

CITIZENS UNITED V. FEC:
THE CONSTITUTIONAL RIGHT THAT BIG CORPORATIONS SHOULD
HAVE BUT DON'T WANT
BY
RICHARD A. EPSTEIN*

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 made this grant possible, and to Ricky Revesz who orchestrated this appointment with his inexorable decanal logic. 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 say on this or any other occasion.

Whether they accept or disagree with what I shall say at this lecture is an open question. But no matter what their views, the topic is indeed important, for my topic is the most controversial Supreme Court decision of the last term—*Citizens United v. Federal Election Commission*,¹ which asked the question of whether a corporation or a union was entitled to pay out of general treasury funds (free of complex regulatory restrictions) for electioneering communications about a political candidate during the 30 days before an election, when, of course, those communications are likely to be the most salient. The topic is one that is very much to my liking because it requires us to pull together law from a number of different areas in order to come up with a coherent analysis of the constitutionality of the

* Laurence A. Tisch Professor of Law, New York University School of Law, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law, The University of Chicago. This paper is a modified version of the inaugural lecture for the Laurence A. Tisch professorship, delivered at NYU on September 27, 2010. My thanks to Brett Davenport, Maxine Sharavsky and Christopher Tan for their usual excellent research assistance.

¹ 130 S. Ct. 876 (2010).

statutory plan. In addition, the Bipartisan Campaign Reform Act (“BCRA”),² more than perhaps any other statute, has the great virtue of requiring some predictive assessment of how BCRA is likely to influence the conduct of our political campaigns. The decision came before the Court this year and, thus, at a time when the economic fortunes of a nation have proved uncertain at best. The timing has led, in turn, to multiple recriminations as to who the culprit is for the nation’s economic woes, either in big business or in excessive government, or in some complex interaction between the two of them. 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 the most divisive decision of the Court in recent years.

The case did not arise in a void, for *Citizens United* overturned the earlier case of *McConnell v. FEC*,³ which had followed *Austin v. Michigan Chamber of Commerce*.⁴ In *McConnell*, it was easy to detect a strong strand of progressive populism into which Justices Stevens and O’Connor tapped when they upheld this very provision some seven years before. In a tribute to NYU, they noted that the great progressive thinker Elihu Root had rightly said that corporate money and politics do not mix, so that some effort to separate the two in order to reduce the effect of the former on the latter was an appropriate way to look at the overall matter.⁵

The Court’s approach in *McConnell* is far from my own. The question for this talk 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 that I developed from the time I left law school in 1968, which was to

² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-55, 116 Stat. 81.

³ 540 U.S. 93 (2003).

⁴ 494 U.S. 652 (1990).

⁵ 540 U.S. at 115.

take comfort in the fact that the opinions I express are generally out of step with the dominant mode of thought. That was a tactic that I brought with me to 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.

This 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. In order 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 in this case was this: No corporation or union could make an expenditure on an “electioneering communication” within 30 days of either a primary or a general election.⁶ Communications of all sorts before that time, when they are likely to be less potent, are permissible. Communications within that period that do not meet the statutory definitions are also allowable. But guess wrong and a felony conviction with serious sanctions awaits. The question is whether this provision should be justified as a matter of constitutional law under the First Amendment’s prohibition against restricting free speech, which is short enough that I can state it in full: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁷ The provision is short and to the point. But like all provisions, shortness in 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 never the place where it is possible

⁶ See 107 Pub. L. No. 155 (defining electioneering communication as “any broadcast, cable, or satellite communication . . . made within . . . 30 days before a primary or preference election.”).

⁷ U.S. CONST. amend. I.

to end. 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 would be odd to say that you can speak at will, but 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. So no one on either side of this debate thinks that *Hillary: The Movie*, which *Citizens United* wanted to broadcast within 30 days of the democratic primary, is not protected because it is only 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 we surely have 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. 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.⁸ This is not a case of pornography or libel, or fraud or insubordination, or any of the other categories of “low speech” that do not garner the same speech-protective response from the Supreme Court. This is not even commercial speech, for even though the original plans called for the movie to be distributed on pay-for-view TV, it is surely not some advertisement to buy or sell some particular product.

At this point, the question turns to the issue of justification, which is the matched pair for freedom. Within the classical view of constitutional law, all these issues were raised in connection with the police power, or the ability of the state to deal with matters of health, safety, general welfare, or morals. And it is here that we can quickly exhaust the obvious justifications that might be invoked to regulate

⁸ See e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348 (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”).

other forms of speech, since there was no allegation in this case that the movie was in some sense fraudulent or defamatory. Indeed, it is worth noting that if it were fraudulent or defamatory, the clear line of American decisions is that no court could enjoin the publication of a libel,⁹ which gives rise to the obvious question of why it becomes possible to block, through administrative processes, those kinds of publication that could never be subject to censor by a court of equity. Even damage actions would be problematic because of the actual malice rule that prohibits suits for false statement, even if done with negligence or gross negligence.¹⁰ 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 we do not have here speech that involves cartel or monopoly practices, or abuse of infants, or any of the other traditional heads of defenses that are widely accepted precisely because they mirror some classical liberal point of view that has done so much to shape the common law. And we can also remove from the scene those complex issues that arise when the government seeks to regulate the conduct of its employees, either civilian or military, to speak their mind. 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 gone through this catalogue, it becomes 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 in looking at those justifications, we have to evaluate them 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

⁹ See *e.g.*, *Alberti v Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (“an injunction will not issue to restrain torts, such as defamation or harassment . . .”).

¹⁰ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 281 (“any one claiming to be defamed by the communication must show actual malice or go remediless”).

in 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 was not an issue in *Citizens United*. The basic claim against the statute in *Citizens United* is that given that these restrictions are already in place, it becomes ever harder to justify additional restrictions of a more or less unprecedented variety. Let me consider some of the variations that surfaced both in this litigation and in the many cases on the topic that preceded it. These 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 final irony therefore 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 in which to improve their own political position, which is better achieving 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.

CONCEPTUAL JUSTIFICATIONS The Stevens dissent in *Citizens United* placed heavy reliance on the 1990 decision of the Court 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 free from any form of government oversight, such as that which is supplied by the FEC in *Citizens United*.¹¹ Much of this argument goes to the question of whether we think that corporations should have any legal rights at all under the First Amendment. In

¹¹ 130 S. Ct. at 930-79.

Citizens United, Justice Stevens' dissent picked up on this strand by noting that corporations are not citizens and cannot vote.¹² 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.

But it hardly follows from all of this that corporations are incapable of speech or should have no right to participate at all in the political process. Just that argument is made by Justice Stevens, and, in these materials, by Professor Dworkin,¹³ on the ground that corporations are fictitious entities that are created by the state. But this is a very dangerous way to look at 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. Here is 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 had the bright idea that it could use its power to incorporate universities to require Berea College to educate its white and black students on separate campuses some 30 miles apart. After all, if it can withhold the permission absolutely, then it could do so with conditions. Indeed, it was just that argument of state power that prevailed.

The logic, as it applies, is that the forfeiture of political speech is the offset for getting the distinctive benefits of limited liability and incorporation. This argument was pressed in two different ways. The first is to treat this 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. The logic has a

¹² *Id.* at 930.

¹³ See *The Decision that Threatens Democracy*, THE NEW YORK REVIEW OF BOOKS (May 13, 2010), available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>.

potent application in the instant case because it would allow Congress to neuter all corporate speech, even if it was not related to an election of a candidate, no matter when it took place. 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 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 how great its contribution to human knowledge.

There is something deeply wrong with this approach, and it is crystallized in one of the most ubiquitous and easily overlooked principles of constitutional law: the doctrine of unconstitutional conditions, which says that even if Congress can either prohibit or allow an activity, it cannot do so on certain conditions. The same doctrine applies to limited liability for corporations. Congress could surely condition the ability of a corporation to gain limited liability on its willingness to take out insurance against the accidents committed by its employees during the course of their operation. But it could not condition this on the company's willingness to waive protection against searches and seizures, or any loss of free speech rights generally. The great virtue of limited liability is that it allows corporations to amass great wealth from individuals who no longer have to fear that their contribution to the corporation exposes them to the loss of all their wealth under the traditional rules that partners are each liable, under a principle of mutual agency, from the wrong of others. But it is a very different matter to say that the decision to take limited liability forces the 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 that the choice of a business form—association versus corporation—that is done for liability or, say, tax reasons, should have so dramatic an effect on a wholly unrelated issue of political participation. All these business forms are close substitutes for each other. It only makes sense to have them governed by a uniform regime of liability for political speech, both as a matter of statutory and constitutional law.

This particular view of the world is not altered by the observation of Justice Stevens that corporations were disfavored at the time of the framing.¹⁴ Surely on this point at least Justice Scalia is correct when he insists that the protection of freedom of “speech” covers the right to speak in association with other individuals, not just the certain persons who exercise them.¹⁵ 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. A ban on speech by aliens in newspapers would not withstand constitutional muster, I believe, even if it were attached to the visas on admission to the country. What the remarks of Justice Stevens show is that there was due animus to corporations that got special charters, giving them a huge competitive advantage over unincorporated bodies that did not have this advantage in raising capital. So it is clear that some alterations had to be made to accommodate corporations, including allowing them to be treated as citizens for the purpose of diversity jurisdiction, which allows private parties to sue or be sued in federal court. The animosity toward these corporations was cured by the liberalization of the rules on incorporation toward the middle of the nineteenth century, not by creating further obstacles to the use of the corporate form.

The second half of this argument is that the position of a corporation is quite different from that of a union. This issue was critical to the decision in *Austin* because unions were not subject to the same limitations as corporations. In one sense, the argument drops out in *Citizens United*, where the legislation was more even-handed between these two institutional rivals. But as the issue comes up, as to the effect on the two groups, it is worth noting that Justice Marshall deftly rejected a quasi Equal Protection challenge on two grounds. First, they had limited liability (a benefit that unions did not have), and second, that dissenting workers can opt out of political contribution in exercise of their First Amendment rights, while corporate

¹⁴ 130 S. Ct. at 949-50.

¹⁵ 130 S. Ct. at 928 (“the 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’”).

dissenters were bound to go along. But this is a highly selective account of the difference between the two types of organizations, for unions have many advantages that corporations do not have. Those dissenting shareholders, for example, may be bound by the decision, but they can also bring derivative actions on behalf of the corporation and they can sell their shares in ways that pummel the firm. Those remedies matter a good deal for the shareholder who sells shares for cash; the employee who resigns from a union cannot sell his position to the next fellow. In addition, unions get enormous privileges under the Clayton Act that exempts many of their activities from the antitrust laws.¹⁶ Unions also have the special protection of the Railway Labor Act¹⁷ or the National Labor Relations Act¹⁸ on key issues as 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 balance of advantages that flows from the passage of the Act.

In similar fashion, the effort to disarm corporations from speech cannot be avoided by the argument that speech is protected by the First Amendment, but the use of money is not. That argument again cuts too deep for its own good because it means that anyone who uses money to obtain assistance in preparing for political speech has crossed over the line into potential criminal conduct. That kind of a position makes no sense in dealing with ordinary interactions between two or more people in which money changes hands in order to purchase labor or goods for speech. Indeed, I would go so far as to say that any effort to cabin this option by, for example, allowing individuals to hire labor at below minimum wage to distribute leaflets should fall to the First Amendment claim that such an effort abridges speech by blocking the necessary and proper means for its realization. I would say the same about any system that sought to subject speakers, whether or not formally a

¹⁶ See 15 U.S.C. § 17 (2006) (creating safe harbors for labor unions and agricultural organizations).

¹⁷ See 45 U.S.C. § 151 (2006).

¹⁸ See 29 U.S.C. §§ 151-169 (2006).

part of the press, to the operation of the various labor laws that are intended to promote and advance the status of unions who can go out on strike and shut down printing facilities.

In the earlier *Lochner v. New York*¹⁹ era, the broader protection of freedom of contract had as one of its collateral advantages the greater protection of freedom of speech. Today, these challenges tend to fail because they are regarded as special pleading by some kinds of business, relative to others. But that is no reason to rejoice in the current law. It is important to note that the rationale for this exemption rests on the rather dubious proposition that restrictions that cut off the lifeblood of speakers are regarded as simply “incidental” restrictions that survive no matter what their impact on the ability of various parties to supply speech. There should be a categorical rule here, but it is exactly the opposite of the ones that are usually proposed. The use of money is a necessary and proper part of any sensible speech activity.

FUNCTIONAL JUSTIFICATIONS Thus far, I think that each effort to find various conceptual ways to undermine the claim for corporate free speech runs into a constitutional dead end. But the stronger issues are not these doctrinal matters. Rather, the heat stems from the assessment of what the use of corporate speech—and now union speech—will do to the political discourse of the nation. This is the point that was hit hard by the President in his State of the Union Address. It was stressed repeatedly by Professor Dworkin in his article in the *New York Review of Books*,²⁰ and it was the centerpiece of the argument of the Court in both *Austin* and *McConnell*.

¹⁹ 198 U.S. 45 (1905).

²⁰ Ronald Dworkin, *The “Devastating” Decision*, THE NEW YORK REVIEW OF BOOKS (Feb. 25, 2010), available at <http://www.nybooks.com/articles/archives/2010/feb/25/the-devastating-decision/>. For Dworkin’s more detailed discussion of the *Citizens United* decision, see Ronald Dworkin, *The Decision that Threatens Democracy*, *supra* note 13.

Much of this argument turns on the question of corruption, or as the point was stated in *Austin*, the appearance of corruption. On this issue, it is necessary first to comment that the second of these rationales seems to be dead on arrival under any form of strict scrutiny. The whole 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 and holds that it takes some proof of a clear and imminent danger before the state can use force to suppress these activities. The suspicion of government abuse and government overbreadth rings large in this case, and it would be very dangerous to allow any administration to go after its critics in this particular fashion.

So what is needed is some real evidence of corruption. In *Austin*, the supposed villain was the “distortion” of the outcome in elections that followed from the use of corporate speech.²¹ 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 that are currently in place. The astute critic would say that, in this instance, one should look

²¹ 494 U.S. at 660-61.

closely at such stalwarts as the Tillman Act²², which prohibits all contributions by corporations to candidates, and the comparable legislation that does the same for unions. 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 makes the Hatch Act,²³ which forbids government employees from making campaign contribution, such a wise statute: Close proximity leads to arm-twisting. And note that the arms that are twisted are not those of public officials, but of their employees. The risk of a shakedown by an employer is great. The Tillman Act is a closer case because that manifest risk is not present. And if that is close, the argument in favor of the BCRA seems to be far weaker. The balancing act contemplated by this case looks to be wholly out of proportion to the risk. Indeed, one striking feature about *McConnell* was the paucity of evidence that Justices Stevens and O'Connor were able to amass in favor of the levels of corruption and improper conduct that were not caught by the narrower rules.

At this point, the argument shifts to what is, at long last, the kernel of the dispute. The fear here is that corporations, with their immense amount of wealth, will so dominate the public stage that the voices of ordinary citizens will be drowned out of the body politic, so that 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."²⁴ There is an evident populist tinge to these arguments, and at the outset let me say that it does not comport with the account of corporations that I would give in light of the years in which I have urged many of them to publicly fight

²² Tillman Act of 1907, 50 Pub. L. No. 36-59, 34 Stat. 864.

²³ Hatch Act of 1939, 76 Pub. L. No. 252-76, 53 Stat. 1147.

²⁴ President Barack H. Obama, State of the Union Address (Jan. 27, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

legislation or administrative behavior that I regard as indefensible—a broad category indeed in light of my own predilections on the matter.

Instead of starting with some detailed empirical information, I want to begin with an anecdote from my professional youth that encapsulates 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 as a legal consultant, I learned of the true power of corporations when we got regularly clobbered in our tort reform efforts. I can recall one meeting where 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 could clearly count votes—and disregard corporate charters. Or there was the time that I appeared in Pennsylvania on the same 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 drafted was unsound. No corporation testified on the other side of the issue 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 then 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 being widely used 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 toward their approval.

As a relative youngster, I had the answer: Denounce the incompetent scientists publicly, and the truth would win out. At which 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 one of its members and do so in ways that delayed all sorts of other applications before the FDA on other products. Many of these delays would look innocent, such as a request for further studies. A company was, of course, free to challenge the delays in court as unjustified, which would serve the purpose of delaying matters further still. 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—did not have the luxury of that option because they were vulnerable on too many fronts. So 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 vulnerability.

It turns out that these anecdotes can be systematized. Politicians respond to votes, not to causes. I recall that after my glorious years with the American Insurance Association 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. 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 whom they know, and frankly you don’t know anybody.” Note that the effort was to lobby quietly, but not to win election campaigns—a theme to which I will return later. More to the point on the second question: How does size interact with the ability to influence public decisions? The usual account that was offered by our familiar suspects is that power means dollars means success. But the lesson from public choice theory is far less clear. One key article on this point was written in the *Journal of Legal Studies* over 20 years ago.²⁵ In it, my friend Fred McChesney noted that the usual story that large concentrated firms can dictate public policy was too simple by half. The problem, quite simply, was that in some cases this concentrated power was a

²⁵ Fred McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

liability not an asset.²⁶ He referred to the practice known as “milker bills,” whereby members of Congress propose new taxes or regulation on some targeted industry unless until they make the requisite contributions to their cause.²⁷ The entire 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 not easy to punish a nonentity in the press. It is easy to concoct anti-corporate attacks that play off the slogans that companies use to promote their brands. What airline do I refer to when I say “come die with me,” or “things go worse with Coke,” or “buy IBM and crash in style.” Too easy.

The issue is clearer still when it is necessary to note that corporations are also subject to other constraints, both legal and practical, that can easily dull their ardor to engage in general political campaigning, either for general causes or for particular candidates. The following are some of the issues that they face. Corporate boards have fiduciary duties to their shareholders, and it is always an open question whether their particular campaign contributions could be regarded as a violation of their duties on the ground that they are intended to deal with matters that are unrelated to the interests of the corporation. In response, it could be rightly said that these contributions will, in general, not provoke any legal liability in light of the extensive discretion that is afforded to most corporate boards under the business judgment rule.

So far so good, but it does not go far enough because someone could allege that political activities 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 be challenged in other ways. Dissident shareholders and board members can easily force the firm to take up the matter in some board

²⁶ *Id.* at 110. (“Similarly, a large stock of specific (nonsalvageable) capital increases the relative attraction to politicians of private rent extraction”).

²⁷ *Id.* at 107-08, 111.

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 are 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. 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.

Here is how it works. Corporations invest heavily in brands, which are the way in which they hold themselves hostage to the public on matters of quality of their product. The firm that does not defend the brand is the firm that cannot survive in the marketplace. Here is the general view of most brand managers about any participation in politics, whether it relates to elections or anything else: By all means, keep a low profile, and by all means follow that distinguished cowardly path that you blazed in dealing with government action. The logic is simple. The political statements that you make will win you many enemies—enemies who can then boycott your products. The political statements may win you some friends, but not friends who will double their purchases 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 that are ideal for the firm, and only those positions. Getting into this swamp is a real danger, and no sensible corporation will do this.

How, one asks, can one tell that this is indeed the case? Here are some of the signals that point in this direction. First, look at the long list of corporations that filed amicus curiae briefs at some stage in *Citizens United*.²⁸ Now that this list has been read aloud in its entirety, we see that it contains only the Chamber of Commerce, which is not a corporation, and whose business is to lobby for corporations. It makes no products that are subject to market retaliation. And, in

²⁸ The list can be found at <http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/>.

many cases, it is neutered. All too often the Chamber of Commerce 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. There is no way that any of these groups want to spend their precious capital on elections that concern all sorts of issues in which there is no distinctive position for a company. 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, their voices are often drowned out by the small people who are said to be unable to organize. We have a few recent cases that are worth some general observations. Target announced a \$150,000 gift to a pro-business group called MN Forward, which also had opposed gay marriage and other issues. The response from MoveOn.org was instantaneous and effective. Target went immediately into a damage control mode, literally not knowing whether to demand a refund of the grant or to ride out the storm. 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 just for the story to go away. Its political career seems short. The same seems true about Whole Foods, whose President, John McKay, wrote a critique of the Obama health care plan, which I regard as mild and moderate, but which generated a firestorm of protest from progressive Whole Foods customers who had rather different ideas. It turns out that the predictions of corporate strength are just not credible. The Internet has changed all that, and allows cause-based groups to lash out at corporate firms that don't toe the line, since they do not have to worry about brand loyalty. Suppose such groups offend folks on the other side of the political spectrum—no matter. The only question that they ask is whether they are in a position to rally their own base, which they are.

They thus operate with a fundamentally different dynamic from the corporation, where it is wise to lay low.

There are ways for corporations to stay out of the political spotlight. As a corporate board member, I would be proactive. Neuter the organization from general political contributions in order to keep from being blackmailed by 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 knows just how vulnerable it is to adverse publicity when it got sued last spring. The key point in all these maneuvers depends on a relentless application of the principle of comparative advantage. Corporations as corporations are concerned about key issues that regulate their own industry. To spend too much on general elections is to waste money on issues that are not germane to the corporate welfare. It is better to look at all issues individually, so that going after candidates is not in the picture. It is no accident, therefore, that the corporation that brought this suit was in the political business and thus had none of the brand name or other institutional constraints.

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. They are thus 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 7 million individuals who are now public employees. Furthermore, they represent these interests at a time when public union members outnumber (in absolute terms) union members in private jobs, and they do so at a time when public union pensions are widely deplored as budget breakers. Unions have something to defend, making it more attractive for them to go after these candidates and anything else that moves. *Citizens United*, if it has an effect at all, is likely to favor labor unions over the mainstream corporation, which is why the unions pushed so hard to get Blanche Lincoln out in Arkansas for her unwillingness to toe

the line on the Employee Free Choice Act.²⁹ That was surely a unique situation, with the balance so tenuous in the Senate. 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 depends on the types of disclosures that are required. The legislation contained various disclosure provisions that survived on the ground that 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 could provoke either counter-speech or, rather, more ugly behaviors, such as those threats that were raised against AIG executives in an attempt to enforce their contracts as written in the spring of 2009. The question of personal threats is not off the table, but it is not dominant on it at all. The efforts to make CEOs sign are clearly an effort to both intimidate and to inform, in uncertain proportions. But in a sense, so few executives want to be caught in this quagmire that it is not clear how broadly it will sweep. 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.

In sum, there is much heat on this discussion and little light. We should strike down the BCRA, but not expect any real miracles. 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 stuff on the table, which promises to shake up matters. On these issues, the weak constitutional protections against various forms of activity mean that

²⁹ H.R. 1409, 111th Cong. (2009).

there are many issues on the political field left to fight out. Ban the corporation and other groups will 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 elements that the dissenters feared. Indeed, it tends to be opposed to both parties and to large corporations that seek their favor. Their positions are explosive and uncertain, but they are where the action is. And it is at this level that we shall see the battle, for the progressive groups will mobilize heavily as well. So, in the end, it is the citizens that will drown out the corporations, as if they wanted to speak. 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.