

## Render Unto Caesar, Inc.

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The Supreme Court’s *FEC v. Wisconsin Right to Life*<sup>2</sup> decision is unfortunately unremarkable. It fits comfortably into a legacy of decisions in which the Supreme Court has toyed with Congress’s ability to restrict the political speech of “outside groups.” In these cases, the Court offers a schizophrenic vision of political regulation. It seems unable to conclude whether the independent opinions of certain social actors, spread among the public via the “expenditure” of their funds, poses a corrupting danger to campaigns or elections that justified deference to Congress’s regulatory choices. If it does, Congress should be able to step in and restrict such pernicious activity. If it doesn’t, Congress shouldn’t.

But because the Court can’t decide, it has instead developed an “in-but-not-in” alternative, which permits Congress (and state legislatures) to restrict the independent speech of corporations and labor organizations, (aliens, too, but we won’t discuss them here) if the message is “too political.”<sup>3</sup> For brevity’s sake I will refer to these as “prohibited sources.” For some time, “too political” has meant that the speech expressly advocated the election or defeat of a clearly identified candidate,<sup>4</sup> or (in pre-BCRA decisions and in some administrative enforcement matters) involved “active electioneering.”<sup>5</sup>

When activists found ways to talk about politics notwithstanding this restriction, in much-maligned “issue advertising,” Congress limited this speech with its own “electioneering” statute, the Bipartisan Campaign Reform Act “BCRA.”<sup>6</sup> Under BCRA, corporations and unions were prohibited from funding *broadcast* communications that featured a clearly identified candidate, targeted to the candidate’s district, within 30 days of the candidate’s primary election or 60 days of the general election.<sup>7</sup> The litigants in *Wisconsin Right to Life* argued successfully that this law, as applied to them, impermissible burdened their speech rights.

Accordingly, the Court had reason once again to consider what corporations and unions should be permitted to do in campaigns. After *Wisconsin Right to Life*, “too

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<sup>2</sup> 127 S. Ct. 2652 (2007).

<sup>3</sup> See 2 U.S.C. § 441b(a) (2000) (prohibiting corporate or labor expenditures “in connection with” federal elections).

<sup>4</sup> *Buckley v. Valeo*, 424 U.S. 1, 41-44 (1976).

<sup>5</sup> *Corporate and Labor Activity in Federal Elections: “Active Electioneering” as a Constitutional Standard*, 49 GEO. WASH. L. REV. 761 (1981); *United States v. UAW-CIO*, 352 U.S. 567, 592 (1957); *United States v. Lewis Food Co.*, 236 F. Supp. 849, 853 (S.D. Cal. 1964) (using electioneering as standard for statutory violation).

<sup>6</sup> Bipartisan Campaign Reform Act of 2002 § 203, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C. and 36 U.S.C.).

<sup>7</sup> See 2 U.S.C. § 441b(c) (2000).

political” now includes only speech that is “the function equivalent of express advocacy.”<sup>8</sup> Spending on messages that discuss policy issues involving candidates remains beyond the reach of regulation, and protected by the First Amendment . . . again, unless the message contains the “functional equivalent of express advocacy” . . . whatever *that* means.

### *Wisconsin Right To Life Continues a Flawed Line of Reasoning*

The Court has affirmed – for the time being – that the First Amendment permits the government to implement a content-based speech restriction, based on the legal form of the spender and whether a message contains something akin to express advocacy.<sup>9</sup> One would assume, following conventional First Amendment doctrine, that the Court would have found some compelling state interest to support such a blanket rule. But it hasn’t,<sup>10</sup> and *Wisconsin Right to Life* perpetuates this oversight.

If the First Amendment preserves the liberty of Americans to speak, in particular about politics, present doctrine seems exactly backward.<sup>11</sup> Why shouldn’t the *most* protection be extended to electoral advocacy, which is the most salient to popular sovereignty and an area where Congressional incumbents might be the most tempted to regulate in ways that tip the scales in their favor?

When the speaker is a prohibited source, several conventional responses to this question surface, each of which has problems:

*Participation by prohibited sources is unfair – they’re using other people’s money via a state-sanctioned vehicle, and can exert disproportionate influence.*<sup>12</sup>

This justification addresses corporations more easily than labor unions, because the corporate form is designed to facilitate the accumulation of funds for business purposes. Corporate control rests with a set of managers whose political agenda can be subsidized by unwitting investors. Despite the poor fit, the rationale also appears in cases involving unions. Courts construe the law to apply to both forms of organization equivalently, regardless of obvious differences between them.<sup>13</sup> This rationale cannot provide a basis for barring unions from making expenditures.

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<sup>8</sup> *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2659 (2007).

<sup>9</sup> This stands, I believe, as a stunning exception to the general rule that content-based speech restrictions are disfavored, and only survive scrutiny if the speech falls within a few narrowly defined categories, i.e., constitutes a clear and present danger of imminent unlawful action, or is defamatory. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 791 (2d ed. 1988).

<sup>10</sup> The closest it has come is in dicta in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990).

<sup>11</sup> *See, e.g., Mills v. Alabama*, 384 U.S. 214, 219 (1966).

<sup>12</sup> *See Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law*, 92 *GEO. L.J.* 871 (2004); Winkler, *Beyond Bellotti*, 32 *LOY. L.A. L. REV.* 133 (1998).

<sup>13</sup> Winkler, *supra* note 12 at 931. (Should be *Id.* if this cite stays right behind this-as is, I created an automatic footnote that updates when you click on the note number and push f9)

Moreover, this argument provides little reason to bar incorporated not-for-profit groups from making expenditures, or small for-profit concerns, where there is not much capital accumulation. It offers no distinction between corporate *political* expenditures (disallowed) and other corporate community spending one might deem *ultra vires* to the corporate purpose – such as subsidizing PBS, the local ballet, nonpartisan voter registration drives, or lobbying incumbent politicians. Why shouldn't management's choices in political spending be regulated (or not) by internal corporate governance procedures, like these other types of social activism?<sup>14</sup>

The Supreme Court has not completely ignored this issue. In *FEC v. Massachusetts Citizens for Life*, it concluded that certain corporations formed for the promotion of political ideas, which do not engage in business activity at all, do not have shareholders, and do not take corporate money, could be exempt from the laws prohibiting *expenditures* (and, later, electioneering communications) by corporations.<sup>15</sup> But not *contributions*, according to a subsequent Court ruling in *FEC v. Beaumont*.<sup>16</sup> The FEC's implementing regulations require a host of certifications and filings for groups who want to take advantage of this paltry exception, and it has not proved a useful liberating tool for group political speech.<sup>17</sup>

In the end, the “*MCFL*” exception is no solution to the overbreadth of the corporate and labor ban. It provides partial relief to a small set of corporations willing to comply with the requirements, and offers no relief to small labor groups that might logically deserve it. If “*immense aggregations of wealth*” are the problem, why not simply apply a limit to all corporations (or unions) that allows for effective participation?

*Participation by prohibited sources is illegitimate because they are legal (fictitious) persons and (among other things) can't vote.*<sup>18</sup>

This argument conflates the role of political speech in democracy with popular sovereignty, which is most directly articulated through voting. First Amendment protection has never been limited to speakers eligible to vote. The franchise, even today, is confined by state (and federal) law by age, status as a felon, period of domicile, mental

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<sup>14</sup> See Robert H. Sitkoff, *Corporate Political Speech, Political Extortion and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1114-1122 (2002).

<sup>15</sup> 479 U.S. 238 (1986).

<sup>16</sup> 539 U.S. 146 (2003).

<sup>17</sup> “*MCFL*” corporations are called “qualified nonprofit corporations” in FEC regulations, and are defined at 11 C.F.R. § 114.10.

<sup>18</sup> See, e.g., EDWIN EPSTEIN, *THE CORPORATION IN AMERICAN POLITICS* 268-83 (1969) (discussing arguments about legitimacy of corporate political action); Fletcher N. Baldwin, Jr. and Kenneth D. Karpay, *Corporate Political Free Speech: 2 U.S.C. § 441b and the Superior Rights of Natural Persons*, 14 PAC. L.J. 209 (1983); Robert E. Mutch, *Before and After Bellotti: The Corporate Political Contribution Cases*, 5 ELECTION L.J. 293, 311-15 (2006) (summarizing cases evaluating corporate speech rights); *First Nat'l Bank of Boston v. Attorney Gen.*, 359 N.E.2d 1262, 1270 (Mass. 1977); Cf. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

capacity, citizenship, and registration requirements.<sup>19</sup> No one has ever suggested that these factors diminish those speakers' political speech rights.

Nor is there any rationale for burdening speech by a group. In fact, since regulation of group speech implicates not only protected speech rights but also protected associational liberties, one would expect First Amendment doctrine to have developed an even more rigorous standard for upholding such laws. Something like that emerges from time to time in particular contexts, but as of yet an overall rule protecting groups has not emerged.<sup>20</sup>

*Participation by prohibited sources is corrupting because they seek to influence legislation, not support good government.*

News accounts and court briefs recite a litany of situations where corporate wealth is used to “buy” legislation and corrupt officeholders. But these situations rarely involve the activity under scrutiny in the *Wisconsin Right to Life* situation – independent spending by a “prohibited source” from its own funds. Instead, they typically involve fundraising or gratuities, often by people attempting to avoid disclosure or limits on contributions (or both).<sup>21</sup> Teapot Dome was a gratuities scandal; Watergate was a multifaceted event, involving abuse of office and hidden financing; and Charles Keating used legal fundraising as an “in” to specific helpful Senators.<sup>22</sup>

Whatever the merits of this quasi-bribery argument in *those* contexts, it is misplaced as a rationale for restrictions on spending from a source's own money.

*Prohibited sources have been “prohibited” for generations, numerous precedents support these restrictions, and there shouldn't be any question that Congress may regulate their political activity.*

Justice Souter's *Wisconsin Right to Life* dissent, for one, argues that the Court's intervention into campaign finance regulation threatens democratic integrity.<sup>23</sup> True, since the passage of the Tillman Act in 1907, corporations have been prohibited from making contribution to federal candidates. Since 1946, corporations and unions have been barred from making expenditures. Surely, an enforcement record demonstrating the scope and contours of these laws helped inform Congress when it recodified this prohibition in the Federal Election Campaign Act.

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<sup>19</sup> See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 41-56 (1974); *Marston v. Lewis*, 410 U.S. 679 (1973); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Muntaqim v. Coombe*, 366 F.3d 102 (2d. Cir. 2004).

<sup>20</sup> A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 196 (Bradley ed. 1945); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>21</sup> See Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to Three Counts*, WASH. POST, Jan. 4, 2006, at A1.

<sup>22</sup> LARRY SABATO & GLENN SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS*, 8-15 (1996).

<sup>23</sup> *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2689 (2007) (Souter, J., dissenting).

Well, no. The Department of Justice brought a few test cases enforcing the expenditure ban against unions, and lost.<sup>24</sup> It pursued a singular corporate prosecution in the 1960's.<sup>25</sup> Public statements suggest that the Department doubted any prosecution of expenditures (as distinguished from contributions) would be constitutional.<sup>26</sup> Yet since the passage of FECA, the Court has invoked history and summarily justified the prohibited source restrictions in broad and conclusory terms.

If the Court were inclined to push a little, the fragile justifications for blind acceptance of the prohibited source restrictions could fail. The legal arguments rest on opaque reasoning from a 1956 labor case, articulated by the deferential Justice Felix Frankfurter in reliance on an unconvincing historical summary.<sup>27</sup> The seminal *Buckley v. Valeo*<sup>28</sup> decision had no occasion to reexamine the roots of the corporate or labor ban. The court in *Massachusetts Citizens for Life*, as we saw above, articulated a constitutional exemption when presented with the expenditure ban in a nonprofit context.<sup>29</sup> Every other Court decision has relied, for better or worse, on a recitation of this shaky foundation.

As a policy matter, times have changed. The modern corporate landscape is quite different from 1907. We don't have good corporate statistics from the turn of the century, but the earliest year we have – 1930, there were 3.3 corporations per 1000 people in the United States. In 1990, it was 14 per 1000 people.<sup>30</sup> “A corporate charter was a privilege to be granted only by a special act of a state legislature, and then for purposes clearly in the public interest.”<sup>31</sup> The corporate world was also much more concentrated then – for example in 1900 half of all American savings were held in life insurance or annuities, and insurance company assets were an important sources of investment capital for other businesses.<sup>32</sup> Many entities that incorporate today for liability-limiting purposes, would not have sought a state corporate charter in 1907.

When the Tillman Act passed in 1907, the nation was trying to cope with new and alarming “immense aggregations of wealth.” The Tillman Act's remedy was a ban on all corporations of *any* sort making *any kind* of contribution. Such categorical breadth might be justifiable in an era of dramatic change, uncertainty, and anxiety. But today we have a mature corporate regulatory system.

Today, any business association or civic group will probably be incorporated. Even some *blogs* incorporate. In the latest corporate tax data (from 2002) the IRS reports

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<sup>24</sup> Mutch, *supra* note 18 at 304-07.

<sup>25</sup> *United States v. Lewis Food Co.*, 366 F.2d. 710 (1966) (discussed in Mutch, *supra* note 18 at 302-08).

<sup>26</sup> Mutch, *supra* note 18 at n. 45 (citing Warren Olney testimony).

<sup>27</sup> *See United States v. UAW-CIO*, 352 U.S. 567 (1957).

<sup>28</sup> 424 U.S. 1 (1976).

<sup>29</sup> *See supra* note \_\_\_\_.

<sup>30</sup> DATAPEDIA OF THE UNITED STATES 1790-2005: AMERICA YEAR BY YEAR 434-39 (George Thomas ed. 2001); U.S. department of the census, population data, <http://www.census.gov/population/censusdata/table-2.pdf>.

<sup>31</sup> PATRICIA BEARD, *AFTER THE BALL: GILDED AGE SECRETS, BOARDROOM BETRAYALS, AND THE PARTY THAT IGNITED THE GREAT WALL STREET SCANDAL OF 1905* 27 (2003) (quoting ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* 6 (1982)).

<sup>32</sup> *Id.* at 10.

that out of over 5.2 million corporations filing returns, 589,768 of them have *no* assets, almost 4 million corporations have assets from \$1 to \$500,000, and just under 2,000 have assets over \$2,500,000,000.<sup>33</sup> Roughly 47% of active corporations *had no net income*. These figures do not include the almost 204,000 tax-exempt charities filing returns in 2002, or the 76,638 returns filed by other kinds of tax exempts, like social welfare organizations and trade associations.

The role of unions in American life has also changed in the years since the expenditure ban was extended to them. At that time of the expenditure ban, unions represented over one-third of the workforce. In 2005 that figure dropped to 12.5%, and union membership continues to fall in absolute numbers.<sup>34</sup>

The reflexive supposition that the corporate or labor form necessarily leads to immense aggregations of wealth, so that *any* corporation or union, for-profit or non-profit, national or local, *must* be barred from making expenditures, isn't borne out in reality. Moreover, these groups should be able to speak on their own. Finally, the reasons for prohibiting independent spending are not well settled in the law, and beg for reexamination.

*What then?*

If the Court takes political speech rights seriously, it should revisit the prohibited source spending prohibition, and either build a reasoned justification for them or find them unconstitutional. If the Court declared the independent expenditure ban unconstitutional, how would the world change?

First, some resources now spent on "issue advertising" would instead be spent on campaign advertising for or against candidates. These corporations and unions would be able to do directly what they may now be doing indirectly – reaching the public to talk about who should be elected. Other spenders now chilled by the law (and the controversy that accompanies political spending) might decide to participate. Would these additional risk-adverse spenders offer something different in debate? One can't say for certain, but it could be that the risk-tolerant activists are more ideologically polarized and resilient to controversy than these new arrivals. Liberalizing the expenditure restrictions could encourage more moderate perspectives.

Second, some media companies would use in-house resources to advocate for campaigns. For broadcasting, FCC licensing requirements and review could limit how far any particular broadcaster could go. Moreover, these organizations would be sensitive to adding any content that would alienate their audiences. A viewer who dislikes the parade of political content on A&E (hypothetically) will change the channel;

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<sup>33</sup> Internal Revenue Service, 2002 Returns of Active Corporations, Table 2 – Balance Sheet, Income Statement and Selected Other Items, by Size of Total Assets, <http://ftp.irs.gov/pub/irs-soi/02co03nr.xls>.

<sup>34</sup> See United States Department of Labor, Bureau of Labor Statistics, "Union Members in 2005," <http://www.bls.gov/news.release/union2.nr0.htm>.

a consumer who disagrees with UPS's political agenda may still use them to ship a package. Context matters.

Third, "business" perspective as such would be expressed, not shielded as it is presently through middlemen. While some have long argued that only "natural" persons are entitled to participate in politics,<sup>35</sup> this cramped view is legally unsound and bad policy. It excludes from the arena a large variety of significant perspectives. Individual shareholders, employees, or workers may not fully appreciate how different issues affect corporations or unions in society – even if they are sympathetic to their goals.

Moreover, the existing limits confine the discussion to the lawmaking (not electoral) arena. Since corporations as such don't speak in federal *campaigns*, legislative differences are managed in the *lobbying* arena, which is exclusively the territory of incumbents and professional government affairs representatives. It would be better if these economic and policy disputes were pulled into home-district campaigns, so that challengers could also speak to them.

Nothing in the above argument would abolish the federal or state laws prohibited direct corporate contributions to candidates, parties and political committees. Nor would it abrogate existing laws treating coordinated expenditures as contributions. The most difficult principle to justify in *Wisconsin Right to Life* and the other expenditure cases is that there is something inherently corrupt about independent corporate and labor political speech. That is the piece of constitutional law that needs to be fixed.

Even if one is less sanguine than I about corporate and labor activity, one would be hard pressed to argue that a ban is a tailored response. If Congress is concerned about corporations and unions drowning out parties and candidates through independent media spending, then why not some reasonable cap coupled with disclosure? These groups could then make whatever political point they preferred, (without dancing around with the express advocacy standard or the electioneering communications ban), the public could be better informed, and incidental or isolated political activity would not violate the law.<sup>36</sup>

As technology progresses, it becomes harder to justify limited political spending on the basis of legal form. With each passing day, viewers have more choices for how to receive material they want – and avoid material they do not want. The "drowning out" bogeyman made some sense in an era with three networks, a handful of independent stations, no remotes, and no TiVo. How about an era in which "television" video comes over the Internet and software analogous to a pop-up blocker deletes any advertising, political or commercial, you don't want to see? What is the justification for protecting viewers from material they choose to watch?

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<sup>35</sup> Richard W. Emory, *A Corrupt Practices Act for Maryland*, 4 MD. L. REV. 248, 256 (1940).

<sup>36</sup> An alternative approach would be to place corporate or labor governance restrictions on such expenditures to protect the interests of shareholders and union members, such as disclosure or requiring a ratifying vote.

What good do corporate and union prohibitions do? As Alexander Heard noted in 1960:

By far the most important political impact of both business and labor forces is felt not through their financial part in politics, but through the web of personal and institutional influences by which they are linked to large numbers of people *in relationships of dependence and respect. And here a point is reached beyond which the effort to put a dollar value on political participation and political influence becomes meaningless.*<sup>37</sup>

When individuals and entities from outside the “web of personal and institutional influences” are silenced, it makes it just that much better for those already “in relationships of dependence and respect.”

If the Court declines to revisit the prohibited source ban in federal law, Congress should take up the challenge. If lawmakers wish to institute a more straightforward and effective campaign finance system that creates fewer distortions, thus enhancing political debate, compliance, and respect for the rules, they should at least revisit the expenditure bans on corporations and labor organizations. As they are presently configured, these rules prohibit some political activity by certain entities for reasons that are hard to fathom or defend. They serve the interests of those who seek grounds for investigating their political opponents, or for those left relatively more influential by the silencing of competing views.

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<sup>37</sup> ALEXANDER HEARD, *THE COSTS OF DEMOCRACY*, 206 (1960) (emphasis added).