

***CITIZENS UNITED* v. *FEC*: THE CONSTITUTIONAL RIGHT THAT BIG CORPORATIONS SHOULD HAVE BUT DO NOT WANT**

RICHARD A. EPSTEIN*

INTRODUCTION

The most controversial Supreme Court decision of the 2009–2010 Supreme Court Term was, without question, *Citizens United v. FEC*.¹ The decision has captured the public imagination both for the question it asked and the answer it gave. In an age of much sharp political division and much incipient populism, it is easy to raise emotional flags by asking the question of whether corporations have the same rights as ordinary citizens. And it is easy for emotional involvement to turn to intense distaste in the aftermath of a decision that it is commonly thought to represent a great triumph of the conservative wing of the Court. All too many commentators, from President Barack Obama on down, have voiced their displeasure at a decision that handed corporate interests a powerful tool by which they can dominate the political arena at the expense of ordinary citizens.

* Laurence A. Tisch Professor of Law, New York University School of Law; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; Senior Lecturer, The University of Chicago. This paper is a modified version of the inaugural lecture for the Laurence A. Tisch Professorship, delivered at New York University on September 27, 2010. It is my very great honor to have been appointed the Laurence A. Tisch Professor of Law at New York University, and to have this opportunity to express my thanks to Alice and Tom Tisch who created this position in honor of his distinguished father, and to Ricky Revesz who orchestrated this appointment with his inexorable decanal logic. My thanks to Brett Davenport, Maxine Sharavsky, and Christopher Tan for their usual excellent research assistance. On the personal side, I have to thank my wife, Eileen, and my children, Melissa, Benjamin, and Elliot for all the personal support that they have extended over the years—subject to the caveat that they are not to be held responsible for anything that I said in my lecture or on any other occasion.

1. 130 S. Ct. 876 (2010).

Or so much of the conventional wisdom goes. In this Article, I examine the many questions that swirl around *Citizens United* to expose the fundamental errors of its many critics. My interest in so doing does not depend on any affection for or hostility to corporate interests. Rather I was drawn to address this case because it requires us to pull together law from a number of different areas to create a coherent analysis of the constitutionality of the statutorily created system in question. Through the course of this Article, I will explore the justifications for the Court's decision in *Citizens United* from both constitutional and pragmatic perspectives. On the former question, I conclude that the majority has much the better of the issue insofar as it seeks to fold issues of corporate speech into the general fabric of First Amendment law. On the latter, I conclude that from a pragmatic point of view most corporations have little desire to exercise the constitutional rights which they receive, and this for the simplest of reasons. Over a broad range of issues, business success depends on keeping a low profile in general elections. Corporations do far better to concentrate their energies on specific issues of concern to them. They become sitting ducks to the extent they choose to enter any broader political arena.

I. *CITIZENS UNITED* IN CONTEXT

Citizens United addressed the question of whether a corporation or a union may use general treasury funds (free of complex regulatory restrictions) to pay for electioneering communications immediately before an election,² (when the communications are likely to be the most salient). The Court in *Citizens United* invalidated the portions of the Bipartisan Campaign Reform Act of 2002 (BCRA)³ that limited such spending.⁴ The BCRA, more than perhaps any other statute, requires some predictive assessment to determine how this complex Act, if it had remained effective in its entirety, would have influenced the conduct of our political campaigns. In addition, the case came before the Court at the beginning of 2010, when the economic fortunes of a nation were uncertain at best. Recriminations have

2. *Id.* at 880–81.

3. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

4. *Citizens United*, 130 S. Ct. at 886.

alternately laid fault for these economic woes with big business, excessive government, or some complex interaction of the two.⁵ The case thus ties into the genuine struggle between the populist and market sentiments that have become ever more polarized in recent years. The BCRA has generated an enormous amount of controversy, and *Citizens United* clearly counts as one of the most divisive decisions of the Court in recent years.

The case did not arise in a void. *Citizens United* overturned portions of the earlier case of *McConnell v. FEC*,⁶ which had followed *Austin v. Michigan State Chamber of Commerce*.⁷ In *McConnell*, decided some seven years before *Citizens United*, Justices Stevens and O'Connor tapped into a strong strand of progressive populism when they upheld the same provisions of the BCRA. In a tribute to New York University (NYU), they noted that the great progressive thinker Elihu Root, NYU Class of 1867, had rightly said that corporate money and politics do not mix,⁸ and that some effort to separate the two to reduce the effect of the former on the latter was an appropriate way to analyze the overall matter.

The Court's approach in *McConnell* is far from my own.⁹ The question for this Article is how to deal with that decision from both a constitutional and pragmatic approach. On both these issues, I remain consistent with the intellectual temperament I developed from the time I left law school in 1968, which was to take comfort that the opinions I expressed were generally out of step with the dominant mode of thought. That was a tactic that I brought with me to the University of Chicago Law School after I left the University of Southern California Law School. And it is one that I happily bring with me to NYU now that I have found a new home at this next stage of my career.

5. See, e.g., Arnold King, *The Financial Crisis: Moral Failure or Cognitive Failure?* 33 HARV. J.L. & PUB. POL'Y 507, 507-08 (2010); Steven Moore & Tyler Grim, *Straw Man Capitalism and a New Path to Prosperity*, 33 HARV. J.L. & PUB. POL'Y 475, 477 (2010).

6. *McConnell v. FEC*, 540 U.S. 93 (2003).

7. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

8. See 540 U.S. at 115.

9. For my critique, see Richard A. Epstein, *McConnell v. Federal Election Commission: A Deadly Dose of Double Deference*, 3 ELECTION L.J. 231 (2004).

II. THE CONSTITUTIONAL FRAMEWORK

An analysis of *Citizens United* is best conducted as a first approximation, disregarding the dominant heat of the day. I take no position, therefore, on whether President Barack Obama or Justice Samuel Alito misbehaved when the President lashed out at the decision during his State of the Union Address.¹⁰ To put the matter in a calmer perspective, it is useful to indicate what the BCRA did, so that the constitutional and economic analysis can take place in an orderly fashion. The key injunction at issue was this: no corporation or union may make an expenditure on an “electioneering communication” within thirty days of a primary or within sixty days of a general election.¹¹ Communications of all sorts before that time, when they are likely to be less potent, were permissible. Likewise, communications within that period that did not meet the statutory definitions for exclusions also were allowable.¹² But guess wrong and a felony conviction with serious sanctions awaited the overeager election campaigner. The question for constitutional law is whether this provision may be justified under the First Amendment’s prohibition against restricting free speech: “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹³ Like all provisions, length is inversely related to difficulties of interpretation and application that arise thereafter. The question is how to address the conceptual and economic issues that this provision raises.

Let us start with a few fundamentals of constitutional interpretation. The first is that the text is the place to start, but it is rarely possible to end there. In this context, there is much fuss about the meaning of the term “speech” and the role that “freedom” plays in defining the scope of the applicable protection. On the former question, speech clearly means “speech plus.” It

10. See generally Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 29, 2010, at A12, available at <http://www.nytimes.com/2010/01/29/us/politics/29scotus.html>.

11. See 2 U.S.C. § 434(f)(3)(A)(i) (2006) (defining electioneering communication as “any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . made within 60 days before a general . . . election . . . or 30 days before a primary or preference election”).

12. *But see* FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (excepting genuine issue advertisements from the BCRA’s preelection blackout period).

13. U.S. CONST. amend. I.

would be odd to say that you can speak at will, but that you are subject to criminal sanctions if you read aloud from a written text whose publication in written form is not protected by the First Amendment. No one on either side of this debate thinks that *Hillary: The Movie*, which Citizens United wanted to broadcast within thirty days of the Democratic primary, is not protected solely because it is a movie. The move from speech to expression in the standard accounts is an effort to plug this obvious gap in the system of constitutional protection.

So electioneering communications surely constitute speech. But what kind of speech? Again, there is really no dispute about this particular issue. It is political speech which, in most circumstances, falls within the core of maximally protected speech under Supreme Court decisions.¹⁴ These decisions hold that speech or expression in the Constitution should have something to do with the ability of individuals to engage in constructive (or divisive) controversy about the behavior of government officials, and the laws that these officials either pass or enforce.¹⁵ *Citizens United* is not a case involving obscenity, libel, fraud, "fighting" words, or any of the other categories of "low speech" that do not garner the same speech-protective response from the Supreme Court.¹⁶ *Hillary: The Movie* is not even commercial speech;¹⁷ even though the original plans called for the movie to be distributed on cable video-on-demand television, it is surely not some advertisement to buy or sell some particular product.

At this point, the constitutional inquiry turns to the issue of justification, which is the other half of the matched pair for freedom. Within the classical view of constitutional law, all of these issues were raised in connection with the police power, or the state's ability to deal with matters of health, safety, general welfare, or morals. Here we can quickly exhaust the obvious justifications that might be invoked to regulate other forms of speech, because there was no allegation in this case that the movie was in some sense fraudulent or defamatory. Indeed, it is worth not-

14. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

15. *Id.*

16. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

17. See *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 557 (1980) (discussing the protection given to commercial speech by the Court).

ing that even if the film were fraudulent or defamatory, our jurisprudence clearly indicates that no court could enjoin the publication of a libel.¹⁸ This line of decisions gives rise to the obvious question of why it becomes possible to block, through administrative processes, those kinds of publications that could never be censored by a court of equity. Even damage actions would be problematic because of the actual malice rule that prohibits suits for false statement about a public figure, even if done with negligence or gross negligence.¹⁹ The puzzle thus remains: Why the heavy sanctions here when the ordinary processes of common law dictate quite different results?

It is equally clear that the speech at issue in *Citizens United* does not involve cartel or monopoly practices,²⁰ or abuse of children,²¹ or any of the other traditional exceptions to First Amendment protection that are widely accepted precisely because they mirror some classical liberal point of view that shaped the common law. We can also remove complex issues that arise when the government seeks to regulate the ability of its employees, either civilian or military,²² to speak their minds. These rules are similar to those that private employers can impose on their workers. Thus, as a matter of principle, it seems clear that the government must also have some proprietary perch that gives it powers above and beyond those that are available to it when it acts only as a regulator and not as a manager.

Having reviewed this catalogue, it is evident that the kinds of justifications that have to be put forward here are those that are distinctive to political campaigns. It should be equally clear that we have to evaluate those justifications not in isolation, but by their incremental effect: How much benefit do we get from these rules in light of the many prohibitions that are already in

18. See, e.g., *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (“[A]n injunction will not issue to restrain torts, such as defamation or harassment . . .”).

19. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ . . .”); see also *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46 (1988) (extending *Sullivan* to public figures).

20. See *Alexander v. United States*, 509 U.S. 544, 559 (1993).

21. See *New York v. Ferber*, 458 U.S. 747 (1982).

22. See, e.g., *Parker v. Levy*, 417 U.S. 733, 758 (1974) (rights of members of military); *Civil Service Comm’n v. Letter Carriers*, 413 U.S. 548 (1973) (rights of federal government employees).

place, including those that prevent outright bribes to public officials, and even more broadly, contributions that various individuals or entities can (or cannot) make to government officials and candidates for public office? The constitutionality of these prohibitions was not an issue in *Citizens United*. However, the basic claim against the provision in *Citizens United* is that given that it becomes harder to justify additional unprecedented restrictions when so many other restrictions are already in place. The variations that surfaced both in this litigation and in the many cases on the topic that preceded it are of two sorts. The first class is largely conceptual, and depends on the unique status of corporations as legal persons under American law. The second class is largely functional, and posits serious dislocations to the public discourse and political process if corporate electioneering speech can take place with impunity.

The great irony is this: On the first point, the correct response is that the proponents of BCRA fail woefully to find a powerful justification of limiting these core forms of political speech. On the second point, it seems clear that big corporations that sell to large consumer markets will take little comfort in a decision that exposes them to serious political risk, while affording them few sensible ways to improve their own political position, which is better achieved by steering clear of public expressions of opinion in election campaigns. The bottom line is that big corporations have little interest in exercising the constitutional right that others have worked so hard to provide them.

III. SOME FANCY, AND FANCIFUL, CONCEPTUAL JUSTIFICATIONS: CORPORATIONS AS LEGAL PERSONS UNDER AMERICAN LAW

Justice Stevens's dissent in *Citizens United* relied heavily on the Court's earlier decision in *Austin*, which sustained a Michigan statute that subjected corporations, but not unions, to restrictions on the kinds of general expenditures that they could make on election campaigns.²³ Much of this argument goes to whether corporations should have any legal rights at all under the First Amendment. In *Citizens United*, Justice Stevens's dissent picked up on this strand by noting that corporations are

23. See *Citizens United v. FEC*, 130 S. Ct. 876, 929–79 (2010) (Stevens, J., concurring in part and dissenting in part).

not citizens and cannot vote.²⁴ But the same is true of churches, boy's clubs, and fraternal organizations. I would not know how to extend the concept of a citizen to such an entity even if I thought it was a good idea. And I certainly would not want to let corporations vote, given that individuals can set up multiple corporations at the drop of a hat.

However, those restrictions do not mean that corporations are incapable of speech or should have no right to participate at all in the political process. Nonetheless, that exact argument is made by Justice Stevens, and subsequently by Professor Ronald Dworkin,²⁵ on the ground that corporations are fictitious entities that are created by the state. This view is a very dangerous way to approach the subject, because it strikes at the heart of the freedom of all the individuals who have decided to join together to form a corporation instead of, perhaps, an unincorporated association or limited partnership.

Let us examine one notable example of the risks of keeping corporations strictly subservient to the states. Around the turn of the last century, the State of Kentucky successfully used its power over the incorporation of universities to require Berea College to educate its white and black students on separate campuses some twenty-five miles apart.²⁶ After all, the argument went, if Kentucky could withhold the permission to incorporate absolutely, then it could do so with conditions. Indeed, it was just that argument of state power that prevailed in a decision by Justice David Josiah Brewer,²⁷ over a powerful dissent by Justice John Marshall Harlan, who had dissented passionately in *Plessy v. Ferguson*.²⁸

Justice Brewer's logic, as it applies to both *Berea College* and *Citizens United*, suggests that the forfeiture of political speech is the offset for getting the distinctive benefits of limited liability and incorporation.²⁹ This argument is pressed in two different

24. *Id.* at 930.

25. See Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. BOOKS, May 13, 2010, at 63, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>.

26. See An Act to Prohibit White and Colored Persons from Attending the Same School, 1904 Ky. Acts 181, cited in *Berea Coll. v. Kentucky*, 211 U.S. 45, 59 (1908) (Harlan, J., dissenting).

27. See *Berea Coll.*, 211 U.S. at 54.

28. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

29. *Berea Coll.*, 211 U.S. at 54 (majority opinion).

ways. The first is to treat incorporation as a bargain between the corporation and the government. We can give or withhold the charter at will. We can, therefore, give it to you only if you butt out of political activities. This logic has a potent application in the instant case because it would allow Congress to neuter all corporate speech, even speech unrelated to the election of a candidate, and regardless of the speech's timing. There is, on this view, no limiting principle on the use of state power. Indeed, the State of New York or the next Republican administration in Washington, D.C., could argue that the *New York Times* could not publish editorials so long as it chose to operate in the corporate form—an unwise social move no matter what one thinks of that paper's substantive positions.

There is something deeply wrong with this approach, and it is crystallized in the doctrine of unconstitutional conditions,³⁰ one of the most ubiquitous, and yet most easily overlooked, principles of constitutional law. According to this doctrine, even if Congress can either prohibit or allow an activity, it cannot coerce, induce, or pressure a party to waive its constitutional rights in exchange for the privilege of engaging in the activity.³¹ The same doctrine applies to limited liability for corporations. Undoubtedly, Congress could condition a corporation's ability to gain limited liability on its willingness to take out insurance against accidents caused by its employees during the course of business. However, it could not condition the limited liability grant on the company's willingness to waive protection against searches and seizures, or any free speech rights generally.³² The great virtue of limited liability is that it protects investors from the exposure to liability risks that existed under partnership law. Because investors are free from fear that their contribution to the corporation exposes them to potential loss of private wealth, limited liability corporations can amass great wealth from individual investors. But it is a very different matter to assert that the decision to take advantage of limited liability forces individuals who incorporate to suffer restrictions on their speech that would be unconstitutional if imposed on them in their individual capacities. It seems beyond reason to say

30. See generally Richard A. Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988).

31. *Id.* at 7.

32. See *id.*

that the choice of a business form—association versus corporation—that is made for liability or tax reasons should have a significant effect on the wholly unrelated issue of political participation. All of these business forms are close substitutes for each other. Therefore, it is sensible for the law to govern them under a uniform regime regulating political speech, both as a matter of statutory and constitutional law.

This particular view of the world is not altered by Justice Stevens's observation that corporations were disfavored at the time of the Framing.³³ Surely on this point Justice Scalia is correct when he insists that the protection of freedom of speech covers the right to speak in association with other individuals, or even to back up their efforts with support in either cash or kind.³⁴ The concept of a marketplace of ideas is that of a competitive market, which in this context means one of free entry, by any and all by whatever strategies or devices that they choose. A ban on speech by aliens in newspapers would not withstand constitutional muster, I believe, even if it were attached to visas upon admission to the country. Justice Stevens's remarks show that there was due animus toward corporations that received special charters, which gave them a huge competitive advantage over unincorporated bodies that did not have this advantage in raising capital at the time of the Framing. Clearly, some alterations had to be made to accommodate corporations, including allowing them to be treated as citizens for the purpose of diversity jurisdiction. The animosity toward these corporations was cured by the liberalization of the rules on incorporation toward the middle of the nineteenth century, but not by creating further obstacles to the use of the corporate form.³⁵

The second half of this argument is that the position of a corporation is quite different from that of a labor union. This issue was critical to the decision in *Austin* because unions were not subject to the same limitations as corporations.³⁶ In one sense, the argument drops out in *Citizens United*, where

33. See *Citizens United v. FEC*, 130 S. Ct. 876, 949–50 (2010) (Stevens, J., dissenting).

34. *Id.* at 928 (Scalia, J., concurring) (“[T]he individual person’s right to speak includes the right to speak *in association with other individuals*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of ‘an individual American.’”).

35. See W. FLETCHER, *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 2 (rev. ed. 2006).

36. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 665–66 (1990).

the legislation was more even-handed between these two institutional rivals. However, once the issue of the statute's effect on the two groups is raised, it is worth noting that in *Austin* Justice Marshall deftly rejected a quasi-Equal Protection challenge on two grounds. First, corporations had limited liability (a benefit that unions did not have), and second, dissenting workers could opt out of political contributions in exercise of their First Amendment rights, although corporate dissenters were bound to go along.³⁷

Unfortunately, Justice Marshall offered a highly selective account of the differences between the two types of organizations, for unions have many advantages that corporations lack. Those dissenting shareholders, for example, may be bound by the decision, but they also can bring derivative actions on behalf of the corporation and sell their shares, pummeling the firm. These remedies matter a good deal for the shareholder who sells shares for cash; in contrast, the employee who resigns from a union cannot sell his position to the next union member. Moreover, unions get enormous privileges under the Clayton Act³⁸ that exempt many of their activities from the antitrust laws. Unions also have the special protection of the Railway Labor Act³⁹ and the National Labor Relations Act⁴⁰ on key issues related to campaigning and collective bargaining, which have to be added into the mix. The balance of advantages to corporations or unions may go this way or that, but it surely does not follow that unions are irrelevant. The BCRA was correct to include them. As I will mention later, though, it becomes difficult to evaluate the overall balance of advantages that flows from the passage of the Act.

In similar fashion, the effort to neutralize corporate speech cannot be avoided by the argument that speech is protected by the First Amendment, but the use of money is not.⁴¹ Again, that argument proves too much, as it would mean that anyone who uses money to obtain assistance in preparing for political

37. *Id.*

38. See 15 U.S.C. § 17 (2006) (creating safe harbors for labor unions and agricultural organizations).

39. See 45 U.S.C. § 151(a) (2006).

40. See 29 U.S.C. §§ 151–169 (2006).

41. See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam) (stating that restricting political expenditures “necessarily includes the quantity of expression”).

speech has crossed over the line into potentially criminal conduct. That position makes no sense in light of ordinary interactions between two or more people in which money changes hands to purchase labor or goods for the creation or publication of speech. Indeed, I would say that any effort to cabin this option by, for example, forbidding individuals to hire labor at below minimum wage rates to distribute leaflets, should fall to the First Amendment because such an effort abridges speech, by blocking the necessary and proper means for its realization. The same is true of any set of prohibitions against political speakers, whether formally a part of the press or not, who help promote the status of unions by encouraging them to strike to shut down printing facilities.

In the earlier *Lochner v. New York*⁴² era, the broader protection of freedom of contract had as one of its collateral advantages the additional protection that it afforded to freedom of speech by precluding regulations that inhibited corporate speech, especially on political matters. Today, challenges of business regulations that hamper political speech tend to fail because they are dismissed by society as the pleadings of special business interests. However, that failure is no reason to rejoice in the current law. It is important to note that the rationale for this exemption from constitutional scrutiny rests on the rather dubious line of cases “holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”⁴³ These incidental effects can be deadly and therefore should be tested by the usual rules of constitutionality developed in other areas. No one could excuse murder on the ground that it was an incidental effect of a political protest. By extension, no system of regulation of corporate speech that devastates the ability of various parties to fund the speech efforts of others can be excused on the ground that it is just an incidental consequence of the general corporate law. There should be a categorical rule here, but the appropriate rule is exactly the opposite of those that are usually proposed.

42. 198 U.S. 45 (1905).

43. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). For a more general critique of the incidental damage rule, see Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 *Stan. L. Rev.* 1003, 1024–27 (2000).

The use of money is a necessary and proper part of any sensible speech activity, and should be protected as such.

IV. FUNCTIONAL JUSTIFICATIONS

Thus far, each effort to find a conceptual way to undermine the claim for corporate free speech runs into a constitutional dead end. But the major issues are not these doctrinal matters. Rather, the controversy stems from divergent assessments of what the use of corporate speech—and now union speech—will do to the political discourse of the nation. President Obama strongly emphasized this point in his State of the Union Address.⁴⁴ Professor Dworkin also stressed it repeatedly in his article in the *New York Review of Books*,⁴⁵ and it was the centerpiece of the Court's argument in both *Austin* and *McConnell*.

A. *What is Corruption?*

Much of this argument turns on the question of corruption, or as the point was stated in *Austin*, the appearance of corruption.⁴⁶ The second of these rationales seems to be dead on arrival under any form of heightened scrutiny. The point of this test is to make sure that government force is exercised only against real dangers, not imagined ones. No one could suppress a demonstration on the ground that it creates the appearance of unruly or dangerous behavior. The usual test veers strongly in the opposite direction, requiring some proof of a clear and imminent danger before the state can use force to suppress these activities.⁴⁷ The suspicion of government abuse and government overbreadth looms large in this case, and it would be very dangerous to allow any state to attack its critics in this particular fashion.

Some real evidence of corruption is needed in order to justify any public suppression of corporate speech. In *Austin*, the supposed villain was the distortion of the outcome in elections that

44. See President Barack H. Obama, State of the Union Address (Jan. 27, 2010), in 156 CONG. REC. H414-06 (daily ed. Jan. 27, 2010).

45. Ronald Dworkin, *The "Devastating" Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, at 65, available at <http://www.nybooks.com/articles/archives/2010/feb/25/the-devastating-decision/>. For Professor Dworkin's more detailed discussion of the *Citizens United* decision, see Dworkin, *supra* note 25.

46. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990).

47. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

followed from the use of corporate speech.⁴⁸ But the term distortion presupposes that we have a clear sense of what the proper baseline should be. Thus, in ordinary bribery cases, we can count the number of voters who changed their votes because of bribes and use that as a possible basis to invalidate certain votes or an entire election. But in this context, there is no baseline that serves a comparable function. The purpose of speech is to switch sentiments by the presentation of new information, and it would be odd that any proof that the speech was effective—such as when the outcome of some election were altered—would be sufficient to show that the campaign that spread the information was also corrupt. That task would be daunting if multiple actors each expressed some sentiment so that it became necessary to cancel each other out. That kind of inquiry makes little or no sense. What is needed is something far more demanding, like finding instances of bona fide corruption that are not already punishable under the complex network of arrangements currently in place.

The astute critic would say that, in this instance, one should look closely at such stalwarts as the Tillman Act,⁴⁹ which prohibits all contributions by corporations to candidates, and the comparable legislation that does the same for unions.⁵⁰ Indeed, these statutes may be overbroad, but at least the direct contribution raises a risk of quid pro quo corruption that should be countered. In my view, that risk is what makes the Hatch Act,⁵¹ which forbids government employees from making campaign contributions, such a wise statute: close proximity leads to arm-twisting. Furthermore, the arms that are twisted are not those of public officials, but of the corporation's own employees. Consequently, the risk of a shakedown by an employer is great. The Tillman Act's prohibition on corporate political donations is a closer case because that the same risk is not present. And if

48. See *Austin*, 494 U.S. at 660–61. For a relentless dissection of this decision, see Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121–26 (2010).

49. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a) (2006)).

50. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 304, § 313, 61 Stat. 136, 159 (superseded by Federal Election Campaign Act Amendment of 1976, Pub. L. No. 94-283, § 112, § 321, 90 Stat. 475, 490 (codified as amended at 2 U.S.C. § 441b(a) (2006))).

51. Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (codified as amended in scattered sections of 5 U.S.C.).

that is close, the argument in favor of the BCRA's electioneering communications ban seems to be far weaker. The balance struck by the BCRA's ban looks to be wholly out of proportion to the risk. Indeed, one striking feature of *McConnell* was the paucity of evidence that Justices Stevens and O'Connor amassed to show that corruption and improper conduct were not caught by narrower rules.⁵²

B. The Limits of Corporate Influence on Public Policy

At this point, the argument shifts to what is, at long last, the kernel of the dispute: the fear that corporations, with their immense amounts of wealth, will so dominate the public stage that the voices of ordinary citizens will be drowned out of the body politic and our elections will be controlled by moneyed interests that pay scant attention to the will of the nation as a whole. As President Obama said in his State of the Union Address: "I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities."⁵³ There is an evident populist tinge to these arguments. At the outset, I note that these arguments do not comport with the account of corporations that I would give based on my years of working on many controversial matters. All too often corporations are highly reluctant to publicly fight indefensible legislation or administrative action.

Instead of starting with some detailed empirical analysis, I want to begin with anecdotes from my professional youth that encapsulate what I believe to be the correct description of corporate participation in public fora: corporations are likely to follow prudentially pusillanimous policies. Years ago, when I worked for the American Insurance Association (AIA) as a legal consultant, I learned the true power of corporations when we were regularly clobbered in our tort reform lobbying efforts. I can recall one meeting where Assemblyman Jesse Unruh, the great California legislator, looked at me and asked, almost plaintively, "Professor Epstein, why should I support any proposal that benefits out of state manufacturers at the expense of in-state consumers?" Unruh clearly could count votes—and disregard corporate charters.

52. *McConnell v. FEC*, 540 U.S. 93 95–96 (2003)

53. Obama, *supra* note 44, at H418.

Then there was the time that I appeared in the Pennsylvania legislature on a panel with Joe Doyle, head of the Pennsylvania AFL-CIO, who began his testimony by noting that he represented 2,100,000 Pennsylvania union members and that his lawyer would explain why the bill that I had helped draft was unsound. No corporation testified in favor of the bill that day. I replied that I represented folks from Aetna, Hartford, and other insurance companies. Same result. No votes. I was far from impressed with the corporate might that stood at my back.

On another occasion, I attended a meeting with members of what was called the Pharmaceutical Manufacturers Association before the branded and generic companies parted ways. The issue before the group was how to deal with FDA rulings on beta blockers, which were in wide use in Europe but not in the United States. The companies believed, with cause, I have been told, that a few administrators in the FDA had thrown up unprincipled roadblocks to prevent their approval. As a relative youngster, I had the answer: denounce the incompetent scientists publicly, and the truth would win out. At that point, I received a gentle rebuke from an industry lawyer who was both older and wiser than me. He said that he liked my suggestion in principle, but not in practice. We could denounce the official and perhaps have him driven from office, but once that was accomplished, the FDA would rally around its ousted member in ways that would delay all sorts of other applications that the company would have before the FDA on other products. Many of these delays would look innocent, such as a request for further studies. A company would be free, of course, to challenge the delays in court as unjustified, but that would only delay matters further. Thus, a small company with only one product before the FDA might take on the agency, but the bigger corporations—the ones with all the market power—do not have the luxury of that option because their multiple applications would leave them vulnerable on too many fronts. Quiet diplomacy with the FDA was the preferred alternative, a task for which I have proved myself remarkably unsuitable. Nevertheless, it was the inversion that stuck with me; big companies have greater exposure to regulatory retaliation, and so less power to challenge government action.

C. The Pitfalls of Corporate Participation in Electoral Politics

It turns out that these anecdotes can be systematized. Politicians respond to votes, not to causes. After my years working with the AIA I met this fellow in the airport and asked him what had become of my services as the AIA moved from New York to Washington, D.C. His reply went something like this: "When we hired you, we hired people for what they knew, and we thought you knew a lot. Now we hire people for who they know, and frankly you don't know anybody." The policymaking effort was to lobby quietly, but not to win election campaigns—a theme to which I will return later.

Yet, before that is done, it is worth posing some hard questions. Does an increase in size yield an increase in power over Congress? Defenders of campaign finance usually claim that dollars translate into power which translates into success.⁵⁴ However, the lessons from public choice theory are far from cohesive on the issue. One key article on this point was written in the *Journal of Legal Studies* over twenty years ago.⁵⁵ My friend Professor Fred McChesney noted that the usual story that large concentrated firms can dictate public policy was too simple by half.⁵⁶ The problem, quite simply, was that in some cases this concentrated power was a liability, not an asset.⁵⁷ He referred to the practice known as "milker bills," whereby members of Congress propose new taxes or regulation on some targeted industry unless it makes the requisite political contributions to their cause.⁵⁸

The game of influence is a two-way street, which exposes an important set of corporate vulnerabilities: Size does not always translate into power; making contributions to gain influence can leave one exposed with few lines of defense; and, it is easy to punish a corporate nonentity in the press because they are hostage to their brands. It is easy to concoct anticorporate attacks that play off the slogans that companies use to promote

54. *See id.* (stating that elections "should be decided by the American people" not by corporate dollars).

55. Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

56. *Id.* at 109–12.

57. *Id.* at 110 ("Similarly, a large stock of specific (nonsalvageable) capital increases the relative attraction to politicians of private rent extraction.").

58. *Id.* at 107–11.

their brands. What airline do I refer to when I say “come die with me?” What of the reworked slogans “things go worse with Coke,” or “buy IBM and crash in style”? Too easy.

The issue is clearer still when it is noted that corporations are also subject to other constraints, both legal and practical, that can easily dull their ardor to engage in political campaigning, either for general causes or for particular candidates. Corporate boards have fiduciary duties to their shareholders, and it is an open question whether particular campaign contributions could be a violation of their duties on the ground that they deal with matters unrelated to the interests of the corporation. In response, it could rightly be said that these contributions will generally not provoke legal liability because of the extensive discretion that is afforded to most corporate boards under the business judgment rule. So far so good, but this rule does not settle the dispute, because someone could allege that political activities either are not germane to corporate business or are subject to some *per se* rule of bad faith conduct.

The question of what issues are appropriate for corporate participation can also be challenged in other ways. Dissident shareholders and board members can force the firm to take up the matter in some board meeting in ways that could distract the firm from its ordinary business activities. Resolutions that deal with proper public statements could be presented for consideration in the press, even if there were no formal rights to have these matters taken up directly. The heat on the board could be powerful because the reputational constraints at play are extremely powerful. After all, the same corporation that pushes many levers to get its detergents on supermarket shelves does not have quite the same clout in political or information markets—it has the maneuverability of a beached whale.

Corporations invest heavily in brands, which is the way they are held hostage to the public on matters of product quality. The firm that does not defend the brand is the firm that cannot survive in the marketplace. The general view of most brand managers about any participation in politics, whether it relates to elections or anything else is, by all means keep a low profile, and by all means follow that distinguished cowardly path that you have blazed in dealing with government action. The logic is simple. Political statements will win a corporation many enemies—enemies who can then boycott your products. The same political statements may win you some friends, but not

friends who will double their purchases just because you have taken a stand they find favorable. Hence, the last thing that you want to do as a corporation is get involved with election campaigns when it is clear that no candidate embodies all the positions—and only those positions—that are ideal for the firm. Entering this swamp presents a real danger, and no sensible corporation should take that risky step.

Some important signals indicate that this is indeed the case. Consider the long list of corporations that filed amicus curiae briefs at some stage in *Citizens United*.⁵⁹ Notice that among the dozens of amici, the filer closest to representing the corporate interest was the Chamber of Commerce, whose business is to lobby for corporations. It makes no products that are subject to market retaliation. And, in many cases, it is neutered. The Chamber of Commerce often finds itself in the odd position of having to take no stand on anything as its various members fight it out in the political and judicial arena. Thus, business versus business is a constant theme on such issues as net neutrality, where Verizon and Google duke it out; or in banking, where the big banks, little banks, and retailers all have different positions; or in drugs, where the branded companies and the generic companies are often at loggerheads. It seems extremely unlikely that corporations in these groups want to spend their precious capital on elections that concern all sorts of issues about which they hold no distinctive position. Instead, the corporations want to spend their money where it matters to them: on particular legislation where they hope to gain influence while flying well below the radar.

And well they should. We also know that once these companies do speak out on any public issue, the individuals who are said to be unable to organize often drown the corporate voices out. A few recent cases merit some general observations. Target announced a \$150,000 gift to MN Forward, a pro-business group which incidentally also has opposed gay marriage and other issues.⁶⁰ The response from MoveOn.org was

59. The full list of Supplemental Amicus Briefs can be found at *Citizens United v. Federal Election Commission*, SCOTUSBLOG.COM, <http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/> (last visited Mar. 19, 2011).

60. See Ira Boudway, *Target's Off-Target Campaign Contribution*, BUSINESS WEEK (Aug. 5, 2010 5:00 PM), http://www.businessweek.com/magazine/content/10_33/b4191032682244.htm.

instantaneous and effective.⁶¹ Target went immediately into a damage control mode, not knowing whether to demand a refund of the grant or to ride out the storm.⁶² Its reputation as a gay-friendly employer was put in jeopardy. There is little doubt that it would have paid a hundred times as much as that grant to make the story disappear. Target's political career seems short.

The same seems true for Whole Foods, whose president, John McKay, wrote a critique of the Obama health care plan, which I regarded as mild and moderate, but which generated a firestorm of protest from progressive Whole Foods customers who had rather different ideas.⁶³ It turns out that the predictions of corporate political strength just are not credible. The Internet has changed all that, allowing cause-based groups to lash out at corporate firms that do not toe the line. Even if such groups offend folks on the other side of the political spectrum, it is no matter because they do not survive on brand loyalty like companies do. They operate with a fundamentally different dynamic from the corporation, where it is wise to lay low. Thus the only question that they ask is whether they are in a position to rally their own base, which they are.

There are ways for corporations to stay out of the political spotlight. As a corporate board member, I would be proactive and insulate the organization from general political contributions to keep from being blackmailed by political or activist groups that would otherwise punish you for your silence in election campaigns on a whole range of issues. That is what Goldman Sachs did, because it knew just how vulnerable it was to adverse publicity when it was sued last spring. The key point in all these maneuvers rests on a relentless application of the principle of comparative advantage. Corporations are naturally concerned about issues that regulate their own industry. To spend too much on general elections is to waste money on issues not germane to the corporate welfare. It is better to look at all issues individually, so that supporting or opposing par-

61. See Paul Schmelzer, *MoveOn.org hits Target over gift to Emmer-backing PAC*, (Aug. 2, 2010, 2:25 PM) MINN. INDEP. <http://minnesotaindependent.com/62515/moveon-org-hits-target-over-gift-to-emmer-backing-pac>.

62. See *id.*

63. See John Mackey, Opinion, *The Whole Foods Alternative to ObamaCare*, WALL ST. J., Aug. 12, at A15.

ticular candidates is not in the picture. It is no accident, therefore, that *Citizens United*, the corporation that brought this suit, was in the political business and thus had none of the brand name or other institutional constraints. No mainstream company would touch this problem with a ten-foot pole.

The position of unions is really quite different on all these metrics. Unions do not sell to general public audiences. They can take powerful positions because they have only one objective: to win over the workers who can join their ranks. Thus, they are not subject to the kind of popular backlash that exists for ordinary corporations, which have to contend with broad-spectrum markets. In addition, unions have a far higher stake in what government does, because they represent over seven million individuals who are also public employees.⁶⁴ Furthermore, they represent these interests at a time when public union members outnumber (in absolute terms) union members in private jobs,⁶⁵ and they do so at a time when public union pensions are widely deplored as budget breakers.⁶⁶

Citizens United, if it has an effect at all, is likely to favor labor unions over mainstream corporations. Unions have something to defend, making it more attractive for them to go after these candidates. Note the recent example of unions working hard to push Arkansas Senator Blanche Lincoln out of her seat⁶⁷ for her unwillingness to toe the line on the Employee Free Choice Act.⁶⁸ Union participation here was perhaps uniquely intense because the balance of power in the Senate was so tenuous. But the asymmetry of the stakes still matters in these circumstances. It is far more likely that unions will take up this privilege than will corporations.

Much of this discussion depends on the types of disclosures that are required. The BCRA contained various disclosure provisions that survived *Citizens United* on the ground that

64. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2010 (Jan. 21, 2011), <http://www.bls.gov/news.release/pdf/union2.pdf>.

65. See *id.* (reporting 7.1 million private sector union members compared to 7.6 million public sector union members in 2010).

66. See, e.g., Clay Barbour & Mary Spicuzza, *Walker Takes Broad Swipe at Public Employee Unions*, WIS. ST. J., Feb. 12, 2011, http://host.madison.com/wsj/news/local/govt-and-politics/article_c814c77a-3600-11e0-b9e0-001cc4c03286.html.

67. Shalia Dewan & Steven Greenhouse, *Unions Make State in Arkansas Race*, N.Y. TIMES, June 6, 2010, at A22.

68. H.R. 1409, 111th Cong. (2009).

they were antifraud provisions that let voters know who is speaking. I have mixed emotions about these provisions because they also make it easier to retaliate against speakers, which in turn could provoke counter-speech or, rather, even uglier behaviors, such as the threats against AIG executives attempting to enforce their contracts in the spring 2009 bailout.⁶⁹ The question of personal threats is not off the table, but it is not at all dominant. The effort to make CEOs sign all public advertisements is clearly an effort both to intimidate and to inform, in uncertain proportions. But because so few executives want to be caught in this quagmire, the intent to dissuade corporate speech through disclosure requirements was successful. Regardless, there will be questions of whether only CEOs should be subject to this level of public opprobrium. Personally, I take greater offense at the efforts to exclude foreign corporations from speaking about domestic elections. Their stake in our laws on trade issues is often great, and blocking these views in an effort to promote some kind of jingoist balance is the worst possible policy, and probably unconstitutional as well.

CONCLUSION

In sum, there is much heat on this discussion and little light. The key issue is to define the determinants of speech level. Writing on this issue after *McConnell*, I took the position that the key determinant of the level of political activity is the size of the stakes in various campaigns, whether for elections or for particular bills. Those stakes are enormous, and they are even greater now than before because there is so much new legislation on the table, which promises to shake up matters. On these issues, the weak constitutional protections against various forms of activity mean that there are many issues on the political field left to fight out. Banning the corporation will cause other groups to take up the cudgels. It is ironic that the Tea Party has grown so mightily and is now a force to be reckoned with, even though it has none of the corporate, or even centralized, elements that the dissenters feared. Indeed, it tends to be

69. Andrew Pergam, *Threats to AIG: "We Will Get Your Children"*, NBCCONNECTICUT.COM (March 26, 2009, 10:44 AM), <http://www.nbccconnecticut.com/news/local/AIG-Threats-We-will-get-your-children.html>.

opposed to both parties and to large corporations that seek their favor. Their positions are explosive and uncertain, but these small groups are where the action is. It is at this level that we shall see the battle, for the progressive groups will mobilize heavily as well. In the end, it is the citizens that will drown out the corporations, as if they wanted to speak, which they do not. Hysterical predictions of transformation are heavily overblown. It will be politics as usual, which is not to say that it will be politics as it should be.