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ALEC, BofA, and the attack on corporate political speech

BY **JAMES R. COPLAND** ON MAY 14, 2012 1:17 PM

On last Thursday and Friday, I was in Charlotte for the spring meeting of the Civil Justice Task Force of theAmerican Legislative Exchange Council, to which I presented my thoughts on how today's securities litigation affected states. Uptown Charlotte was visited by various protesters affiliated with labor unions, the Occupy movement, and other left-leaning causes who were objecting to ALEC's meeting and at the earlier-in-the-week annual shareholder meeting for Bank of America.

The protests against ALEC have been led by Van Jones's Color of Change organization, which has attacked the free-market organization for drafting "stand your ground" model legislation arguably (though not really) at issue in the Trayvon Martin shooting. (Note: Florida's stand-your-ground law pre-dates ALEC's model bill, and the group has now disbanded the task force responsible for advancing that model legislation.) Like Ted, I've found the left's attacks on ALEC to be profoundly disingenuous. First, it's clearly the case that those opposed to ALEC's reform work—in the case of the Civil Justice Task Force, for instance, the American Association for Justice, formerly known as the Association of Trial Lawyers of America—offer up legislation and legislative amendments to further their own interests. Second, if ALEC didn't exist, corporations would still offer draft legislation and legislative amendments to further their own interests; it just wouldn't be vetted by a broad group including legislators across several states and thinkers like myself, my former colleague and Point of Law founding editor Walter Olson (now at the Cato Institute), our editor Ted Frank and others at his Center for Class Action Fairness, and ALEC Civil Justice Task Force co-chair Victor Schwartz, who edits the most-used law school casebook on torts. Exactly how is ALEC supposed to be an unusually nefarious force, apart from the fact that its critics disagree with its agenda?

Both the anti-ALEC and anti-Bank of America protests were part of a broader fight being waged by various interests against corporate political speech. Such protests usually invoke the largely irrelevant Supreme Court decision in *Citizens United*, which allowed independent corporate expenditures in campaigns but has nothing to do with corporate lobbying, trade association membership, and political action committees, which have long existed. The big story of the 2012 elections to date isn't corporate spending but that of various billionaires spending their personal money through "Super PACs"; corporations are understandably loathe to spend their own dollars directly on electioneering, since they have customers of divergent political preferences.

Playing on just these divergent political preferences in the broader populace, the protesters against corporate political spending, often couched as advocates for “disclosure” of various types, hope to squelch corporate participation in the political arena, as the effort to induce corporations to disassociate from ALEC makes clear. But there’s an interesting tie between the protest against Bank of America and that against ALEC, too, as I’ve chronicled in various writings through the Manhattan Institute’s Proxy Monitor project: shareholder activism related to corporate political spending is on the rise, and indeed shareholder proposals related to corporate political spending or lobbying are the most numerous single class of proposal this proxy season.

Fortunately, notwithstanding the broad support of the proxy advisory firm Institutional Shareholder Services (ISS), these proposals have not been gaining traction. According to data in our Proxy Monitor database, to date in 2012, among Fortune 200 companies, shareholder proposals related to political spending or lobbying have garnered on average the support of only 18.3% of shareholders—down from 22.6% in 2011. Most shareholders seem to understand that corporations’ unilaterally exiting the political process isn’t helpful to share value. The vast majority of studies on corporate political spending suggest that what intuitively makes sense about corporate political spending and lobbying makes sense: for better or worse, companies that spend money on politics reap positive returns to shareholders. Whether this is good for the body politic—because it increases informed decision making, and because factions cancel each other out as Madison argued in Federalist 10—may be open to reasonable debate, but it’s hard to argue that a corporation’s shareholders are hurt by it being involved in politics.

That hasn’t stopped some folks from trying. A 2010 study by Harvard Law School’s John C. Coates IVanalyzed data from 1998 through 2004 and found that corporate political spending and lobbying were “strongly negatively related to firm value.” But Coates’s 2010 study, somewhat incredibly, failed to control for obvious confounding factors like firm size and industry—which matter greatly given the high fixed costs of setting up political action committees and K Street lobbying shops, as well as different industries’ vastly different regulatory environments. As one independent reviewer of a forthcoming Manhattan Institute Center for Legal Policy paper on corporate political spending noted:

There would certainly be consensus among academics to include relevant firm characteristics such as firm size and industry. Not including such characteristics – assuming that they are available and there is agreement that they should be included – seems to me to be equivalent to “academic malpractice” and such a researcher could correctly be accused of promoting advocacy rather than science.
Coates does control for variables such as firm size and industry in a follow-up 2012 paper, but when he applies those controls, his correlations largely disappear. Applying a more robust testing methodology—albeit one with imperfections—Coates only finds a negative association between political spending/lobbying and his hand-chosen measure of corporate performance for unregulated industries, and then only with a coefficient value so small as to be rather miniscule. And of course even this association could be due to reverse causation, a problem inherent in such studies: companies that are struggling are likely to spend more on politics because they hope to lobby the government for help; that help may or may not come, but even if it does it may not be enough to offset their already-flagging performance, which is wholly unrelated to their political spending itself.

As noted, we have a forthcoming paper on this topic that expands on these issues while assessing not just the outlier Coates study but the broad array of literature on corporate political spending and lobbying. Our paper is written by an outside author who is hardly a corporate apologist but rather a former scholar with the left-leaning Progressive Policy Institute and an economic advisor for multiple Democratic Party presidential campaigns.

I hope that various corporations and investors responding to shareholder proposals in the interim, as well as groups convening to discuss this topic, such as the Conference Board, will use due caution in crediting the claims of advocates trying to limit corporate political speech through the shareholder process.