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Recommended Citation

Michael D. Guttentag, *Teaching Citizens United v. FEC in the Introductory Business Associations Course*, 8 J. Bus. & Tech. L. 163 (2013)

Available at: <https://digitalcommons.law.umaryland.edu/jbtl/vol8/iss1/8>

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MICHAEL D. GUTTENTAG*

Teaching *Citizens United v. FEC* in the Introductory Business Associations Course

THE INFLUENCE OF CORPORATIONS IN THE POLITICAL ARENA is a timely issue. Funding for political campaigns by corporate entities has increased dramatically in the past ten years, and lobbying continues to be a growth industry.¹ A few firms have recently taken positions on controversial political issues, such as the President of Chick-fil-A sanctioning opposition to same-sex marriage.² The 2010 Supreme Court decision in *Citizens United v. Federal Election Commission*, holding that many restraints on corporate involvement in contests for federal political office are an unconstitutional infringement on a corporation's constitutional right to free speech, has made it easier for corporations to get involved in the political arena.³ This Essay offers one perspective on how to bring issues related to the role of the firm in the political arena and, in particular, the Supreme Court's decision in *Citizens United* into the introductory business associations course.

Understandably, students expect to learn something in the introductory business associations class about the relationship between corporations and the polity. However, I do not recommend treating the jurisprudence of free speech and how it relates to the corporate form as a separate course topic. Instead, I recommend integrating the topic of corporate activity in the political arena into several of the

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1. With respect to the growth of campaign financing by various types of corporate entities, see Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES, July 22, 2012, <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html>; Richard L. Hasen, *How the Supreme Court Flooded the 2012 Campaign Season with Cold, Hard Cash*, SLATE, Mar. 9, 2012, http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html; *Lobbying Database*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/index.php> (last visited Sept. 5, 2012) (stating that the aggregate amount of reported expenditures on lobbying in the United States increased from \$1.44 billion in 1998 to \$3.33 billion in 2011).

2. K. Allan Blume, *'Guilty as Charged': Cathy Says of Chick-fil-A's Stand on Biblical & Family Values*, BAPTIST PRESS (July 16, 2012), <http://www.bpnews.net/BPnews.asp?ID=38271> ("We are very much supportive of the family -- the biblical definition of the family unit."); Kim Severson, *Chick-fil-A Thrust Back Into Spotlight*, N.Y. TIMES, July 26, 2012, at A13.

3. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010).

larger themes discussed in the introductory business associations class, such as the costs that may arise from differences between manager interests and shareholder interests, the costs that may arise from following a shareholder primacy norm, and the distinctive nature of the role of the transactional lawyer.

This Essay considers four specific examples of how to integrate the role of corporations in politics within the curriculum of an introductory business associations course. First, I offer several reasons not to treat the jurisprudence of corporate political spending as a separate and independent topic when teaching the introductory business associations class.⁴ Second, I explain how to integrate corporate political activity into a class discussion on the costs that can arise from differences between the interests of a firm's shareholders and a firm's managers.⁵ Third, I explain how a discussion of corporate political activity can help to enhance a discussion of whether the exclusive goal of a for-profit corporation should be maximizing shareholder value ("shareholder primacy").⁶ Finally, I suggest how to explore the question of whether spending corporate funds to influence a political campaign is a wise business decision.⁷

There are four reasons why I choose not to treat the jurisprudence of corporate activity in the political arena as a separate topic in the introductory business associations course. First, understanding restrictions on a firm's involvement in the political arena is ancillary to my primary teaching objectives in the introductory class. My primary teaching objectives for the introductory business associations class are: (1) to provide an overview of the laws governing the formation, external relations, internal dynamics, and termination of various types of firms; and (2) to introduce students to the distinctive challenges of transactional lawyering. Neither of these teaching objectives is significantly advanced by considering the jurisprudence of corporate political activity in detail. Second, it is not evident that the attention recently paid to the influence of the corporation in politics either reflects a significant change in the extent to which firms can engage in political activity or is indicative of an increased role for public firms in political campaigns. New York Times reporter Matt Bai argues, for example, that increased financing of federal elections by corporations is primarily a response to the Bipartisan Campaign Reform Act of 2002, popularly known as the McCain-Feingold law, rather than an outgrowth of the more recent *Citizens United* decision.⁸ Bai also reports that spending on federal elections by publicly traded companies appears to be quite

4. See *infra* text accompanying notes 8–10.

5. See *infra* text accompanying notes 17–24.

6. See *infra* text accompanying notes 25–30.

7. See *infra* text accompanying notes 31–34.

8. Bai, *supra* note 1.

small.⁹ Third, the scope and applicability of the First Amendment is central to determining the constitutionality of restrictions on political contributions by private firms,¹⁰ and discussions regarding free speech strike me as more appropriate for a class on constitutional law than a class on the law of business associations. Finally, when teaching a four-unit course that covers principal/agency relationships, partnerships, and corporations, time is precious. For this type of survey class, the role of the corporation in the polity would not seem to warrant independent treatment.

However, the choice not to include a separate and independent consideration of *Citizens United* in the introductory business associations class is not without costs. There are several aspects of the *Citizens United* decision that are intriguing from the perspective of an introductory business associations course. For example, the debate between the majority and the dissent in the *Citizens United* opinion about the evolution of the corporate form in the United States could provide a nice starting point for a discussion of the history of the corporate form.¹¹ Another aspect of the *Citizens United* decision especially relevant to the introductory business associations class is the discussion between the majority and the dissent as to the extent of the power of a shareholder in a public company to effect or control corporate behavior.¹² I take up this aspect of the *Citizens United* decision when introducing students to the problems arising from agency costs in the corporate setting, as discussed more fully below.¹³

While I do not treat the *Citizens United* decision as a separate and independent topic in my introductory business associations course, there are three areas where I have found it useful to supplement the course material with a discussion of issues raised by the *Citizens United* decision. These three areas are: (1) the potential for differences between the interests of those who manage the firm and those who own

9. Bai, *supra* note 1 (“Of the \$96 million or more raised by these super PACs [during the 2012 Republican primaries], only about 13 percent came from privately held corporations, and less than 1 percent came from publicly traded corporations.”).

10. See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (providing that the material effect of restrictions on contributions are not to be measured by their material effect on the business or its property because there is no support for that proposition in the First Amendment).

11. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 926 (2010) (Scalia, J., concurring) (“As I have previously noted, ‘[b]y the end of the eighteenth century the corporation was a familiar figure in American economic life.’ . . . Most of the Founders’ resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed. Modern corporations do not have such privileges, and would probably have been favored by most of our enterprising Founders — excluding, perhaps, Thomas Jefferson and others favoring perpetuation of an agrarian society. . . . At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.”) (corrections in the original) (citations omitted); *id.* at 949 (Stevens, J., concurring in part and dissenting in part) (“Those few corporations that existed at the founding were authorized by grant of a special legislative charter. . . . Corporations were created, supervised, and conceptualized as quasi-public entities, ‘designed to serve a social function for the state.’”) (footnotes omitted).

12. See *infra* text accompanying notes 22–24.

13. See *infra* text accompanying notes 17–24.

the firm,¹⁴ (2) the costs and benefits of shareholder primacy,¹⁵ and (3) the role of a transactional lawyer in advising on business decisions that involve legal risks.¹⁶

The topic of the potential for differences between the interests of a business's principal and a business's agent comes up repeatedly in an introductory business associations course. Having someone else work on your behalf is rarely an entirely satisfactory way to get things done. While I touch on the possibility of agency costs arising in the context of both principal-agency relationships and partnerships, I do not directly address the conceptual and economic issues surrounding agency costs until I introduce the corporate form. When introducing the corporate form, I discuss the characterization of "agency costs" developed by Jensen and Meckling, as this provides a natural offshoot from the discussion of the formal separation of ownership and control in the corporate form.¹⁷

The potential consequences of a divergence between the political views of the firm's managers and shareholders is one interesting way in which to highlight agency costs.¹⁸ One can ask: How would you feel if the managers of a corporation you owned shares in decided to oppose same-sex marriage, even if a majority of the firm's shareholders supported same-sex marriage?¹⁹ One can share with the students the story of Chick-fil-A's president, Dan Cathy, speaking out in favor of relying on the "biblical definition of the family unit" in the summer of 2012.²⁰ There is also evidence that the level of a firm's political activity may be positively correlated with indicators of high agency costs and negatively correlated with the maximization of shareholder value, which suggests that the divergence between the political views of the firm's managers and shareholders also imposes financial costs on shareholders.²¹

An issue related to the potential for differences to arise between the political views of shareholders and managers is the extent to which shareholders are able to control the activities of the firm. Interestingly, the extent of shareholder control of

14. See *infra* text accompanying notes 17–24.

15. See *infra* text accompanying notes 25–30; Tara J. Radin, *Stakeholders and Sustainability: An Argument for Responsible Corporate Decision Making*, 85 WM. & MARY ENVTL. L. & POL'Y REV. 363, 376–77 (2007).

16. See *infra* text accompanying note 31–34.

17. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, in FOUNDATIONS OF CORPORATE LAW (Roberta Romano ed., 2010).

18. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84 (1998) ("We explain that the interests of directors and executives with respect to political speech decisions may diverge from those of shareholders, that the financial implications of these decisions are hardly trivial, and that the costs of the divergence of interests may be exacerbated by the special expressive significance that these decisions carry for shareholders.") (footnote omitted).

19. Chick-fil-A is a privately-owned corporation, so the likelihood of any student actually owning shares in this particular firm is quite low. But see Benjamin I. Sachs, Editorial, *How Pensions Violate Free Speech*, N.Y. TIMES, July 13, 2012, at A19.

20. See *supra* note 2; see also *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 975 (2010) (Stevens, J., concurring in part and dissenting in part) ("Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.").

21. See John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657 (2012).

political activity by a firm was a topic of disagreement between the majority and the dissent in the *Citizens United* decision. The majority opinion written by Justice Kennedy concludes that shareholders are likely to have a large degree of control over the political activities of the firm: “There is, furthermore, little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”²² Justice Stevens, on the other hand, in his dissent in *Citizens United* expresses skepticism about the ability of shareholders to systematically and consistently control the activities of the firm, including the firm’s involvement in the public sphere.²³ Stevens writes:

*It is an interesting question ‘who’ is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. . . . It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management.*²⁴

A second useful way to include the holding and issues surrounding the *Citizens United* decision in the introductory business associations class comes when discussing the ends to which the corporation should be managed. I use the case of *Dodge v. Ford*²⁵ to raise the issue as to what the appropriate goal or goals of the for-profit corporation should be. I frame a discussion of the ends to which a for-profit corporation should be directed as a choice between the following three alternatives: (1) shareholder primacy (as exemplified by the holding in *Dodge v. Ford*),²⁶ (2) stakeholder theory,²⁷ and (3) director primacy.²⁸

My discussion of the ends to which the corporation should be managed tends to focus on shareholder primacy, and, in particular, on the costs and benefits of requiring firms to only pursue the goal of shareholder wealth maximization. In terms of the benefits of shareholder primacy, I emphasize the interplay between shareholder primacy and agency costs. I suggest that accepting shareholder primacy helps to limit the extent to which the firm’s agents can extract private benefits at the expense of the firm’s shareholders. If agents have more latitude in choosing the purposes to be served by the corporation, they may use this increased latitude in

22. *Citizens United*, 130 S. Ct. at 911 (citation omitted).

23. *Id.* at 978 (Stevens, J., dissenting).

24. *Id.* at 972.

25. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

26. *Id.* at 684 (“A business corporation is organized and carried on primarily for the profit of the stockholders. The power of the directors are to be employed for that end.”).

27. See, e.g., Radin, *supra* note 15, at 382–83 (defining a stakeholder as “any individual or group who affect, or is . . . affected by, the operations of the firm”).

28. See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 573–74 (2002–03) (stating that “there is no such thing as shareholder primacy. . . . Primacy within the corporation is vested in the power of directors . . . as ‘original and undelegated’ authority”).

ways that benefit their own interests instead of those of the corporation's other stakeholders. In terms of the costs of shareholder primacy, I contrast the behavior of a firm pursuing shareholder primacy with that of a normal individual. Research suggests that most people are willing to act in pro-social ways even at a personal cost.²⁹ A firm that is truly committed to shareholder primacy is potentially the equivalent of a psychopath — an organization acting without any concern for the well-being of others.

Corporate action in the political sphere is a particularly salient example of the costs that may result when a firm makes decisions driven solely by the goal of shareholder welfare maximization. For example, an energy company might work to eviscerate environmental protection laws in order to increase profitability, or a pharmaceuticals firm might seek to eliminate safety regulations in order to lower the cost of offering new products. An entertainment company might strive to extend the duration of intellectual property rights solely to maximize current asset value. Each of these actions might involve engaging with the political process in a way that maximizes shareholder value. Yet the shareholders of these firms are also citizens, who may prefer to have the polity make decisions that are informed by considerations beyond the costs and benefits of the policy to a few private, profit-seeking firms. The interests of a firm's owners are almost always going to be broader than those dictated by a single-minded effort to capture the political process in ways that maximize firm value.³⁰

A third opportunity to discuss the holding and issues surrounding the *Citizens United* arises when I discuss the importance of thinking like a businessperson in order to be a good transactional lawyer. A lawyer asked by a company for advice about engaging in the political process should be aware that, particularly after *Citizens United*, there are fewer restrictions on corporate involvement in federal political contests.³¹ But a good transactional lawyer should also recognize that questions regarding the legality of funding a particular political position or candidate raise the related, but distinct, topic of whether such funding is a good business idea. For example, the public stance by the President of Chick-fil-A in favor of traditional marriage did generate an upsurge in business in the short-term for Chick-fil-A, and there is an adage that any publicity is good publicity.³² On the

29. See, e.g., Ernst Fehr & Urs Fischbacher, *The Nature of Human Altruism*, 425 NATURE 785 (Oct. 23, 2003) ("Strong reciprocators bear the cost of rewarding . . . even if they gain no individual economic benefit.").

30. The *New York Times* editorial board raises a similar concern in the context of corporate funding of state judicial elections. Editorial, *North Carolina, Meet Citizens United*, N.Y. TIMES, June 6, 2012, at A26.

31. Rick Hasen, *What Matt Bai's Missing in His Analysis of Whether Citizens United is Responsible for the Big Money Explosion*, ELECTION L. BLOG (July 18, 2012, 10:41 AM), <http://electionlawblog.org/?p=37108>; see also CONFERENCE BD., HANDBOOK ON CORPORATE POLITICAL ACTIVITY 11 (2010), available at <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/id/4084>.

32. Jeannine Hunter & Gregory Thomas, *Chick-fil-A Appreciation Day: Thousands Flock to Restaurants, Company Has Record Sales*, WASH. POST (Aug. 2, 2012), [http://www.washingtonpost.com/blogs/under-](http://www.washingtonpost.com/blogs/under-the-radar/wp/2012/08/02/chick-fil-a-appreciation-day-thousands-flock-to-restaurants-company-has-record-sales/)

other hand, Bai reports that at least one election lawyer advises: “If you’ve got a bank on every corner, if you’ve got stores in every strip mall, you don’t want to be associated with a social cause.”³³ A good transactional lawyer would be remiss in not being aware of these potential risks and benefits, even though such concerns go beyond the scope of strictly legal advice.³⁴ Whether a client is well-served by her lawyer sharing this type of information depends very much on the nature of the particular attorney-client relationship, but it provides a valuable discussion exercise.

My hope is that this Essay provides a helpful framework for how to integrate the role of politics and, specifically, the Supreme Court’s decision in *Citizens United* into the introductory business associations course.

god/post/eat-more-chicken-rallies-protests-of-support-and-critique-planned-at-chick-fil-a-restaurants/2012/08/01/gJQAb3TMPX_blog.html.

33. Bai, *supra* note 1.

34. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2007).