



CORPORATIONS, UNIONS, AND CONSTITUTIONAL DEMOCRACY

When It Comes to Politics, the Roberts Court Makes Corporations Strong and Unions Weak

By Jamie Raskin



“The state need not permit its own creation to consume it.”

— Justice Byron White, dissenting in *First National Bank of Boston v. Bellotti* (1978)

The U.S. Constitution focuses on the powers of government and the rights of the people, but it ignores what sociologists call the “intermediate institutions” of society—like corporations and unions, neither of which was mentioned by the Framers. But these social institutions are integral to the distribution of political power and the prospects for justice in everyday life. And yet, because they lack textual grounding and definition in the Constitution, corporations and unions have been subject to dramatic changes in their legal status and political rights over time.

When the nation began, there were few corporations and they were kept on a short leash. They were seen purely as an exercise of governmental power: as legislative instrumentalities chartered to accomplish specific social and economic purposes.¹ No one pretended that they were voluntary membership organizations with constitutionally protected political rights. But business corporations began to slip the chain in the 19th and 20th centuries, winning the rights of “general incorporation” in Delaware in 1899 and everywhere else afterward, and picking up the extraordinary legal advantages of limited shareholder liability and perpetual life.² Their growing wealth—and willingness to use it—immediately raised the question of whether corporations, these *products* of public power and design, could legitimately convert their wealth into political influence and become participants in the sovereign acts of political decision-making and public policymaking.

Yet, as much as giant corporations tried to have their way in politics, it was well-accepted Supreme Court doctrine for two centuries that, as Chief Justice John

Marshall put it in 1819, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law” and therefore, by definition, *not* possessing any of the constitutionally guaranteed political rights of the people.³

But remarkably, today, during the Roberts Court era, 21st-century corporations have become political rights-bearing constitutional subjects, enjoying most of the First Amendment political free speech rights of human citizens—and then some. Under the watershed *Citizens United* decision in 2010, the “corporate identity” of the institutional “speaker”⁴ was discarded as a valid reason to keep CEOs from spending corporate funds on political campaigns. The Supreme Court’s odd formulation of the issue suggested that business corporations, which had been excluded from spending in federal political campaigns, were victims of identity-based discrimination like members of racial minority groups. Ever since, top executives have been



¹Nicole Bremner Cásarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 NEB. L. REV. 689, 715-16 (1991); see also Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518, 636 (1819).

²Cásarez, *supra* note 1 at 717; Benjamin Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 846-48 (2012); See also Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 327, 358-62 (2007).

³Dartmouth College, 17 U.S. (4 Wheat) 518, 636 (1819).

⁴*Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 364-65 (2010).

empowered to freely withdraw money from their corporate treasuries and invest it in Super PAC and “dark money” campaigns to elect or defeat political candidates of their choosing. And they are doing it to the tune of hundreds of millions of dollars in every election cycle; in this year’s election, it could be in the billions. Business corporations, which had never been seen as political membership organizations in the 18th, 19th, and 20th centuries, are now treated by the Court as political membership organizations and have become major actors in the world of political campaign finance.

The legal construction of unions has experienced similarly remarkable transformations. Early craft unions in the 18th and 19th centuries encountered little repression, but by the late 19th century, industrial unions faced both Pinkerton-style violence and criminal prosecution as antitrust conspiracies based on the theory that they were trying to illegitimately fix the price of labor.⁵ This criminalization of expressive and associational worker activity preceded the devastating period of “labor injunctions,” when businesses obtained sweeping judicial injunctions, complete with contempt citations, to shut down union strikes and order workers back to work. These assaults on union organizing were interrupted by passage of the Clayton Antitrust Act of 1914, which declared that “labor is not a commodity”⁶ and thus, by definition, could not be the subject of a criminal price-fixing conspiracy. Workers withholding their labor to pressure employers were not racketeers manipulating the price of labor but sovereign individuals acting in solidarity to advance their lot in life.

Workers continued to fight to establish that their right to organize was protected by the First Amendment and that their right to strike—that is, to *not* work—was implied by the Thirteenth Amendment prohibition against involuntary servitude and could not be nullified by sprawling common-law injunctions handed down by union-busting courts. After intense labor organizing and passage of the National Labor Relations Act (NLRA) in 1935 as part of President Franklin Delano Roosevelt’s New Deal, workers won the statutory right to engage in “concerted activities,” to organize unions as their collective champions and to engage in collective bargaining without unjust reprisals.⁷ In

cases like *Hague v. CIO*⁸ and *Schneider v. Irvington*,⁹ which followed passage of the NLRA, unions achieved recognition under the First Amendment as legitimate political associations when they won for all citizens the right to petition and speak in places of “public forum,” meaning the parks, streets, and sidewalks that have been held in trust for civic communication.

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But today, once again, unions are under relentless attack and are fighting simply to justify their existence. They are being forced to defend normal membership dues and the “fair share” agency fee payments that are made by nonmember employees whose interests the unions must also represent.¹⁰ With the percentage of the overall workforce in unions falling to below 10 percent today, unionized workers are fighting off a legal onslaught that resembles the period of labor injunctions a century ago.

Corporations and unions are fundamentally dissimilar: the former are formal legal constructs endowed with special privileges and organized for purposes of wealth maximization and investment (and they are remarkably effective at what they do, absent corruption), whereas the latter are genuine expressions of political and social organizing by people in the workplace (and they are remarkably effective at what they do, absent repression and corruption).

But corporations and unions occupy a similar doctrinal space in the First Amendment thinking of the Supreme Court. At least since passage of the Taft-Hartley Act in 1947, conservatives in Congress and on the Supreme Court have sought to equate corporations and unions for the purpose of enlarging the political rights of the

5 Benjamin Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 822-23 (2012).

6 15 U.S.C. § 17 (2014).

7 29 U.S.C. § 157 (2014).

8 307 U.S. 496 (1939).

9 308 U.S. 147 (1939).

10 Garrett Epps, *The End of Public-Employee Unions?*, THE ATLANTIC, Feb. 20, 2015, <http://www.theatlantic.com/politics/archive/2015/02/the-end-of-public-employee-unions/385690/>.

former. This equation has sunk deeply into American legal, political, and social consciousness, weakening the sense of unions as organic democratic institutions in civil society (as opposed to just being economically motivated bargaining partners) while aggrandizing the political power of CEOs of large companies who are increasingly, if bizarrely, treated as leaders of civic membership associations.

Paradoxically, as actors in the real world of American politics, corporations now have won substantially *more* rights than labor unions. In Taft-Hartley, Congress strictly regulated the political spending of unions to compel levels of disclosure that have never been imposed on business. Moreover, in a series of decisions related to union dues and so-called “agency fees,” the Supreme Court has held that employees paying “agency fees” must be given a pro rata rebate of their fees proportionate to the amount of their money spent on ideological or political campaigns to which they object. There is no parallel constitutional ruling for dissenting corporate shareholders to win a pro rata individual rebate for political spending by corporations to which they object. This asymmetry presents important questions for public policy today: Should dissenting corporate shareholders in fact be given the rights of dissenting union or “agency fee” members? Should all shareholders at least have the opportunity to vote on whether to create a political campaign budget? Or should both agency fee payers and corporate

shareholders have to accept all institutional political activity they help pay for as the inevitable price of participating in collective action in a democratic society?

The First Amendment has become the fulcrum of major constitutional decision-making related to both corporations and unions. It is the magical source of the unprecedented new political rights and powers conferred on corporations by *Citizens United*. It is also the putative basis of legal and juridical attacks on unions and their right to collect agency fees from workers they represent. It will be the terrain of struggle over growing efforts to grant dissident shareholders opt-out rights and objector rebates equivalent to what union objectors enjoy today. Thus, given that our constitutional silence on corporations and unions permits the justices to define these institutions largely according to their own ideological values and political vision, it is important to provide a strong First Amendment analysis to ground the treatment of corporations and unions in a rigorous and pro-democratic constitutional framework. Otherwise we will continue to drift into a legal regime in which privately owned business corporations that do not operate on democratic principles internally end up with more political rights than unions, which are actual democratic membership organizations with millions of members.



I. Unions and Corporations Are Fundamentally Different

When it comes to political freedoms, especially campaign spending rights, both Congress and the Supreme Court have treated corporations and unions as peas in a pod. This is strange. Unions are, in a doctrinal sense, membership organizations protected by the Constitution. Under the First Amendment, citizens have a right to associate and communicate, and to band together for common purposes. A union is a paradigmatic expression of voluntary political and social activity by free citizens.

However, a business corporation is a state-chartered entity registered to engage in lawful profit-seeking pursuits and endowed with significant legal privileges. The major such privilege is the limited liability of stockholders for the debts and liabilities of the corporation, an advantage that has helped turn corporations into fantastically successful and attractive vehicles for capital investment and wealth production. Limited shareholder liability means that an investor in BP Oil, after the spill in the Gulf of Mexico, could lose only up to the amount of his or her investment. Victims of the spill could not sue the investor and take his or her house or car, for example, to pay for a ruined farm or business. Limited shareholder liability partially socializes the risks and costs of corporate activity, generating extraordinary economic incentives for investment and awesomely creative and productive entrepreneurial activity.

Corporations also enjoy “perpetual life,” meaning that they survive changes in management and continue to build wealth indefinitely in a way that individuals and families simply cannot because of the laws of nature—physical life and death—and the corresponding laws of inheritance and estate taxation. Individual and family wealth is inevitably dispersed to some substantial extent, whereas corporate wealth keeps growing. There are, of course, other advantages extended to corporations, including favorable tax treatment of capital gains income as compared to wages, bankruptcy protections, and so on.

For more than two centuries, both conservative and liberal justices took the position that corporations are neither natural persons nor membership groups made up of natural persons, but rather “artificial” entities, public constructs chartered for economic

purposes and endowed with legal advantages to promote capital accumulation, investment, and growth.

Chief Justice John Marshall captured the essential doctrine in the *Dartmouth College* case (1819): “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence.”¹¹



This understanding infused the courts’ defense of the 1907 Tillman Act, which banned corporate contributions to federal candidates. When beer industry corporate executives were prosecuted in 1916 for violating the Act in the 1914 midterm elections, the United States District Court for Pennsylvania rejected their First Amendment argument and other legal arguments against the Tillman Act’s prohibition on corporate contributions: “These artificial creatures are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient to and subordinate to the government and the citizenship of which it is composed.”¹²

¹¹ *Dartmouth College*, 17 U.S. (4 Wheat) 518, 636 (1819).

¹² Robert E. Mutch, *BUYING THE VOTE* 87 (2014).

In *First National Bank of Boston v. Bellotti* (1978),¹³ which was authored and driven by former Big Tobacco lawyer Justice Lewis Powell, a five-justice Supreme Court majority gave corporations the right to spend money campaigning in public referendum and initiative elections based on the metaphysical notion that their speech must be protected regardless of their “corporate identity,” suggesting in an ethereal way that bans on corporate spending in referendum campaigns made them victims of discrimination.¹⁴ Against this first serious gambit to constitutionalize corporate political spending rights, dissenting Justice Byron White pointed out the obvious: that business corporations are artificial creations and that we endow them with awesome legal advantages—“limited liability, perpetual life and the accumulation, distribution and taxation of assets”—all in order to “strengthen the economy generally.”¹⁵ A corporation, he argued, has no constitutional right to convert its state-enabled economic wealth into the purchase of direct political power in the electoral arena. As he so cogently put it: “The state need not permit its own creation to consume it.”¹⁶ Corporations must be the *objects* of democratic power and decision-making, not the sovereign *authors* of it. Even Chief Justice William Rehnquist agreed, arguing that business corporations, which are magnificent agents of capital accumulation and wealth maximization in the economic sphere, “pose special dangers in the political sphere.”¹⁷

Thus, until the 5-4 *Bellotti* decision broke the ice in 1978 and the 5-4 *Citizens United* completely shattered the traditional paradigm in 2010, it was standard First Amendment doctrine that corporations enjoy no “money speech” rights in public elections because they are not citizens of the body politic. To suggest that corporations are simply organic political assemblies of citizens is what the philosophers call a “category error.” It is a misclassification.

¹³ 435 U.S. 765 (1978).

¹⁴ *Id.* at 778.

¹⁵ *Id.* at 809 (White, J., dissenting)

¹⁶ *Id.*

¹⁷ *Id.* at 826 (Rehnquist, J., dissenting)

II. *Citizens United* and the Constitutional Equation of Corporations and Unions

Yet, the organizing premise of the *Citizens United* decision, and indeed now the whole *Citizens United* era, is that corporations, like labor unions, are essentially just plain old associations of citizens. The corporate speaker, Justice Anthony Kennedy wrote, is just “an association that has taken on the corporate form.”¹⁸ Picking up on the majority’s dubious metaphysical reasoning from the *Bellotti* case, the *Citizens United* majority found that the “corporate identity” of the speaker did not deprive it of *any* of a flesh-and-blood citizen’s free political spending rights. Next to fall, under this logic, will of course be the Tillman Act itself. James Bopp and the other lawyers fighting to destroy campaign finance law are already arguing that our newly defined corporate citizens must have the right to give directly to federal candidates. And why not? This giant leap does seem to be a logical step from the core reasoning of *Citizens United*. The only rationale for limiting individual contributions to federal candidates is preventing corruption and the appearance thereof, but Congress has already set the appropriate dollar limits—why shouldn’t they apply equally (and sufficiently) to corporate citizens as well as the old-fashioned natural person kind?

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¹⁸ *Citizens United*, 558 U.S. at 349.



The five-justice majority in *Citizens United* defined business corporations as groups of citizens entitled to all of the political free speech rights of the people. In practical terms this doctrinal shift has meant that CEOs have a newly minted First Amendment right to take hundreds of millions or billions of dollars out of corporate treasuries to spend freely on behalf of, or in opposition to, political candidates, parties, and campaigns. This right is bounded only by the toothless and essentially irrelevant review of the “business judgment rule,” which permits management to spend corporate resources in any way that is “reasonably” calculated to advance overall corporate interests. There are no reported cases of shareholders or others successfully suing to recover corporate monies wasted on political expenditures or contributions. And the great campaign reformer Philip Stern once unsuccessfully tried this “corporate waste” strategy to rein in the political activities of General Electric, in which he owned stock.

The jurisprudential transformation of business corporations into political associations constitutes an astounding betrayal of our democratic history. Starting at the beginning of the 20th century, when the country was riveted by a series of political spending scandals in the life insurance industry, defenders of political democracy have fought for passage of campaign finance laws that have treated corporate treasury spending as a threat to popular

government. This was the genesis of the Tillman Act, which banned direct corporate contributions to federal candidates. The key mover behind this ban, United States Senator William E. Chandler (R-N.H.), wrote that, “A republic is supposed to be individual government,” but “when corporations can furnish money to carry elections from corporate treasuries, individualism in government is gone,” and when “the custom grows broad enough, the whole character of government is changed, and corporations rule, not men.”¹⁹

Robert E. Mutch’s sensational 2014 book, *Buying the Vote: A History of Campaign Finance Reform*, demonstrates that Senator Chandler’s understanding of corporate political spending was pervasive and indeed bipartisan more than a century ago. The *New York Tribune*, which was the leading Republican Party newspaper, editorialized in 1905:

In the United States the government is intended to be a government of men. A corporation is not a citizen with a right to vote or take a hand otherwise in politics. It is an artificial creation. . . . Interference by it with the state and attempts by it to exercise rights of citizenship are fundamentally a perversion of its power. Its stockholders, no matter how wise or how rich, should be forced to exercise their political influence as individuals with an equality with other men. That is the

¹⁹ Mutch, *supra* note 11 at 46.



basic principle of democracy, and forgetfulness of it is responsible for many corporation abuses and for much of the popular prejudice against incorporated wealth.²⁰

Mutch points out that the ban on corporate contributions seemed so obvious to people that the Senate elections committee brought the Tillman Act to the Senate floor with “only the most perfunctory explanation: ‘The evils of the use of money in connection with political elections are so generally recognized that the committee deem it unnecessary to make any argument in favor of the general purpose of this measure.’”²¹ It was taken for granted that government by the people could not survive campaign financing by the corporations.

The public recognition that corporate spending on politics constitutes an *external* threat to popular democratic decision-making was accompanied at the time by an understanding that it also works a serious *internal* threat to the integrity of business practices within the corporation. Mutch quotes the *Baltimore Sun*’s statement that a corporate contribution is a contribution by some corporate officer who “uses other people’s money to further his individual political

views.”²² Indeed, *Other People’s Money* became the title of Louis Brandeis’ powerful book indicting political spending by banks.²³ *The Outlook* newspaper remarked that “men are more generous with other people’s money than with their own,”²⁴ and Senator Chandler observed that it was “much more convenient for the large stockholders in corporations to have their contributions made from the corporate treasuries than make them by large checks upon their private funds.”²⁵

But in *Citizens United*, the majority casually threw out both the external democratic critique of corporate political spending and the internal corporate integrity critique. Justice Kennedy’s argumentation did not proceed much beyond the idea that Mitt Romney expressed far more cogently in a spontaneous utterance on the campaign trail in New Hampshire—“corporations are people too, my friend!” Justice Kennedy argued simply that “corporate identity” should not be grounds for excluding CEO-directed money from campaigns, implying somehow that corporations have been the victims of sinister political discrimination for more than a century. Addressing the internal critique—that shareholders should not have their money used by executives for political purposes without their consent or knowledge—Justice Kennedy was similarly cavalier. If shareholders dissent from political expenditures made by management, he wrote blandly, they will correct the situation “through the procedures of corporate democracy.”²⁶ He was confident of this prediction because he assumed that all political spending will be thoroughly disclosed online: “With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”²⁷ None of these assumptions has even a tenuous relationship to reality, but they do at least suggest some pathways, discussed below, for trying to mitigate the *Citizens United* decision.

In any event, *Citizens United* essentially constitutionalized the facile equation of corporations and unions that had inspired Congress to treat them the same for a long time. Congress had banned both corporate and union treasury political spending and

²⁰ *Id.* at 51.

²¹ *Id.* at 53.

²² *Id.* at 52.

²³ Louis D. Brandeis, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* (1914).

²⁴ Mutch, *supra* note 11 at 52.

²⁵ *Id.*

²⁶ *Citizens United*, 558 U.S. at 362.

²⁷ *Id.* at 370.

“We should want corporations to thrive, succeed, profit, and prosper (within the law!), but we should not want them to govern.”

forced both corporations and unions wishing to get involved in politics to set up political action committees (PACs) funded by voluntary individual contributors. This parallel prohibition on independent treasury spending by corporations and unions in political campaigns goes back to the 1940s to the War Labor Disputes Act and the Taft-Hartley Act. It has informed federal and state campaign finance law ever since, including the Bipartisan Campaign Reform Act (BCRA) of 2002 (McCain-Feingold), which the Supreme Court invalidated in *Citizens United*. The longstanding parallel treatment of corporations and unions has the obvious whiff of political compromise about it, but it has always been a strikingly flimsy analogy, based only on the fact that corporations and unions have sometimes been adversaries and sparring partners, and unions used to be in industrial society what John Kenneth Galbraith called a “countervailing power” to big business. But, as a constitutional proposition, this ubiquitous equation cannot withstand serious analysis of what these two institutions are and how they function in society.

As we have seen, a corporation is an artificial legal entity created and defined by the state that functions as a capital stock ownership structure, a vehicle of investment, and a hierarchical network of contractual obligations. It is designed extremely effectively to make profit and it is governed by a board and management in the fiduciary interests of the shareholders, whose voting power is determined not on a one person, one vote basis but simply by the number of shares they own. Business corporations are a form of property; they are not organized for political purposes and they have never been political membership organizations. We should want corporations to thrive, succeed, profit, and prosper (within the law!), but we should not want them to govern.

A union, on the other hand, *is* a political membership organization in the workplace and in society. It is not a form of property controlled by shareholders based on the percentage of stock they own, but rather a democratically governed association that operates on a one member, one vote principle. Federal law requires unions to be democratic; to conduct regular

elections for office, with statutory free-speech protections for dissidents; and with legally actionable enforcement of all the democracy.²⁸ The purpose of the union is to advance common political and economic objectives—for example, higher wages and workplace safety, expanded voting rights and political participation, strengthened Social Security benefits—while strengthening the participatory voice of workers. In so-called right-to-work states, a worker need not join or pay dues to a union at all, even in a unionized workplace. Even in other states, workers are not required to pay for anything but their share of union workplace representation. They may demand a rebate of any money spent for political causes, no matter how much they benefit from pro-worker legislation. So when workers choose to be full members, despite their right to opt out, that decision must be honored as the highest form of collective political activity. In other words, unions are voluntary political associations centered on the workplace, and whatever money they have to spend comes directly from union dues and contributions paid by their members.

Thus, unions should enjoy First Amendment political expression rights because they really *are* associations of citizens and, if the spending of money on an independent basis is going to be defined as protected speech, as the Supreme Court defined it in *Buckley v. Valeo*,²⁹ then unions surely have an equal right to engage in the practice. To be sure, unions are just one political voice among many—the union share of the workforce has been shrinking dramatically—and there is no guarantee that they will be right or virtuous about any particular matter of public policy. For example, there is an important debate emerging right now about whether police officer unions have prevailed too much in insulating from effective discipline officers accused of brutality and misconduct. Whatever the merits of this or that conflict, unions are indisputably membership groups deserving protection under the First Amendment.

28 29 U.S.C. §§ 401 et seq.

29 424 U.S. 1 (1976).

III. Corporations Now Have Greater Political Rights than Unions

Despite the fact that unions are membership groups of citizens and corporations are not, the grand irony is that, because of lopsided federal laws and the Supreme Court's decision in *Citizens United*, corporate CEOs today have won more freedom to spend treasury money on politics than union leaders have. CEOs can take money directly out of their corporate treasuries and pump it into political campaigns as independent expenditures (or, where allowed, as direct candidate contributions) without any prior shareholder approval, notice, or redress afterward. Although direct corporate independent expenditures in support of or in opposition to a candidate must be disclosed to the Federal Election Commission, that is not the case if corporate executives channel money through 501(c)(4) and 501(c)(6) organizations, which is now the preferred and pervasive alternative. In that case, there is no disclosure or reporting whatsoever required of their contributions. This is what the press has come to call "dark money," hundreds of millions of dollars of which have already flowed into federal and state elections. Furthermore, individual shareholders have no right to a proportionate rebate or refund if they disagree with a company's political expenditures and happen to learn of it.

Unions, meanwhile, are far more closely regulated and restricted in their political expenditures. To begin with, under federal law, all unions have to publicly report and disclose to the government *all* political expenditures and contributions of any type. Under the Labor Management Reporting and Disclosure Act (LMRDA) of 1959, unions must file forms annually with the Department of Labor disclosing any "direct or indirect" political disbursements "to all entities and individuals" at every level of American politics—federal, state, and local, including both candidate and ballot issue elections.³⁰ Even contributions to 501(c)(4) groups must be reported, which means that, while there are raging rivers of "corporate dark money" across the land, there is no such thing as "union dark money" because all union political spending must be disclosed. While both unions and corporations have to disclose to the FEC any direct political spending to fund electioneering communications and independent expenditures in federal races, unions must report to the Department of Labor any political expenditures of any type at all, which means that their contributions to 501(c)(4) and 501(c)(6) organizations are also fully disclosed and reported.

More importantly, the Supreme Court has imposed on unions a series of strictures compelling them to refund to nonmember workers in a bargaining unit any

30 U.S. Dep't of Labor, Office of Labor-Mgmt. Standards (OLMS), Schedule 16 - Political Activities and Lobbying, <http://www.dol.gov/olms/regs/compliance/efs/LM2sched16.htm>.



portion of their “agency fees” that has gone to fund political activities they disagree with. The asserted basis for this requirement is the First Amendment rule against compelled speech. While a sequence of Supreme Court rulings—*Intl. Ass. of Machinists v. Street*,³¹ *Abood v. Detroit Board of Education*,³² and *Communication Workers of America v. Beck*³³—has upheld “union security” clauses that require recalcitrant workers in a collective bargaining unit to pay “fair share” dues or “agency fees” for the costs of the broad array of representational services they receive, the Court has found that the First Amendment gives such workers the right to “opt out” of any union political expenditures that they object to and that do not relate directly to that representation. This line of authority also guarantees objectors the right to get paid back for the relevant portion of their fees expended on what they consider offensive political purposes.

As everyone knows, corporate shareholders who object to their personal portion of corporate treasury money going to pay for particular political purposes or candidates have no such right or recourse. Indeed, they do not even have a right to *find out* about secret political expenditures being made by their company. Nor do they enjoy a right to vote in advance on whether the company should have a political spending budget at all or whether the CEO and deputies should be making corporate contributions on behalf of specific political candidates. In other words, corporations are not weighted down by any constitutional rulings compelling the kind of respect for dissenting shareholders that unions must show to the dissenting “agency fee” workers they represent.

The traditional rationale for granting opt-out and rebate rights to objectors in the union context but not to objectors in the corporate shareholder context is that workers forced to join a “union shop” are operating under a compulsion that shareholders are not. Of course, this argument can be flipped when we recognize that “union shop” jobs are a tiny fraction of the workforce—7 percent³⁴—while the vast majority of investment opportunities for pensioners and savers involve large corporations that engage in political spending without consulting shareholders or even notifying them that treasury wealth is being used for

political purposes. Most public and private workers who have pension and retirement or 401(k) plans are invested in the stock market, and more than 70 percent of shares of Fortune 500 firms are owned by massive institutional investors, chiefly federal, state, and local retirement and pension funds and mutual funds. Although these multibillion-dollar funds are themselves prevented by law or contract from engaging in partisan political activity, they channel money into corporations that themselves freely engage in political spending.

Thus, is it really harder for workers to avoid a “union shop” than it is for shareholders to avoid a company spending corporate resources on political campaigns and causes? This seems dubious in light of the fact that union shops are both rare and known in advance, while corporate political spending is not only pervasive in the wake of *Citizens United* but also largely secret. Furthermore, it is not clear why shareholders should be legally presumed to benefit from all corporate expenditures, including political and ideological ones, while workers represented by a union are legally presumed to benefit only from “representational” activity and have rebate demand rights for the rest.

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On the Roberts Court, conservatives want to have it both ways when it comes to corporations and unions. On the one hand, when it comes to assimilating corporations into the world of politics and political spending, corporations are treated like unions, as groups of people entitled to robust First Amendment rights. On the other hand, when it comes to protecting the rights of dissenting members to find out about and consent to collective political expenditures, conservatives see no analogy between the two and impose on unions a set of draconian requirements that they would never dream of imposing on corporations to protect shareholders.

31 367 U.S. 740 (1961).

32 431 U.S. 209 (1977).

33 487 U.S. 735 (1988).

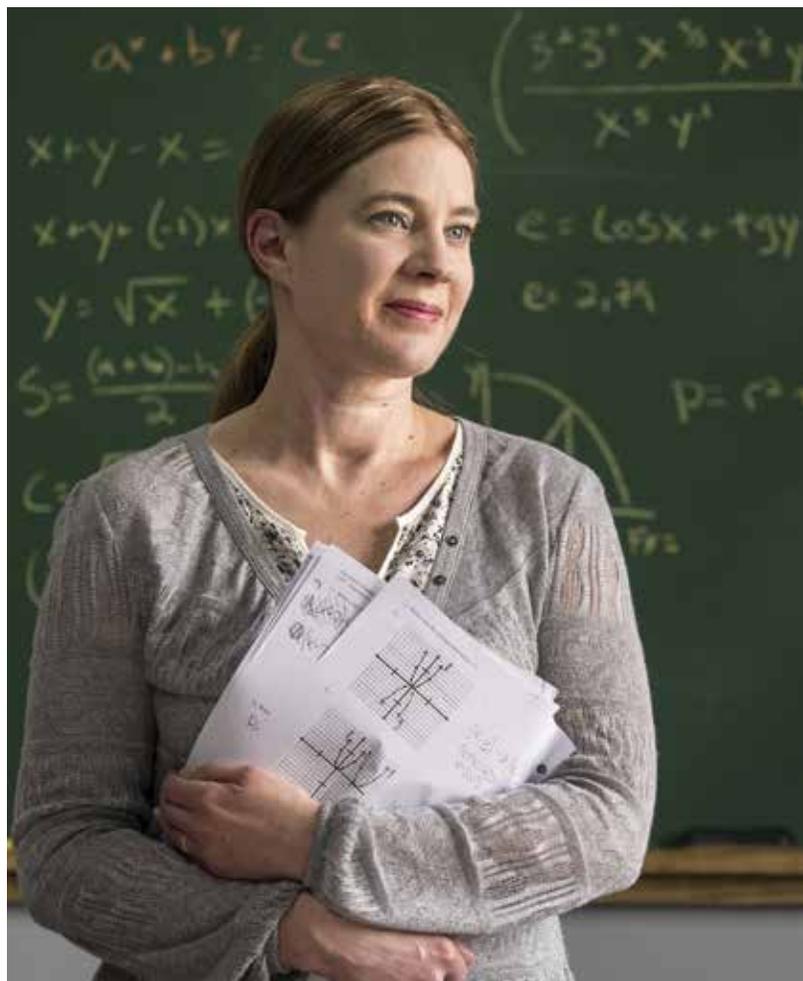
34 AFL-CIO, *CEPR Report: How to Create More ‘Good’ Jobs*, Apr. 29, 2013, <http://www.aflcio.org/Blog/Economy/CEPR-Report-How-to-Create-More-Good-Jobs>.

IV. Why Shouldn't Dissenting Shareholders Have the Same Rights as Dissenting Union Members? Potential Solutions to the Problem of Unrestrained Corporate Political Spending in the *Citizens United* Era

The increasingly glaring asymmetry between the treatment of union agency fee payers and corporate shareholders has provoked an interesting and growing public and policy debate as investors, retirees, and people with mutual fund investments wake up to the fact that corporations they may be invested in are spending hundreds of millions of dollars to advance or thwart political candidates.

In a 2012 article published in the *Columbia Law Review*,³⁵ Professor Benjamin Sachs observed that the current law “imposes a restriction on unions’ ability to fund” campaigns “that corporations do not face,”³⁶ and he made the case for “symmetrical treatment of employees and shareholders when it comes to the political spending practices of unions and corporations.”³⁷ Sachs argued that corporate shareholders should come to enjoy the same “opt-out” and “rebate” rights for the hundreds of millions of dollars being spent by corporations in politics. He suggested that “corporations offer shareholders the right to receive a dividend payment each year in an amount equal to the shareholder’s pro rata share of the corporate budget that was spent on politics.”³⁸

Scholars Catherine Fisk and Erwin Chemerinsky have urged a different approach to the problem. They, too, argue for symmetry in the treatment of unions and corporations, but they reject the opt-out option for shareholders, arguing instead that both unions and corporations under *Citizens United* should “be able to spend money in election campaigns without legal protection for dissenting shareholders or members.”³⁹ They argue that political spending by collective entities does *not* constitute



compelled speech by dissenters. They obviously have a point: when the government spends taxpayer money on abortion services or war in Iraq, it does not imply that all citizens favor the expenditure or support the policy. Moreover, they argue that even if the speech rights of dissenters are affected, it is on a content and viewpoint-neutral basis, which means that the government only needs to show that its policy is substantially related to an important government interest, and here there is such an interest: the advancement of the overall effectiveness of institutional political speech, at least as defined by the Supreme Court. Most institutions could not operate effectively if every institutional expenditure needed to be vetted by every member of the group.

But several state legislators—including the author of this report—have introduced yet another approach to the asymmetry in law that we call “shareholders united” legislation. This legislation focuses on the promises of “corporate democracy” and corporate spending disclosure that Justice Kennedy floated

35 Benjamin Sachs, *Unions, Corporations, and Political Opt-Out Rights after Citizens United*, 112 *COLUM. L. REV.* 800 (2012).

36 *Id.* at 803.

37 *Id.* at 819-20.

38 *Id.* at 808.

39 Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 *CORNELL L. REV.* 1023, 1029-30 (2013).

vaguely in *Citizens United*.⁴⁰ Under this approach, corporations engaged in political spending would have to [1] confirm that any corporate political spending has been authorized in advance by shareholders owning a majority interest in the company; and [2] disclose all political contributions and expenditures by posting them on company websites within 48 hours. Under this plan, companies could seek general authorization for their political budgets on an annual basis, which is the way companies do it under a parallel law in the United Kingdom. Today no state imposes a shareholder majority assent requirement on corporations, and there is no movement on even basic disclosure of corporate spending at the federal level, where the Senate was blocked from voting on the DISCLOSE Act and the Securities and Exchange Commission continues to ignore more than one million comments demanding required disclosure of corporate political spending by public companies.

Note that the ownership structure of many corporations may make it simply impossible for a majority of the shareholders to approve of corporate political spending under the terms of a “shareholders united” law. This will in fact be the case with many publicly traded companies. More than 70 percent of shares of Fortune 500 firms are owned by massive institutional investors, chiefly federal, state, and local retirement and pension funds and mutual funds, but also universities, foundations, charities, and other not-for-profits. These multibillion-dollar funds are prevented from engaging in partisan political activity either by their fiduciary responsibilities, their tax status, federal or state laws, or contract.

A recent poll shows that 80 percent of Americans favor legislation to condition corporate political spending on shareholder assent. Even several CEOs I have spoken to about this problem welcome a shareholder rule. They know that big pools of cash in corporate treasuries make an irresistible target for politicians who understand that executives have little ability and no incentive to say no when politicians come calling for a chunk of “other people’s money,” as Justice Louis Brandeis called it. Although the campaign finance reform movement has focused on the billions of dollars in corporate money flowing into political campaigns as a form of legalized *bribery*, there is good reason to see this transfer as a form of legalized *extortion* too. Corporate money in electoral politics forms an axis of

plutocracy where mutual coercion is experienced by both givers and takers. The late-19th-century strategies of Boss Hanna, William McKinley’s campaign manager, who assessed banks and large corporations 1 percent of their assets for Republican Party victory, have returned with a vengeance, and on a bipartisan basis, in the *Citizens United* era.



V. Free Riders as Conservative Heroes: New Attacks on Unions Proliferate

The political matchup between large corporations and unions is, of course, no fair fight. Corporations collect trillions of dollars in profit every year; the depleted ranks of labor unions collect only several hundred million in revenues, and those are declining. Meanwhile, the ability of unions to even collect dues from “agency fee” members is suddenly being cast in doubt by a conservative move to delegitimize such payments as a form of impermissible compelled speech.

The traditional logic of “agency fee” membership, as spelled out in a series of Supreme Court decisions, had always been widely accepted, even by conservatives like Justice Antonin Scalia, but it is now under severe attack. The idea was that when unions negotiate a “union shop” agreement with employers, the “union security” clauses in the contract ensure that new employees will either join the union or agree to pay “agency fees” to the union as the official bargaining agent that has negotiated for higher wages, better health and other benefits, grievance procedures, and the like. The Supreme Court’s decisions have allowed for a rebate for any union political expenditures not directly related to collective bargaining but retained the basic administrative core of the agency fee payment as a necessary answer to the “free rider” problem. The

40 S.B. 0153 (HB 0885), 2015 Reg. Sess. (Md. 2015); LD 53 (HP 47), 127th Led., 1st Reg. Sess. (Me. 2015).

conceptual distinction between a union's collective bargaining representation and its political advocacy can, of course, be contested because both activities seek to advance the position of union members. But the distinction has held for decades.

But four years ago, in *Knox v. SEIU*,⁴¹ Justice Alito wrote an opinion weakening the ability of unions to collect funds from nonmembers, requiring an "opt in" rather than an "opt out" in certain circumstances, and agency fees came under fire once again in *Harris v. Quinn*.⁴² Although the Supreme Court majority did not use that case as the opportunity to abolish agency fees, Justice Alito sent strong messages that he would indeed eagerly do away with the whole apparatus, which he linked to corrupt Illinois Democratic Party politics at one point in the oral argument. Now there is a potentially explosive federal case before the Supreme Court, *Friedrichs v. California Teachers Association*,⁴³ that takes aim directly at the whole agency fee system. The claim is that requiring nonmember teachers to pay union "agency fees" even for *nonpolitical* administrative expenditures related to representation of employees is a form of unlawful compelled speech under the First Amendment. The theory is that, because the positions taken in collective bargaining negotiations by public sector unions affect public policy as much as lobbying and political campaign contributions, anti-union employees should not have to pay for the costs of their representation. Having once urged the difference between money spent on political campaigns and money spent on collective bargaining and workplace advocacy, conservatives now say it is all politics and it is all compelled speech. Anti-union forces are essentially arguing that there is a First Amendment right to be a free rider off of other people's union dues. As radical as this theory is, this case today hangs like a dagger pointed at the heart of the public sector unions.

As the campaign against unions intensifies and the public tries to figure out a way to resist a corporate takeover of electoral politics, new problems of political control in the workplace are emerging in the *Citizens United* era. An important December 2014 article in the Harvard Law Review, "Citizens United at Work: How the Landmark Decision Legalized Political Coercion in the Workplace,"⁴⁴ makes the point that, by legalizing campaign expenditures by corporations and treating businesses as political associations of citizens, the Roberts Court has created a new dynamic in which corporate employers "may now require employees to participate in a wide range of political activities, unhindered by the Constitution or by federal or state statutes."

This is a dramatic reversal in the law. Before, corporations and unions could not use treasury resources on campaigns and could not force employees to engage in political advocacy. But if business corporations are to be treated as political associations and the CEOs speak for the members through their control of company resources, why can't CEOs require their employees to staff phone banks, canvass local neighborhoods, and work the polls for favored candidates? The new regime means that someone can, as a valid part of their work day, be forced to be involved in political campaigning on behalf of a large corporation. The demolition of the wall of separation between corporate treasury spending and political campaigns threatens to knock over the protections against political coercion and mobilization of corporate employees in the workplace. In the name of the political freedom of the "corporation," both shareholders and workers can be conscripted into a political program dictated by the CEOs of the wealthiest business corporations in the country

"... this case today hangs like a dagger pointed at the heart of the public sector unions."

41 132 S.Ct. 2277 (2012).

42 134 S.Ct. 2618 (2014).

43 No. 13-57095 (9th Cir. Nov. 18, 2014), *petition for cert. filed*.

44 128 HARV. L. REV. 669 (2014).



Conclusion: Big Corporations on Top

In deciding *Citizens United*, the majority found the political free speech of business corporations so important to society that it overrode both our traditional legal understanding of a corporation as an artificial entity created for economic purposes and the interest that individual shareholders have in not seeing a portion of their investments diverted, often secretly, for campaign purposes that may betray their deepest political convictions. The undivided corporate political voice is now of preeminent and paramount importance.

Meantime, in cases like *Knox v. SEIU* and the looming *Friedrichs v. California Teachers Association*, conservative jurists and lawyers trivialize the political free speech interests of unions—which are made up of actual flesh-and-blood members under the First Amendment—by inflating the dubious speech claims of a small minority of anti-union free riders beyond all recognition. The object here obviously is to destroy unions by giving all the free riders they can round up an anti-union heckler’s veto that will help to drain unions of the resources they need to survive.

With textual silence in the Constitution on the intermediate social entities of corporations and unions, the jurisprudence is extremely sensitive to changes in the political mood. Everything today reflects a Supreme Court majority intent upon inflating the rights and powers of CEOs and corporate managers while shrinking the rights and powers of unions and working people.

It will take vigorous democratic conversation in Congress and the state legislatures to reopen political space for unions and to compel basic disclosure and democratic checks on the political power of CEOs. We would do well to remember Justice White’s lucid statement in the *Bellotti* case that the democratic state need not permit its own creation to consume it. This bit of logical analysis has come to sound like a prophetic warning in the confusion of the *Citizens United* era.



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