

Bob,

Let me start by getting back to the root question: Should corporations -- for-profit, business corporations -- be allowed to make campaign contributions? And let me go back to the 1907 law as it was debated at the time, not as it is today, burdened with half a century's worth of legislative and regulatory accretions.

Let's imagine ourselves as members of Congress in, say, 1906, debating whether or not to pass the bill. "What would be the practical effect?" we'd ask. We'd agree that some corporations would find the law a useful shield against campaign fundraisers. But we'd also agree that big companies that still wanted to make contributions would find clever ways to disguise their actions and probably wouldn't find many prosecutors willing to go up against them. After all, catchy axioms about how laws only catch the small fry go back to ancient Greece.

But we can't admit defeat and try to lose the bill in committee because there's a scandal that isn't dying down as fast as we'd like. So Congress to do something about it, or at least appear to be doing something. And, given the recent appearance of corporations that are bigger than anyone could have imagined a few decades ago, the bill does state an important principle about how our democracy should work. So we pass it, and we're not surprised when it doesn't work and it isn't enforced.

The problem with the ban isn't that it has been ineffective or that it was simply an appeal to abstract notions of equality. The problem is that it was a legal solution to a political problem. Legal solutions work only if it makes political sense to enforce the law. But what do you do when it makes political sense to pass a law and it also makes political sense not to enforce it?

And the law itself makes sense. There isn't a single good argument in favor of allowing corporations to make campaign contributions. I tried to deal with this toward the end of my ELJ piece, so all I'll say here is that corporations aren't voluntary associations of individuals, which means they're not groups in any way that makes sense in terms of participation in a democracy. People apply for jobs at corporations not to be with the other employees but because that's usually the only way they can practice their vocations and make a living at it. Many of those employees do belong to real groups -- professional associations, political and issue organizations, even bowling leagues -- because they share something important with the other members. That's why people join MCFL and the Sierra Club. It's not why they go to work for corporations.

So where is the "substantive restriction on political activity?" If corporations aren't citizens, aren't voluntary associations of citizens, and don't have the same First Amendment rights as citizens, then whatever they are, they aren't legitimate political actors in a democracy. Of course, a big corporation is a concentration of such economic power that it becomes a political actor by default, whatever the motivations of its managers. But the law still makes sense because it's a good thing to state clearly that illegitimate political actors should not engage in political activity.

But then the political situation changes and enforcement becomes unavoidable. The first serious enforcement isn't against corporations but against labor unions. Yes, the law had to be misapplied to bring unions under it. But remember that the law had by that point been lying around unenforced -- and uninterpreted -- for about 40 years. Had there been 40 years of enforcement against corporations, there would have been a history of interpretations that would have been harder to stretch out of shape.

If your problem is the misapplication, then target it, not the law. The solution is to have Congress revisit the law and declare that labor unions are associations of individuals and can't be brought under a prohibition that applies to for-profit corporations. If all goes well, that may happen by the law's 200th anniversary.

Instead, you suggest we permit corporations to make campaign contributions but place ceilings on them. Why? You say direct contributions would have "the virtue of transparency," but how much is that worth in practical terms? Would corporations and unions be able to make bigger contributions directly than they can now through PACs? If not, what's the point? The corporation PAC managers I've talked to think the PAC audit trail gives them transparency now. If corporations that are already politically active won't be able to make bigger contributions, won't they evade the limits? Would limits be any more enforceable than a ban?

I'm sure you'd like to have a positive reason for moving to limits, which may be why you seem to be flirting with the notion that corporations are really just groups. (That notion, btw, strikes me as either purposely deceptive or naively romantic.) But it seems the reason for your proposal is that we're powerless to prevent corporations from making campaign contributions, so we should try limiting them. And that's neither practical nor principled.

I agree the current law is a mess. It can't do what it should do and does do what it shouldn't. But the problem is political and the solution has to be political. What I'd be happy to see is more and bigger unions making more campaign contributions, even if they do make them through PACs.