COLUMBIA LAW REVIEW
SIDEBAR

VOL. 112 **OCTOBER 8, 2012** **PAGES 206–218**

LABOR SPEECH, CORPORATE SPEECH, AND POLITICAL SPEECH: A RESPONSE TO PROFESSOR SACHS

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Why do corporations spend money on politics? A recent report by the Manhattan Institute found that "most firms, like most individuals, behave rationally and strategically in their spending decisions on campaigns and lobbying, devoting resources in ways that, they have reason to expect, will benefit the corporations themselves and their shareholders."[1] This is not surprising. The Supreme Court's decision in *Citizens United v. FEC*[2] remains deeply unpopular amid fears that corporate money will swamp our political system. Political spending enables corporations to get greater access to government officials and potentially a greater say in designing legislation and regulation.[3] Companies make political contributions and spend on political advertising because it's good for business—their business. Campaign contributions help unions, too. The Service Employees International Union (SEIU) spent an estimated $60 million to help elect Barack Obama in 2008.[4] During the president's first six months in office, no one logged more White

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1. Robert J. Shapiro & Douglas Dowson, Corporate Political Spending: Why the Critics Are Wrong, 15 Legal Pol'y Rep. 1, 3 (2012), available at http://www.manhattan-institute.org/pdf/lpr_15.pdf (on file with the *Columbia Law Review*); see also Editorial, Political Spending Pays, Wall St. J. (June 18, 2012), http://online.wsj.com/article/SB10001424052702303734204577468443488066430.html (on file with the *Columbia Law Review*) (discussing Manhattan Institute study).

2. 130 S. Ct. 876 (2010).

3. For example, the Bush Administration's Energy Task Force met secretly with "oil and gas companies and . . . trade groups—many of them big contributors to the Bush campaign and the Republican Party." Michael Abramowitz & Steven Mufson, Papers Detail Industry's Role in Cheney's Energy Report, Wash. Post (July 18, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701987.html (on file with the *Columbia Law Review*).

4. Chris Lehmann, Andy Stern: The New Face of Labor, Washingtonian, March 2010, at 55, 55, available at http://www.washingtonian.com/articles/people/andy-stern-the-new-face-of-labor/ (on file with the *Columbia Law Review*). The union spent $85 million on political campaigns as a whole in 2008. Kris Maher, SEIU Campaign Spending Pays Political Dividends, Wall St. J. (May 16, 2009), http://online.wsj.com/article/SB124243785248026055.html (on file with the *Columbia Law Review*).

House trips than then-SEIU President Andy Stern. He visited twenty-two times, including seven inside the Oval Office.[5]

The *Citizens United* decision opened up the potential for corporations and unions to give unlimited amounts of money in support of politicians and their campaigns for office. However, at the same time, the Court has continued to restrict the ways in which unions can draw upon their own funds for such purposes. Just this past spring in *Knox v. Service Employees International Union Local 1000,* the Court held that the union had violated the First Amendment rights of objecting nonmembers when it required them to pay a special assessment for political funds.[6] The case presented an unusual situation: The union seemed to have overstepped existing legal requirements for allowing nonmembers to opt out of political spending, and it had already promised to return the funds. Nevertheless, the majority opinion took the occasion to go beyond the question at hand and impose new, more onerous requirements.

Although the disparity between union and corporate political spending has existed for some time,[7] the decisions in *Citizens United* and *Knox* both highlighted and exacerbated the divide. Unions can only collect funds for political donations from those represented employees who do not object. Corporations, on the other hand, can use funds from their general treasury without providing any exit for shareholders who disagree with such spending. This "asymmetry" in treatment is the subject of Benjamin Sachs's article, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United.[8] Sachs argues that the traditional reasons for the distinction—that absent opt-outs, union nonmembers would be "compelled" to give money for political purposes, while corporate shareholders are not—do not hold up under scrutiny. As a result, Sachs contends that "[i]f Congress or the Court intends unions and corporations to be on equal footing with respect to campaign finance, . . . unions and corporations ought to be treated symmetrically when it comes to political opt-out rights."[9]

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5. Maher, supra note 4.

6. 132 S. Ct. 2277, 2293 (2012).

7. See, e.g., Laura K. Chapin, Supreme Court Ruling Empowers Corporations More than Labor Unions, Thomas Jefferson Street Blog, USNews.com (Jan. 22, 2010), http://www.usnews.com/opinion/blogs/laura-chapin/2010/01/22/supreme-court-ruling-empowers-corporations-more-than-labor-unions (on file with the *Columbia Law Review*) ("According to the Center for Responsive Politics, business and corporate interests accounted 70.8 percent of the total U.S. political contributions in 2007–2008, while only 2.7 percent came from labor."). There is some debate about the actual extent of union political contributions. See Tom McGinty & Brody Mullins, Political Spending by Unions Far Exceeds Direct Donations, Wall St. J. (July 10, 2012), http://online.wsj.com/article/SB10001424052702304782404577488584031850026.html (on file with the *Columbia Law Review*) (arguing that actual union donations, including donated work hours, are significantly larger than direct expenditures usually tracked). But even at the highest end of the labor spending range, corporations still spend significantly more. See, e.g., id. (noting that in 2008 corporate PACs donated $2 billion, while union PACs donated $75 million).

8. Benjamin I. Sachs, Unions, Corporations, and Political Opt-Out Rights After *Citizens United*, 112 Colum. L. Rev. 800 (2012) [hereinafter Sachs, Unions].

9. Id. at 869.

I agree with Sachs that the current restrictions on union spending create a significant disparity between corporate and union political power. But I do not agree with his solution. Sachs argues that shareholders suffer from much of the same compulsion to speak as those represented by a union and that therefore shareholders should be given the same opt-out rights that represented nonmembers enjoy.[10] Rather than extending opt-out rights to everyone, however, we should recognize that union political expenditures are part of the costs of doing business. Whether it is labor speech or corporate speech, it is all "business" speech—namely, part and parcel of operating in a modern economy. Neither represented employees nor shareholders should have the right to withdraw their funds from so critical a part of their organization's operations.

I. THE SUPREME COURT'S PERSPECTIVE: LABOR SPEECH AS COMPELLED SPEECH

The Supreme Court's recent decision in *Knox* is the latest in a long line of cases concerning the rights of union dissidents[11] to opt out of certain expenditures.[12] These rights do not matter in right-to-work states, where employees can refuse to join a union but are still covered by union representation. In states that do not allow such refusals, however, unions may require all employees to pay union dues to cover the costs of their representation. The majority of the bargaining unit decides: If most employees want a union, then all are covered and pay; if not, no one gets a union (and no one pays). Employees may not opt out of a union's representation or the costs of the union dues to cover such representation.

However, the Supreme Court has carved out a portion of the union's dues that nonmembers need not pay, even if covered. Unions must segregate the funds that they spend on representation—namely, the costs of bargaining and contract administration—from the funds they expend for political purposes. Beginning with the 1961 *International Ass'n of Machinists v. Street* case, the Court held that employees must be free to withhold union dues from political causes with which they may disagree.[13] Union opponents could be compelled to pay for their actual representation in order to avoid the free-rider problem, but that compulsion only extended to the actual costs of representation.[14]

10. Id. at 866 (suggesting that "resolving the asymmetry by extending opt-out rights to the corporate context is both the better, and the more likely, way forward").

11. For purposes of this piece, the terms "dissidents" and "nonmembers" refer to those employees who are represented by a union but have chosen not to be members. The term "objecting nonmembers" will be used to cover those nonmembers who specifically object to paying union dues for the union's political activity.

12. See, e.g, Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 770 (1961) (imposing opt-out requirements for use of union funds for political speech under Railway Labor Act); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977) (extending opt-out rights to public employees); Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 745 (1988) (extending opt-out rights to workers under National Labor Relations Act);

13. *Street*, 367 U.S. at 768–69.

14. Id. at 760–64.

Politics was a different matter. The carve-out in *Street*, which applied to employees under the Railway Labor Act, was extended to public employees[15] as well as private employees covered by the National Labor Relations Act.[16] Both the courts and administrative agencies have spent a fair amount of time wrestling with the specifics of these carve-outs, creating a jurisprudence that Sachs describes as "byzantine."[17] The Supreme Court has had occasion to weigh in on this process at various points, and it has continued to protect and expand dissidents' political opt-out rights in ways large and small.

In *Knox*, the Court again privileged the rights of represented employees to opt out—or rather, not to have to opt out in the first place—from union political spending.[18] The case concerned an additional dues assessment levied against represented employees, including nonmembers, to fund political activities in California.[19] Two propositions were on the California state ballot: Proposition 75, which would have required an opt-in system for charging members fees to be used for political purposes, and Proposition 76, which would have given the Governor the ability to reduce state appropriations for public-employee compensation.[20] SEIU sought to gather its resources to fund political expenditures, especially in opposition to these propositions. The Court found that the union violated its nonmembers' political opt-out rights when it collected this assessment without providing an opportunity to refuse.[21] Based on the Court's precedents, this holding was uncontroversial.[22] However, the Court went on to find that when levying a special assessment or dues increase for political purposes, public-sector unions could only collect funds from those represented employees who agreed to the collection.[23] For the first time, the Court required a union to secure permission for the collection of political funding rather than simply allowing an opt-out process.

Both the concurrence and the dissent in *Knox* took issue with the opt-in rule.[24] And indeed, this is a significant change in policy, particularly with

15. *Abood*, 431 U.S. at 235–36.

16. *Beck*, 487 U.S. at 761–63.

17. Sachs, Unions, supra note 8, at 818. As an example, the National Labor Relations Board issued thirty-nine opinions between 1996 and 2000 dealing with political opt-out rights. Wilma B. Liebman & Peter J. Hurtgen, The Clinton Boards—A Partial Look from Within, 16 Lab. Law. 43, 72 (2000).

18. Knox v. Serv. Emps. Int'l Union Local 1000, 132 S. Ct. 2277, 2295–96 (2012).

19. The assessment was entitled "Emergency Temporary Assessment to Build a Political Fight-Back Fund." Id. at 2285–86.

20. Id. at 2285.

21. Id.

22. See id. at 2296 (Sotomayor, J., concurring in the judgment) ("When a public-sector union imposes a special assessment intended to fund solely political lobbying efforts, the First Amendment requires that the union provide nonmembers an opportunity to opt out of the contribution of funds. I therefore concur in the Court's judgment.").

23. Id. at 2293, 2296 (majority opinion).

24. See id. at 2296 (Sotomayor, J., concurring in the judgment) (criticizing the new rule as beyond the scope of the questions presented and briefed); id. at 2306 (Breyer, J., dissenting) (agreeing with Justice Sotomayor's concurrence).

signs that the opt-in requirement may soon expand.[25] But at its root is the fear of compulsion—the fear that requiring dissenting members to pay political dues will violate their First Amendment rights. As the Court argues:

> Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues? 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.[26]

As long as the underlying issue is the alleged compulsion of nonmembers to contribute to political causes against their will, the Court will continue to make it more difficult for the union to collect these funds. The Court opined in *Knox* that an opt-out rule "represents a remarkable boon for unions."[27] Such a boon will likely not last for long.

Interestingly, the Court cites to *Citizens United* for the proposition that "[p]ublic-sector unions have the right under the First Amendment to express their views on political and social issues without government interference."[28] It adds: "But employees who choose not to join a union have the same rights."[29] It is this notion of compulsion—that employees cannot be compelled to "speak" against their will—that Professor Sachs takes on in his article.

II. THE SACHS PERSPECTIVE: CORPORATE SPEECH AS COMPELLED SPEECH

Sachs contends there is an asymmetry between the Court's rules for corporations and unions when it comes to political speech.[30] While *Citizens United* enabled both to spend freely on that speech, the Court's opt-out regime applies only to labor. Shareholders have no equivalent right to opt out and insist that their funds not be used for political activity.[31] Sachs recognizes the standard reasoning behind this asymmetry—namely, that represented union nonmembers are compelled to give against their will to the union treasury, while shareholders face no such compulsion. The compulsion is not absolute; nonmembers are free to quit their jobs rather than be forced to pay for union political speech. But requiring this level of opt-out is arguably onerous. In

25. See id. at 2299 (Sotomayor, J., concurring in the judgment) (noting that "the majority strongly hints" of the rule's expansion).

26. Id. at 2290 (majority opinion).

27. Id.

28. Id. at 2295.

29. Id.

30. Sachs has a penchant for addressing asymmetries in labor law. See Benjamin I. Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing, 123 Harv. L. Rev. 655, 659 (2010) (characterizing card check and speedy representation elections as "asymmetry-correcting altering rules").

31. Sachs, Unions, supra note 8, at 805.

comparison, the decision to sell one's shares in a particular company seems to impose a relatively trivial cost.[32]

Sachs seeks to "unsettle" this conclusion.[33] Although quitting one's job may seem a more significant burden than divesting from a stock, Sachs endeavors to show that, in terms of legal principle, the two burdens are more alike than has been appreciated. Using philosophical notions of coercion, he argues that both the decision not to work and the decision not to invest have coercive features and that in both cases economic power over certain economic opportunities is deployed to secure support for a political agenda.[34] He notes that the stock market provides critical investment opportunities, and it is a real economic burden to be shut out of them.[35] On the flip side, the costs of leaving union employment may be smaller than imagined, particularly as such an increasingly small percentage of employers are unionized.[36] Rather than agreeing with the Court that there is only compulsion in one of these contexts, Sachs contends that "the analysis here would support a contrary judgment: a judgment that *both* sets of costs are unacceptable, and that the two contexts are therefore defined by similar degrees of compulsion."[37]

One argument in favor of the current strictures on union spending is that union security agreements involve a degree of state coercion that the corporate structure does not share. Sachs points out, however, that corporations are creatures of the state, and that state law facilitates their creation.[38] Security agreements—in which employers agree to deduct union dues from wages and provide the funds directly to the union—are products of private negotiation and compromise, and as such reflect less state action than the corporate form. Sachs also assesses the nature of the First Amendment interests of both union nonmembers and corporate shareholders. He counters the notion that unions are expressive associations and corporations are not by arguing that "the predominant purpose of both institutions is economic: Corporations act to advance the economic interests of their shareholders, while unions operate to advance the economic interests of their members."[39] Moreover, to the extent that union members have stronger associational interests than shareholders,

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32. The Supreme Court has used this reasoning:

> The critical distinction here is that no shareholder has been "compelled" to contribute anything. Apart from the fact, noted by the dissent, that compulsion by the State is wholly absent, the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason. A more relevant analogy, therefore, is to the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue.

First Nat'l Bank of Bos. v. Belotti, 435 U.S. 765, 794 n.34 (1978).

33. Sachs, Unions, supra note 8, at 807.

34. Id. at 832–44.

35. Id. at 838–43.

36. Id. at 833–38. Sachs estimates that ten percent of U.S. jobs are covered by union security agreements. Id. at 834–35.

37. Id. at 844.

38. Id. at 844–51.

39. Id. at 853.

Sachs notes a critical distinction: "[U]nion membership is never required of anyone. Instead, the objecting employee can only be required to pay dues to the union—membership is 'whittled down to its financial core.'"[40]

Sachs argues persuasively that both shareholders and union-represented employees are at some level economically coerced to support political speech with which they may disagree. And he notes that according to *Citizens United*, political speech cannot be restricted based on the identity of the speaker.[41] Thus, the asymmetry between the opt-out rule for union-represented workers and the lack of such a rule for shareholders must present a constitutional problem. Sachs recognizes that the asymmetry could be corrected in one of two different ways: (1) "Opt-out rights could be extended to shareholders," or (2) "the opt-out right could be withdrawn from employees."[42] However, he argues that extending opt-out rights to shareholders "is both the better, and the more likely, way forward."[43] First, extending the opt-out would help avoid the "considerable price" that employees and shareholders pay to avoid having to fund contrary political speech.[44] Second, Sachs notes the Court's long history of support for opt-out rights in the union context, and thinks Congress would be more inclined to protect shareholders in a similar manner.[45] Thus, he proposes potential federal or state mechanisms for shareholders to remove their pro-rata share of assets from the pool of corporate money available for political speech.[46] He also contends that public employees should have the right to object to mandatory pension investments in funds that include corporate shares and, therefore, fund corporate speech.[47] For those who might object to the costs for these opt-out mechanisms—well, sauce for the goose . . . .

Sachs's solution may have some political juice to it. Other influential commentators have proposed ways for shareholders to restrict their corporation's political spending,[48] and such proposals do "align the interests of a set of political actors that do not always act in concert."[49] However, I fear that Sachs has created a false symmetry. Yes, both shareholders and union-represented employees provide economic support for political speech to which they may object. But there is no reason to stop there. Participating in almost

40. Id. at 856.

41. Id. at 858 (citing Citizens United v. FEC, 130 S. Ct. 876, 905 (2010)).

42. Id. at 865. He notes: "Symmetry itself, that is, demands only that the rule be the same in the two contexts; it does not dictate what the rule should be." Id.

43. Id. at 866.

44. Id.

45. Id.

46. Id. at 864–65.

47. Id. at 866–69. See also Benjamin I. Sachs, How Pensions Violate Free Speech, N.Y. Times, July 12, 2012, at A23, available at http://www.nytimes.com/2012/07/13/opinion/under-citizens-united-public-employees-are-compelled-to-pay-for-corporate-political-speech.html (on file with the *Columbia Law Review*).

48. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., Corporate Political Speech: Who Decides?, 124 Harv. L. Rev. 83, 115–17 (2010) (proposing supermajority approval requirement for corporate political spending).

49. Sachs, Unions, supra note 8, at 865 (conjuring potential coalition of labor, institutional investors, shareholder advocates, and campaign finance reformers).

any economic relationship leads to the same difficulty. The decision to purchase a car from a particular corporation forces the consumer to fund the corporation's political speech just as much as the shareholder does.[50] The purchaser does not have an ownership interest in the corporation, but in both cases the corporation can "coerce" a party to support its political speech by using some of the resources that party has provided in the service of that speech.[51] And neither does Sachs mention another set of players within the corporation that are also "compelled" to provide resources for speech: employees. Workers may have little input into the political activities of their company, but they provide their labor to support the company and its business. An employee has just as strong a case—if not a stronger one—that she should not be compelled to provide labor that either indirectly or, in some cases, directly supports the employer's political speech.[52] After all, an employee faces the same choice that a union dissenter does (in the absence of opt-out rights): Support the speech or quit.[53] And what about taxpayers whose funds go to grants, contracts, tax breaks, or refundable loans to corporations? Are they not the most "compelled," out of all these groups, to support the political speech of the corporations who receive government monies?

Given that all economic relationships can connect the dots between economic support and "compelled" political speech, Sachs must defend his choice to limit his opt-out to union dissidents and shareholders. Upon further inspection, the limitation does not hold up. Sachs notes that both unions and corporations are similarly situated in terms of being organizations with both

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50. In fact, most shareholders have provided no money at all to the corporation. The corporation only receives money upon the initial sale of the stock; after that, shareholders pay their money to other shareholders. Sachs does not address this limitation.

51. For an argument that consumers in certain circumstances are bound to the company through long-term lock-in, and thereby deserve participation rights in corporate governance, see David G. Yosifon, Consumer Lock-In and the Theory of the Firm, 35 Seattle U. L. Rev. 1429, 1430–31 (2012).

52. The employee may, in fact, be required to express a message she does not want to express. See, e.g., Lila Shapiro, Chick-fil-A Anti-Gay Controversy: Gay Employees Speak Out, Huffington Post (Aug. 1, 2012, 5:31 PM), http://www.huffingtonpost.com/2012/08/01/chick-fil-a-anti-gay-controversy-employees-speak-out_n_1729968.html (on file with the *Columbia Law Review*) (discussing reactions of gay and lesbian employees to the controversy). Compelled speech presents a stronger constitutional concern than compelled subsidization of speech, particularly when there is a high risk that the compelled speech will be attributed to the compelled speaker. See Sachs, Unions, supra note 8, at 856–58.

53. With one notable exception, courts have not protected private-sector employees when they suffer discharge or other discipline in the exercise of their own First Amendment rights. For the exception, see Novosel v. Nationwide Ins. Co., 721 F.2d 894, 903 (3d Cir. 1983) (overturning motion to dismiss employee's wrongful termination claim). But see Lisa B. Bingham, Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions, 55 Ohio St. L.J. 341, 348 (1994) ("The prevailing view is that the First Amendment cannot be the basis of a public policy exception in wrongful discharge claims in the absence of state action."); David C. Yamada, Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace, 19 Berkeley J. Emp. & Lab. L. 1, 22 (1998) ("In arguing for protection of private employee speech under the public policy exception, advocates and commentators have turned to the First Amendment and its state counterparts as the requisite sources of public policy. This argument, however, has had little success in the courts.").

economic and political activity. However, simply because the two types of organizations are comparable does not mean that two sets of stakeholders in each organization are similarly comparable. Shareholders and union members may seem akin to each other because both control voting rights within their organizations, and both therefore make up the "polity" of such entities.[54] However, this is actually a bad justification for Sachs, because he is specifically addressing the extent to which *nonmembers* can be coerced into supporting a union's political speech. The union political spending cases concern the extent to which nonmembers who are nevertheless represented by a union must pay for the costs of their representation. As Sachs recognizes, "union membership is never required of anyone."[55] Once an employee becomes a member, the union can require full dues that include political expenses. But there is no analogue to nonmembers in the shareholder context. At best, Sachs can argue that some public employees may have their funds funneled into a pension plan that holds stock in companies and thereby coerces them into participating. However, these employees' holdings in individual companies' shares—however attenuated—retain full membership interests. These interests can be exercised to limit or change the corporation's political expenses, just as a union member can exercise her voting rights to limit such expenses. But nonmembers have no governance rights, and they can claim a positive desire not to have any. Nonmembers who are nevertheless represented by unions much more closely resemble consumers than shareholders. They are not owners, voters, or residual-interest holders; they instead receive and benefit from the union's services.[56] Their dues are intended to prevent them from free-riding on the services provided by the union.[57] Thus, in terms of symmetry, the more apt comparison would seem to be between a union's represented nonmembers and the consumers of a corporation's goods and services. Sachs does not provide an argument for symmetry between these two groups.

It may be possible to extend Sachs's arguments about compelled political speech to these other economic relationships: consumers, employees, taxpayers, even tort victims.[58] But aside from the practical difficulties of extending these opt-outs, they represent a misconception about the role of political speech for corporations and unions. Such speech does not represent an easily segregable "extra" set of activities that is unrelated to the organization's underlying mission. Instead, political contributions and activities are an

54. See Matthew T. Bodie, Information and the Market for Union Representation, 94 Va. L. Rev. 1, 49–51 (2008) [hereinafter Bodie, Information] (discussing "market for lemons" problem in context of shareholders and union members); Matthew T. Bodie, Mandatory Disclosure in the Market for Union Representation, 5 Fla. Int'l U. L. Rev. 617, 618 (2010) (using SEC's mandatory disclosure regime for corporate securities to argue for similar disclosure system in union representation context).

55. Sachs, Unions, supra note 8, at 856.

56. See Bodie, Information, supra note 54, at 36–40.

57. Union members are themselves much closer to participants in a consumer-owner cooperative than shareholders. See id. at 42.

58. Shareholders enjoy limited liability as to the tort victims of the corporation. To the extent the victims fail to collect the full amount of their damages, society forces them to provide a subsidy to the corporation. Thanks to Sam Bagenstos for this point.

integral part of modern business. The asymmetry should be resolved the other way.[59]

III. MY PERSPECTIVE: LABOR SPEECH AS CORPORATE SPEECH

In *International Ass'n of Machinists v. Street*, the Court argued that nonmembers should be forced to share in the costs of their collective representation, but not in the costs of the union's political speech.[60] As Justice Frankfurter argued in dissent, however, political participation is "activity indissolubly relating to the immediate economic and social concerns that are the raison d'etre of unions."[61] He contended that "[t]he notion that economic and political concerns are separable is pre-Victorian."[62] So ever since the Court started down this doctrinal path, critics (such as Justice Frankfurter) have found the Court to be misguided in seeking to separate union representation from political action. A union's economic and political activities are intertwined, and efforts to separate them make no policy sense.[63]

What is new, however, is *Citizens United*'s stirring call for the free speech rights of corporations. The Court asserted the importance of all forms of political speech, including corporate political speech, in "presenting both facts and opinions to the public."[64] The Court specifically defended corporations against a "compelled speech" argument: "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech even if it was

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59. In fairness to Sachs, he takes pains to say that his Article is not endorsing the validity of the union opt-out rule. See Sachs, Unions, supra note 8, at 805 n.22 ("The Article leaves for another day an exploration of whether the union opt-out rule is justified on its own terms . . . ."); id. at 814 n.71 ("This Article . . . is not concerned with the validity of the union rule on its own terms . . . . To this extent, the Article takes the union rule as given . . . ."). However, at other points he asserts that adding opt-out to corporate shareholders would be superior to removing the opt-out for union actors. Id. at 866 (suggesting that adding a corporate opt-out is the better approach). The focus of his Article is to emphasize the compulsion of speech inherent in the corporate form, and to advocate for an opt-out from this compulsion. Although Sachs appears to want both options kept open, his Article's proposed solution would enshrine, rather than eliminate, the union opt-out rule.

60. 367 U.S. 740, 770 (1960).

61. Id. at 800 (Frankfurter, J., dissenting).

62. Id. at 814.

63. Sachs himself cites supporters of this argument. See Sachs, Unions, supra note 8, at 814 n.71 (citing David B. Gaebler, Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds, 14 U.C. Davis L. Rev. 591, 601–02 (1981) ("In many instances, union political activity is integrally related to the pursuit of union representational goals."); Alan Hyde, Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism, 60 Tex. L. Rev. 1, 33 (1981) ("The myth that politics is distinct from economics is characteristic of Western liberal thought, and contemporary American labor law partakes of this myth.")). I have argued for this as well. See Matthew T. Bodie, Mother Jones Meets Gordon Gekko: The Complicated Relationship Between Labor and Private Equity, 79 U. Colo. L. Rev. 1317, 1353 (2008) ("We need to recognize that unions, like their negotiating counterparts, are in business. As such, they should be free to pursue their political objectives as any other business.").

64. 130 U.S. 876, 907 (2010).

enabled by economic transactions with persons or entities who disagree with the speaker's ideas."[65]

Thus, in contrast to Sachs's claim about the political and judicial feasibility of a shareholder opt-out,[66] the decision in *Citizens United* makes it seem like a much more opportune time to challenge the Court's ill-conceived notion that political speech is somehow outside a union's business model. The Court itself is acknowledging that there is a degree of involuntariness or compulsion when political speech is "enabled by economic transactions with persons or entities who disagree with the speaker's ideas."[67] But *Citizens United* stands for the notion that corporations have a critical role to play in the national political dialogue, even though some of the corporation's stakeholders may not agree with its political positions. In the wake of this game-changing decision that elevates the importance of corporate political activity, the Court should recognize the importance of union political speech to the business of collective representation.

It may be uncomfortable for pro-union commentators to argue that political speech is a critical component of representation, because it makes unions look more like every other business hustling for its interests. There is a reason for the public's distaste of *Citizens United*,[68] and it's largely that people don't like corporations spending gobs of money to protect their special concerns. Unions don't want to be lumped in with greedy companies; they have a higher ideological purpose. Indeed, although it hurts his argument, Sachs argues that in contrast with corporations, unions do not just express political ideas—they develop them.[69] This seems a curious concession, especially since corporations seem to be developing political ideas from within, too.[70] But it reflects the notion that unions are special—that they play a

65. Id. at 905.

66. Sachs, Unions, supra note 8, at 865–66.

67. *Citizens United*, 130 U.S. at 905.

68. See Dan Eggen, Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing, Wash. Post (Feb. 17, 2010, 4:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html (on file with the *Columbia Law Review*) ("Eight in 10 poll respondents say they oppose the high court's Jan. 21 decision"); Andrew Joseph, Poll: Most Voters Oppose Citizens United Decision, National Journal Influence Alley Blog (Jan. 20, 2012, 5:40 PM), http://influencealley.nationaljournal.com/2012/01/poll-most-voters-oppose-citize.php (on file with the *Columbia Law Review*) ("62 percent of all voters oppose the Supreme Court's Citizens United decision").

69. Sachs, Unions, supra note 8, at 854–55 ("[W]hile both unions and corporations engage in the expression of political ideas and messages, unions are also the site for the development of political ideas among their memberships.").

70. See Ann Zimmerman & Kris Maher, Wal-Mart Warns of Democratic Win, Wall St. J., Aug. 1, 2008, at A1 ("Wal-Mart Stores Inc. is mobilizing its store managers and department supervisors around the country to warn that if Democrats win power in November, they'll likely change federal law to make it easier for workers to unionize companies—including Wal-Mart."). The American Legislative Exchange Council (ALEC) is an example of corporations banding together to fund the development of state legislative initiatives. See Mike McIntire, Nonprofit Acts as a Stealth Business Lobbyist, N.Y. Times, April 22, 2012, at A1 ("[S]pecial interests effectively turn ALEC's lawmaker members into stealth lobbyists, providing them with talking points, signaling how they should vote and collaborating on bills affecting hundreds of issues like school vouchers and tobacco taxes.").

more important and enlightened role in our politics than companies do. The idea that unions are institutional players in a broad social movement, rather than businesses providing services to their customers, remains stubbornly held.

It makes much more sense, however, to acknowledge and assert that unions are businesses, and that their political spending goes to support their business interests. Unions are in the business of selling representation to employees.[71] As our system is constructed, employees make the decision to purchase these services collectively, rather than individually. But that does not mean the decision is no longer economic. A group of employees with common interests[72] chooses whether or not to buy collective representation from the labor union. That decision is binding on the entire unit: If a majority wants the union, then all are represented, whereas if a majority does not want the union, then none are represented. There is coercion inherent in the relationship, in that the will of the majority dictates whether the purchase will or will not happen. But if most employees choose the union, then the union must represent the entire group. Because all bargaining unit members enjoy the fruits of the representation, the statute provides that all represented employees can be required to pay for the costs of that representation. The Supreme Court has affirmed the right of states to authorize agency-shop agreements in both the public and private employee context, concluding that the collection of dues is warranted in order "to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred."[73]

The money that unions spend on politics is an integral part of the "costs incurred" in collective representation. In fact, political spending is perhaps even more important to unions (as businesses) than it is to most companies. Unions participate in one of the most heavily regulated—and politicized—markets in the country. Decisions by federal and state governments can have a huge impact on their ability to represent employees collectively; in fact, it can be taken away in one fell swoop.[74] Both unions and corporations engage in political speech to advance their economic interests. SEIU did not support President Obama as an outside ideological lark; it supported him because it

71. See Bodie, Information, supra note 54, at 52 ("[T]he union is trying to persuade its potential customers that they should purchase its services."); Samuel Estreicher, Deregulating Union Democracy, 2000 Colum. Bus. L. Rev. 501, 514–16 (discussing market for representative services). See generally Kye D. Pawlenko, Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism, 8 U. Pa. J. Lab. & Emp. L. 651 (2006) (arguing for increased competition between unions for provisions of services to workers).

72. The NLRA allows employees in a particular "bargaining unit" to choose a representative for that group of employees. See 29 U.S.C. § 159(a) (2006) ("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 . . . .").

73. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 181 (2007).

74. See Act of Mar. 11, 2011, 2011–2012 Wisc. Legis. Serv. 29 (West), available at https://docs.legis.wisconsin.gov/document/acts/2011/10.pdf (prohibiting, inter alia, employers from collecting union dues); Kris Maher & Douglas Belkin, Restrictions on Unions Become Law, Wall St. J., Mar. 12–13, 2011, at A3 (describing anti-union effects of 2011 Wisconsin budget act).

believed he would best promote its economic interests. And its work paid off.[75] Businesses understand this.[76] Unions understand this as well. It is the notion that political and representational activities are separate that needs to be pitched out the window.

We are almost always "compelled" to support speech as part of our economic relationships. If I buy a Chick-fil-A sandwich, I cannot refuse to pay for that portion of the price that supports the corporation's opposition to same-sex marriage.[77] The Supreme Court recognized in *Citizens United* that allowing political speech "opt-outs" for all economic transactions would, ultimately, harm the First Amendment rights of the entity itself.[78] Nonmembers who are nevertheless represented by a union may not want to buy that representation, but the majority has decided otherwise, and these nonmembers receive the benefits of the purchase. Part of the purchase price of collective employee representation is the political participation that supports that representation. The nonmember has options: Find another job, or persuade her fellow employees to drop the union. But no other type of economic transaction has been provided the special opt-out for political speech that the Court has provided to union nonmembers.

CONCLUSION

The ability of union consumers—those enjoying the fruits of representation—to opt out of political expenses is asymmetrical and improper. But Professor Sachs's correction for this asymmetry is flawed. In order for his theory to be operationalized fairly, there would need to be opt-out rights for all economic participants who provided support for speech with which they disagree. Instead of attempting to separate these myriad intertwined strands, we should instead recognize that unions' political activities are part of their business of providing representation services to employees. If represented employees are to pay their fair share of representation, these costs must be included as well. To provide otherwise is to unfairly restrict unions in their ability to participate in the marketplace for ideas. On this basic principle, Sachs and I agree.

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75. See Lehmann, supra note 4, at 55 (discussing ties between SEIU and Obama Administration).

76. For a terrific exploration of this point, see Jill E. Fisch, How Do Corporations Play Politics?: The FedEx Story, 58 Vand. L. Rev. 1495, 1503–11 (2005) (discussing FedEx's lobbying for transportation policies).

77. See Kim Severson, A Chicken Chain's Corporate Ethos Is Questioned by Gay Rights Advocates, N.Y. Times, Jan. 30, 2011, at A16 (discussing gay rights advocates' unwillingness to eat Chick-fil-A after learning company supports anti-gay marriage efforts).

78. Citizens United v. FEC, 130 S. Ct. 876, 905 (2010) ("The First Amendment protects [speech funded by the marketplace], even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.").

Preferred Citation: Matthew T. Bodie, *Labor Speech, Corporate Speech, and Political Speech: A Response to Professor Sachs*, 112 COLUM. L. REV. SIDEBAR 206 (2012), http://www.columbialawreview.org/wp-content/uploads/2012/10/206_Bodie.pdf