Montana Law Review

Volume 74
Issue 1 *Winter 2013*

Article 6

January 2013

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Recommended Citation
Ciara Torres-Spelliscy, *Taking Opt-In Rights Seriously: What Knox v. SEIU Could Mean for Post-Citizens United Shareholder Rights*, 74 Mont. L. Rev. 101 (2013).
Available at: http://scholarship.law.umt.edu/mlr/vol74/iss1/6

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TAKING OPT-IN RIGHTS SERIOUSLY: WHAT *KNOX V. SEIU* COULD MEAN FOR POST-*CITIZENS UNITED* SHAREHOLDER RIGHTS

Ciara Torres-Spelliscy*

I. Introduction

In the span of one week in June 2012, the United States Supreme Court deftly amplified corporate political speech rights[1] and simultaneously hampered the political speech rights of unions.[2] This election year development is troubling in light of the Supreme Court's 2010 *Citizens United v. Federal Election Commission*[3] decision. One of *Citizens United*'s proffered rationales for giving corporations the same political speech rights as human beings was the equality of all political speakers.[4] If corporations are tantamount to humans in the eyes of the law for First Amendment purposes,[5] then surely corporations and unions should also be on equal footing.[6] Yet they are not. On closer inspection, the five-Justice conservative majority of

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1. *W. Tradition Partn., Inc. v. Atty. Gen. of Mont.*, 271 P.3d 1 (Mont. 2011), *cert. granted*, *judgment rev'd sub nom. Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (summarily reversing the Montana Supreme Court).

2. *Knox v. Serv. Employees Intl. Union, Local 1000*, 132 S. Ct. 2277, 2296 (2012).

3. *Citizens United v. Fed. Election Commn.*, 130 S. Ct. 876 (2010).

4. *Id.* at 898 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." (internal citations omitted)); *id.* at 914–917 (invalidating 2 U.S.C. § 441b, which barred corporations and unions from spending their general treasuries on electioneering communications).

5. Dahlia Lithwick, *The Pinocchio Project: Watching as the Supreme Court Turns a Corporation into a Real Live Boy*, Slate, http://www.slate.com/id/2242208/ (Jan. 21, 2010).

6. Post-*Citizens United*, unlimited independent expenditures can be made by any "non-connected entities—including individuals, unincorporated associations, non-profit organizations, labor unions, and for-profit corporations." *Republican Natl. Comm. v. Fed. Election Commn.*, 698 F. Supp. 2d 150, 152 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3544 (2010); *see also* Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & Pol. 557, 567 (Summer 2012) ("spending limits are now unconstitutional, even as to corporations and labor unions . . . .").

the Supreme Court[7] is not as absolutist in its zest for equality as the majority's opinion in *Citizens United* indicates.[8]

This article will explore the implications of the Supreme Court's disparate treatment of similarly-situated politically active corporations and unions. Two paths lead to more equitable treatment of these two groups: either (1) corporate political speech should be regulated more or (2) union political speech should be regulated less. This piece argues in favor of the former. In particular, corporate political spending lacks the transparency and consent mechanisms present in union political spending. Policymakers should address both of these failings in the corporate context.

The Roberts Supreme Court's asymmetrical treatment of corporations and unions was on full display in the 2011–2012 term. *American Tradition Partnership, Inc. v. Bullock*[9] coupled with *Knox v. Service Employees International Union, Local 1000*[10] demonstrates that a double standard persists between corporations, who are now privileged speakers in the Court's eyes, and unions, who are currently disfavored speakers. The Supreme Court imposes different degrees of consent from corporations' and unions' constituent parts before they electioneer.[11] Under U.S. law, corporations are not required to get consent from their shareholders before the corporate entity speaks politically using corporate funds.[12] By contrast, public-sector un-

7. Here, I am referring to Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito.

8. The Court in *Citizens United* harkened back to the Court in *Bellotti*, which came to a similar conclusion. *Citizens United*, 130 S. Ct. at 904 (citing *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (finding the inherent "worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual.")).

9. *Am. Tradition Partn., Inc.*, 132 S. Ct. 2490, 2491.

10. *Knox*, 132 S. Ct. 2277, 2296.

11. Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 Wm. & Mary Bill of Rights J. 1, 24–25 (1995) ("The considerations that justify individuals' use of their wealth to power the intensity of their advocacy preferences and magnify their advocacy voices . . . do not justify the advocacy voices of multi-purpose associations. Members of associations often do not all agree with their organizations' collective choice.").

12. Frances R. Hill, *Teaching Elements of Election Law Beyond the Disciplinary Borders of "Election Law"*, 56 St. Louis U. L.J. 789, 799 (Spring 2012) ("Writing for the majority in *Citizens United*, Justice Kennedy dismissed this issue with a breezy reference to 'the ordinary mechanisms of corporate democracy.' Experts in corporation law have expressed little confidence in this analysis."); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 Case W. Res. L. Rev. 497, 530–531 (Winter 2010) ("Political expenditure decisions—as directors currently implement them—therefore lack the approval or dissent of the citizen-shareholders, and there is no mechanism for shareholders to obtain detailed information regarding corporate political expenditures absent voluntary disclosures.").

ions[13] must receive nonmembers'[14] consent before political spending in certain circumstances.[15]

In *American Tradition Partnership*, the Court had the chance to reexamine its controversial decision in *Citizens United*,[16] which held that corporations have the right to spend their treasury funds for electioneering in federal elections.[17] *American Tradition Partnership* reviewed a challenge to Montana's century-old corporate political expenditure ban and gave the Court the opportunity to bless state regulation of corporate political spending in the name of federalism.[18] Instead of taking this opportunity to test its theoretical assumptions about corruption in *Citizens United*[19] by examining the actual facts arising out of Montana's well-documented history of corporate political corruption, the Court summarily reversed the Montana Supreme Court.[20] *American Tradition Partnership* generated a slew of new condemnations as lawyers and reform advocates grasped that the Court would not deign to hear a case with a more robust factual record than the thin one offered to the Justices in *Citizens United*.[21] Predictably, four Jus-

13. Public-sector unions are unions representing employees of the government, whether local, state or federal.

14. Nonmembers of a union are workers who are covered by a union's collective bargaining agreement who choose not to join the union but are required to pay union dues.

15. For a more in-depth account comparing corporate and union political spending regulations, see generally Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after* Knox v. SEIU Local 1000, 98 Cornell L. Rev. ___ (forthcoming 2013).

16. Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 Am. Bus. L.J. 507, 508 (Fall 2012) ("To say that *Citizens United*'s holding is controversial is an understatement.").

17. *Citizens United*, 130 S. Ct. at 913.

18. *Am. Tradition Partn., Inc.*, 132 S. Ct. at 1308 (granting stay of Montana Supreme Court's decision pending review of cert. petition).

19. *Citizens United*, 130 S. Ct. at 908–909 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

20. *W. Tradition Partn., Inc. v. Atty. Gen. of Mont.*, 271 P.3d 1 (2011), *cert. granted*, *judgment rev'd sub nom. Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (summarily reversing the Montana Supreme Court).

21. *See e.g.* Rachel Weiner, *Supreme Court's Montana Decision Strengthens* Citizens United, Wash. Post, http://www.washingtonpost.com/blogs/the-fix/post/supreme-courts-montana-decision-strengthens-citizens-united/2012/06/25/gJQA8Vln1V_blog.html (June 25, 2012) (quoting Senator Chuck Schumer as saying that the Court was "further tipping the balance of power in America in favor of deep-pocketed, outside interests"); Rick Pearson, *Durbin: May Take New Court to Overturn 'Super PAC' Ruling*, L.A. Times, http://www.latimes.com/news/politics/la-pn-durbin-may-take-new-court-to-overturn-super-pac-ruling-20120625,0,5760539.story (June 25, 2012) (quoting Senator Dick Durbin as saying that the Supreme Court's decision showed that it did not understand that "oligarchs are trying to control the political system for their own purposes"); Shannon McGovern, *Supreme Court Ruling Lets Politics Go Up for Sale*, U.S. News & World Rep., http://www.usnews.com/opinion/articles/2012/07/04/supreme-court-ruling-lets-politics-go-up-for-sale (July 4, 2012) (questioning Frank Askin, the ACLU's general counsel, about his view that the Court's decision in *American Tradition Partnership* was incorrect and a setback for democratic governance); *Statement of John Bonifaz, Executive Director, Free Speech for People: On the U.S. Supreme Court's Decision Striking Down Montana's Corrupt Practices Act*, http://www.freespeechforpeople.org/node/411 (June 25, 2012) (asserting that the Supreme Court

tices dissented from the summary reversal in *American Tradition Partnership*, providing yet another 5–4 Supreme Court decision in the area of campaign finance.[22] *American Tradition Partnership* clarified that corporations would have the unfettered ability to buy political ads in state elections despite the variation among the states or the policy preferences of their respective citizens.

Within a week, the Supreme Court also made new law in *Knox*,[23] a case that garnered far less fanfare and scrutiny than *American Tradition Partnership*. In *Knox*, the Court ruled that a public-sector union must give nonmembers of the union, who pay limited union dues, the ability to opt in to each new special assessment[24] to pay for last-minute political expenditures before the union can spend the money.[25] One way of conceptualizing the Supreme Court's decision in *Knox* is that it required consent from nonmembers to use their money for political speech.

Until *Knox*, unions complied with controlling Supreme Court precedent if nonmembers were afforded the opportunity to opt out of the union's political spending after the fact.[26] The *Knox* holding represents a titanic shift by placing corporate managers and union leaders in decidedly diver-

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ignored overwhelming factual evidence in order to uphold its previous ruling in *Citizens United*); Lisa Rosenberg, *Supreme Court Fails to Correct or Amend its* Citizens United *Decision*, Sunlight Foundation Blog, http://sunlightfoundation.com/blog/2012/06/25/supreme-court-fails-to-correct-or-amend-its-citizens-united-decision/ (June 25, 2012) (positing that the Supreme Court had a chance to reconsider whether independent expenditures gave rise to corruption and whether current disclosure laws were adequate, and concluding that the Court erred in not taking the opportunity to address these points); Nicole Flatow, *The Populist, Bipartisan History of the Now-Invalidated Montana Anti-Corruption Law*, ACS Blog, http://www.acslaw.org/acsblog/the-populist-bipartisan-history-of-the-now-invalidated-montana-anti-corruption-law (June 25, 2012) (detailing Professor Anthony Johnstone's account of the history of Montana's Corrupt Practices Act and his regret that the U.S. Supreme Court overturned the landmark legislation after 100 years of campaign finance reform).

22. *Am. Tradition Partn., Inc.*, 132 S. Ct. at 2491–2492 (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.). Other 5–4 Supreme Court campaign finance decisions include: *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Davis v. Fed. Election Commn.*, 554 U.S. 724 (2008); *Fed. Election Commn. v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); and *McConnell v. Fed. Election Commn.*, 540 U.S. 93 (2003).

23. *Knox*, 132 S. Ct. at 2277.

24. Here, a "special assessment" stands in contrast to a regular, annual assessment of union dues.

25. *Id.* at 2295.

26. *See Commun. Workers of Am. v. Beck*, 487 U.S. 735, 745, 768 (1988) (Labor unions differ from corporations in that union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities. Although a union and an employer may require that all bargaining unit employees become union members, a union may not compel those employees to support financially "union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment."); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986) (temporary loans of nonmembers' money for a union's political program violated the First Amendment); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.").

gent legal positions.[27] Corporate managers have an advantage because they can spend on politics without getting consent from investors or other constituencies. (Indeed, as will be explained herein, corporations can even hide their political spending from shareholders.) Meanwhile, leaders of public-sector unions must perform the logistically formidable task of gathering individual opt-ins for special assessments from nonmembers before engaging in certain political spending.

Unions as well as corporations, ranging from tiny nonprofits to large multinationals, have been empowered by *Citizens United*[28] to spend unlimited treasury funds in politics.[29] Unlike unions, however, corporations are not subject to the opt-in requirement analogous to the *Knox* requirement for unions. Again, U.S. law imposes no duty on corporations to obtain shareholder consent before engaging in political spending.[30] This American rule (perhaps better described as American rule-less-ness) stands in stark contrast to the United Kingdom's approach to the identical circumstance.[31]

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27. In contrast to *Knox*, a previous state court case held that unions did not have to get an opt-in for political spending. *Sanger v. Dennis*, 148 P.3d 404, 414–419 (Colo. Ct. App. 2006) (affirming a preliminary injunction against a regulation requiring unions to obtain written permission before using a member's dues or contributions to fund political campaigns, reasoning that plaintiffs showed a reasonable probability of success on their claim that an "opt-in" requirement violated the members' First Amendment freedom of association rights); *see e.g.* Erwin Chemerinsky, *High Court's Union Dues Case May Change the Political Landscape*, A.B.A. J., http://www.abajournal.com/news/article/chemerinsky_high_courts_union_dues_case_may_change_the_political_landscape (July 2, 2012); Mark Brenner, *Supreme Court Opens Door to 'Open Shop'*, Labor Notes, http://labornotes.org/2012/07/supreme-court-opens-door-%E2%80%98open-shop%E2%80%99 (July 23, 2012).

28. *Citizens United*, 130 S. Ct. at 887 ("Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections."); *see also id.* at 913 ("[O]verruling *Austin* 'effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy.'" (internal citation omitted)).

29. Unlimited independent expenditures can be made not just by corporations but any "non-connected entities—including individuals, unincorporated associations, non-profit organizations, labor unions, and for-profit corporations." *Republican Natl. Comm.*, 698 F. Supp. 2d at 152. Corporations and unions could already spend freely on ballot measures. *See e.g. Bellotti*, 435 U.S. at 777 (noting that the value of speech entitled to First Amendment protection "does not depend upon the identity of its source, whether corporation, association, union, or individual").

30. Lucian A. Bebchuk & Robert L. Jackson, *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 89–90 (2010) ("Where the interests of directors and executives diverge from those of shareholders with sufficient regularity and magnitude, [such as in executive compensation,] corporate law rules impose special requirements designed to address this conflict.").

31. *See* Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U.S.F. L. Rev. 525, 542–548 (2011); Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach*, in *Risk Management and Corporate Governance* 391 (Jalilvand & Malliaris, eds., Routledge 2011).

U.K. statutory law requires shareholder authorization prior to corporate political spending.[32]

With the Supreme Court unlikely to change legal positions on this issue until the Court's composition itself changes, the responsibility to foster more equitable regulations for corporations is left to the American electorate, Congress, the States, and executive agencies, such as the Securities and Exchange Commission ("SEC"), which must work within the boundaries of current precedent.[33] The Supreme Court's ruling in *Knox* requiring opt-ins for union political expenditures provides an additional basis for arguing that publicly traded American corporations should likewise marshal shareholder consent before corporate political expenditures are made.

II. Definitions

Before I proceed to meditate about how *Knox* changed campaign finance and labor law, defining a few key terms and concepts is in order. Under labor law, workers in a bargaining unit can take a vote to unionize by majority rule.[34] Even if a minority of workers in the bargaining unit object to the union, the union will nonetheless represent all of the workers in the bargaining unit in wage negotiations with managers, and the union can collect membership dues from all of the workers in the bargaining unit regardless of their desire to be in the union.[35] Those who object to being in the union are known as "nonmembers." Thus unions can have both members (willing participants paying full-dues) and nonmembers (employees covered by the collective bargaining agreement who pay limited dues and object to being part of the union).

Unions can require nonmember employees to pay their *pro rata* share of annual dues to the union for the union's collective bargaining costs on

32. Political Parties, Elections and Referendums Act 2000, c. 41, §§ 139–140, & sch. 19 (2000) (Eng.).

33. Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. Review of Books, http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/?pagination=false (Apr. 15, 2010) ("Congress should also require that any corporation that wished to engage in electioneering obtain at least the annual consent of its stockholders to that activity and to a proposed budget for it, and that the required disclosure in an ad report the percentage of stockholders who have refused that blanket consent.").

34. 29 U.S.C. § 159 ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.").

35. *Emporium Capwell Co. v. W. Addition Community Org.*, 420 U.S. 50, 67 (1975). The rules are different in right-to-work states. *See* Fisk & Chemerinsky, *supra* n. 15, at 10 ("In right-to-work states, employees who wish to form a union are effectively forced to subsidize the provision of the union benefits to co-workers who refuse to support the union."); *Hughes Tool Co.*, 104 NLRB 318 (1953) (union cannot charge nonmembers a fee in a right-to-work state).

behalf of all employees.[36] The union fees for collective bargaining costs are known as "chargeable expenses" in labor law.[37] The requirement that nonmembers who benefit financially from the union's collective bargaining agreement pay dues prevents unfair freeriding.[38] This power to collect dues is not plenary, however, as a line of Supreme Court cases has held that unions cannot use objecting nonmembers' dues for political expenditures.[39] Before *Knox*, Supreme Court precedent dictated that nonmembers must be given a yearly opportunity to opt out of the union's political spending and get back the *pro rata* percentage of their dues attributable to politicking.[40]

Public-sector unions are those unions that represent employees of the government. Courts have been particularly diligent in regulating public-sector unions to ensure that employees who must join a union in order to work for the government are not thereby coerced into espousing views the worker may find objectionable. Just like private-sector unions, which have nonmembers, public-sector unions can also have nonmembers. The *Knox* case is about a public-sector union (Service Employees International Union, Local 1000) and its nonmembers.[41]

III. The Paycheck Protection Battle

One of the fault lines in the legislative and litigation battles over unions' political spending has been whether union nonmembers must be given the opportunity to opt in or opt out of the union's political spending. Those hostile to union power have tried to build on the Supreme Court's rulings

36. *Knox*, 132 S. Ct. at 2303.

37. Fisk & Chemerinsky, *supra* n. 15, at 17 n. 67 ("[C]hargeable expenses are those deemed to be for the collective bargaining activities, which nonmembers must pay for, while non-chargeable expenses are those for political activities, which nonmembers do not need to pay for.").

38. Ross Runkel, *When Union Fees Go Up, Must a "*Hudson *Notice" Go Out?*, SCOTUSblog, http://www.scotusblog.com/2012/01/when-union-fees-go-up-must-a-"hudson-notice"-go-out/ (Jan. 5, 2012) ("An additional 'agency shop agreement' requires non-members in the bargaining unit to pay a percentage of the dues amount (an 'agency fee') to pay for the union's expenses of performing services that benefit the bargaining unit.").

39. *See Commun. Workers of Am.*, 487 U.S. at 745; *Abood*, 431 U.S. at 231–233; *Ysursa v. Pocatello Educ. Assn.*, 555 U.S. 353, 359 (2009).

40. *Commun. Workers of Am.*, 487 U.S. at 745; *Abood*, 431 U.S. at 231–233; *Ysursa*, 555 U.S. at 359; *see also* Bebchuk & Jackson, *supra* n. 30, at 114 ("But the Court has also acknowledged individuals' constitutional interest in avoiding association with political messages with which they disagree—holding, for example, that unions violate the First Amendment rights of their members when union leaders spend union funds for political speech that the individual members oppose, even when the speech is in the members' collective interest.").

41. *Knox*, 132 S. Ct. at 2291–2292. Unionized workers receive separate protection under Supreme Court decisions that allow employees who do not want to support the union's political activities to demand a refund of the portion of any mandatory union fee that is used for such purposes. *See Commun. Workers of Am.*, 487 U.S. at 743; *Abood*, 431 U.S. at 240; *see also Davenport v. Wash. Educ. Assn.*, 551 U.S. 177, 184 (2007) (state may require its public-sector unions to receive affirmative authorization from a nonmember before spending the nonmember's agency fees for election related purposes).

on nonmember opt-outs by adopting so-called paycheck protection laws to statutorily require opt-ins.[42] Unions have resisted paycheck protection efforts all over the country, including in California where the issue has been on the ballot more than once.[43] For example, in 1998 Proposition 226 ("Prop. 226") would have transformed California into a paycheck protection state. Many California unions countered Prop. 226 and were victorious.[44] As I was writing this paper in 2012, the California Paycheck Protection Initiative ("Prop. 32") was on the ballot and, once again, it lost.[45] So far, the voters have defeated all attempts at adopting paycheck protection in California. The *Knox* case arose out of a union's efforts to defeat a paycheck protection ballot measure in 2005.

Unions have been able to defeat paycheck protection ballot measures and legislative bills in several states.[46] This ideological battle has raged back and forth in the past couple of years. But California's story has not been replicated everywhere. A handful of states have adopted so-called paycheck protection laws, which require unions to get nonmembers to opt in to political spending (as opposed to merely requiring an after the fact opt-out).[47]

The issue of paycheck protection has been heavily litigated in the courts, including the Supreme Court.[48] In 2007, in *Davenport v. Washing-*

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42. Robert Reich, *It's Time for a Shareholder Protection Act*, http://robertreich.org/post/347547700 (Jan. 22, 2010) ("For many years, anti-union lobbyists have pushed what they call 'pay-check protection' laws, supposedly designed to protect union members from being forced, through their dues, to support union political activities they oppose. Under such laws—already in effect in several states—no union dues can be spent for any political purpose unless union members agree. The same principle should protect shareholders from being forced to spend their share of corporate earnings in favor of or against a particular candidate.").

43. Paycheck protection was on the California ballot in 1998 in Prop. 226 and was defeated. *See* Ballotpedia, http://ballotpedia.org/wiki/index.php/California_Proposition_226,_the_%22Paycheck_Protection%22_Initiative_(1998) (accessed Feb. 3, 2013).

44. Harry G. Hutchison, *Reclaiming the Labor Movement through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 U. Mich. J.L. Reform 447, 466 n. 104 (2000).

45. Joe Mathews, *It's Time to Retire "Paycheck Protection"*, NBC S. Cal., http://www.nbclosangeles.com/blogs/prop-zero/Union-Dues-Paycheck-Protection-Proposition-32-Ballot-Initiative-Conservatives-178079541.html (Nov. 10, 2012).

46. *See* Ariz. S.B. 1365 (defeated in the senate); Colo. Amend. 49 (2008) (defeated by voters); N.C. S.B. 727 (vetoed by the governor).

47. *See e.g.* Idaho Code §§ 44–2001 to 2011 (2012); Wash. Rev. Code Ann. § 42.17A.500 (2012); Utah Code Ann. §§ 20A–11–1401 to 1404; Mich. Comp. Laws Ann. § 423.210 (2012); Wyo. Stat. Ann. §§ 22–25–101 to 115 (2012); Ohio R.C. § 3599.031(H) (this code provision is no longer active due to *United Auto Workers, Local Union 1112 v. Philomena*, 700 N.E.2d 936, 947 (Ohio 1998)).

48. Michael C. Kochkodin, *A Good Politician Is One That Stays Bought: An Examination of Paycheck Protection Acts & Their Impact on Union Political Campaign Spending*, 2 U. Pa. J. Lab. & Empl. L. 807, 810–822 (2000) ("Today, one of the most talked about issues in the 'opt in' versus 'opt out' debate is the emergence of 'paycheck protection' acts. Paycheck protection acts require unions to obtain written permission from workers before spending worker union dues or agency fees for political purposes. . . . Paycheck protection acts abolish 'opt out' union funding schemes in which 'dissent is not

ton Education Association,[49] the Supreme Court upheld a state law requiring public-sector labor unions to receive affirmative authorization from a nonmember before spending the nonmember's agency-shop fees for electoral purposes.[50] Justice Scalia noted in the *Davenport* lead opinion that public-sector unions only have these funds because employees are legally compelled to pay them.[51] In other words, the Court found that the restriction is not on "how the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money."[52] *Davenport* affirmed the right of states to adopt such paycheck protection laws under the Constitution.[53] *Davenport* left states with the freedom to choose between adopting or rejecting paycheck protection. In 2012, the Court went one big step further in *Knox*, by constitutionally requiring an affirmative opt-in for nonmembers when public-sector unions make a special assessment to spend in an upcoming election (regardless of whether states desire this extra requirement or not).[54] Given the traditional competition between labor and corporations in the political realm, this begs the question whether the logic of *Knox* should extend to corporations as a matter of basic fairness.[55]

IV. Central Holdings of *Knox*

The *Knox* case arose out of a 2005 ballot measure fight in California spawned by Governor Schwarzenegger's attempt to curb the power of pub-

. . . presumed' in favor of the creation of 'opt in' systems where employees must affirmatively consent to funding non-collective bargaining union expenditures.").

49. *Davenport*, 551 U.S. 177.

50. Robert C. Cloud, Davenport v. Washington Education Ass'n*: Agency Shop and First Amendment Revisited*, 224 Ed. Law Rep. 617, 627 (2007) (Cloud describes the holding in *Davenport* as follows: "[T]he Supreme Court reversed and remanded, ruling that Section 760 was constitutional for two primary reasons: (1) Washington State voters had the legal authority to approve or disapprove agency shop agreements in the State; they also had the power to add reasonable, viewpoint-neutral restrictions on the use of agency shop fees and (2) Section 760 enhanced First Amendment protection for dissenters who do not wish to subsidize political or ideological positions with which they disagree. To the United States Supreme Court, such coercion was unacceptable and unconstitutional in a free and democratic society.").

51. *Davenport*, 551 U.S. at 187.

52. *Id*. (emphasis in original).

53. The Supreme Court has held that "opt-in" requirements are constitutional when applied to agency-shop fees levied on public employees who are not union members. In such cases, those making payments are not union members; rather, they are government employees whose employment is conditioned upon contribution to the union. *Id.* at 187–188.

54. *Knox*, 132 S. Ct. at 2296.

55. Jay Eisenhofer, Citizens United *and the Fight for Shareholder Rights*, Reuters, http://www.reuters.com/article/2012/08/23/us-citizens-united-idUSBRE87M0WM20120823 (Aug. 23, 2012). (Eisenhofer discusses *Knox* and asks, "But which constituency is missing its free-speech rights? Shareholders—who currently have no voice in the political expression of the companies in which they invest.").

lic-sector unions during a special election.[56] To battle Schwarzenegger's ballot initiatives, the Service Employees International Union, Local 1000 ("SEIU") charged its members and nonmembers a special one-time assessment as the 2005 election intensified. One measure on the California ballot, Proposition 75 ("Prop. 75"), would have required unions to get employees' affirmative consent before charging them fees to be used for a union's political purposes.[57] Put another way, Prop. 75 would have changed California into a paycheck protection state in 2005. Also on the ballot at the same time was Proposition 76 ("Prop. 76"), which would have given the Governor of California the power to reduce appropriations for public unions' employees' compensation.[58]

SEIU's ability to collect dues from nonmembers, including special assessments, was derived from both California law and contract law.[59] SEIU made a special assessment to pay for the Union's opposition to the Schwarzenegger ballot initiatives. Objecting nonmembers of SEIU, including Diane Knox, sued, complaining that the Union's levying a special assessment without providing them with a second *Hudson* notice was unconstitutional.[60] A "*Hudson* notice" is a notice given to union nonmembers alerting them that the union has made political expenditures, so that they have the ability to opt out of their dues being used for the union's political spending after the fact.[61] In this case, SEIU had given one *Hudson* notice for the past year's political spending, but not a second *Hudson* notice for

56. W. James Young, *Casting an Overdue Skeptical Eye:* Knox v. SEIU, 2011–2012 Cato Sup. Ct. Rev. 333, 334 ("In 2005, Governor Schwarzenegger proposed four ballot initiatives, sending California's government-employee labor unions into high dudgeon.").

57. Paycheck protection was on the California ballot in 1998 in Prop. 226 and was defeated. Prop. 75 was also defeated in 2005. Prop. 32, which tried to impose paycheck protection once more, was on the California ballot in November 2012 and failed. *See* Joe Garofoli, *Teachers Union Drops $7.5 Million Against Prop. 32*, San Francisco Chronicle Politics Blog, http://blog.sfgate.com/nov05election/2012/08/03/teachers-union-drops-7-5-million-against-prop-32/ (Aug. 3, 2012).

58. California Legislative Analyst's Office, *Proposition 76: Key Issues and Fiscal Effects*, http://www.lao.ca.gov/2005/prop_76/prop_76_093005.htm (Sept. 30, 2005).

59. *Knox*, 132 S. Ct. at 2284, 2295; *see also* Cal. Govt. Code Ann. § 3502(a).

60. *Knox v. Westly*, 2008 WL 850128 (E.D. Cal. Mar. 28, 2008), *rev'd and remanded sub nom. Knox v. Cal. St. Employees Assn., Local 1000, Serv. Employees Intl. Union, AFL-CIO-CLC*, 628 F.3d 1115 (9th Cir. 2010), *rev'd and remanded sub nom. Knox v. Serv. Employees Intl. Union, Local 1000*, 132 S. Ct. 2277 (2012), *vacated sub nom. Knox v. Cal. St. Employees Assn., Local 1000, Serv. Employees Intl. Union, AFL-CIO-CLC*, 692 F.3d 924 (9th Cir. 2012).

61. Daniel Fisher, *Supreme Court Says Unions Can't Bill Non-Members For Political Spending*, Forbes, http://www.forbes.com/sites/danielfisher/2012/06/21/supreme-court-says-unions-cant-bill-non-members-for-political-spending/ (June 21, 2012) ("Unions are supposed to separate out political expenses and give non-members a so-called 'Hudson notice' explaining the split and giving them the opportunity to pay only the non-political share of expenses."). The name *Hudson* refers to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

the special assessment to pay for the battle against the Schwarzenegger ballot measures (Prop. 75 and Prop. 76) during the special election in 2005.[62]

Writing for the majority in *Knox*, Justice Alito held that unions may not use objecting nonmembers' money, even temporarily, for politics:

> [R]equiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions. . . . An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree. But a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining."[63]

SEIU's failure to send out a separate *Hudson* notification drew ire from the majority, which characterized this behavior as an "aggressive use of power" and "indefensible."[64]

Seven of the nine Justices concluded that a second *Hudson* notice was indeed necessary.[65] But the five-person majority went even further, stating that an affirmative opt-in, instead of just an opt-out, was constitutionally required. As Justice Alito wrote for the five-person majority:

> To respect the limits of the First Amendment, the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out. Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all. Even if this burden can be justified during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires.[66]

In other words, the majority in *Knox* required consent before the Union spent other people's money on politics. In the deepest of ironies, Prop. 75, the paycheck protection ballot measure that was defeated by California's voters[67] and was the motivation for SEIU to spend in the California election in 2005, was partially resurrected by judicial fiat in the *Knox* case, which requires affirmative opt-ins for a public-sector union's political spending.

One thing that *Knox* does not clarify is whether opt-ins will be required of public-sector unions as a general matter whenever they make political expenditures or whether the requirement will only apply to special assessments. Another open question is whether *Knox*'s opt-in requirement

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62. *Knox*, 132 S. Ct. at 2285–2286.

63. *Id.* at 2290 (quoting *Hudson*, 475 U.S. at 305) (internal citations omitted).

64. *Knox*, 132 S. Ct. at 2291.

65. *Id.* at 2296–2297 (Sotomayor, J., concurring in the judgment, joined by Ginsburg, J.).

66. *Id.* at 2293 (majority).

67. Institute for Governmental Studies, *Proposition 75*, http://igs.berkeley.edu/library/elections/proposition-75 (Nov. 8, 2005).

will only be applied in the context of public-sector unions. Unions at private companies do not necessarily raise the same concerns about governmental compelled speech because of a lack of state action. The language in *Knox* seems quite broad, but only future cases with different facts will clarify the scope of *Knox*'s holdings.

What is clear is that in *Knox* the Supreme Court continued a peculiar pattern of providing fewer protections to unions *vis-à-vis* other political spenders. As Professor Charlotte Garden argues, "When it comes to First Amendment protections, it has been well documented that labor unions receive less protection than other social movement groups, and their speech sometimes receives less protection than even commercial speech."[68]

V. The Logic of Requiring Opt-In for Public-Sector Unions

Although the issue of nonmember opt-in had not been fully briefed,[69] the Supreme Court in *Knox* crafted, seemingly out of whole cloth, a broad new right for nonmembers of public-sector unions to consent to political expenditures before the fact:

> Public-sector unions have the right under the First Amendment to express their views on political and social issues without government interference. But employees who choose not to join a union have the same rights. . . . when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent.[70]

Again, the Supreme Court could not have been clearer in stating that public-sector unions in particular must give nonmembers the ability to opt in to each new special assessment for political spending.

The Supreme Court reasoned that opt-ins were constitutionally required for public-sector unions for three reasons: (A) nonmembers had the right not to be compelled to speak; (B) the government could not be forced

68. Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 Wm. & Mary L. Rev. 1, 17 (2011); *see also* James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 Hastings Const. L.Q. 189, 191 (1984) ("On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a 'black hole' beneath the ladder.").

69. Had the issue been fully briefed, the Court may have taken more care to notice that the nonmembers in this case had not been forced to pay for the special assessment at all. Fisk & Chemerinsky, *supra* n. 15, at 17 ("[F]or the fiscal year that began in July 2005, the SEIU's nonchargeable expenditures were lower than they had been in the year ending June 2005. Only 31% of its expenditures were nonchargeable (as compared to 44% in the prior year). Hence, the dissenters ended up being charged less, including the emergency temporary assessment, than was their fair share of the union's annual expenses. Thus, on the facts of the case, none of the plaintiffs was actually forced to subsidize any political speech." (internal citations omitted)).

70. *Knox*, 132 S. Ct. at 2295–2296 (internal citations omitted).

to subsidize the union's political speech; and (C) dissenting workers need particular protection.

A. The Right Not to Speak

The Supreme Court has long held the view that the First Amendment protects not only the right to speak but also the right not to speak. The compelled speech cases prevent the government from forcing individuals from endorsing messages that the individual would rather not espouse.[71]

As a consequence of the right not to speak, nonmembers of both private- and public-sector unions have the right to object to funding union spending that is not germane to the union's collective bargaining responsibilities.[72] This right not to be compelled to speak in the union context is rooted in federal statutes (such as the Railway Labor Act[73] and the National Labor Relations Act[74]), as well as the First Amendment.[75]

The right to be free of compelled speech applies to both "agency shops," under which employees can choose whether to join the union, and "union shops," under which all employees must be union members. According to the Supreme Court, in the union shops, unions must avail poten-

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71. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (holding that a statute requiring law schools to accommodate military recruiters does not constitute compelled speech); *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 559 (2005) (stating that the Supreme Court always assumed that the proscription on compelled-subsidy speech did not apply when the government was the speaker); *U.S. v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (stating that the First Amendment "prevent[s] the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object" (internal citations omitted)); *Bd. of Regents of U. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233–234 (2000) (holding that a required student fee to fund extracurricular activities at a university is not compelled speech so long as the funding is viewpoint neutral); *Riley v. Natl. Fedn. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (stating that, for First Amendment purposes, no difference exists between compelled speech and compelled silence); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (stating that the First Amendment was designed to prevent both limiting speech and coercing speech).

72. From a constitutional point of view, the opt-out requirements' being extended to private-sector unions is particularly interesting since there is not any obvious state action in a contract among private parties. *See* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights after* Citizens United, 112 Colum. L. Rev. 800, 807 n. 28 (2012) (citing Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 Hastings L.J. 1, 83 (1989) ("[L]abor law . . . has statutorily protected constitutional interests of workers by balancing workers' right of free association against other competing legitimate interests [even absent state action].")).

73. *See Intl. Assn. of Machinists v. Street*, 367 U.S. 740 (1961).

74. *Commun. Workers of Am.*, 487 U.S. at 745 (decided on statutory, not constitutional, grounds); *see also* Garden, *supra* n. 68, at 37 ("The Court ultimately avoided the constitutional question and held that, as a matter of statutory interpretation, the NLRA permitted unions and employers to require employees to become union members, but the '"membership" that could be required had been "whittled down to its financial core," . . . [which] covered 'the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."' ").

75. *See Abood*, 431 U.S. at 226.

tial members of membership that has been "whittled down to its financial core" of negotiating labor contracts and other economic matters between labor and management, such as strikes.[76] In *Knox*, the Court's concern with compelled speech was at the heart of the decision. As the Court wrote:

> [B]y allowing unions to collect any fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers. . . . The general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail.[77]

Another way of framing this is the Supreme Court hereby privileged the autonomy of the individual over the autonomy of the labor organization to speak (or not speak) politically.

B. No Government Subsidies for Political Speech

The Supreme Court's jurisprudence makes it evident that the government is not required to subsidize political speech, including in the public-sector union context.[78] As the Court clarified in *Davenport*, "it is well established that the government can make content-based distinctions when it subsidizes speech."[79]

In 2009's *Ysursa v. Pocatello Education Association*,[80] the Supreme Court reviewed the constitutionality of an Idaho statute that imposed criminal penalties on unions that funded political activities with money automatically deducted from government employees' paychecks. This law required unions to collect any money to be used for political speech separately from union dues. The Court upheld the Idaho law, concluding once more that the government "is not required to assist others in funding the expression of

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76. *Natl. Labor Rel. Bd. v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963).

77. *Knox*, 132 S. Ct. at 2295.

78. *Regan v. Taxation Without Representation*, 461 U.S. 540, 545 (1983) (Congress could "refuse[ ] to pay for the lobbying out of public monies."); *Smith v. Highway Employees*, 441 U.S. 463, 465 (1979) (per curiam) ("First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize [a labor] association and bargain with it"); *see also Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 71–73 (2008) (noting that a rule restricting the use of state funds to promote or oppose unionization impermissibly expressed a pro-union preference, thereby chilling one side of the public debate).

79. *Davenport*, 551 U.S. at 188–189; *see also Ysursa*, 555 U.S. at 359 ("Idaho is under no obligation to aid the unions in their political activities. And the State's decision not to do so is not an abridgement of the unions' speech . . . ."); *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2816 ("'Laws that burden political speech are' accordingly 'subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'"); *id.* at 2834 ("And under the First Amendment, that makes all the difference. In case after case, year upon year, we have distinguished between speech restrictions and speech subsidies.").

80. *Ysursa*, 555 U.S. 353.

particular ideas, including political ones."[81] *Knox* likewise concluded, "The government may not prohibit the dissemination of ideas it disfavors, nor compel the endorsement of ideas that it approves."[82]

C. Dissenting Workers' Rights

The *Knox* majority was particularly concerned with the rights of workers who were involuntarily nonmembers of the union, who might object to the union's political views. As the majority stated, "When a State establishes an 'agency shop' that exacts compulsory union fees as a condition of public employment, '[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree.' "[83]

The Supreme Court referred to this situation as an "impingement" on the First Amendment rights of the dissenting workers.[84] The Court's concern with the rights of dissenting union members is not a newfangled concept.[85] For example, in 1991, a plurality of the Supreme Court held in *Lehnert v. Ferris Faculty Association*:[86]

> The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing [the employees'] funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[87]

Thus, the Court has been and continues to be solicitous towards workers who do not wish to subsidize unions' political speech. Overall, this is consistent with the general pattern of the courts being more eager to curtail the political speech rights of unions[88] than they have been with corporate political speech.[89] As a matter of equity, the Court should be troubled as well about the inability of shareholders to consent to corporate political spending.

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81. *Id.* at 357–358.

82. *Knox*, 132 S. Ct. at 2288.

83. *Id*. at 2282.

84. *Id*.

85. Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1746–1747 (May 2005) (explaining that dissenters "speak truth to power" by attempting to persuade the majority).

86. *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991).

87. *Id.* at 522 (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

88. *See Abood*, 431 U.S. at 243–244 (Rehnquist, J., concurring) ("I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union.").

89. *See Citizens United*, 130 S. Ct. at 911 (upholding corporate speech rights over shareholder protection objections); *Bellotti*, 435 U.S. at 793–795 (same).

VI. Statutory Regulation of Union and Corporate Speech

Knox was not drafted on a blank slate. Congress, state legislatures, voters, and courts have contested the political rights of unions for at least six decades. From a statutory point of view, corporations and unions have often been regulated in parallel ways for campaign finance purposes. These groups have been policed as the result of a bipartisan tug of war: Democrats typically target corporations, while Republicans typically target unions.[90] The following is a brief overview of how corporations and unions have been subjected to nearly identical legal schemas.

For the past sixty-plus years, federal statutory law has treated unions and corporations equally for the purposes of campaign finance expenditure and contribution bans. For instance, both groups are forbidden from directly contributing to federal candidates under the Tillman (1907)[91] and Taft-Hartley (1947) Acts.[92] In addition, the Taft-Hartley Act banned both unions and corporations from making independent expenditures in favor of federal candidates.[93] While the direct contribution ban persists because of a case called *Federal Election Commission v. Beaumont*,[94] *Citizens United* has negated the independent expenditure ban.[95]

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90. Samuel F. Wright, *Clipping the Political Wings of Labor Unions: An Examination of Existing Law and Proposals for Change*, 5 Harv. J.L. & Pub. Policy 1, 35 (1982) ("Because labor union contributions and expenditures overwhelmingly favor Democrats, several Republican Senators and Congressmen have introduced bills designed to 'clip the political wings' of labor unions.").

91. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b).

92. Richard Briffault, *The Future of Reform: Campaign Finance after the Bipartisan Campaign Reform Act of 2002*, 34 Ariz. St. L.J. 1179, 1198 n. 98 (2002) (asserting that an arguable justification for treating corporations and unions the same has to do with "the same combination of government-provided support and lack of correlation between the payment of union dues and support for the union's electoral position [that] provide support for the limits on unions"); Jessica A. Levinson, *We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech after* Citizens United, 46 U.S.F. L. Rev. 307, 312–313 (Fall 2011) ("Four decades after the enactment of the Tillman Act, Congress passed the Taft-Hartley Act (also known as the Labor Management Relations Act). This 1947 law prohibited corporations and labor unions from making independent expenditures in support of, or in opposition to, federal candidates. Taft-Hartley was the precursor to the provision of McCain-Feingold struck down by the Court in *Citizens United*." (internal citations omitted)).

93. Subcomm. of the H. Comm. on Labor, *To Regulate Labor Organizations: Hearing on H.R. 804 and H.R. 1483*, 78th Cong. (1943) (Con. Gerald W. Landis (R-IN) testified, "The public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials." And he sought to "put labor unions on exactly the same basis, insofar as their financial activities are concerned, as corporations have been on for many years.").

94. *Fed. Election Commn. v. Beaumont*, 539 U.S. 146 (2003).

95. *U.S. v. Danielczyk*, 683 F.3d 611, 614 (4th Cir. 2012) (*Beaumont* is still good law), *cert. denied*, No. 12-579, 2013 WL 656067 (Feb. 25, 2013). *Accord Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 867–869 (8th Cir. 2012); *Preston v. Leake*, 660 F.3d 726, 729 (4th Cir. 2011); *Ill. Liberty PAC v. Madigan*, —- F. Supp. 2d —-, 2012 WL 4764152 at **1–3 (N.D. Ill. Oct. 5, 2012), *aff'd*, No. 12-3305, 2012 WL 5259036 (7th Cir. Oct. 24, 2012); *see also Iowa Right to Life Comm., Inc. v. Tooker*, 795 F. Supp. 2d 852, 869 (S.D. Iowa 2011), *certified question answered*, *Iowa Right To Life*

The Federal Election Campaign Act of 1971 ("FECA") allowed both corporations and unions to establish separate segregated funds (a.k.a. PACs), which may solicit and collect money from specified corporate- or union-affiliated individuals[96] and make contributions to candidates.[97] Prior to *Citizens United*, both groups were required to spend through PACs in federal elections.[98] The two groups were allowed to communicate directly with their own members without running afoul of the campaign finance laws.[99] Both were also subject to certain disclosure requirements under federal law.[100] The Federal Election Commission ("FEC") has promulgated regulations to enforce campaign finance laws, and these FEC regulations have treated both groups with similar strictures.[101]

In 2002, when Congress closed loopholes in the federal campaign finance laws, it chose to treat corporations and unions identically once

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Comm., Inc. v. Tooker, 808 N.W.2d 417 (Iowa 2011) ("pursuant to *Beaumont*, Iowa can generally ban all direct corporate contributions.").

96. *Fed. Election Commn. v. Natl. Right to Work Comm.*, 459 U.S. 197 (1982) (upholding FECA's limitations on a corporation's ability to solicit funds for its SSF to its limited class).

97. 2 U.S.C. § 441b(b)(4)(B). The limited class for corporations is defined as stockholders, executive personnel, administrative personnel, and family members. 11 C.F.R. § 114.5(g)(1) (2011). For unions, the limited class is union members, executive personnel, administrative personnel, and family members. 11 C.F.R. § 114.5(g)(2).

98. Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 588 (2011) ("The Federal Election Campaign Act ("FECA") blessed the political action committee ("PAC") alternative: corporations and unions could establish separate political committees to spend money on these campaigns, but these PACs were limited in both the amount that could be contributed to candidates and who could be solicited to contribute."); *Beaumont*, 539 U.S. at 154 ("[T]he [corporate contribution] ban has always done further duty in protecting 'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.'" (internal citations omitted)); *id*. at 163 ("The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure . . . .").

99. *U.S. v. Cong. of Indus. Org.*, 335 U.S. 106, 123–124 (1948) ("We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an 'expenditure in connection with any election' of candidates for federal office intended to outlaw such a publication. We do not think § 313 reaches such a use of corporate or labor organization funds.").

100. Jennifer S. Taub, *Money Managers in the Middle: Seeing and Sanctioning Political Spending after* Citizens United, 15 N.Y.U. J. Legis. & Pub. Pol'y 443, 452 (2012) ("Under McCain-Feingold, corporations and unions were subject to two major expenditure prohibitions as well as disclaimer, disclosure, and reporting requirements . . . .").

101. Cynthia L. Bauerly & Eric C. Hallstrom, *Square Pegs: The Challenges for Existing Federal Campaign Finance Disclosure Laws in the Age of the Super PAC*, 15 N.Y.U. J. Legis. & Pub. Pol'y 329, 336 (2012) ("For the last thirty years, the FEC has developed rules governing the participation of corporations and labor unions in electioneering activities based on the principle that both contributions and expenditures were forbidden."). After *Citizens United*, the FEC announced that it would not enforce the federal ban on expenditures by corporations or unions. FEC Press Release, *FEC Statement on the Supreme Court's Decision in* Citizens United v. FEC, http://www.fec.gov/press/press2010/20100205 CitizensUnited.shtml (Feb. 5, 2010).

more.[102] Congress banned both from making so-called "sham issues ads" (a.k.a. electioneering communications).[103] This electioneering communication ban, along with Taft-Hartley's independent expenditure ban, were overturned as unconstitutional in *Citizens United*, thereby allowing both groups to spend in federal elections, so long as they spend the money independently of federal candidates.[104] The 2002 law (known as "McCain-Feingold," the "Bipartisan Campaign Reform Act," or "BCRA") also banned corporations and unions from donating so-called "soft money" to political parties.[105] The BCRA soft money ban still survives.[106]

The motivation behind the federal corporate and union bans was a normative judgment by Congress that economic war chests should not be converted into political war chests.[107] As the Supreme Court explained in *Federal Election Commission v. National Right to Work Committee*,[108] the two primary purposes of the bans were to: (1) "ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests'

102. Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871, 935 (2004) ("BCRA's new limitations on corporate and union electoral activity further restrict executives' ability to misuse 'other people's money' by prohibiting expenditure of general treasury funds on parties or sham issue advertising campaigns.").

103. *See* Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (codified at 2 U.S.C. § 441b(b)(2) (2002)) (prohibiting corporations and unions from using funds to fund electioneering communications or for speech expressly targeting a political candidate); 2 U.S.C. § 434(f)(3)(A) (defining "electioneering communications").

104. Hasen, *supra* n. 6, at 557 ("Congress failed to fill the gaping holes in the federal disclosure rules that followed the Supreme Court's *Citizens United* decision, freeing corporate and labor union money in the political process." (internal citations omitted)).

105. 2 U.S.C. § 441i (2002); Spencer Overton, *The Participation Interest*, 100 Geo. L.J. 1259, 1266–1267 (Apr. 2012) ("Within a few election cycles, innovative lawyers carved loopholes in the federal restrictions, and reformers crafted and pushed for the Bipartisan Campaign Reform Act of 2002 to plug the loopholes. The 2002 Act banned soft money contributions to parties (which previously were unlimited) and restricted 'sham issue ad' political spending by corporations and unions." (internal citations omitted)); Jan Witold Baran, *Address Money, Politics, and Lobbying*, 58 Cath. U. L. Rev. 913, 915 (Summer 2009) ("[BCRA] also federalized fundraising by political parties by prohibiting the solicitation, collection, or use of 'soft money,' which predominantly were funds from corporations and unions.").

106. *Republican Natl. Comm.*, 698 F. Supp. 2d 150, *aff'd*, 130 S. Ct. 3543 (2010) (upholding BCRA's party fundraising restrictions).

107. *U.S. v. United Auto Workers*, 352 U.S. 567, 585, 590–592 (1957) (describing the government's effort "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital"); *id*. at 572 (quoting H. Comm. on Election of Pres., Vice-Pres., & Reps. in Cong., *Hearing on Contributions to Political Committees in Presidential and Other Campaigns*, 59th Cong. (1906) ("The greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?")); *Citizens United*, 130 S. Ct. at 933 (Stevens, J., dissenting) ("The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress' most significant efforts to regulate the role that corporations and unions play in electoral politics.").

108. *Natl. Right to Work Comm.*, 459 U.S. 197.

which could be used to incur political debts from legislators who are aided by the contributions"; and (2) "protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."[109] The law provided these protections for over 60 years. Now those protections have largely been eradicated through *Citizens United* and its 2012 companion, *American Tradition Partnership*.

VII. The Supreme Court's Superficial Equal Treatment of Corporations and Unions

Following Congress's lead, the Supreme Court has also treated corporations and unions similarly with respect to campaign finance bans, with one notable exception in *Austin v. Michigan Chamber of Commerce*.[110] The Court has traditionally thought of corporate and union spending in the same breath. For example, pre-*Citizens United*, the Court was equally focused on preventing ideological nonprofits from funneling corporate and union money into federal elections.[111] And in 2003, in *McConnell v. Federal Election Commission*,[112] the Supreme Court held that the federal government can constitutionally prohibit political parties from accepting corporate and union money.[113]

For most of the twentieth century, the Court deferred to Congress's and state legislatures' line-drawing judgments in campaign finance statutes, including the choice to ban certain organizations from spending in elections.[114] That deference ended with Chief Justice Rehnquist's death and

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109. *Id.* at 207–208; *see also Fed. Election Commn. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas."); *id.* ("Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may provide an unfair advantage in the political marketplace.").

110. *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990). *Austin* upheld a Michigan law that banned corporate independent expenditures but not unions'. As the Court in *Austin* explained, "Whereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure." *Id.* at 665.

111. *Mass. Citizens for Life, Inc.*, 479 U.S. at 263–264 (invalidating then-applicable independent expenditure limits on nonprofit corporations that accepted no money from business corporations or labor unions). Justice Rehnquist, dissenting in *Bellotti*, felt corporations and unions could both be subject to campaign finance limitations. *Bellotti*, 435 U.S. at 826–827 (Rehnquist, J., dissenting) (concluding "any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.").

112. *McConnell*, 540 U.S. 93.

113. *Id.* at 155–156, *partially overruled on other grounds*, *Citizens United*, 130 S. Ct. at 913.

114. *Beaumont*, 523 U.S. at 159–160 ("[C]oncern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations."); *Nixon v. Shrink Mo. Govt. PAC*, 528 U.S. 377 (2000) (upholding low contribution limits against First Amendment challenge); *Cal. Med. Assn. v. Fed. Election Commn.*, 453 U.S. 182, 200–201 (1981) ("The differing restrictions placed on

Justice O'Connor's retirement and the ascension to the bench of Chief Justice Roberts and Justice Alito in 2006. As Justice Breyer once complained about his new brethren: "It is not often in the law that so few have so quickly changed so much."[115]

The Roberts Supreme Court held in *Citizens United* that requiring political activity to be conducted through separate segregated funds or PACs impermissibly burdens corporate and union freedom of expression.[116] This dismantling of the rules on organizational political spending is part of a greater deregulatory trend led by the Supreme Court. Over the past six years, the Roberts Supreme Court has actively deregulated many of the rules that heretofore had governed campaign finance in both federal and state elections.[117] Not only has the Court struck down Vermont's contribution limits as being too low,[118] invalidated the federal Millionaire's Amendment as discrimination against the rich,[119] and declared that the tie goes to the speaker should one arise between speakers and regulators,[120] but in *Citizens United*, the Supreme Court gave corporations and unions the First Amendment right to spend an unlimited amount of money on political ads—placing them on equal footing with human beings.[121] And capping off this trend, *American Tradition Partnership* reaffirmed *Citizens United* for the purpose of state elections.

This deregulation has rippled through lower courts as well. Thanks to a lesser-known 2010 case called *SpeechNow.org v. Federal Election Commission*,[122] corporations and unions have a new political vehicle to use:

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individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process."); *United Auto Workers*, 352 U.S. at 585 (describing Congressional efforts "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital.").

115. Joan Biskupic, *Roberts Steers Court Right Back to Reagan*, USA Today, http://usatoday30.usatoday.com/news/washington/2007-06-28-supreme-court-right_N.htm (June 29, 2007) (quoting Breyer, J.). To be fair, Justice Breyer was talking about the impact of the new Justices on school desegregation jurisprudence in this quote, but his analysis could apply to what Justices Roberts and Alito have done to campaign finance law as well.

116. *See Citizens United*, 130 S. Ct. at 897 ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.").

117. *See generally* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 Minn. L. Rev. 1064 (2008).

118. *Randall v. Sorrell*, 548 U.S. 230, 261–263 (2006) (invalidating Vermont's contribution and expenditure limits).

119. *Davis*, 554 U.S. at 743–744 (invalidating the federal Millionaire's Amendment).

120. *Wis. Right to Life, Inc.*, 551 U.S. at 474 ("*WRTL II*") (invalidating the federal source restriction for ads that were not the functional equivalent of express advocacy).

121. *See Citizens United*, 130 S. Ct. at 900; *see also* Steven Greenhouse, *A Campaign Finance Ruling Turned to Labor's Advantage*, N.Y. Times, http://www.nytimes.com/2011/09/26/us/politics/a-campaign-finance-ruling-turned-to-labors-advantage.html (Sept. 25, 2011).

122. *SpeechNow.org v. Fed. Election Commn.*, 599 F.3d 686 (2010).

independent expenditure only committees or what the press has dubbed "Super PACs."[123] Super PACs have enabled corporations and unions to aggregate their unlimited funds along with money from individuals and associations to buy political ads in federal elections, so long as the ads are purchased independently of candidate campaigns. The creation of Super PACs for both corporations and unions has been blessed by the FEC.[124]

When it comes to analyzing the campaign finance regulation of corporations and unions, the Supreme Court has been willing to uphold (in the case of *Beaumont*) or strike down (in the case of *Citizens United*) regulations for both groups with an even hand. But as discussed in this piece, the Supreme Court has simultaneously participated in diluting the ability of unions to use their rights to spend in politics through the opt-out and opt-in cases.

VIII. Key Differences Between the Union and Corporate Contexts

Arguably, unions should never have been lumped in with corporations in federal campaign finance laws since the two groups are structurally different.[125] Academics have argued that corporations deserve more restrictive campaign finance regulation than their union counterparts because of the state conferred advantages that go with the corporate form, such as limited liability for investors and perpetual existence.[126]

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123. Bauerly & Hallstrom, *supra* n. 101, at 343–344 ("*Citizens United*, *SpeechNow*, as well as *EMILY's List*, and more recently *Carey*, concluded that neither FECA's prohibition on corporate and labor union contributions nor its amount limits may constitutionally be applied to contributions made for the purpose of financing independent communications.").

124. FEC Press Release, *FEC Statement on* Carey v. FEC*: Reporting Guidelines for Political Committees that Maintain a Non-Contribution Account*, available at http://www.fec.gov/press/Press2011/20111006postcarey.shtml (Oct. 5, 2011) ("The Commission will no longer enforce 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), as well as any implementing regulations, against any nonconnected political committee with regard to contributions from individuals, political committees, corporations, and labor organizations . . . .").

125. *See e.g.* Sachs, *supra* n. 72 (Sachs discusses why opt-out rights available to union members create an inherently unequal relationship when compared with corporations because shareholders have no right to object to corporate political spending. Additionally, the article points out other advantages that government confers upon corporations, including limited liability and tax exemptions.).

126. *See e.g.* Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. Pa. L. Rev. 31, 56 (2004) (Hasen discusses the now overruled *Austin v. Michigan State Chamber of Commerce* and its rationale as to why campaign finance regulations can target corporations and not labor unions. Namely, it is due to the state-conferred advantages provided *vis-à-vis* the corporate structure and the fact that shareholders have no opt-out rights.); Reza Dibadj, *Expressive Rights for Shareholders after* Citizens United*?*, 46 U.S.F. L. Rev. 459, 467 (Fall 2011).

Moreover, labor unions make up the lowest percentage of the American workforce in nearly a century.[127] The smaller scale of unions compared to the scale of corporations is an additional reason that formal equal treatment may lead to unequal results.[128] Even the biggest union[129] is dwarfed when compared with the biggest corporation.[130] As the Supreme Court once wrote in *Buckley v. Valeo*,[131] "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[132]

Furthermore, union members working in a single location are more likely to share political opinions *vis-à-vis* economic policy choices in comparison with disparate shareholders living around the world, who may have nothing in common.[133] This is an additional reason why unions should get

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127. Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. Times, http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html (Jan. 23, 2013) ("That brought unionization to its lowest level since 1916 . . . .").

128. *See e.g.* John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 Cornell L. Rev. 1019, 1031 (2012) ("Labor unions can lobby and make political contributions, but their political power has steadily subsided for decades as the percentage of the unionized U.S. work force has declined."); Emma Greenman, Note, *Strengthening the Hand of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in a Post-*Wisconsin Right to Life *Era*, 24 J.L. & Pol. 209, 242–243 (Summer 2008) ("Concentrated aggregations of corporate and union money are not equally distributed, and political spending may not reflect the interests or preferences of the dispersed shareholders or union members who ultimately control the company or union. Giving the diverse community of shareholders and union members the opportunity to opt-out, or prevent corporate and union general treasury dollars from being spent in the political arena, could provide a valuable check on the use of money aggregated in the economic arena to disproportionately influence the political debate.").

129. One could argue about how to define the "biggest" in this context. According to the U.S. Department of Labor, the U.S. labor union with the most assets ($480 million) in 2012 was Electrical Workers IBEW AFL-CIO, and the U.S. labor union with the most members (11.5 million) in 2012 was the AFL-CIO.

130. Sprague & Wells, *supra* n. 16, at 508 ("But what the *Citizens United* majority conveniently ignored is one particular attribute which has existed for at least one hundred years: that exceptionally large corporations, controlled by a handful of individuals, have amassed great quantities of wealth and power, which dwarf the resources of the individual electorate, as well as the corporations' own minority shareholders, ultimately diluting individuals' political voice."); *see also* Vincent Trivett, *25 U.S. Mega Corporations: Where They Rank If They Were Countries*, Business Insider, http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6 (June 27, 2011) ("If Wal-Mart were a country, its revenues would make it on par with the GDP of the 25th largest economy in the world [ ], surpassing 157 smaller countries."); Steve Coll, *Gusher: The Power of ExxonMobil*, The New Yorker, http://www.newyorker.com/reporting/2012/04/09/120409fa_fact_coll (Apr. 9, 2012) ("ExxonMobil has developed an algorithmic formula for political spending and lobbying that has reinforced its alignment with Republican candidates. Exxon's annual revenues, of four hundred billion dollars, are about the same as the GDP of Norway.").

131. *Buckley v. Valeo*, 424 U.S. 1 (1976).

132. *Id.* at 97–98 (referring to the differential treatment of major and minor political parties under FECA).

133. Richard L. Hasen, *Justice Souter: Campaign Finance Law's Emerging Egalitarian*, 1 Alb. Govt. L. Rev. 169, 191 (2008) (Hasen discusses his disappointment with Justice Souter's dissent in *WRTL II* because it equated labor union spending with corporate spending. The author then goes on to

more (not less) flexibility in political spending in comparison to corporations.[134]

As Professor Adam Winkler once explained, union members are likely to have more information about their union's political spending than a shareholder is going to have about corporate political spending: "shareholders simply will not know when the corporations in which they have invested make political expenditures, much less make them to support causes they disagree with or make them with general treasury funds . . . ."[135] By contrast, union members may be more in the know. As Professor Winkler continued:

> A union member may actually be better able to discover the use of his dues than a shareholder because he works with other dues-paying members in a union shop where information may spread easily. . . . [A] dissenting shareholder . . . faces problems associated with limited control and limited knowledge that make divestment an utterly ineffective remedy for unwanted corporate electoral spending.[136]

This is one more reason why prophylactic rules/laws requiring disclosure in the corporate political spending context are needed.

A. Transparency Differences among Corporations and Unions

While corporations and unions get similar treatment in terms of federal contribution bans, the parallels end there. Union political speech is far more heavily regulated under current labor law. For example, union political spending is more transparent than its corporate analog.[137] Unions file political reports with the Department of Labor's Office of Labor-Management Standards pursuant to the Labor-Management Reporting Act of 1959.[138] A reporting union must distribute this information to its members,[139] and the Department of Labor treats this information as public.[140]

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discuss the reasons why union spending more closely resembles the opinions of its members than does corporate spending, namely, the fact that union members have opt-out rights whereas corporate political spending is controlled by a few incredibly wealthy business executives.).

134. *Natl. Right To Work Comm.*, 459 U.S. at 210 ("[T]he 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" (quoting *Cal. Med. Assn.*, 453 U.S. at 201)).

135. Adam Winkler, *Beyond* Bellotti, 32 Loy. L.A. L. Rev. 133, 167–168 (1998).

136. *Id.* at 205.

137. *See e.g.* Adam Crowther, *Opponents of Campaign Finance Disclosure Create False Distinctions in Treatment of Unions and Corporations: The DISCLOSE Act Would Apply Equally to Both*, Public Citizen, http://www.citizen.org/documents/campaign-finance-disclosure-unions-vs-corporations-report.pdf (Nov. 28, 2012); Rick Cohen, *Time to Revive Democracy in the U.S.: Tell Shareholders How Their Dollars Are Used in Politics*, The Nonprofit Quarterly, http://www.nonprofitquarterly.org/author/2-uncategorised/18971-time-to-revive-democracy-in-the-us-tell-shareholders-how-their-dollars-are-used-in-politics.html#.URAqVKU72Ag (Jan. 11, 2012).

138. 29 U.S.C. § 431.

139. 29 U.S.C. § 431(c).

Form LM-2[141] requires the union to disclose "all direct and indirect . . . political disbursements or contributions in money," defined as any disbursement "intended to influence" the outcome of a primary or general election, as well as all lobbying disbursements made with the intent of influencing public policy.[142] Form LM-2 also requires the disclosure of additional information that pertains to disbursements of $5,000 or more, including information about the recipient, amount, and purpose.[143] The filing organization must also report the total amount it disbursed for the filing period.[144] Copies of completed LM-2 forms are available online through the Labor Department's website.[145]

Corporations are not under similar legal duties to disclose their political spending to investors. In 2010, Nell Minow, an expert in corporate governance, gave a speech addressing the new corporate political spending unleashed by *Citizens United* and the transparency problem it created for investors. Ms. Minow urged:

> If investors are going to be able to send some kind of a market reaction to this political speech by corporations, we have to have better disclosure. We are currently facing a situation where some companies are taking public positions in favor of one thing and then funneling money to intermediary groups to oppose it. We can't have that any more. So, we need better disclosure about the contributions and other kinds of political speech pay, that is paid out.[146]

The SEC, which regulates publicly traded companies, should take a page from the Labor Department's playbook and require transparency from corporations that spend in politics.[147] At present, the SEC rules contain no requirement for publicly traded companies to inform the investing public about their political spending.[148] This may change in the near future.[149] In

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140. 29 U.S.C. § 435.

141. 29 C.F.R. §§ 403.2 to 403.3.

142. *See* Department of Labor, *Instructions for Electronic Form LM-2 Labor Organization Annual Report*, http://www.dol.gov/olms/regs/compliance/erds/LM2Instr2-2-04koREVISED.pdf (accessed Feb. 3, 2013).

143. *Id.*

144. *Id.*

145. *See* Department of Labor, *Union Search*, http://kcerds.dol-esa.gov/query/getOrgQry.do (accessed Feb. 3, 2013).

146. Nell Minow, *Diane Sanger Memorial Lecture*, transcript and audio available at http://www.sechistorical.org/museum/programs/2010/ (Mar. 17, 2010).

147. Ciara Torres-Spelliscy, *Could the SEC Please Give Democracy a Hand?*, Thomson Reuters News & Insight, http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/01_-_January/Could_the_SEC_please_give_democracy_a_hand_/ (Jan. 9, 2012); Courteney Keatinge, *Companies Still Silent on Their Use of Free Speech*, Glass Lewis & Co., http://www.glasslewis.com/blog/companies-still-silent-on-their-use-of-free-speech/ (Nov. 9, 2012).

148. David Earley & Ian Vandewalker, *Transparency for Corporate Political Spending: A Federal Solution*, Brennan Center, http://www.brennancenter.org/publication/transparency-corporate-political-spending-federal-solution (Aug. 1, 2012); *see e.g.* Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice* at 3, available at http://www.brennancenter.org/publication/corporate-campaign-spending-giving-shareholders-voice (Jan. 27, 2010) ("Corporate law is ill-prepared for this

2011, ten corporate law professors petitioned the SEC to require disclosure of corporate political spending.[150] A record-breaking 480,000 people filed public comments with the Commission urging it to act on this petition.[151] In late 2012, the SEC placed a potential rule addressing corporate political spending on the Office of Management and Budget's ("OMB") Regulatory Agenda.[152] According to the OMB, a notice of proposed rule-making on corporate political spending by the SEC is scheduled for 2013.[153]

B. Differences in Consent for Corporations and Unions

Besides the differences in the level of transparency for politically active corporations and unions, there is also a marked difference in the level of consent that each group is required to get from its constituents before it spends in politics. As Professors Bebchuk and Jackson explain in the *Harvard Law Review*: "corporate law rules do not require a company to separate political spending from other expenses or to provide shareholders with specific details about that spending."[154]

Moreover, the Supreme Court in *Citizens United* seemed hopelessly optimistic that corporate democracy[155] would protect shareholder interests

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new age of corporate political spending by publicly-traded companies. Today, corporate managers need not disclose to their investors—individuals, mutual funds, or institutional investors such as government or union pension funds—how funds from the corporate treasury are being spent, either before or after the fact. And the law does not require corporate managers to seek shareholder authorization before making political expenditures with corporate funds.").

149. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 146 (2010) ("[I]ncreasing disclosure and disclaimer requirements for corporations making expenditures in connection with political campaigns . . . seems initially attractive to both libertarians and egalitarians.").

150. Bebchuk et al., *Committee on Disclosure of Corporate Political Spending Petition for Rulemaking at Securities and Exchange Commission*, available at http://www.sec.gov/rules/petitions/2011/petn4-637.pdf (Aug. 2, 2011) ("Because the Commission's current rules do not require public companies to give shareholders detailed information on corporate spending on politics, shareholders cannot play the role the Court described."); *see also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1199–1207 (1999) (arguing in favor of stronger mandatory SEC disclosure rules in order to increase corporate social transparency).

151. Securities and Exchange Commission, *Comments on Rulemaking Petition: Petition to require public companies to disclose to shareholders the use of corporate resources for political activities [File No. 4-637]*, http://www.sec.gov/comments/4-637/4-637.shtml (accessed on Feb. 24, 2013).

152. Matea Gold, *Advocates Cheer SEC Consideration of Corporate Disclosure Rule*, L.A. Times, http://www.latimes.com/news/politics/la-pn-sec-campaign-spending-disclosure-20130108,0,55217.story (Jan. 8, 2013).

153. Office of Information and Regulatory Affairs, *Office of Management and Budget Unified, Regulatory Agenda and Regulatory Plan*, http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=3235-AL36 (accessed on Feb. 3, 2013).

154. Bebchuk & Jackson, *supra* n. 30, at 89; *see also* John C. Bogle, *The Supreme Court Had Its Say. Now Let Shareholders Decide*, N.Y. Times, http://www.nytimes.com/2011/05/15/opinion/15bogle.html (May 14, 2011) (arguing for a supermajority shareholder vote on corporate political spending).

155. *Citizens United*, 130 S. Ct. at 916 ("Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosure

in preventing political spending that could offend investors.[156] As the *Citizens United* majority argued:

> Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are in the pocket of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.[157]

Justice Stevens writing for the dissent in *Citizens United* roundly rejected this argument:

> [B]y "corporate democracy," presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that "these rights are so limited as to be almost nonexistent," given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.[158]

One reason for concern about the robustness of quotidian corporate democracy comes from outside of the campaign finance context. A year after *Citizens United*, the SEC promulgated a rule pursuant to the Dodd-Frank Act that would have given shareholders the ability to run their own nominees for board elections.[159] This proxy access rule was invalidated by the D.C. Circuit Court.[160] As a result of this ruling, the mechanisms of corporate democracy are far from functional in the fundamental area of board elections.[161]

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rapid and informative."); *but see* Lucian A. Bebchuk, Essay, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 688–694 (2007) (discussing the various impediments that make it costly and difficult for shareholders to replace incumbent directors).

156. *See generally* Julie N.W. Goodridge & Christine Jantz, *Corporate Political Spending: Why Shareholders Must Weigh In*, The Journal of Values-Based Leadership, http://scholar.valpo.edu/jvbl/vol5/iss2/3/ (2012).

157. *Citizens United*, 130 S. Ct. at 916 (internal quotations omitted).

158. *Id.* at 978 (Stevens, J., concurring in part and dissenting in part).

159. Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56668–56669 (2010) (codified at 17 C.F.R. § 240.14a-11) ("proxy access rule").

160. The proxy access rule was vacated by *Bus. Roundtable v. Sec. & Exch. Commn.*, 647 F.3d 1144 (D.C. Cir. 2011); *see also* Bo Becker, Daniel Bergstresser & Guhan Subramanian, *Does Shareholder Proxy Access Improve Firm Value? Evidence from the* Business Roundtable *Challenge* (working paper), available at http://www.hbs.edu/faculty/Publication%20Files/11-052.pdf (Jan. 19, 2012) (concluding "financial markets placed a positive value on shareholder access, as implemented in the SEC's 2010 Rule.").

161. *See e.g. Administrative Law—Corporate Governance Regulation—D.C. Circuit Finds SEC Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis*—Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011)*, 125 Harvard L. Rev. 1088, 1095 (2012) ("The effects of [*Business Roundtable v. SEC*] are troubling. The *Business Roundtable* ruling disrupts the SEC's ability to fulfill its statutory mandate to oversee the proxy process."); Paul Hodgson, *BRT and Chamber of Commerce Prevail on Proxy Access*, GMI Ratings, http://www3.gmiratings.com/home/2011/07/brt-and-chamber-of-commerce-prevail-on-proxy-access/ (July 22, 2011) ("It is difficult to understand why anyone who supports a successful capitalist economy, based on shareholders investing in good management

IX. Treat Corporations and Unions Alike

Politically active corporations should be regulated in ways that mirror union regulations so that shareholders receive a greater opportunity to consent and increased transparency. Clearly there are structural differences among unions and corporations.[162] Nonetheless, the principle ostensibly animating the Court's intervention in *Knox* is a desire to protect the individual's ability to support only those political causes that coincide with the individual's belief system. Consequently, if union nonmembers should not be forced to subsidize speech with which they disagree, then shareholders should likewise not have to subsidize speech with which they disagree.[163]

As Professor Victor Brudney noted, the fact that corporations can spend in politics "leaves to be solved the crucial questions of the state's power to decide who, within the corporation, may authorize it to utter that speech . . . ."[164] Shareholders cannot prevent wasteful corporate political spending under the current rules.[165] As Professor John C. Coates IV concluded, "Contrary to the Supreme Court's stated assumption, shareholders were not able to protect themselves from misuse of corporate funds for political purposes prior to *Citizens United*, and the risk of such misuse has increased as a result of the decision."[166] Yet the Court seemed willfully blind to the problem of shareholders' subsidizing objectionable corporate

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and electing effective representatives to the board, should object to those shareholders occasionally electing a representative directly, and getting rid of directors who clearly do not have their best interests at heart.").

162. One structural difference could be the lack of state action in the shareholder context. However, as noted above, state action does not appear to be a dispositive barrier to imposing consent mechanisms in the private-sector union context. Bebchuk & Jackson, *supra* n. 30, at 114 ("[T]he union case and the public company case [are] distinguishable because participation may be required by law in the former but not the latter . . . [but] the volitional nature of being a shareholder . . . does not protect shareholders from the consequences of political speech they disfavor."); Sachs, *supra* n. 72, at 829 ("conditioning economic opportunities on a political funding requirement is normatively problematic even in the absence of compulsion[—e]ven if employees are not 'compelled' to work for union employers or shareholders are not 'compelled' to invest in the stock market . . . .").

163. Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 Yale L.J. 235, 236–237 (1981) ("But the number of shareholders who are likely to disagree with some of management's political expenditures is not trivial . . . ."); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. Pa. L. Rev. 646, 676 (1982) ("[D]emocratic theory still would not justify granting corporate executives discretionary control over the massive corporate resources, which were gathered for commercial purposes, in order to pursue their political objectives.").

164. Brudney, *supra* n. 163, at 248.

165. Subcomm. on Cap. Mkts., Ins., and Govt. Sponsored Enters. of the H. Comm. on Fin. Servs., *Hearing on Corporate Governance After* Citizens United, 111th Cong. 10–11 (Mar. 11, 2010) (Statement by Ann Yerger, Exec. Dir., Council of Institutional Investors, "Left unchecked, management can contribute to favored candidates, causes, or charities that have no value to the company or even advocate positions contrary to shareowners' best interests.").

166. John C. Coates IV, *Corporate Politics, Governance, and Value before and after* Citizens United, 9 J. of Empirical Legal Studies 657–696 (Dec. 2012); *see also* Andy Kroll, Citizens United*: The*

political speech at the same time they worked to protect union nonmembers from even temporarily funding union political speech.

I am, of course, not the only one to suggest that there is a logical chasm between how the Court treats corporations and unions that engage in politics. As Professor Reza Dibadj noted, "consider also that union members have greater rights than shareholders *vis-à-vis* unwanted political speech."[167] Indeed, Professors Charlotte Garden, Benjamin Sachs, Catherine L. Fisk, and Erwin Chemerinsky have all written compelling pieces on this phenomenon of the Court's treating corporations with deference while micromanaging unions. These professors have argued that the Court and the legislatures they review should harmonize their approach to these two politically active groups, either by relaxing the requirements for unions as Professors Garden, Fisk, and Chemerinsky suggest or by requiring more of corporations as Professor Sachs suggests.[168]

Professor Sachs notes the differential treatment of corporations' and unions' political speech in the following manner: "By imposing such substantive and administrative burdens on unions but not corporations, the current asymmetry treats political speakers differently. . . . [T]here may be no justification for this asymmetry."[169] Professor Sachs suggests that shareholders should have a right to opt out of corporate political spending:

> Congress [ ] and state lawmakers [have a] conceptually sound justification for offering shareholders a right to opt out of financing corporate political activity. . . . [S]uch a reform could . . . involve a requirement 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.[170]

Professor Sachs is not alone in suggesting this opt-out prescription post-*Citizens United*. Attorney Jeremy Mallory articulated in a recent law review article: "The most parsimonious solution would be to recognize that the principles articulated in the union-dues and segregated-funds cases apply to the corporate context, warranting a remedy such as a pre-emptive

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Shareholders Strike Back, Mother Jones, http://www.motherjones.com/politics/2011/05/citizens-united-home-depot-elections (June 1, 2011).

167. Dibadj, *supra* n. 126, at 467 (quoting *Intl. Assn. of Machinists*, 367 U.S. at 768–769 ("In *International Association of Machinists v. Street*, the Supreme Court held that '§ 2, Eleventh [of the Railway Labor Act] is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.'")).

168. *See* Garden, *supra* n. 68, at 41–44; Fisk & Chemerinsky, *supra* n. 15; Sachs, *supra* n. 72, at 869.

169. Sachs, *supra* n. 72, at 808.

170. *Id.*

opt-out by shareholders."[171] This solution has also been offered by Professor Jennifer S. Taub.[172]

While I agree with the basic premise of Professor Sachs' analysis of the problem, here I am suggesting a slightly different solution. Professor Sachs suggests that shareholders should be able to opt out of corporate political spending to earn an extra mini-dividend.[173] I argue that, akin to the right articulated for nonmembers of unions in *Knox,* shareholders should have the right to opt in to corporate political spending through a shareholder vote before a corporation spends in the political arena.[174] And here I advocate for a vote on the annual proxy as the means through which shareholders could manifest their objection or consent to corporate political spending.[175]

X. The U.K. Experience with "Opt-In" for Public Companies

Models of how to structure shareholder consent are rare, as many countries simply ban corporate spending in elections.[176] Yet the U.S. is not

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171. Jeremy G. Mallory, S*till Other People's Money: Reconciling* Citizens United *with* Abood *and* Beck, 47 Cal. W. L. Rev. 1, 39 (2010).

172. Taub, *supra* n. 100, at 484 ("As an alternative, the statute might also permit investors across the intermediation chain to, like union members, be given the right to opt out of political spending.").

173. Benjamin Sachs, *Corporate Shareholders Deserve Equal Rights on Campaign Finance*, Atlantic Wire, http://www.theatlanticwire.com/politics/2012/08/corporate-shareholders-deserve-equal-rights-campaign-finance/55688/ (Aug. 13, 2012).

174. Here my proposal for shareholder consent that I have written about in more detail elsewhere is most closely akin to that suggested by Professors Bebchuk and Jackson. Others have also suggested this reform as well. *See e.g.* Brian J. Robbins & Justin D. Rieger, *Corporate Political Spending Post*-Citizens United, Law360 Expert Analysis, available at http://www.robbinsarroyo.com/shareholders-rights-blog/robbins-umeda-attorneys-discuss-corporate-political-spending-in-law360/ (Sept. 28, 2011) (Arguing, "Such reform could be accomplished by ensuring that: (1) corporations obtain shareholder approval before making political expenditures; (2) shareholders define in advance how and when corporate funds can be used in the political arena; and/or (3) corporations disclose material information concerning their political spending decisions and the rationale behind those decisions to their stakeholders.").

175. Annual shareholder proxy votes are a different mechanism than a *Hudson* notice followed by a *Knox* "opt-in," but they represent the closest workable analog in the corporate law context. For a more fulsome explanation, see Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach* in *Risk Management and Corporate Governance*, *supra* n. 31, at 420 ("The reason I suggest the British model instead of a model where every individual expenditure is subject to a separate shareholder vote is a deep concern about administrability and transaction costs. A system that puts every political action of a corporation to a vote would be costly and unwieldy to administer. By contrast, under this proposal, the corporation can simply add an additional question (on the authorization of the political budget) to the list of items that are regularly subject to a shareholder vote at the annual meeting, alongside traditional matters like reelecting the board of directors or appointing auditors. This gives shareholders a say without making the whole process collapse under its own weight.").

176. Suzanne Mulcahy, *Money, Politics, Power: Corruption Risks in Europe*, Transparency International, http://www.transparency.org/whatwedo/pub/money_politics_and_power_corruption_risks_in_europe (June 6, 2012) ("Some European countries have opted for a complete ban on corporate donations ([including] Belgium, Estonia, France, Hungary, Latvia, Lithuania, Poland and Portugal) . . . .").

unique in allowing corporate political spending. The U.K. has allowed corporations to spend in Parliamentary elections, but the U.K. requires greater regulation of corporations that politick than the U.S. does presently. Shareholder protections are needed here just as they are needed in the U.K.[177] Thus, the U.K. provides a functioning model for U.S. regulators to emulate.

In 2000 and 2006, the U.K. amended its Companies Act to require shareholder votes before public companies can spend in either U.K. or E.U. elections.[178] Before the 2000 amendments to the U.K. Companies Act, corporate governance experts raised concerns about corporate managers in public companies spending other people's money in U.K. elections. For example, Anne Simpson from the Pensions and Investment Research Consultants ("PIRC") testified before a Parliamentary committee in 1998:

> Our other main point is accountability. When the directors decide to make a corporate donation, that is made from shareholder funds. . . . In other words, the majority of shareholders in British companies are institutions such as pension funds and insurance companies who are investing on behalf of others—they are investing the public's money by and large. We therefore think it is absolutely essential that the directors seek approval from shareholders for donations that they wish to make from shareholders' funds.[179]

A year later, Stephen Byers, the U.K. Secretary of State for Trade and Industry, also showed concern about accountability when corporations spent in elections, writing, "In recent years there has been growing concern about directors' accountability to shareholders in relation to political donations by companies. This concern is due in part to the scope for conflict between a director's personal wishes or interests and his duty to the company."[180] Consequently, the Parliamentary Committee studying the matter of corporate spending in the U.K. recommended greater transparency and share-

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177. *Bellotti*, 435 U.S. at 812–813 (White, J., dissenting) ("There is an additional overriding interest related to the prevention of corporate domination which is substantially advanced by Massachusetts' restrictions upon corporate contributions: assuring that shareholders are not compelled to support and financially further beliefs with which they disagree where, as is the case here, the issue involved does not materially affect the business property, or other affairs of the corporation. . . . Massachusetts has chosen to forbid corporate management from spending corporate funds in referenda elections absent some demonstrable effect of the issue on the economic life of the company. In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group.").

178. *See* Companies Act 2006, available at http://www.legislation.gov.uk/ukpga/2006/46/contents; Institute of Chartered Secretaries & Administrators, *ICSA Guidance on Political Donations*, https://www.icsaglobal.com/assets/files/pdfs/081110%20-%20Political%20Donations.pdf (accessed Feb. 3, 2013) (providing an overview of how the Companies Act treats corporate political spending).

179. Committee on Standards in Public Life, Fifth Report, Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, 1998, Cmt. 4057–II, ¶ 3750, http://www.archive.officialdocuments.co.uk/document/cm40/4057/volume-2/volume-2.pdf (statement of Anne Simpson, Joint Managing Dir., Pensions & Inv. Research Consultants Ltd.).

180. U.K. Dept. of Trade & Indus., URN 99/757, Political Donations by Companies ¶ 1.2, http://web.archive.org/web/20000817034025/www.dti.gov.uk/cld/donation.pdf (1999).

holder consent.[181] Parliament adopted both recommendations in the Companies Act's 2000 Amendments, thereby increasing accountability by requiring shareholder votes before the corporation can spend money from general treasury funds for political purposes.[182]

A. How the U.K. Approach Might Translate in the American Corporate Context

The International Corporate Governance Network considers the U.K.'s approach to be a best practice.[183] This group suggests: "Shareholders should be able to vote on a company's political donations policy, preferably through a company-proposed resolution or, secondly, through a shareholder resolution. Shareholders should be able to vote on the maximum amount of company donations for political purposes. Shareholders also should be in a position to vote on material changes to the company's donations policy."[184] Of course there is a risk that what works abroad could get lost in translation in the American context. But there are enormous similarities between U.K. and American corporate law, which make the importation of the U.K.'s methods a reasonable approach.[185]

The Shareholder Protection Act, which has been introduced by both houses of Congress, would import into the U.S. the U.K. approach of re-

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181. *Donations to Political Parties: The Neill Report's Recommendations for Companies*, PLC Magazine, http://plc.practicallaw.com/8-100-8765# (Nov. 1, 1998) ("The report recommends that a company intending to make a donation, whether in cash or in kind, and including any sponsorship, or loans or transactions at a favourable rate to a political party should obtain the prior authority of its shareholders. This authority could be in the form of a broad enabling power, valid for no longer than four years, and could typically be conferred by a resolution passed at the company's annual general meeting giving the board of directors discretion about the making of such donations up to a prescribed limit.").

182. *See* Ciara Torres-Spelliscy, *Shareholder Consent is Key in Political Spending*, Brennan Center for Justice, http://www.brennancenter.org/blog/archives/shareholder_consent_is_key_in_political_spending/ (Mar. 16, 2010); Richard Williams, *Regulating Political Donations by Companies: Challenges and Misconceptions*, 75 The Modern Law Review 951, 960 (Nov. 2012) ("In practice, though, the scope for self-interested conduct by directors will likely be much reduced by the [shareholder] authorisation rule, not least because directors have clear incentives to disclose the intended direction or purpose of donations, if not the intended recipients, at the time of authorisation. Perceived abuse of an authorisation resolution would reduce the chances of securing authorisation in the future and could even put directors' positions on the board in jeopardy.").

183. International Corporate Governance Network, *ICGN Statement and Guidance on Political Lobbying and Donations*, http://www.responsible-investor.com/images/uploads/advertising/ICGN_PLD.pdf (2012).

184. *Id.*

185. *See* Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. Corp. L. 59, 77–78 (2010) ("[T]he United States and the U.K. share a common legal heritage and because their markets share important similarities—both have been historically characterized by a base of dispersed investors."); *see generally* Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, *Corporate Ownership around the World*, 54 J. Fin. 471 (1999) (explaining that the United States and the United Kingdom both demonstrate good shareholder protection and widely held medium-sized firms).

quiring shareholder consent for corporate political spending.[186] The Act would change U.S. securities laws to require a shareholder vote to authorize an annual budget for political expenditures before the money is spent.[187] This bill would empower a majority of shareholders to act to approve corporate political spending.[188] In many ways this legislation is more modest than the rights now available in the union context, where dissenting nonmembers have been given primacy over the majority.

States have also explored the idea of adopting shareholder protection laws through an admixture of state corporate laws and election laws.[189] Some states have required boards of directors to approve future political spending by corporate managers. Board approval for corporate political expenditures is required in three states: Missouri, Louisiana, and Iowa.[190] Last year, Massachusetts introduced a bill that would require board approval before a company could engage in political expenditures.[191] Connecticut's legislature passed a similar bill, but it was vetoed by the governor.[192] Board approval may offer a sensible middle ground between those who want exclusive manager control and those who want significant shareholder input.[193]

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186. Shareholder Protection Act, H.R. 4790, 111th Cong. (2010); Shareholder Protection Act, H.R. 2517, 112th Cong. (2011); Shareholder Protection Act, S. 1360, 112th Cong. (2011).

187. Lisa Rosenberg, *Bill Shines a Light on Corporate Political Spending*, Sunlight Foundation Blog, http://sunlightfoundation.com/blog/taxonomy/term/shareholder-protection-act/ (July 13, 2011) ("In addition [to] making spending on our elections more transparent, the [Shareholder Protection Act] bill will provide important protections to the millions of Americans who hold shares in publicly traded companies. Right now, if shareholders disagree with the political expenditures made by the companies they own—if they even know about them—their only option to protest is to sell their stock."); J. Robert Brown, Jr., *Shareholder Protection Act of 2011 – Preemption, Prevention and Protection (What* Citizens United *May Have Wrought) – Part 1*, CBA CLE Legal Connection, http://cbaclelegalconnection.com/2011/07/j-robert-brown-jr-shareholder-protection-act-of-2011-preemption-prevention-and-protection-what-citizens-united-may-have-wrought/ (July 26, 2011).

188. Ciara Torres-Spelliscy, *11 Reasons Why We Need the Shareholder Protection Act*, Business Ethics Magazine, http://business-ethics.com/2011/07/13/1225-opinion-11-reasons-why-we-need-the-shareholder-protection-act/ (July 13, 2011).

189. For an overview of post-*Citizens United* state legislation January 2010–January 2011, see National Conference of State Legislatures, *Life After* Citizens United, http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx (updated Jan. 4, 2011).

190. Ciara Torres-Spelliscy, *Transparent Elections after* Citizens United, Brennan Center, http://www.brennancenter.org/publication/transparent-elections-after-citizens-united (Mar. 1, 2011); Mo. Ann. Stat. § 130.029; La. Rev. Stat. Ann. § 18:1505.2(F); Iowa Senate File 2354, signed by Governor Chester Culver, April 8, 2010.

191. Mass. S.B. 305, http://www.malegislature.gov/Bills/187/Senate/S00305 (2011).

192. Mark Pazniokas, *Common Cause Slams Malloy Veto of Campaign Finance Bill*, CT Mirror, http://www.ctmirror.org/story/16655/malloy-vetoes-campaign-finance-bill (June 15, 2012) (discussing the governor's veto of H.B. 5556 in 2012).

193. Roger Coffin, *A Responsibility to Speak:* Citizens United*, Corporate Governance and Managing Risks*, 8 Hastings Bus. L.J. 103, 166 (Winter 2012) ("[P]olicy makers, including judges, state corporate law and model codes, should clarify that the independent members of a board of directors who are subject to an open election process should have the responsibility to oversee corporate political speech

A state could change its laws to give shareholders improved transparency and consent regarding corporate political spending.[194] In the past two years, bills to this effect have been introduced in Maryland, New York, California, Wisconsin, Pennsylvania, and Maine.[195] Maryland was the first state to adopt a law requiring that disclosures of corporate political spending be made directly to shareholders.[196]

B. Constitutionality of the U.K. Approach

Since Congress and the states have yet to adopt requirements for shareholder votes on corporate political spending, there has not yet been a case or controversy for a court to adjudicate. However, there is language in *Citizens United* that gives the government the ability to protect shareholders. As Justice Kennedy wrote for an eight-person majority:[197]

> Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative. . . . 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. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits. . . . [D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.[198]

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in the same manner and with the fiduciary responsibilities with which boards oversee other variations of corporate risk.").

194. Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 Temp. L. Rev. 1, 3 (Fall 2012) ("Although the U.S. Constitution might preclude Congress from restricting corporate speech, it does not necessarily preclude state governments from amending corporate law in a way that effectively restricts the ability of entities incorporated within their jurisdiction from exercising this right." (internal citations omitted)).

195. *See* Md. S.B. 570, http://mlis.state.md.us/2010rs/bills/sb/sb0570f.pdf (2010); N.Y. S.B. 101–2011, http://open.nysenate.gov/legislation/bill/S1012011 (2011); Cal. A.B. 919, http://corporatereformcoalition.org/wp-content/uploads/2011/03/California-Shareholders_last-yearsbill.pdf (2009); Pa. H.B. 1002, http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=H&billTyp=B&billNbr=1002&pn=1082 (2011); Maine H.P. 1120, http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1120&item=1&snum=125 (2011); Peter Hardin, *WI Senate OKs Shareholder Consent Bill*, Gavel Grab, http://www.gavelgrab.org/?p=9793 (Apr. 14, 2010).

196. MD Elec. Law §§ 13–306 and 307; Robert Stern, *Sunlight State By State After* Citizens United, http://www.citizen.org/documents/sunlight-state-by-state-report.pdf (June 2012); Ciara Torres-Spelliscy, *Maryland Jumps to the Head of the Clas*s, Brennan Center Blog, http://www.brennancenter.org/blog/maryland-jumps-head-class (Apr. 12, 2011).

197. Eight Justices voted in favor of disclosure and disclaimers in both 2010's *Citizens United* and 2003's *McConnell*.

198. *Citizens United*, 130 S. Ct. at 916.

The language of *Citizens United* is clear that shareholders have the right to hold corporations accountable for their political spending.[199] Accountability may include a U.K.-style shareholder authorization through an annual vote similar to the *Knox* requirement of an opt-in for unions.

Professors Bebchuk and Jackson intimate that legislation like the Shareholder Protection Act is constitutional under the First Amendment.[200] Indeed their own proposed solution would require a supermajority shareholder vote before a company could spend in politics, which is an even more stringent requirement than the majority vote contemplated in the Shareholder Protection Act.[201] Meanwhile Professors Robert Sprague and Mary Ellen Wells have criticized the Shareholder Protection Act as not going far enough because dissenting shareholders who lost a vote would still have to fund corporate political speech with which they disagreed.[202] And Professor Brudney once even suggested unanimous shareholder votes could be required before a corporation could spend on politics.[203]

C. Popular Support for Shareholder Consent

As a democracy, American voters can choose to modify U.S. laws to suit changed circumstances. Polling since *Citizens United* indicates that Americans would embrace requiring greater consent within corporations concerning the issue of corporate political expenditures.[204] Indeed, Americans of all stripes have expressed their dismay with the Supreme Court's decision in *Citizens United*. For example, a *Washington Post-ABC News* poll conducted right after the decision found "[e]ight in 10 poll respondents

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199. Even Professor Ribstein, who was actively hostile to shareholder protections after *Citizens United*, acknowledged that *Citizens United* "upheld the disclosure and disclaimer provisions of the law in question and suggested that regulation of corporate governance might pass constitutional muster." Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 Ga. St. U. L. Rev. 1019, 1021 (Summer 2011) (internal citations omitted).

200. Bebchuk & Jackson, *supra* n. 30, at 116.

201. *Id*. (suggesting that a requirement of up to four-fifths would probably pass constitutional muster).

202. Sprague & Wells, *supra* n. 16, at 554 ("[N]either bill addresses dissenting shareholders who, like all shareholders under current law, may be forced into being associated with speech they may not support.").

203. Brudney, *supra* n. 163, at 241 (Writing in reaction to the *Bellotti* decision, *Citizens United*'s precursor: "While other provisions of the Constitution may limit the government's power to prescribe the allocation of decision making authority, the restrictions on government power contained in the First Amendment do not address, or without more inhibit, the government's power to determine whether corporate decisions should be made by officers or directors without even consulting stockholders, only by stockholders, or only by supermajority or unanimous vote of stockholders.").

204. *See* Stephen Ansolabehere & Nathaniel Persily, *Knowledge Networks, Field Report: Constitutional Attitudes Survey* 101, Q515 (2010) (on file with the *Columbia Law Review*) (reporting that in response to the question, "Should corporations be required to get approval from their shareholders for expenditures related to political campaigns?" 84.5% of those polled answered: "Yes").

say they oppose the high court's Jan. 21 decision to allow unfettered corporate political spending, with 65 percent 'strongly' opposed."[205]

The American public also wants better corporate controls in light of *Citizens United*. Another poll from February 2010 found a "majority of voters strongly favor both requiring corporations to get shareholder approval for political spending (56 percent strongly favor, 80 percent total favor) and a ban on political spending by foreign corporations (51 percent strongly favor, 60 percent total favor)."[206]

Polling in 2012 shows little has changed in the intervening two years. Democracy Corps found in November 2012:

> Two thirds (64 percent) of 2012 voters said that democracy was undermined in this election by big donors and secret money that control which candidates we hear about. . . . Voters give strong support across the board to a series of reforms like closing the revolving door (81%), [and] increased disclosure of outside money (85%).[207]

The 2012 polling has shown how frustrated American voters are with corporate money in politics.[208] Nearly nine in ten Americans agree that there is too much corporate money in politics according to a poll released by Bannon Communications on behalf of the Corporate Reform Coalition in late October 2012. This poll also found overwhelming support for corporate governance reforms in light of *Citizens United*. According to the poll, 81 percent of Americans agree that companies should only spend money on political campaigns if they disclose their spending immediately.[209] This poll also found that more than seven out of ten Americans (71%) favor a requirement that a company's shareholders approve all corporate political spending before the money is spent. These polls conclusively show that a strong majority of the American public supports responding to *Citizens United* by improving corporate governance to protect shareholders.

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205. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, Wash. Post, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html (Feb. 17, 2010).

206. Stan Grenenberg et al., *Strong Campaign Finance Reform: Good Policy, Good Politics*, Greenberg Quinlan Rosner Research, http://www.marylandpirg.org/sites/pirg/files/resources/Campaign-Finance-Memo-Final.pdf (Feb. 8, 2010).

207. Stan Grenenberg et al., *Voters Push Back Against Big Money Politics*, Democracy Corps, http://www.democracycorps.com/National-Surveys/voters-push-back-against-big-money-politics-full-report/ (Nov. 13, 2012).

208. Alex Seitz-Wald, *Everyone Hates* Citizens United, Salon, http://www.salon.com/2012/10/25/people_really_hate_citizens_united/ (Oct. 25, 2012).

209. Liz Kennedy, *Citizens Actually United: The Bi-Partisan Opposition to Corporate Political Spending and Support for Common Sense Reform*, Demos, http://www.demos.org/publication/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and-support (Oct. 25, 2012).

XI. Conclusion

When a billionaire spends his own money in an expensive election like the $7 billion federal election in 2012,[210] such spending may be wasteful vanity, but at least the money is his to squander.[211] As this piece has explored, more difficult questions arise when the heads of organizations spend money belonging to others for political purposes. This phenomenon has arisen in at least two contexts in American elections: in unions, where dues are utilized, and in public corporations, where investor money is used for electioneering. The issue of prior consent for this type of political spending has become pressing now that *Citizens United* has expanded the ability of organizations like corporations and unions to electioneer.[212]

Our nation has struggled with regulating money in politics for centuries.[213] In the normal course of events, the political branches, the 50 states, or voters choose the contours of such regulations. *Knox* is remarkable because it makes the Supreme Court the source of a national paycheck protection rationale, at least in the case of special assessments for public-sector unions. But *Knox* raises the intriguing possibility that a future Supreme Court (instead of a state legislature or Congress) could impose a shareholder consent rule. In the meantime, the onus is on state legislatures, Congress, administrative agencies, and American voters to bring corporate po-

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210. The amount of money spent in elections is of concern. *See* Senator Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 Yale L. & Policy Rev. 235, 235 (Fall 2010) ("This is the real danger of unrestricted campaign expenditures—that elected officials legislate on behalf of corporations, unions, and other powerful organizations instead of their constituents."); *see also* Robert F. Bauer, *Appraising* Citizens United, prepared for a conference at the Cato Institute, http://electionlawblog.org/wp-content/uploads/bauer-cato.pdf (Jan. 23, 2012) ("[I]n the time of billion dollar Presidential campaigns and multi-million dollar Congressional campaigns, the question of campaign expense as a public policy concern might have received more attention in the Court's [*Citizens United*] analysis. In the field of campaign finance, cost is the ground from which spring all other issues of consequence.").

211. Theodoric Meyer, *How Much Did Sheldon Adelson Spend on the 2012 Election?*, Salon, http://www.salon.com/2012/12/23/how_much_did_sheldon_adelson_spend_on_the_2012_election (Dec. 23, 2012); Kevin Drum, *Why Sheldon Adelson Spent $150 Million on the 2012 Election*, Mother Jones, http://www.motherjones.com/kevin-drum/2012/12/why-sheldon-adelson-spend-150-million-2012-election (Dec. 3, 2012).

212. Bebchuk & Jackson, *supra* n. 30, at 84–85 ("[L]awmakers should develop special rules to govern who may make political speech decisions on behalf of corporations" and "[t]he expansion of the scope of constitutionally protected corporate political speech brought about by *Citizens United*, however, makes the need for such rules all the more pressing.").

213. *See e.g. Jackson v. Walker*, 5 Hill 27 (N.Y. Sup. 1843) (Supreme Court of New York discussing an 1829 New York State law concluding, "The legislature evidently thought that the most effectual way 'to preserve the purity of election,' was to keep them free from the contaminating influence of money. . . . The legislature have [sic] said that the thing shall not be done, and that is enough."); *Financing Presidential Campaigns: Report of the President's Commission on Campaign Costs* at 2 (President's Commission 1962) (reporting to President Kennedy on the "rocketing costs of Presidential campaigns, and the recurring difficulties parties encounter in meeting those costs").

litical spending rules in line with union political spending rules. If unions must jump through hoops to exercise their political rights, then corporations should too.[214]

214. Ronald Gilson & Michael Klausner, *Corporations Can Now Fund Politicians. What Should Investors Do?*, Forbes, http://www.forbes.com/forbes/2010/0329/opinions-citizens-united-corporate-shareholders-on-my-mind.html (Mar. 29, 2010) ("The answer is to mandate that corporations let stockholders vote annually on whether they want the company to exercise the rights that *Citizens United* gave them to get into political races.").