

CORPORATE INFLUENCE IN REFERENDA: A COMMENT ABOUT THE PRESCRIPTION

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Professor Raskin obviously has written a thoughtful paper that captures a populist concern with the vast sums of money spent in referenda.¹ As the litigator on the panel, I want to direct my brief comments to his proposed solution—a ban on corporate spending in initiative campaigns—and in particular to his emphasis on the Supreme Court’s suggestion in *First National Bank v. Bellotti* that the Court might look favorably on such a restriction if it was “supported by record or legislative findings that corporate advocacy threatened . . . to undermine democratic processes.”²

In the end, I do not believe that Professor Raskin’s proposal survives First Amendment scrutiny. I seriously doubt that a majority of the current Court would recognize a compelling government interest in restricting corporate spending in referenda. To my mind, the Court’s description of “corruption” in *Austin v. Michigan Chamber of Commerce*³ is the high water mark for the government’s authority to restrict corporate speech in campaigns. But even if the Court were to recognize such an interest, it certainly would reject Professor Raskin’s proposed *ban* on corporate spending,⁴ which under *Austin* would not be sufficiently tailored to fulfill the State’s goals.⁵

I therefore believe that, instead of banning corporate spending in initiatives, legislatures should adopt campaign finance reform meas-

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1. See Jamin B. Raskin, *Direct Democracy, Corporate Power, and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1 N.Y.U. J. LEGIS. & PUB. POL’Y 21.

2. 435 U.S. 765, 789 (1978), cited in Raskin, *supra* note 1, at 34.

3. 494 U.S. 652, 659 (1990).

4. See Raskin, *supra* note 1, at Parts I, IV, V.

5. See 494 U.S. at 660 (holding that the ban on corporate spending is legitimate because it “does not impose an *absolute* ban on all forms of corporate political spending . . .”).

ures that leave substantial room for corporate speech in initiatives. I fear that to adopt Professor Raskin's prescription would lead to years of costly and demoralizing litigation that would end in a judicial determination that a spending ban violates the First Amendment.

I

BELLOTTI LEAVES OPEN THE STATE'S INTEREST IN RESTRICTING CORPORATE SPENDING

The Massachusetts statute in *Bellotti*⁶ allowed corporations to spend money to influence only those initiative campaigns that "materially affect[ed]" their interests.⁷ The *Bellotti* case was notable both because it was the Supreme Court's first major campaign finance decision after *Buckley v. Valeo*⁸ and because it promised to tackle the knotty problem of the First Amendment rights of corporations generally.

The Court divided five-to-four, with Justice Powell's opinion for the majority holding that corporate speech is entitled to constitutional protections and that public discussion of initiatives is "the type of speech indispensable to decisionmaking in a democracy"⁹ The majority then transformed the vice identified by the Massachusetts statute—the disproportionate impact of corporate spending on the outcome of referenda—into a First Amendment virtue: "the fact that advocacy may persuade the electorate is hardly a reason to suppress it."¹⁰ Massachusetts could not overcome the value of corporate speech with the compelling governmental interest recognized in *Buckley*—preventing the appearance and reality of *quid pro quos* from candidates in exchange for campaign spending¹¹—for the simple reason that initiatives involve issues, not candidates. *Bellotti* thus rejected a government interest in levelling the playing field in referenda. Three of the four dissenters would have sustained the statute on the ground "that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process."¹²

6. 435 U.S. at 765.

7. See 435 U.S. at 768; see also MASS. GEN. LAWS, ch. 55, § 8 (1977).

8. 424 U.S. 1 (1976) (holding constitutional provisions limiting individual contributions to campaigns despite First Amendment concerns).

9. *Bellotti*, 435 U.S. at 777.

10. *Id.* at 790.

11. See *Buckley*, 424 U.S. at 26.

12. 435 U.S. at 809 (White, J., dissenting). Then-Justice Rehnquist dissented separately on the ground that the State, which literally creates a corporation, has a right to

When the Supreme Court addresses an area of the law for the first time, it prudently tends to leave itself “escape hatches”—statements in opinions that give the Justices room to maneuver in later cases as doctrines mature through debate in the lower courts and in the literature. *Bellotti*, for example, leaves open the possibility that a later case could consider “whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restrictions as applied to corporations, unions, or like entities.”¹³ The Court also notes that “in the quite different context of participation in a political campaign for election to public office[,] . . . Congress might well be able to demonstrate” a compelling state interest in restricting corporate spending.¹⁴ Moreover, the excerpt invoked by Professor Raskin explains that if the State’s “arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.”¹⁵

II

FROM *BELLOTTI* TO *AUSTIN*: CHANGING ATTITUDES REGARDING CORPORATE SPENDING

The Court’s suggestion in *Bellotti* that “record or legislative findings” might alter its views¹⁶ was taken up relatively quickly. To cite two prominent examples, in 1982, Daniel Lowenstein published a detailed study of the twenty-five California ballot propositions between 1968 and 1980 in which one side substantially outspent the other, and demonstrated “that one-sided spending has been ineffective when it is in support of the proposition but has been almost invariably successful when it is in opposition.”¹⁷ Three years later, John Shockley reviewed “[t]he [b]est [c]urrently [a]vailable [e]vidence” (including the Lowen-

limit the range of matters on which it may speak through its incorporation process. *Id.* at 823-24 (Rehnquist, J., dissenting).

13. *Id.* at 777-78 n.13 (Powell, J.).

14. *Id.* at 788 n.26.

15. *Id.* at 789.

16. *Id.*

17. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 U.C.L.A. L. REV. 505, 511 (1982).

stein study), and came to basically the same conclusion.¹⁸ Both researchers argued that these results would support restrictions in referenda under *Bellotti*.¹⁹

As it happens, this is an area of the law in which the Court took advantage of the maneuvering room it had left itself. The Justices' views developed in line with the literature and general public awareness of the impact of corporate spending in elections. For example, in a 1982 case, *FEC v. National Right to Work Committee*,²⁰ the Court unanimously upheld a requirement that corporations create a segregated fund for contributions to federal candidates, deferring to Congress' judgment on the need to limit "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization . . ." ²¹ In 1985, the Court recognized in *FEC v. National Conservative Political Action Committee*²² that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form . . ." ²³ In *FEC v. Massachusetts Citizens for Life*,²⁴ the Court opened the door even further to restrictions by acknowledging that the "resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers."²⁵

Those cases did not absolutely resolve the issue left open in *Bellotti*, however, because they addressed restrictions on corporate spending in *candidate elections*—which involve the potential for *quid pro quos* that was central to *Buckley*—while still drawing from *Bellotti* the distinction that "a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates."²⁶ But the Court took a major step in this regard in *Austin v. Michigan Chamber*

18. See John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 391-400 (1985), cited in Raskin, *supra* note 1, at Part II n.23.

19. See Lowenstein, *supra* note 17, at 591; Shockley, *supra* note 18, at 313, 415-16.

20. 459 U.S. 197 (1982).

21. *Id.* at 207.

22. 470 U.S. 480 (1985).

23. *Id.* at 500-01.

24. 479 U.S. 238 (1986).

25. *Id.* at 258.

26. *Nat'l Conservative Political Action Committee*, 470 U.S. at 495-96 (citing *Bellotti*, 435 U.S. at 789-90).

of Commerce,²⁷ a 1990 challenge to a Michigan statute that prohibited corporate expenditures to influence candidate elections, except through a segregated fund.²⁸ *Austin* is particularly important to this discussion because *Buckley* clearly held that independent expenditures (as opposed to direct contributions) in candidate elections do not trigger the concern for *quid pro quo* corruption.²⁹ The *Austin* Court placed the corporation's expenditures "at the core of our electoral process and of the First Amendment freedoms,"³⁰ and found that the statute's segregated fund requirement triggered heightened scrutiny because it barred the corporation from spending its own money in the campaign.³¹

The Court nonetheless upheld the statute based on the State's compelling interest in restricting corporate spending, which it drew from the decisions discussed above. According to the majority, "State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that . . . allow corporations . . . to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace."³² Thus, as Professor Raskin recognizes,³³ *Austin* identifies "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."³⁴ The State's interest in combating this form of corruption is unrelated to the response, or even the existence, of a candidate. It seems to me that Professor Raskin is right to imply that the Court in *Austin* substantially reversed course from *Bellotti*. The *Bellotti* dissenters' concern that corporate economic power "may, if not regulated, dominate . . . the very heart of our democracy"³⁵ is the very foundation of *Austin*. The expenditures in *Austin*, which were not coordinated with the candidate, were the rough equivalent of spending in referenda. The interest recognized by the Court thus applies not only to instances in which spending may create *quid pro quos* with candi-

27. 494 U.S. 652 (1990).

28. *See id.*

29. *See* 424 U.S. at 47.

30. 494 U.S. at 657 (citations omitted).

31. *See id.* at 658.

32. *Id.* at 658-59 (internal quotation marks and citation omitted).

33. *See* Raskin, *supra* note 1, at Part IV.

34. 494 U.S. at 660.

35. 435 U.S. at 809 (White, J., dissenting).

dates, but to all instances in which corporate spending works to distort political discourse.

III THIS FAR AND NO FURTHER

If *Austin* takes us so close, why do I not agree with Professor Raskin that states may constitutionally restrict corporate spending in initiative campaigns? The votes just do not add up. *Austin* itself is a closely divided decision, and one member of the six-Justice majority (Justice Stevens) wrote separately to emphasize the Court's recognition of the "vast difference" between spending restrictions in campaign elections and in referenda and to suggest that the Court's holding in *Austin* be limited to the context in which it was decided.³⁶

More importantly, it is now a very different Court than it was in 1990. Four members of the *Austin* majority (Brennan, Marshall, White, and Blackmun) are no longer on the Court. The dissenters (O'Connor, Scalia, and Kennedy), who would not allow the State to restrict independent expenditures in either candidate elections or initiative campaigns, remain.

The Court's current composition thus leaves a core of four Justices prepared to reject Professor Raskin's proposal. It seems likely that the recently appointed Justices would do so as well, in light of the Court's ruling in *Colorado Republican Campaign Committee v. FEC*.³⁷ In that case, Justices Souter, Breyer, and O'Connor voted to strike down restrictions on uncoordinated expenditures. They cited *Bellotti* for the proposition that "where there is no risk of 'corruption' of a candidate, the Government may not limit even contributions."³⁸ Justice Thomas, in a separate opinion, took the strong position that all limitations on campaign spending must be subject to strict scrutiny review.³⁹ Justice Ginsburg joined in Justice Stevens' dissent on the ground that expenditures in candidate elections created the possibility of *quid pro quo* corruption, a rationale that is inapplicable to referenda.⁴⁰ Moreover, Justices Ginsburg, Souter, and Breyer all joined the opinion of the Court in *McIntyre v. Ohio Elections Commission*,⁴¹

36. See 494 U.S. at 678 (Stevens, J., concurring).

37. 116 S. Ct. 2309 (1996).

38. *Id.* at 2319.

39. *Id.* at 2325-29 (Thomas, J., concurring in the judgment and dissenting in part).

40. *Id.* at 2332 (Stevens, J., dissenting).

41. 514 U.S. 334 (1995).

which cites *Bellotti* approvingly for the proposition that ballot initiatives do not carry a risk of corruption.⁴²

I recognize that if a State were to implement Professor Raskin's proposal, any challenge would take several years to reach the Supreme Court, in which time its composition could change further still. But the most likely retirees are Chief Justice Rehnquist and Justice Stevens, whose votes on this issue balance each other out. Furthermore, if the question were presented today, the votes cast by the new Justices suggest that the Court would strike down restrictions on corporate spending by a wide margin, making a shift of one or two votes irrelevant to the outcome.

Finally, unlike Professor Raskin, I do not believe that a more developed factual record will affect the Justices' views. In the last twenty years, the Court's campaign finance and corporate speech doctrines have moved well beyond "escape hatches" that leave it the opportunity to substantially alter course. The individual Justices now have fairly settled opinions that only the most extraordinary revelations seem likely to dislodge.

IV

A NOTE ABOUT NARROW TAILORING

To this point, I have tried to explain why the current Supreme Court would not recognize a compelling government interest in restricting corporate spending in initiative campaigns. But Professor Raskin's specific proposal—not just to limit, but to *ban* corporate spending—deserves brief attention as well, because I believe that it clearly is constitutionally infirm in light of *Austin*.

The statute in *Austin* required that any corporate expenditure in a candidate election occur through a segregated fund, essentially, a political action committee.⁴³ Every member of the Court agreed that the statute triggered First Amendment scrutiny because it barred corporations from expressing their support for candidates through their own treasury funds.⁴⁴ The majority was willing to sustain the statute, however, because, and only because, "the Act [did] not impose an *absolute* ban on all forms of corporate political spending but permit[ted] corporations to make independent political expenditures through separate segregated funds."⁴⁵

42. See *id.* at 352 n.15.

43. See 494 U.S. at 654-55.

44. See *id.* at 658 (Marshall, J.), 695-96 (Kennedy, J., dissenting).

45. *Id.* at 660 (Marshall, J.).

Professor Raskin's proposal unfortunately crosses precisely the line in the sand drawn by *Austin*. In the case of a segregated fund requirement, "[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views."⁴⁶ A spending prohibition, in contrast, silences an entire class of speakers.

V

CONCLUSION

I recognize the aspirational tone of Professor Raskin's paper. He ably demonstrates that massive spending in campaigns can have terribly corrosive consequences. However, in moving from a description of the problem to a prescription for solving it, Professor Raskin overstates the bounds of acceptable government action under the First Amendment—at least as read by the current members of the Supreme Court. By recognizing that the Constitution prohibits all-encompassing measures, such as a complete ban on corporate spending, states can develop statutes that attempt to preserve both a productive political discourse and the right to speak.

46. *Id.* at 660-61.