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WISCONSIN RIGHT TO LIFE: SAME SONG, DIFFERENT VERSE

ALLISON R. HAYWARD*

The Supreme Court's *FEC v. Wisconsin Right to Life*¹ (*WRTL II*) 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." Accordingly, I cannot agree with Professor Hill that the decision represents an agenda-setting or framework-defining departure from the Court's previous campaign finance decisions.

In these previous cases, as with the *WRTL II* decision, the Court has offered 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, pose a corrupting danger to campaigns or elections that justifies deference to Congress's regulatory choices. If it does, Congress should have the power to restrict such pernicious activity. If it does not, Congress should not be given such power.

But, because the Court cannot 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."² For brevity's sake I will refer to these as "prohibited sources." For some time, "too political" has meant that the speech either expressly advocated the election or defeat of a clearly identified candidate,³ or (in earlier decisions and in some administrative enforcement matters) involved "active electioneering."⁴

When activists found ways to talk about politics notwithstanding this restriction, through much-maligned "issue advertising," Congress limited this speech with its own "electioneering" statute, the Bipartisan Campaign Reform

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1. *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 127 S. Ct. 2652 (2007).

2. *See* 2 U.S.C. § 441b(a) (2000) (prohibiting corporate or labor expenditures "in connection with" federal elections).

3. *Buckley v. Valeo*, 424 U.S. 1, 41-44 (1976).

4. *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 a standard for statutory violation), *rev'd on other grounds*, 366 F.2d 710 (9th Cir. 1966); Note, *Corporate and Labor Activity in Federal Elections: "Active Electioneering" as a Constitutional Standard*, 49 GEO. WASH. L. REV. 761, 773 (1981).

Act (BCRA).⁵ Under the BCRA, corporations and unions were prohibited from funding *broadcast* communications that featured a clearly identified candidate and targeted the candidate's district within thirty days of the candidate's primary election or within sixty days of the general election.⁶ The litigants in *WRTL II* argued successfully that this law, as applied to them, impermissibly burdened their speech rights.⁷

Accordingly, the Court had reason once again to consider what corporations and unions should be permitted to do in campaigns. After *WRTL II*, "too political" now includes only speech that is "the functional equivalent of express advocacy."⁸ Spending on messages that discuss policy issues involving candidates remains beyond the reach of regulation and is protected by the First Amendment unless the message contains the "functional equivalent of express advocacy"⁹

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 has not,¹⁰ and *WRTL II* perpetuates this oversight.

If the First Amendment preserves the liberty of Americans to speak, particularly about politics, then the present doctrine seems backwards.¹¹ It seems the *most* protection should 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.

Several arguments attempt to refute the contention that corporate or labor advocacy deserves full First Amendment protection. But none do the necessary work to justify banning express advocacy by corporations and unions. As these rationales are plainly insufficient, the Court should either declare the corporate

5. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 91 (codified in scattered sections of 2 U.S.C. and 36 U.S.C.).

6. See 2 U.S.C. § 441b(c) (Supp. III 2005).

7. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2670 (2007).

8. *Id.*

9. The Court failed to define "functional equivalent of express advocacy."

10. The closest it has come is in dicta in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 ("[The Court] has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections.")). 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* 791–92 (2d ed. 1978).

11. See, e.g., *Mills v. Ala.*, 384 U.S. 214, 219–20 (1966) (holding unconstitutional a state statute restricting newspaper editors' freedom in publishing editorials on day of election).

and labor expenditure ban unconstitutional or craft a sufficient rationale for it grounded in First Amendment doctrine.

One common argument made is that participation by prohibited sources is unfair: Corporations and unions are using other people's money via a state-sanctioned vehicle and can exert disproportionate influence.¹² This rationale is more appropriate for corporations 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.¹³ Unions, by contrast, are organized for advocacy of workers interests, which could reasonably include political activity. The obvious differences between these entities should counsel for different restrictions in any case, yet the law treats unions and corporations essentially as alter egos. The rationales originally made to justify corporate restrictions also appear in cases involving unions.¹⁴ Courts construe the law to apply to both forms of organization equivalently, regardless of obvious differences between them.

Moreover, this "unfairness" argument provides little reason to bar incorporated not-for-profit groups or small for-profit concerns where there is not much capital accumulation from making expenditures. It is also applied selectively to political activity, for no apparent reason. It offers no distinction between corporate *political* expenditures, which are 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. Management's choices in political spending should be regulated by internal corporate governance procedures, like these other types of social activism.¹⁵

The Supreme Court has not completely ignored this issue. In *FEC v. Massachusetts Citizens for Life (MCFL)*, 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.¹⁶ The FEC's implementing regulations require a host of certifications and filings for groups who want to

12. See Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 154–155 (1998); Adam Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871, 873 (2004) [hereinafter Winkler, "Other People's Money"].

13. Winkler, "Other People's Money," *supra* note 12, at 874–75.

14. *United States v. UAW-CIO*, 352 U.S. 567 (1957).

15. See Robert H. Sitkoff, *Corporate Political Speech, Political Extortion and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1118 (2002).

16. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986). But, they would not be exempt from laws prohibiting *contributions*, according to a subsequent Court ruling in *FEC v. Beaumont*, 539 U.S. 146 (2003).

take advantage of this paltry exception, and it has not proved a useful liberating tool for group political speech.¹⁷

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 it offers no relief to small labor groups that might logically deserve it. If “immense aggregations of wealth”¹⁸ are the problem, then by simply applying a reasonable political expenditure limit to corporations (or unions), the law would reflect some sensitivity to legitimate speech interests.

A second point often made in support of limiting participation by prohibited sources is that such participation is illegitimate because the prohibited sources are legal (fictitious) persons and, among other things, cannot vote.¹⁹

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 just those 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 capacity, citizenship, and registration requirements.²⁰ No one has ever suggested that these factors diminish the political speech rights of other persons ineligible to vote.

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. This sentiment emerges from time to time in particular contexts, but as of yet

17. “MCFL” corporations are called “qualified nonprofit corporations” in FEC regulations, and they are defined at 11 C.F.R. § 114.10 (2007).

18. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2672 (2007) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)) (emphasis added).

19. *See, e.g.*, *First Nat’l Bank of Boston v. Attorney Gen.*, 359 N.E.2d 1262, 1270 (Mass. 1977) (stating corporations do not have the same First Amendment rights as persons), *rev’d*, 435 U.S. 765 (1978); EDWIN EPSTEIN, *THE CORPORATION IN AMERICAN POLITICS* 268–83 (1969) (discussing arguments about legitimacy of corporate political action); Fletcher N. Baldwin, Jr. & Kenneth D. Karpay, *Corporate Political Free Speech: 2 U.S.C. § 441b and the Superior Rights of Natural Persons*, 14 PAC. L.J. 209, 217 (1983); Robert E. Mutch, *Before and After Belotti: The Corporate Political Contribution Cases*, 5 ELECTION L.J. 293, 311–15 (2006) (summarizing cases evaluating corporate speech rights). *Contra* *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

20. *See, e.g.*, *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (felon restriction); *Marston v. Lewis*, 410 U.S. 679, 681 (1973) (registration requirements); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (age restriction), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI; *Muntaqim v. Coombe*, 366 F.3d 102 (2d. Cir. 2004) (felon restriction), *vacated*, 449 F.3d 371 (2d Cir. 2006).

an overall rule specially protecting groups as such has not emerged.²¹ The Court in *WRTL II* could have focused on this aspect of the problem, but did not.

A third justification for the corporate and labor expenditure ban is that this activity poses a special danger of corruption because these speakers seek self-interested legislation, rather than good government.

News accounts and court briefs in campaign finance cases 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 *Wisconsin Right to Life*—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.²² 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.²³ Whatever the merits of this quasi-bribery argument in *those* contexts, it is misplaced as a rationale for restrictions on independent spending.

A final point made on behalf of the corporate and labor expenditure bans argues from tradition, history, and convention. Prohibited sources have been “prohibited” for generations; numerous precedents support these restrictions; and there should not be any question that Congress may regulate their political activity.

Justice Souter’s *WRTL II* dissent, for one, argues that the Court’s intervention into campaign finance regulation threatens democratic integrity preserved by this long history of regulation.²⁴ Since the passage of the Tillman Act in 1907, corporations have been prohibited from making contribution to federal candidates,²⁵ and since 1946, corporations and unions have been barred from making expenditures.²⁶ It, therefore, might seem that an enforcement record demonstrating the scope and contours of these laws must have helped

21. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) (holding unconstitutional a city ordinance limiting contributions by associations); *NAACP v. Button*, 371 U.S. 415 (1963) (holding that the activities of the NAACP are modes of expression and association protected by the First and Fourteenth Amendments which may not be prohibited); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 196 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835).

22. See Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts*, WASH. POST, Jan. 4, 2006, at A1.

23. LARRY SABATO & GLENN SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* 8–15 (1996).

24. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2689 (2007) (Souter, J., dissenting).

25. Tillman Act of 1907, Pub. L. 59-36, 34 Stat. 864; FEC, THIRTY YEAR REPORT 3 (2005).

26. Taft-Hartley Act of 1947, ch. 120, § 304, 61 Stat. 159-160; FEC, *supra* note 25, at 4.

inform Congress when it recodified this prohibition in the Federal Election Campaign Act (FECA).²⁷

However, the Department of Justice brought a few test cases enforcing the expenditure ban against unions and lost.²⁸ It pursued a singular corporate prosecution in the 1960s.²⁹ Contemporaneous public statements suggest that the Department doubted any prosecution of expenditures (as distinguished from contributions) would be constitutional.³⁰ Yet since the passage of FECA, the Court has reinterpreted history and summarily justified the prohibited source restrictions in broad and conclusory terms.

If the Court were inclined to push a little, the fragile historical justification for blind acceptance of the prohibited source restrictions could fail. The legal arguments rest on opaque reasoning from a 1957 labor case, articulated by the deferential Justice Felix Frankfurter in reliance on an unconvincing historical summary.³¹ The seminal *Buckley v. Valeo* decision had no occasion to reexamine the roots of the corporate or labor ban.³² 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.³³ 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. In 1920, there were roughly 3 corporations for every 1000 people in the United States; in 1990 there were 15 per 1000.³⁴ “[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.”³⁵ Many

27. Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (codified at 2 U.S.C. §§ 431–55).

28. Mutch, *supra* note 19, at 304–07.

29. U.S. v. Lewis Food Co., 366 F.2d. 710, 711 (9th Cir. 1966); *see* Mutch, *supra* note 21, at 302–08.

30. Mutch, *supra* note 19, at 306–307, n.45 (citing *Fed. Elections Act of 1955: Hearings on S. 636 Before the Subcomm. on Privileges and Elections of the Comm. on Rules and Administration*, 84th Cong. 210 (1955). (testimony of Warren Olney III, Assistant Attorney Gen.)).

31. *See* United States v. UAW-CIO, 352 U.S. 567, 570–85 (1957).

32. *Buckley v. Valeo*, 424 U.S. 1 (1976).

33. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 250–51 (1986).

34. *See* HISTORICAL STATISTICS OF THE UNITED STATES 1-51 (population figures), 3-496 (corporation figures) (Susan B. Carter et al. eds., Cambridge University Press 2006). According to this source, in 1920 there were 313,835 corporations and a population of 105,710,620; in 1990 there were 3,716,650 corporations and a population of 248,709,873. *Id.*

35. 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)).

entities that incorporate today do so for liability-limiting purposes, and they would not have sought a state corporate charter in 1907. 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 source of investment capital for other businesses.³⁶

When the Tillman Act passed in 1907, the nation was trying to cope with new and alarming “immense aggregations of wealth.”³⁷ The Tillman Act’s remedy was a ban on all corporations making *any kind* of contribution.³⁸ Such categorical breadth might be justifiable in an era of dramatic change, uncertainty, capital concentration, 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 reported that out of over 5.2 million corporations filing returns, 589,768 of them had no assets, almost 4 million corporations had assets from \$1 to \$500,000, and just under 2,000 had assets over \$2,500,000,000.³⁹ Roughly 47% of active corporations had no net income.⁴⁰ 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 exempt entities like social welfare organizations and trade associations.⁴¹

The role of unions in American life has also changed in the years since the expenditure ban was extended to them. At the time of the expenditure ban, unions represented over one-third of the workforce.⁴² In 2005 that figure dropped to 12.5%, and union membership continues to fall in absolute numbers.⁴³

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 not-for-profit, national or local, *must* be barred from making expenditures, is not borne out in reality. Moreover, these groups should be able to speak on

36. *Id.* at 10.

37. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2672 (2007) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

38. *FEC*, *supra* note 25, at 3.

39. INTERNAL REVENUE SERVICE, 2002 RETURNS OF ACTIVE CORPORATIONS, TABLE 2 – BALANCE SHEET, INCOME STATEMENT AND SELECTED OTHER ITEMS, BY SIZE OF TOTAL ASSETS (2005), <http://www.irs.gov/pub/irs-soi/02co02nr.xls>.

40. *Id.*

41. *Id.*

42. Michael Wachter, *The Rise and Fall of Unions*, REGULATION, Summer 2007, at 27.

43. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007 424 (126th ed. 2006).

their own. The reasons for prohibiting independent spending are not well-settled in the law and beg for reexamination.

If the Court takes political speech rights seriously, it should revisit the prohibited source spending prohibition and either build a reasoned justification for it or find it unconstitutional. If the Court declared the independent expenditure ban unconstitutional, how might the universe of money in politics 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—reach 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. One cannot say for certain whether these additional risk-adverse spenders would offer something different in the debate, 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, while some media companies would use in-house resources to advocate for campaigns, there are other restraints that will limit that use. For broadcasters, FCC licensing requirements and review could limit how far any particular broadcaster could go.⁴⁴ Moreover, these speakers would be especially sensitive to adding any content that would alienate their audiences. For example, a viewer who dislikes the parade of political content on A&E will change the channel; but a consumer who disagrees with UPS’s political agenda may still use them to ship a package.

Third, the “business” or labor perspective as such would be expressed, not shielded through middlemen as it is presently. While some have long argued that only “natural” persons are entitled to participate in politics,⁴⁵ 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 corporations and unions to giving opinions on laws and legislation not on lawmakers. Since corporations cannot speak in federal *campaigns*, concerns that a business may have with its congressional representative 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

44. See, e.g., 47 U.S.C. § 315 (2002).

45. See, e.g., Richard W. Emory, *A Corrupt Practices Act for Maryland*, 4 MD. L. REV. 248, 256 (1940).

pulled into home-district campaigns so that challengers could also speak to them.

Nothing in the above argument would abolish federal or state laws prohibiting 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 doctrine that needs to be revisited.

Even if there is a real danger behind corporate and labor speech, it is difficult 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 it should consider 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.⁴⁶

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 “disproportionate influence” argument, presented as the first possible rationale in this discussion made some sense in an era with three networks, a handful of independent stations, no remotes, and no TiVo. This justification does not hold up in an era where “television” video comes over the internet and software analogous to a pop-up blocker deletes any advertising, political or commercial, a viewer does not want to see. What is the justification for protecting viewers from material they choose to watch?

What harm might 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.*⁴⁷

In other words, established economic players have a variety of means by which to work their influence. The ability to make independent expenditures is, by

46. 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.

47. ALEXANDER HEARD, *THE COSTS OF DEMOCRACY* 206 (1960) (emphasis added).

contrast, something a new player lacking such connections could use. The law at present prevents many from doing so. 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. 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.