

Welcome, and thanks to Sara Coleman, Rachel Rattner and the student leaders for organizing this, to Liz Kennedy of Demos for coming down from Boston and to all of you for attending this discussion of one of the important issues of our day. You know, there is a famous story of a Roman who came to Rabbi Hillel, one of the great sages of the 2d century, and said “I’ll convert if you can teach me the whole Torah while standing on one foot.” And Hillel replied, “Do not do to others what you would not have them do to you. The rest is commentary – go and learn.” So I’m going to use my limited time to give you my views on one foot, or maybe one and a half. If you want the commentary, you’ll need to ask in the questions.

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) is not about speech at all. It is, instead, the latest attempt of the Supreme Court to impose Mr Herbert Spencer’s Social Statics – the theory of laissez-faire – on a unwilling nation, this time through the First rather than the Fourteenth Amendment.

Corporations are creations of humanity, not God, and they have legal rights, not natural rights. Under our corporate law, they are incapable of free speech.

Corporate speech is **expensive**, not free: A corporation speaks by spending money – hiring someone to write, or advertise, for it – that comes from customers and employees and investors and which we entrusted to its leaders for entirely different purposes.

And it is **coerced**, not free. Those leaders are fiduciaries, who are required by law to set aside their own interests and commitments and values and act, instead, in the interests of the corporation as defined by the law.

Corporations are self-perpetuating bureaucratic governance organizations. Allowing them to help choose our elected officials is no different from allowing those officials to use the public treasury to promote their own perpetual candidacy. It is a form of idolatry or absolutism – setting our creations above us to rule us. A democratic republic cannot allow its creatures to control its people.

And allowing corporations to intervene in politics is a form of corruption that threatens our capitalist market system. As Acemoglu and Robinson’s recent bestseller “Why Nations Fail” emphasizes, successful economies require preventing economic incumbents from using their economic power to obtain political power that they can then use to set rules that give themselves more

economic power. When the economic elite controls the law, it quickly discovers that taking is easier than making. Our largest and most successful industries today – finance, medical drugs and insurance, military procurement, software, oil – all depend on government created monopoly rights and subsidies. Allowing them to use those subsidies to obtain more threatens democracy and markets alike.

Thank you.

Questions:

How does this analysis relate to unions? Unions are democratic organizations with leaders elected by majority vote of a voluntary membership. This is quite different from business corporations, which do not have members and elect their board on the basis of one share one vote – by wealth rather than citizenship – with most shares being held by other organizations and voted by fiduciaries constrained by law to set aside their personal ideals and views of the national good.

Union funds come from membership contributions. Moreover, under current law, unions may not use funds raised for any other purpose for political speech: they must get the agreement of each individual funder before using his or her money. In contrast, corporate funds come from charging consumers more than the firm pays employees, suppliers and investors. None of these contributors have any right to veto corporate speech or insist that the funds they supplied not be used to pay for it. Indeed, none of the sources of corporate funds even have any way of knowing how much they have supplied to the firm, let alone what it is being used for. Only shareholders, the least likely source of corporate funds, have any say at all, and it is extraordinarily limited (directors, while elected by shares, have a legal obligation to exercise independent business judgment to act in the interests of the corporation, not the country or capitalist markets).

What about close corporations? A close corporation is a corporation that is controlled by a single shareholder or a small and unified group of shareholders. A shareholder or shareholder group that controls a majority of the votes can replace the board of directors at will; one that controls all the shares is free of the obligations of fiduciary duty (since only shareholders have standing to sue). This means that shareholders of close corporations “own” the corporation in a way that is quite different from publicly held corporations, where no one has the right to run the corporation according to his or her or its will alone.

In close corporations, restrictions on corporate speech do NOT infringe on any reasonable expectation of the shareholder. First, shareholders have no right to use corporate funds for personal purposes; that is perhaps the most fundamental rule of the separation of corporation from shareholder. Second, the shareholder is free to cause the corporation to declare a dividend at any time, providing that it is not a fraud on creditors. This is only the proper and appropriate way for the shareholder to use corporate money for personal purposes, including promoting personal political views.

If shareholders wish to use corporate funds to promote their politics, the appropriate thing to do is to declare a dividend. Even a complete and total ban on corporate spending for “speech” would not interfere with the personal rights of the shareholder in any way.

While no one is proposing a ban on corporate speech, even a complete and total ban on corporate speech would not infringe on First Amendment values (although it might be ill-advised from an economic perspective). Since controlling shareholders can always declare a dividend and use the resulting funds to finance the shareholders’ speech, the only effect of limitations on corporate speech would be: (1) to prevent the shareholder from abusing control by using corporate funds that do not belong to the shareholder for personal purposes, (2) to limit tax fraud by preventing shareholders from pretending that personal expenses are business expenses, and (3) to reduce the likelihood of deceiving listeners who might view the corporate name as more authoritative than the puppet-master behind it.

Are corporations political associations? Of course, a political association can be incorporated, although there are more appropriate organizational forms. But a business corporation, by law and design, cannot be a political association. It has no human members. It is not an association of people, but a legal vehicle to allow a pool of capital to act in a coordinated fashion.

Is money speech? That is a larger question – the question of *Buckley v. Valeo*. On the one hand, in a market economy, freedom of speech without money isn’t worth much – as AJ Liebling is said to have said, freedom of the press is guaranteed only to those who own one. So, if freedom of speech is going to have any content at all, it must include some protection of the right to spend money to promote speech. On the other hand, speech is not simply a commodity to be bought and sold. In particular, we use speech – especially political debate – to determine the limits of the market. To buy and sell political debate is, simply, corruption. If we allow our form of government to be bought and sold, instead of voting to decide when to trust markets, we lose any claim to self-government and any expectation of life, liberty or happiness.

More concretely, current speech jurisprudence insists (with Hobbes) that freedom means no more than the absence of restraint. This is probably wrong on its merits – neither science nor

the arts nor any intelligent discussion progresses by absence of regulation, and it is simply not true that more speech is better, as anyone who has ever suffered through a boring lecture or attempted to find useful and accurate discussions of controversial or technical matters on the internet is perfectly aware. But even if “more is better” is a reasonable way to think about speech, conflating money and speech is extraordinarily wrongheaded and dangerous. Money cannot be left unrestrained in a market economy. Otherwise, the rich will use it to buy things that should not be for sale – including our political freedom and democratic process. Indeed, ultimately, they will use it to ensure the end of markets, since markets by their nature are never fully deferential to incumbent wealth or power.