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CITIZENS, UNITED AND *CITIZENS UNITED*: THE FUTURE OF LABOR SPEECH RIGHTS?

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ABSTRACT

Within hours of its announcement, the Supreme Court's decision in Citizens United v. FEC *came under attack from progressive groups. Among these groups were some of America's largest labor unions—even though the decision applies equally to unions and for-profit corporations. The reason is clear: there exist both practical and structural impediments that will prevent unions from benefitting from* Citizens United *to the same extent as corporations. Therefore,* Citizens United *stands to unleash a torrent of corporate electioneering that could drown out the countervailing voice of organized labor.*

This Article, however, takes a broader view of Citizens United *to explore a possible silver lining for labor. It posits that, in articulating a wide-ranging vision of associations' free speech rights, the Court*

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undermined the intellectual basis of a lengthy string of cases that has limited the First Amendment protection applicable to labor-related speech in other contexts, such as picketing, boycotting, and striking. Additionally, by discounting the First Amendment interests of dissenting shareholders, Citizens United *calls into question the validity of restrictions on unions' use of lawfully collected dues and fees for political speech and new organizing. Accordingly, this Article concludes that* Citizens United *has the potential to impact significantly unions' First Amendment rights outside of the campaign finance arena.*

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INTRODUCTION

> *Today the US Supreme Court lifted the floodgates and started dismantling century-old restrictions on corporate electoral activity in the name of the "free speech rights" of corporations—meaning if you are a "corporate person" (aka a CEO or corporate official), you are now free to hit the corporate ATM and spend whatever of your shareholders' money it takes to elect the candidates of your choice.*
>
> —Anna Burger, former Secretary-Treasurer of the Service Employees International Union, commenting on *Citizens United v. Federal Election Commission*.[1]

The Supreme Court's recent decision in *Citizens United v. Federal Election Commission*[2] made headlines for its controversial holding that corporations have the same First Amendment rights as people to engage in independent election-related speech.[3] Predictably, much of the reaction focused on the extent to which *Citizens United* would afford corporations greater influence over the outcomes of elections, leading opponents of expanded corporate power—including labor unions—to condemn the decision. Yet *Citizens United* also applies to labor unions, freeing them to spend general treasury funds on electioneering[4]—and raising the question of why unions' reactions to *Citizens United* were nearly universally negative.

On one hand, the answer to this question is apparent: when it comes to election-related speech, *Citizens United* is a net loss to unions, as compared to corporations.[5] For several reasons, unions

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1. Press Release, SEIU, Batten Down the Hatches: Supreme Court Opens Floodgates for Corporate Spending in Elections (Jan. 21, 2010), http://www.seiu.org/2010/01/batten-down-the-hatches-supreme-court-opens-floodgates-for-corporate-spending-in-elections.php. Anna Burger retired from the Service Employees International Union (SEIU) on August 11, 2010, after serving as Secretary-Treasurer from 2001 until 2010 and as the first chair of the labor federation Change to Win from 2005 until 2010. *Anna Burger*, SEIU, http://www.seiu.org/a/ourunion/anna-burger.php (last visited Sept. 25, 2011).

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

3. *Id.* at 903 ("[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity.").

4. *See infra* Part II.A.

5. *See infra* Part II.

are unlikely to realize much benefit from being relieved of the obligation to channel certain election advocacy through a political action committee. First, unlike small businesses and associations that may have been deterred from engaging in election advocacy because of the difficulty of creating a political action committee (PAC), many unions either already operate PACs or are affiliated with parent unions that do. Second, even without the accounting and reporting requirements that come with operating a PAC, unions must still comply with other segregation and reporting requirements in order to avoid spending fees submitted by nonmembers on political speech. Third, although *Citizens United* freed unions to spend money derived from sources other than union dues on political speech, it is unlikely that there is much such money to spend.

However, *Citizens United*'s broad articulation of First Amendment principles also has the potential to expand unions' First Amendment rights outside of the election context. In particular, *Citizens United* undermines the reasoning by which the Court has repeatedly—and at times inexplicably—upheld limitations on unions' picketing and boycott activity and made it more difficult for unions to obtain and use for political speech dues and fees paid by represented workers. Thus, *Citizens United* has the potential to expand what unions can say, how they can say it, and how they can pay for that speech.

To reach this conclusion, this Article looks beyond a narrow reading of *Citizens United* that is limited to the campaign finance arena and instead focuses on the Court's articulation of broader First Amendment principles as applied to unions and corporations. Specifically, the Court:

- rejected the argument that some methods of conveying an idea could be restricted provided other methods are available, particularly when those other methods are less effective;
- placed no importance on whether a particular speaker sought to speak in pursuit of profit, rather than engage in self-expression, pursue social change, or vindicate a similar purpose;
- placed significant importance on the rights of listeners to hear all available viewpoints;

- rejected as a rationale for limiting corporate speech the fact that corporations may express views not held by their shareholders;
- stated, without discussion, that a corporation was an association; and
- implied that associations have First Amendment rights that are independent from those of their members.[6]

This Article argues that these principles cannot be reconciled with the Court's decisions upholding the constitutionality of existing limits on labor speech, including Congress's prohibition of certain union-led strikes and boycotts, antitrust limitations on labor organizing and striking by workers who are not covered by labor law, and judge-made law protecting "objecting" workers from having to contribute to union political speech. Part I of this Article extracts from *Citizens United* the relevant principles of First Amendment law that the Court applied to corporations and unions. Part II describes what this Article calls *Citizens United*'s "direct" and "indirect" effects on labor speech and discusses why *Citizens United* may be a net loss in terms of unions' election speech but a win in terms of broader labor speech rights. Finally, Part III addresses some reasons that courts may not adopt this analysis.

I. *CITIZENS UNITED*'S FIRST AMENDMENT

The *Citizens United* petitioners challenged section 203 of the Bipartisan Campaign Reform Act[7] (BCRA), which banned corporations and unions from spending general treasury funds on direct political advocacy for or against federal candidates,[8] as well as on "electioneering communications,"[9] which merely refer to candidates for federal office shortly before an election. Specifically, Citizens United, a nonprofit corporation, sought to use its general treasury funds to make available via "video-on-demand" a ninety-minute

6. *See infra* Part I.

7. 2 U.S.C. § 441b (2006).

8. *Citizens United*, 130 S. Ct. at 886.

9. BCRA defined "[a]n electioneering communication ... as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office" within thirty days of a federal primary or sixty days of a federal general election. *Id.* at 877 (quoting 2 U.S.C. § 434(f)(3)(A) (2006) (internal quotation marks omitted)).

documentary that was sharply critical of Hillary Clinton.[10] Because it wished to distribute the video within sixty days of the 2008 presidential election, and because Citizens United accepted corporate funding, BCRA's ban at least arguably applied.[11]

The Court began by addressing a number of narrow arguments that BCRA did not apply to Citizens United's documentary.[12] Among them was Citizens United's argument that BCRA could not constitutionally be applied to video-on-demand because that medium required a potential viewer to take "a series of affirmative steps" in order to watch the program and thus had a relatively low risk of distorting the political process.[13] The Court brusquely rejected this argument, stating that "any effort by the Judiciary to decide which means of communication are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority," and that, in any event, the line-drawing process would be "questionable" and would chill protected speech.[14] Thus, even though some forms of speech are much less likely to reach listeners, the Court refused to distinguish between different methods of conveying a particular message—either all methods would be available, or none would.

Having dispensed with that and other relatively narrow arguments, the Court turned to the facial challenge to BCRA's independent expenditure provision.[15] The Court began by noting that the ban would apply to advocacy organizations such as the Sierra Club, the National Rifle Association, and the American Civil Liberties Union, and that such application would constitute "classic examples of censorship."[16] Indeed, the majority opinion discussed for-profit corporations and advocacy organizations essentially interchangeably, all under the rubric of "associations,"[17] with the only nod toward the

10. *Id.* at 887.

11. *Id.*

12. *Id.* at 888-96.

13. *Id.* at 890.

14. *Id.* at 890-91.

15. *Id.* at 894.

16. *Id.* at 897.

17. *Id.* at 900 ("The Court has thus rejected the argument that the political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"); *id.* at 904 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); *id.* at 906-07 ("*Austin* ... permits the

possibility of distinguishing between them—and an ambivalent one at that—coming in Justice Scalia's concurrence.[18] Thus, the Court overruled *Austin v. Michigan Chamber of Commerce*—which upheld campaign finance restrictions that applied to corporations but not unions or advocacy groups[19]—because that holding "permit[ted] the Government to ban the political speech of millions of associations of citizens."[20] Further, the Court implied that, as associations, corporations had First Amendment rights independent from those of their constituent shareholders or members. Specifically, the Court concluded that BCRA was overinclusive in part because it encompassed small corporations controlled either by one person or by a handful of people.[21] But, given that those people could engage in virtually identical political speech in their personal capacities, it is difficult to see whose First Amendment rights would be impeded under BCRA—unless the corporation has its own First Amendment rights.

The Court continued, concluding that the harms of stifling corporate, or associational, speech were not alleviated by the fact that corporations were free to form political action committees that could make independent expenditures, subject to funding restrictions and reporting requirements.[22] Here, the Court listed in detail the various reporting requirements that apply to PACs, concluding that,

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Government to ban the political speech of millions of associations of citizens."); *id*. at 908 ("Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.").

18. *Id*. at 928 (Scalia, J., concurring) ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons*.... The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not 'an individual American.'"); *see also id*. at 927 ("Both corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets.... The dissent offers no evidence—none whatever—that the First Amendment's unqualified text was originally understood to exclude such associational speech from its protection."); *id*. at 929 ("The [First] Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals.").

19. 494 U.S. 652 (1990). The *Austin* Court concluded that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries," threatened to distort the political process. *Id*. at 660.

20. *Citizens United*, 130 S. Ct. at 906-07.

21. *Id*. at 911.

22. *Id*. at 897.

in light of those "onerous" requirements, "a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign."[23] Accordingly, the Court concluded that restrictions on corporate independent expenditures are restrictions on speech whose "purpose and effect are to silence entities whose voices the Government deems to be suspect."[24] In other words, "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster,"[25] and administrative burdens on their political speech are impermissible.

The *Citizens United* majority identified two First Amendment interests impacted by BCRA's independent expenditure provisions: those of the corporate would-be speakers, and those of the public, who might want to hear from "the voices that best represent the most significant segments of the economy."[26] Thus, *Citizens United* flatly rejected the possibility of distinguishing corporate speakers from other speakers based on their particular social role as profit-making enterprises for purposes of establishing the applicable level of First Amendment protection.[27] In other words, despite the fact that corporations' election-related speech must "aim 'to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities,'"[28] corporate speech is equally worthy of First Amendment protection as speech by nonprofit advocacy groups. In fact, a profit motive could result in unique and valuable insights that might be lost if corporate speakers were excluded from election-related speech.[29]

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23. *Id.* at 897-98.

24. *Id.* at 898.

25. *Id.* at 900 (quoting Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 8 (1986)). The Court further stated that it had previously "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.*

26. *Id.* at 907 (quoting McConnell v. FEC, 540 U.S. 93, 257-58 (2003) (Scalia, J., concurring in part)).

27. *Id.* ("By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public.").

28. *Id.* at 974 (Stevens, J., concurring in part and dissenting in part).

29. *Id.* at 912 (majority opinion) ("On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials."); *see also id.* at 929 (Scalia, J.,

Countervailing interests fell comparatively flat: the Court rejected as compelling state interests the prevention of corruption or its appearance,[30] the protection of "dissenting shareholders from being compelled to fund corporate political speech,"[31] and the need to avoid distortion of the political process or the potential for corporations to amplify their message in the political marketplace based on their winnings in the economic marketplace.[32] In other words, political speech that is motivated by some CEO's belief that passage of particular legislation or election of a certain candidate will benefit the corporate bottom line is as valuable as political speech sparked by any other motivation.

With this holding, *Citizens United* reversed the course that the Court had set in other campaign finance cases—particularly, for purposes of this Article, in *FEC v. Massachusetts Citizens for Life* (*MCFL*).[33] *MCFL* distinguished corporations from pure advocacy organizations, holding that independent expenditure restrictions like those at issue in *Citizens United* were unconstitutional as applied to nonprofit advocacy organizations that did not accept contributions from corporations or unions.[34] In so holding, the Court relied explicitly on MCFL's purpose, which was to engage in political advocacy.[35] As the Court stated, "MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."[36] Thus, the *MCFL* Court endorsed the view that political speech by an organization whose

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concurring) ("[T]o exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.").

30. *Id.* at 908-11 (majority opinion).

31. *Id.* at 911. The Court held both that this interest was not compelling and that BCRA was both under- and over-inclusive, because, on the one hand, BCRA permitted general treasury-funded electioneering communications outside of the thirty- or sixty-day windows; and, on the other, BCRA applied to corporations with only one shareholder even though, in those corporations, there was no dissenting contingent to protect. *Id.*

32. *Id.* at 904-07.

33. 479 U.S. 238 (1986).

34. *Id.* at 263-64.

35. *See, e.g.*, *id.* at 264 (stating that the fact that MCFL "was formed for the express purpose of promoting political ideas, and cannot engage in business activities" was crucial to the Court's holding).

36. *Id.* at 259.

mission is advocacy of a social or political issue is not only distinguishable from corporate political speech but is also entitled to more First Amendment protection. *Citizens United*, however, either placed no significance on the organizational mission, or else concluded that a profit-making motive was as important, from a First Amendment perspective, as an "inherently political" motive.

Thus, *Citizens United* rejected *MCFL*'s conclusion that a speaker's purpose or motivation, including profit motive, could be determinative of his or her First Amendment rights.[37] It also declined to weigh the probable effectiveness of the method of communication as part of the First Amendment calculus. The next section will discuss how these principles might apply to unions in and outside of the campaign finance context.

II. *CITIZENS UNITED* AND LABOR UNIONS

Curiously, *Citizens United* hardly referred to unions at all, even though the decision applies to unions,[38] and even though the majority opinion talked extensively about other types of associations—such as news organizations and nonprofits, like the Sierra Club—and the importance of their political speech to American democ-

37. *Citizens United*, 130 S. Ct. at 913 ("The First Amendment does not permit Congress to make ... categorical distinctions based on the corporate identity of the speaker and the content of the political speech."). In dissent, Justice Stevens noted some ambiguity in the majority opinion as to whether the speaker's motivation might still play *some* role in the First Amendment calculus. *See id.* at 936 n.12 (Stevens, J., concurring in part and dissenting in part). However, in light of the Court's ringing endorsement of the value of corporate speech to the political process and the Court's persistent broad-brush treatment of corporations as associations, it is hard to identify any such limiting principle in the majority opinion.

38. *Id.* at 886-87 (majority opinion) (stating that section 302 of BCRA applies to unions). Though the majority opinion in *Citizens United* does not speak directly to whether unions are encompassed in its holding, there is nothing in the opinion that suggests a basis upon which unions might be excluded. Further, Chief Justice Roberts's concurring opinion states explicitly that the majority opinion applies to both unions and corporations, *id.* at 917 (Roberts, C.J., concurring) (referring to corporations and unions), and neither the majority opinion nor the other opinions dispute that statement. Moreover, within days of *Citizens United*'s announcement, the Federal Election Commission stated that it would no longer enforce the independent expenditure provisions of BCRA against either corporations or unions. News Release, FEC, FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC* (Feb. 5, 2010), *available at* http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml. Thus, even if it were theoretically possible that the Court meant to exclude unions from *Citizens United*'s holding, it certainly did not convey as much.

racy.[39] Against the backdrop of this wide-ranging opinion, the Court's failure to discuss labor unions was particularly unusual because the *Austin* Court had concluded that "crucial differences between unions and corporations" meant that certain justifications for restricting political speech by corporations did not apply to unions. In particular, *Austin* focused on the fact that, unlike corporations, "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."[40]

Yet, *Citizens United* has the potential to have both direct and indirect effects on unions. By direct effects, I mean those that are a direct consequence of the case's holding that the "independent expenditure" provisions of BCRA are unconstitutional. By indirect, I mean those that are outgrowths of the Court's articulation of general First Amendment principles. This Article will discuss these in turn.

A. Citizens United*'s Direct Effects*

Most obviously, *Citizens United* means that unions, like corporations, will be free to spend money from their general treasuries on independent advocacy for or against particular candidates. Theoretically, this could mean that unions will be able to spend more money on elections, with resulting increases in political clout. But, as a practical matter, unions' influence must be measured as a function of corporations' clout. Because corporations in the aggregate have much more money to spend than do unions—and because corporations' collective political expenditures dwarf unions'

39. *Citizens United*, 130 S. Ct. at 896-97.

40. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 665-66 (1990).

political expenditures[41]—it is likely that *Citizens United* will only increase business interests' comparative advantage over unions.

Even beyond sheer disparities in spending power, there exist structural reasons that *Citizens United* will mean relatively little for unions' political influence. First, as to the PAC requirement itself, although creating a PAC and complying with the rules that govern its operation is surely taxing, many unions already have in place both PACs themselves and mechanisms for complying with election law.[42] Additionally, there is relatively little chance that an "upstart" union will not be able to "establish a PAC in time to make its views known regarding candidates and issues in a current campaign."[43] Not only are there simply not very many upstart unions to begin with, those that do exist generally affiliate with a venerable national or international union that is well accustomed to complying with election law.[44]

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41. In the months after *Citizens United* was announced, unions dramatically outspent corporations on independent campaign advertising. T.W. Farnam, *Unions Spending Big on Campaign Ads*, WASH. POST, July 7, 2010, at A4, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070602133.html?sid=ST2010070605201 (discussing corporate and union spending between January and July 2010). However, that trend reversed once midterm election campaigning began in earnest. The Center for Responsive Politics reports that, whereas labor groups and related individuals spent about $96 million on political campaigns in 2010, business groups and related individuals spent $1.3 billion. *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates and Parties*, CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/overview/blio.php (last visited Sept. 25, 2011). In that regard, it is worth noting the recent disclosure of an e-mail from one coal-industry executive to several others, stating that "a number of coal industry representatives recently have been considering developing a 527 entity with the purpose of attempting to defeat anti-coal incumbents in select races." E-mail from Roger L. Nicholson, Senior Vice President, Int'l Coal Corp., Inc. (July 27, 2010, 09:45 EST), *available at* http://abcnews.go.com/site/page?id=11272702. The e-mail referenced *Citizens United*: "With the recent Supreme Court ruling, we are in a position to be able to take corporate positions that were not previously available in allowing our voices to be heard." *Id.*

42. A search shows that 1607 active labor organizations reported to the Department of Labor that they had a PAC during Fiscal Year 2010. *See* U.S. Dep't of Labor, *Union Search*, http://kcerds.dol-esa.gov/query/getOrgQry.do (select "Search Active Unions Only" and "PAC"; then select "2010" in the "Fiscal Year" field; then follow "submit" hyperlink) (last visited Sept. 25, 2011). A total of 20,897 labor organizations filed reports for Fiscal Year 2010. *Id.* (select "Search Active Unions Only"; then select "2010" in the "Fiscal Year" field; then follow "submit" hyperlink). For a listing of PACs in the United States, see, for example, FEC, PACRONYMS (2009), *available at* http://www.fec.gov/public/pacronyms/Pacronyms.pdf.

43. *Citizens United*, 130 S. Ct. at 898.

44. "Independent" unions filed only 818 union disclosure reports with the Department of Labor for Fiscal Year 2010, suggesting that there are a maximum of 818 private-sector unions in the country that are not affiliated with a parent union. *See* U.S. Dep't of Labor, *Union*

Second, *Citizens United* created the possibility of using funds that come from sources other than member dues.[45] However, unions are nonprofit organizations, and the majority of their income typically comes from dues and fees rather than other sources, such as investments and loans.[46] Thus, unions simply may not have available to them significant untapped sources of income with which to engage in political speech.

Additionally, unions' uses of dues and fees for political purposes are encumbered even beyond BCRA's independent expenditure provision. For example, unions are not permitted to use for political purposes dues and fees submitted by members who object to such use,[47] and they must publicly disclose many of their expenditures and receipts pursuant to the Labor Management Reporting and Disclosure Act.[48] This means that even if unions are excused from the segregation and reporting requirements that election law imposes, they must nonetheless carefully track their spending and ensure that only authorized funds go toward political activities. Thus, unless *Citizens United* undermines these requirements as

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Search, http://kcerds.dol-esa.gov/query/getOrgQry.do (select "Search Independent Unions Only"; "Search Active Unions Only"; then select "2010" in the "Fiscal Year" field; then follow "submit" hyperlink) (last visited Sept. 25, 2011). However, even that number is inflated because some unions file multiple reports during the year. *See, e.g.*, *id*. Moreover, some unaffiliated unions—like the National Education Association—are themselves large, venerable unions. *See id*. Thus, the number of small independent unions that may be unable to comply with campaign finance law is much smaller than 818.

45. *See* 2 U.S.C. § 441b(b)(4)(A)(ii) (2006).

46. For example, one of the largest local unions in the country, SEIU Local 32, reported on its 2009 LM-2 that its cash receipts that year were about $74.7 million, of which $65.3 million came from dues. *See* U.S. Dep't of Labor, *Union Search*, http://kcerds.dol.esa.gov/query/getOrgQry.do (select "SEIU-SERVICE EMPLOYEES" in the "Union Name" field; select "2009" in the "Fiscal Year" field; follow "Submit" hyperlink; select the box next to "SERVICE EMPLOYEES NATIONAL HEADQUARTERS"; select the "Receipts Report"; then follow "Submit" hyperlink) (last visited Sept. 25, 2011). The union owned other assets, including investments, but didn't sell them off during the year. *See id*. For its part, the SEIU obtained more than two-thirds of its 2009 receipts from a per-member tax paid by local unions, with most of the rest coming from loans and rental income. *See id*. (select "SEIU-SERVICE EMPLOYEES" in the "Union Name" field; select "2009" in the "Fiscal Year" field; follow "Submit" hyperlink; select the box next to "SERVICE EMPLOYEES"; select the "Receipts Report"; then follow "Submit" hyperlink) (last visited Sept. 25, 2011).

47. *See infra* Part II.A.2.a; *see also* Commc'n Workers v. Beck, 487 U.S. 735, 762-63 (1988); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977).

48. 29 U.S.C. § 431(b) (2006) (requiring unions to file financial reports containing information about assets, liabilities, receipts, salaries, loans made, and other disbursements).

well—a point to which I will return[49]—*Citizens United* did not free unions from the need to segregate "political" funds from other funds, nor from the need to comply with reporting requirements in order to engage in political speech.

Finally, whatever the difficulty of complying with BCRA, the availability of funds with which unions might engage in political speech is substantially limited by the well-documented "representation gap" between the number of workers who are union members and the number of workers who would like to belong to a union.[50] Whatever the cause of the representation gap, its effect is that unions will receive fewer dues with which to fund political advocacy than they would if everyone who wanted to belong to a union did belong. Further, if, as has been persuasively argued, the representation gap is largely attributable to employers' abilities to defeat unionization drives through coercive tactics such as retaliating against pro-union workers and holding mandatory, closed-door meetings with employees in order to disparage the union,[51] then it is all the more troubling: corporations will be able to enjoy a "virtuous cycle," in which they can defeat unionization drives with increasing effectiveness, which will in turn leave unions weaker and less able to oppose hostile legislative reform, judicial nominees, and the like.[52]

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49. *See infra* Part II.B.2.b.

50. Only about 12 percent of workers currently belong to a union. News Release, Bureau of Labor Statistics, Union Members—2010 (Jan. 21, 2011), *available at* http://www.bls.gov/news.release/pdf/union2.pdf; *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528 (2002). However, in a 2005 survey, over half of workers said that if an election were held today, they would vote for a union. Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever* (Econ. Policy Inst., Briefing Paper No. 182, 2007), *available at* http://www.sharedprosperity.org/bp182/bp182.pdf. Further, that number had been steadily rising over at least the previous two decades. *Id.* When given a choice between representation by a union and formation of a workplace committee comprised of workers and management that would get together to discuss problems, a plurality of workers still indicated they would choose a union, and a large majority of workers wanted one or the other. *See id.* at 7. Thus, at least as of 2005, most workers wanted to belong to a union, and a large majority wanted more voice on the job in some form.

51. *See* Estlund, *supra* note 50, at 1543-44; Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 379-81 (2001) (citing literature showing the "causal role of employer opposition in union election losses").

52. The *Citizens United* majority was entirely unconcerned about the possibility that some corporate voices might drown out others. Rather, it repeatedly invoked the metaphor of the "marketplace of ideas," which derives from *Abrams v. United States*, 250 U.S. 616, 630 (1919)

Thus, it is doubtful that the freedom to spend general treasury funds on independent political speech will ultimately make much difference to unions. To the contrary, it may even prove to be a net loss if it results in a relatively greater amplification of corporate political speech.

It is not surprising, then, that several unions have condemned *Citizens United*, and that the SEIU has called for a constitutional amendment to overturn *Citizens United*.[53] Of course, this opposition could have a variety of motivations: unions may believe, rightly or wrongly, that *Citizens United* holds little meaningful promise for them in light of corporations' greater spending power; or they may perceive greater benefit in aligning themselves with popular outrage about *Citizens United* than in getting out from under BCRA; or they may believe, implausibly, that they can get the best of both worlds in the form of a constitutional amendment that limits corporate, but not union, speech. In any event, it is evident that some labor unions do not see a significant benefit in *Citizens United*, and considering the probable effects of overturning of BCRA's independent expenditure provisions alone, it is difficult to conclude that they are wrong.

But, the *Citizens United* Court also articulated broad First Amendment principles that will have application in areas of First Amendment doctrine that are unrelated to campaign finance, assuming the Court does not limit *Citizens United* to the campaign finance context in a later case. Thus, the next section explores what *Citizens United* means for other aspects of labor speech doctrine and whether it might give labor unions an unexpected cause for celebration.

(Holmes, J., dissenting) (stating that "the best test of truth" of an idea is "the power of the thought to get itself accepted in the competition of the market"). Citizens United v. FEC, 130 S. Ct. 876, 906 (2010). Thus, the majority evidently views the possibility that some voices might be drowned out by corporate or union election advocacy as a net positive, because, by definition, an idea that fails to gain traction in the marketplace is a wrong idea. Of course, it is hardly news that, particularly in national elections, large organizations, including PACs, dominate the media, and small organizations and individuals are at a distinct disadvantage. However, to the extent that unions are a significant counterweight to corporations, it would be troubling if, as I predict, labor political expression is artificially limited by aspects of labor law that prevent unions from growing commensurate with employees' support.

53. *E.g.*, Ari Berman, *Citizens Unite Against 'Citizens United,'* THE NATION (July 29, 2010), http://www.thenation.com/article/38032/citizens-unite-against-citizens-united.

B. Citizens United*'s Indirect Effects*

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.[54] This Section describes relevant portions of the Court's pre-*Citizens United* labor speech doctrine and discusses the extent to which it is undermined by *Citizens United*.

1. Labor Picketing and Boycotting, and the Waning Relevance of Unions' "Economic" Mission

In the First Amendment context, the Court has distinguished between labor, commercial, and political speech.[55] In so doing, the Court has focused on the form of the speech, the identity and general "mission" of the speaker, and the speaker's goal in making the particular utterance.[56] However, as discussed above,[57] *Citizens United* largely jettisoned these considerations from the First Amendment calculus, leaving only what this Article will call "structural," or categorical, aspects of speech as permissible bases on which to assign degrees of First Amendment protection. Thus, in *Citizens United*, once the Court identified the speech at issue as falling into the category of election-related speech—something that was not difficult to do in light of its focus on a presidential candidate—the conclusion followed nearly automatically that the speech was entitled to the same full First Amendment protection as any other speech falling into that category, regardless of whether Citizens United was a corporation or whether its goal was to benefit financially by helping to elect a candidate who would enact favorable economic policies.

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54. *See, e.g.*, 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.").

55. *See generally id.* (discussing these distinctions).

56. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762-65 (1976).

57. *See supra* Part I.

This section traces the development of the Court's First Amendment doctrine as it pertains to labor picketing, boycotting, and striking, and then discusses the potential impact thereon of *Citizens United*.

a. Labor Picketing

The National Labor Relations Act (NLRA),[58] as amended by the Labor Management Relations Act (LMRA),[59] contains a number of prohibitions on picketing by labor unions. First, section 8(b)(1)(A), as interpreted by *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*,[60] prohibits picketing that involves "violence, intimidation, and reprisal or threats thereof"[61] in the service of coercing employees to join or refrain from joining a union.[62] Additionally, and more importantly for purposes of this Article, the NLRA bans even peaceful picketing under a number of circumstances. Section 8(b)(4)(i) makes it an unfair labor practice for a union to picket in order to "induce or encourage" employees to strike or boycott if the union has one or more of four impermissible goals: (1) to "forc[e] or requir[e]" an employer or self-employed person to join a union or to agree to boycott another employer; (2) to "forc[e] or requir[e]" anyone to stop "using, selling, handling, transporting, or otherwise dealing" with the products of another employer, or to force an employer to bargain with the union even though the union is not the certified representative of the relevant employees; (3) to "forc[e] or requir[e]" any employer to bargain with a union when another union is already the certified representative of the relevant employees; or (4) to "forc[e] or requir[e]" any employer to assign work to members of one union over another.[63] Further, under section 8(b)(7), it is an unfair labor practice for a union to picket, or threaten to picket, when the goal of the picketing is to "forc[e] or requir[e]" the employer to recognize or bargain with a union that has not been

58. 29 U.S.C. §§ 151-69 (2006).

59. Labor Management Relations (Taft-Hartley) Act, 80 Pub. L. No. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-44, 167, 171-83, 185-87 (2006)).

60. 362 U.S. 274 (1960).

61. *Id.* at 290.

62. 29 U.S.C. § 158(b)(1)(A).

63. *Id.* § 158(b)(4)(i)(A)-(D).

certified as the bargaining representative of the relevant employees and when one of the following is true: (1) another union has been properly recognized as the relevant employees' bargaining representative; (2) an NLRB election has taken place within the preceding year; or (3) the picketing has been going on for more than thirty days without the union having filed for an NLRB election.[64] Finally, in addition to these statutory prohibitions, the Court has upheld the right of states to enjoin picketing expressing a viewpoint that is contrary to state policy.[65]

First Amendment challenges to these restrictions on labor picketing have often failed based on the rationale that picketing is at least partly coercive conduct, which the First Amendment does not protect. In some of these cases, violent conduct served to justify regulating the speech aspects of picketing. The Court held that when picketing was accompanied by "violence on a considerable scale"[66] and "enmeshed with contemporaneously violent conduct,"[67] it could not be separated from the violence for First Amendment purposes. Instead, it was to be treated as part of a single course of conduct that had the potential to coerce listeners, not through speech, but through physical harm or the threat thereof.[68]

However, the Court has also held that even nonviolent labor picketing can be "coercive," because "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[69] In this view, picketing itself—walking back and forth while holding signs—seems to be the "conduct" justifying limitations on union advocacy.[70]

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64. *Id*. § 158(b)(7).

65. Hughes v. Superior Court, 339 U.S. 460, 466 (1950) (holding that the state could ban "industrial" picketing that subverts its "policy against involuntary employment on racial lines").

66. Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 291, 298-99 (1941) (holding that the power to limit picketing comes from the power to limit coercion and that when picketing has previously involved substantial violence, future picketing can also be enjoined); *see also* Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 205 (1921) (holding that the Clayton Act's labor exemption was not applicable to strikes and picketing that involved violence).

67. *Meadowmoor Dairies*, 312 U.S. at 292.

68. *Id*. at 294.

69. Int'l Bhd. of Teamsters, Local 695 v. Vogt, 354 U.S. 284, 289 (1957).

70. *See, e.g.*, NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S.

The Court has set forth multiple accounts of how even nonviolent picketing can "induce" action by either individuals viewing the picket line or the target of the picket line. First, it has suggested that picketing may intimidate onlookers such that they will be unwilling to cross the picket line, regardless of their sympathies—or lack thereof—for the picketers' cause.[71] Second, at least one member of the Court has theorized that union members may simply comply with any labor picket line they see out of reflexive loyalty to the union movement.[72] Finally, the Court has reasoned that labor picketing can be limited consistent with the First Amendment because, regardless of the reasons that customers or suppliers honor a picket line, a successful picket line can damage its target economically, thereby compelling the target to cede to the union's demands.[73]

Based on its conclusion that labor picketing involves an element of coercive conduct, the Court has held that it can be restricted when it has an impermissible goal, regardless of how likely the picketing is to accomplish that goal. Examples of impermissible goals include seeking to compel an employer to violate law[74] or state and federal policies.[75] The Court has also upheld the NLRA's prohibitions on picketing as justified by Congress's desire to promote labor peace and economic stability.[76]

58, 77 (1964) (Black, J., concurring) (stating that picketing "includes at least two concepts: (1) patrolling, that is, standing or marching back and forth or round and round on the street, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; (2) speech, that is, arguments, usually on a placard, made to persuade other people to take the picketers' side of a controversy" (citations omitted)).

71. *See* Truax v. Corrigan, 257 U.S. 312, 327-28 (1921); *cf.* Bakery & Pastry Drivers & Helpers Local 803 v. Wohl, 315 U.S. 769, 775 (1942) (implying that picketing could be deemed improper when it caused customers to "turn away").

72. NLRB v. Retail Store Emps. Union Local 1001 (*Safeco*), 447 U.S. 607, 619 (1980) (Stevens, J., concurring in part and concurring in the result) (explaining that picketing is a unique form of communication because it "calls for an automatic response to a signal, rather than a reasoned response to an idea").

73. *Vogt*, 354 U.S. at 292.

74. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 504 (1949) (upholding an injunction against picketing that sought to encourage an employer to boycott another company, in violation of antitrust law).

75. *See* Hughes v. Superior Court, 339 U.S. 460, 466 (1950).

76. *Safeco*, 447 U.S. at 611 (plurality opinion) (stating that NLRA policy was to protect secondary parties from becoming embroiled in labor disputes, and that picketing that threatened secondary parties could be restricted); Int'l Bhd. of Teamsters, Local 309 v. Hanke, 339 U.S. 470, 477-79 (1950) (holding that a state could enjoin peaceful picketing based on the

Curiously, limits on unions' rights to picket have endured as courts have expanded the First Amendment protection afforded to others who engage in picketing, even when that picketing is accompanied by violence[77] or conducted in pursuit of illegal or contrary-to-policy goals.[78] For example, eight members of the Supreme Court agreed that the First Amendment shielded members of the Westboro Baptist Church from tort liability arising out of its highly offensive picketing at the funerals of armed services members.[79] The Court concluded that even though Westboro's "contribution to public discourse may be negligible," the First Amendment nonetheless trumped tort liability because "Westboro addressed matters of public import on public property, in a peaceful manner."[80] Interestingly, the *Phelps* Court listed "a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral," but did not enumerate restrictions on secondary labor picketing among them.[81] As it seems unlikely that the Court did not think of labor picketing, this omission may have been a tacit recognition that the Court's labor picketing doctrine is simply in a class of its own.

The Court's most recent explanation for its different treatment of unions, as compared to other types of groups (such as the Westboro Church), rests on its perception that union picketing is essentially economic. Thus, the Court has distinguished labor picketing from "public-issue picketing," calling the latter "an exercise of ... basic constitutional rights in their most pristine and classic form,"[82] while

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determination that picketing would undermine small businesses by subjecting them to "dictation as to business policy").

77. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926 (1982) (holding that civil rights picketing and other conduct is protected by First Amendment, even though scattered incidents of violence had taken place); Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (holding that white supremacist speech is protected unless violence is "imminent").

78. For example, the Supreme Court has held that limitations on the conduct of protestors at abortion clinics must be narrowly tailored, even though the state has a strong interest in protecting its citizens' freedom from unwanted speech while seeking medical care. Hill v. Colorado, 530 U.S. 703, 715, 728 (2000).

79. Snyder v. Phelps, 131 S. Ct. 1207 (2011) (Roberts, C.J., joined by Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan, J.J.; Breyer, J., filed a separate concurring opinion).

80. *Id.* at 1220.

81. *Id.* at 1218 (listing picketing in front of a residence and at abortion clinics).

82. Carey v. Brown, 447 U.S. 455, 465-66 (1980) (rejecting an Illinois state statute that permitted labor picketing more broadly than other picketing and distinguishing between labor

labeling the former "speech of an entirely private and economic character."[83] Likewise, the Court has reasoned that certain picketing that could be restricted in the labor context nonetheless could not be restricted in other contexts, because "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity."[84]

More recently, the Court backed off the position that all union speech is inherently "economic," rather than "public issue." In *DeBartolo v. Florida Gulf Coast Building & Construction Trades Council*,[85] the NLRB ordered a union to stop distributing handbills asking consumers not to patronize a shopping mall because of a dispute with a contractor that had been hired to work on the mall.[86] Notably, the handbills were phrased in terms of the impact of the labor dispute on the larger community, stating, for example, that substandard wages would diminish workers' buying ability and threaten the prevailing wage standard in the entire community.[87] The Court held, as a matter of constitutional avoidance, that the NLRA should not be construed to forbid this handbilling.[88] But the Court neither "suggest[ed] that communications by labor unions are never of the commercial speech variety," nor did it even determine conclusively that the handbilling at issue was not commercial.[89] Thus, even as the Court seemed to be on the verge of stating outright that political speech by unions was entitled to the same degree of constitutional protection as other political speech, it

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picketing from "public-issue picketing ... on issues of broader social concern").

83. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763 n.17 (1976); *see also* Bd. of Trustees v. Fox, 492 U.S. 469, 478 (1989) (commercial speech receives less First Amendment protection than political speech).

84. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912-13 (1982). Secondary boycotts involve attempts to coerce neutral employers to get involved in labor disputes by threatening a strike or consumer boycott.

85. 485 U.S. 568 (1988).

86. *Id.* at 573. The NLRB concluded that the union's conduct violated the NLRA's prohibition on secondary boycott activity. *Id.*

87. *Id.* at 570 n.1.

88. *Id.* at 575-76.

89. *Id.* at 576. Though the *DeBartolo* Court referred to the possibility that union speech was commercial speech, the Court has never applied its commercial speech doctrine to labor unions—rather, as described in this and the following section, the Court has applied a test that is *less* stringent than the commercial speech test to restrictions on labor picketing and boycotting.

backed off, allowing for the possibility that the union's speech might still be primarily economic in nature.

In sum, although the Court has long recognized that peaceful picketing that communicates the facts of a labor dispute is expression to which the First Amendment applies,[90] it has also limited the scope of applicable First Amendment protection when picketers are unions or union members. These cases initially reasoned that picketing could be regulated because it constituted "conduct" rather than "speech."[91] More recently, though, the Court has expanded protection for "coercive" picketing in nonlabor contexts. The Court has relied on unions' "economic" motive for picketing, regardless of the expressive content, to contrast union picketing from what the Court has characterized as true political or public-interest picketing.

b. Strikes and Boycotts

The NLRA prohibits not only secondary picketing[92] but also secondary strikes or boycotts—those designed to force a neutral employer to become involved in pressuring an employer with which the union has a primary dispute.[93] It also prohibits most "hot cargo" agreements—agreements that a secondary employer will not handle the goods or services of a primary employer—as well as requests from one union to another to go on strike or refuse to handle goods in order to put pressure on a primary employer.[94]

As with picketing, the Court has upheld the constitutionality of the NLRA's prohibition of secondary boycotts and strikes,[95] even as it has held that other entities' secondary boycotts are protected by

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90. Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940) (overturning a loitering conviction for labor picketing based on the First Amendment); Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937) (observing that union members may "make known the facts of a labor dispute" because "freedom of speech is guaranteed by the Federal Constitution").

91. *E.g.*, Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 294 (1941).

92. Secondary picketing is aimed at forcing or requiring anyone to stop "using, selling, handling, transporting, or otherwise dealing" with the products of another employer. NLRA, 29 U.S.C. § 158(b)(4)(i)(B) (2006).

93. *Id.* As discussed above, the Court held in *DeBartolo* that this section only applies to calls for secondary consumer boycotts that are accomplished by means of picketing. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 573 (1988); *supra* note 85 and accompanying text.

94. 29 U.S.C. § 158(b)(4)(i), (ii).

95. *See, e.g.*, Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 225-27 (1982).

the First Amendment.[96] Again, the Court has distinguished the two based on its perception of unions as primarily economic actors —even when the secondary strike itself is not motivated by any economic concern.[97] Addressing such a political secondary strike, which was called to protest the Soviet invasion of Afghanistan,[98] the Court held that the union's conduct was punishable under the NLRA notwithstanding its arguments for First Amendment protection. Recognizing the political character of the strike, the Court concluded it was "more rather than less objectionable"[99] because it was called "in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity."[100] Moreover, the Court's conception that the appropriate scope of a union's role did not include "random political objective[s]"[101] was apparently crucial to its holding. The Court held that the First Amendment protected a coercive secondary boycott launched in pursuit of a social justice objective just one year later, in *Claiborne Hardware*.[102]

The Court has also relied on the presence of an "economic" purpose outside of the NLRA context, to distinguish protected speech from antitrust violations. In *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n* (*SCTLA*), the Court considered an antitrust action against a group of lawyers who accepted appointments from the District of Columbia Superior Court to represent indigent criminal defendants.[103] The District of Columbia government set their compensation, which had remained at $20 per hour for out-of-court time and $30 per hour for in-court time since 1970.[104] By the early 1980s, even the D.C. government was sympathetic to the lawyers' calls for pay increases but unable to grant an

96. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912-13 (1982).

97. *Allied Int'l*, 456 U.S. at 222-23.

98. *Id*. The Court accepted that the union would not benefit economically from the strike. *Id*.

99. *Id*. at 225 (citation omitted).

100. *Id*. at 225-26 (citation omitted).

101. *Id*. at 226.

102. 458 U.S. 886, 910 (1982) (stating, regarding secondary boycott, that "[s]peech does not lose its protected character, however, simply because it may ... coerce [listeners] into action"). Further, *Claiborne Hardware* cited *Allied International* with approval, so it presumably did not overrule that case. *Id*. at 912.

103. 493 U.S. 411, 414 (1990).

104. *Id*. at 415.

increase for political reasons.[105] In response, the lawyers formed a "strike committee," and resolved not to accept any new appointments until their hourly rate was raised—a resolution that about 90 percent of the lawyers who regularly accepted cases kept.[106] They also circulated a petition explaining that they would not accept cases until the government raised their hourly rate.[107] Their activities received significant media coverage.[108]

Ultimately, the lawyers successfully convinced D.C.'s mayor and City Council to grant a raise, and the lawyers went back to work.[109] However, the Federal Trade Commission saw the lawyers' conduct not as protected protest activity but instead as "a conspiracy to fix prices and to conduct a boycott" in violation of section 5 of the Federal Trade Commission Act.[110] In their defense, the lawyers argued that their "boycott was adequately justified by the public interest in obtaining better legal representation" and that it was protected by the First Amendment, either because the lawyers were petitioning the government or because their boycott was political action to which *Claiborne Hardware*'s principles applied.[111]

That defense was unsuccessful. Like the labor boycotts that the Court discussed in *Claiborne Hardware* and *Allied International*,[112] the Court saw the lawyers' goals as economic[113]—even though the Court "assume[d] that the preboycott rates were unreasonably low, that the increase ha[d] produced better legal representation for indigent defendants" and that the boycott was necessary to raise the reimbursement rate, "given that neither indigent criminal defendants nor the lawyers who represent them command any special appeal with the electorate."[114] Nonetheless, the Court held that the "social justifications proffered for respondents' restraint of trade ...

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105. *Id.* at 416.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 418.
110. *Id.* at 418-19 (citations omitted).
111. *Id.* at 419 (citing E. R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)). *Noerr* held, as a matter of constitutional avoidance, that the Sherman Act did not prohibit lobbying, even when the lobbyists' goals were anticompetitive. 365 U.S. at 136.
112. *See supra* notes 99-102 and accompanying text.
113. *SCTLA*, 493 U.S. at 423.
114. *Id.* at 421.

do not make it any less unlawful."[115] Importantly, the reason was that "the undenied objective of [the lawyers'] boycott was an economic advantage for those who agreed to participate."[116] Thus, regardless of the content of the lawyers' speech, its motivation was its undoing. In fact, beyond concluding that it constituted a boycott and a horizontal price-fixing arrangement,[117] the *SCTLA* majority did not pay much attention to the content of the lawyers' speech. Instead, the Court concluded that any "expressive component" was essentially irrelevant because "[e]very concerted refusal to do business with a potential customer or supplier has an expressive component."[118]

The following principles can be discerned from the Court's cases on picketing and boycotting: First, labor speech can be restricted if it has the potential to coerce, provided its viewpoint conflicts with law or state policy. In contrast, advocacy by other individuals or groups is often protected under the First Amendment even if it is actually coercive. Second, the Court views the appropriate role of unions as encompassing only economic advocacy on behalf of their membership; virtually any other goal could fail the "contrary to policy" test.

c. Citizens United*: Replacing Motive and Identity with Category and Structure*

As described above, the Court has repeatedly held that unions' and workers' "economic" goals mean that their speech is entitled to less First Amendment protection than tactically similar—but, in the Court's view, politically motivated—speech. In contrast, the *Citizens United* Court held that the fact that the goal of corporate political speech was profit did not detract from its level of First Amendment

115. *Id.* at 424.

116. *Id.* at 426. Justice Stevens, who also drafted the opinion in *Claiborne Hardware*, 458 U.S. 880 (1982), rejected the lawyers' attempt to draw an analogy to that case: "[The *Claiborne Hardware* defendants] sought no special advantage for themselves.... They sought only the equal respect and equal treatment to which they were constitutionally entitled.... Equality and freedom are preconditions of the free market, and not commodities to be haggled over within it." *SCTLA*, 493 U.S. at 426-27.

117. *SCTLA*, 493 U.S. at 436 n.19.

118. *Id.* at 431.

protection.[119] Further, the Court was adamant that neither the fact that a speaker is a corporation nor the fact that non-*MCFL* corporations are profit-driven operations was a sufficient basis upon which to burden corporate political speech.[120] Given all this, if nothing except economic motivation distinguishes labor expression from other groups' expression, then surely it would violate *Citizens United* to continue to treat them differently

If this is true, and if the *SCTLA* majority was correct that every antitrust violation is expressive,[121] then antitrust law may also be in some trouble. On the other hand, if labor speech, commercial speech, and public issue/political speech can actually be categorized based on structural or other factors—for example, the audience at which the expression is aimed—then it might be reasonable to continue treating those categories of speech differently.

Indeed, there appear to be some viable ways to distinguish commercial speech from political speech, even post-*Citizens United*. For example, in the Court's initial articulation of the commercial speech doctrine, it focused on the content of the speech, observing that there were "commonsense differences between speech that does 'no more than propose a commercial transaction' ... and other varieties."[122] At minimum, then, speech that advertises the prices of goods or offers to buy or sell an item can be placed in the "commercial speech" category.[123] On the other end of the spectrum, the Court

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119. *Supra* note 37 and accompanying text.

120. *Supra* note 29 and accompanying text.

121. *SCTLA*, 493 U.S. at 431.

122. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976) (citation omitted).

123. Some commentators predict the total collapse of the distinction between commercial and political speech in the wake of *Citizens United*. *E.g.*, Tamara R. Piety, Commentary, Citizens United and the Threat to the Regulatory State, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010), http://www.michiganlawreview.org/assets/fi/109/piety.pdf. Although I think that distinction between commercial and public issue/political speech will remain viable as discussed in this section, I agree that it will become easier for corporations to avoid having their speech characterized as "commercial" by courts. This is because once a speaker's motivation falls away from the analysis, speakers can readily shape nearly any message into a "political" message. Thus, one can easily imagine even a message about the price of pharmaceutical drugs rendered political when clothed in a message about community welfare. For example, Walmart's advertisements for its four-dollar prescriptions, which feature consumer testimonials, discuss the impact of prescription drug prices on Medicare recipients, the state of the economy generally, and the need for affordable health care in this country. *Affordable Prescription Program Testimonials*, WALMART, http://replay.web.archive.org/

has previously stated that discussion of either constitutional[124] or statutory[125] rights are entitled to special protection. If that principle is still correct, then the SCTLA's speech about the importance of indigent criminal defendants' Sixth Amendment right to counsel would be protected to the same extent as any other speech falling into that category, regardless of underlying motive.

Furthermore, closer inspection reveals other ways of distinguishing commercial from political speech. For example, in his partial dissent in *SCTLA*,[126] Justice Brennan rejected the majority's motivation-based conclusion: "the different *purposes* of the speech can hardly render the Trial Lawyers' boycott any less *expressive*."[127] Instead, he argued that the content of the lawyers' activity could be meaningfully distinguished from the run-of-the-mill antitrust violation, proposing that "[w]hen a boycott seeks to generate public support for the passage of legislation, it may operate on a *political* rather than *economic* level, especially when the government is the target."[128] In contrast, he noted, "a *typical* boycott functions by transforming its participants into a single monopolistic entity that restricts supply and increases price."[129] Thus, Justice Brennan identified three aspects of the SCTLA lawyers' boycott that—independent of their motivation—placed their expression in the public issue/political expression category and not the commercial/

20100102045459/http://walmartstores.com/healthwellness/8457.aspx (accessed by searching for Walmart in the Internet Archive index) (featuring consumer testimonials stating that Walmart's program "especially impacts older customers who are on Medicare"; that, before finding Walmart, a consumer "found [her]self on unemployment and could not afford [her] medication"; and thanking Walmart for "doing for our great American Country—what our government, congress and legislators could not do [sic]"). Once motivation becomes irrelevant, it is difficult to distinguish much of that speech from advocacy for or against healthcare reform. Similarly, the *Virginia State Board of Pharmacy* Court observed that there were few commercial messages to which a "public interest element ... could not be added," because a pharmacist "could cast himself as a commentator on store-to-store disparities." 425 U.S. at 764-65.

124. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914-15 (1982).

125. Hague v. CIO, 307 U.S. 496, 499, 513 (1939) (holding that the Fourteenth Amendment protects the right of citizens to gather to discuss federal legislation).

126. Justice Brennan also concurred in part, agreeing that the lawyers' conduct was "neither clearly outside the scope of the Sherman Act nor automatically immunized from antitrust regulation by the First Amendment." *SCTLA*, 493 U.S. at 437 (Brennan, J., concurring in part and dissenting in part).

127. *Id.* at 449.

128. *Id.* at 441.

129. *Id.* at 442.

economic category: its public nature; that it was aimed at achieving legislative change; and that the government was the target.[130] In addition, Justice Brennan emphasized that the boycott was really a strike, which meant that, in order to communicate the strength of their message, the lawyers had to give up their own income, which was surely a hardship.[131]

Although the factors on Justice Brennan's nonexhaustive list may be neither a necessary nor a sufficient basis to distinguish between different categories of speech without resort to considering motivation, they are a useful starting point. For example, speech that seeks to address the public is more likely to be about a matter of public concern, and thereby occupy a privileged place in the First Amendment hierarchy, than speech that addresses only a single private party.[132] In that regard, whether the speech receives meaningful media attention may also be relevant.[133] For example, the statement "raise (or lower) your prices by 15 percent, or we'll take our business elsewhere" is unlikely to garner much news coverage absent some social or political content that might persuade the public to take a stand on the cause. Thus, when Walmart threatens to change suppliers unless a particular factory lowers its prices, it may be a talking point for Walmart opponents, but it is not generally something that Walmart itself seeks to publicize.[134] Additionally, *Citizens United* stressed the First Amendment interests of listeners in being able to receive information,[135] which is far more relevant when a message is being aimed at the general public

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130. *Id.* at 441-43.

131. *Id.* at 450.

132. *E.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983).

133. Of course, some actors will avoid publicity because they believe their expression to be illegal, or fail to avoid publicity because they believe their expression to be legal. To the extent the actor's behavior depends on its perception of the law, rather than whether it needs public support in order to improve its chances of succeeding at accomplishing its goals, that behavior would likely be irrelevant to the First Amendment analysis.

134. For example, a United Food and Commercial Workers' Local Union states on its website that Walmart "pressures its extensive network of vendors to cut labor costs and lower prices every year." *The Walmart Threat*, UFCW LOCAL 152, http://www.ufcwlocal152.org/walmart_action.php (last visited Sept. 25, 2011). Unsurprisingly, I have been unable to identify any similar statement on Walmart's own corporate website.

135. *E.g.*, Citizens United v. FEC, 130 S. Ct. 876, 908 (2010) ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought.").

to either accept or reject, than when it is in the nature of a threat being aimed, in relative secrecy, at a single recipient.

Applying these categories, much labor speech will fall into the political/public issue category, rather than the commercial speech category or some sort of separate "labor" category. Much labor speech is inherently political, as the Court has occasionally recognized. In *Thornhill v. Alabama*,[136] a 1940 case, the Court stated that the "health of the present generation and of those as yet unborn may depend on [wage and hour issues].... [L]abor relations are not matters of mere local or private concern."[137] More recently, *DeBartolo* recognized that wage levels could, at least sometimes, be a community concern.[138] Likewise, in cases about the extent to which employees can be required to pay union dues or fees, the Court has described a panoply of reasons that employees might have political or ideological objections to belonging to a union.[139] Given that assessment of the political nature of some employees' objections to belonging to a union or to a union's conduct—a correct assessment, in my view—it is difficult to see how the union's expression itself can be regarded as apolitical.

Even if one rejects the view that speech about working conditions is inherently political in favor of the view that labor speech is tantamount to commercial speech about the cost of human work,[140] much labor speech arising outside the bargaining context will still qualify as political. Thus, the *DeBartolo* Court's recognition that

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136. 310 U.S. 88 (1940).

137. *Id.* at 103; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762-63 (1976) (noting *Thornhill*'s language, and rejecting the idea of drawing a distinction between addressing "the merits of unionism in general" and addressing an "immediate dispute" at a single plant).

138. *See supra* text accompanying note 87.

139. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977) ("[An employee's] moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, whereas another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. These examples could be multiplied.").

140. *Cf.* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1554-56 (2010) (describing how bargaining over wages and working conditions differs fundamentally from bargaining in other business contexts).

speech about the benefits of unionism to the community was not "typical commercial speech."[141] And, it is likely that labor speech will increasingly fall into the category. Indeed, in order to win community support, labor union campaigns often link their goals to other social issues, like the prevailing community wage, environmental health and safety, and dignitary concerns.[142] If the courts can no longer focus on the fact that the speakers in those instances are labor unions, then it is difficult to see how they could continue to maintain First Amendment distinctions between their expression and that of other groups.

This new opportunity for the expansion of First Amendment protection for labor speech has the potential to impact the labor movement beyond simply opening up new avenues for picketing and secondary activity. First, erasing the distinction between labor unions and other social movement groups should free labor unions to work more often and more closely with other types of groups to pursue their joint goals, including through secondary boycotts and picketing, without the risk that different sets of First Amendment principles will be applied to labor and nonlabor groups in the same coalition.[143] Second, *Citizens United* could create the opportunity for groups not covered by the NLRA or another labor statute, like the SCTLA lawyers, to act collectively—a development that is of particular importance in light of employers' increasing classification of workers as "independent contractors."[144] Third, it should render

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141. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 576 (1988). Of course, topics other than politics are entitled to "full First Amendment protection," including "expression about philosophical[,] social, artistic, economic, literary, or ethical matters." *Abood*, 431 U.S. at 231.

142. *See* James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 901-04 (1991) (describing alliances between unions and other types of advocacy groups).

143. For a detailed description of how existing labor law differs from First Amendment principles that apply to other social movements and how these two might interact in the context of joint union-social movement advocacy, see *id.* at 919-31.

144. Many of these workers are likely to be misclassified and in fact should be deemed employees. *See* Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 457-58 (1999) (explaining the phenomenon, and consequences, of misclassifying employees as independent contractors); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 297-98 (2001) (noting that, although employers often "crave the control they enjoy in a normal employment relationship," the advantages of labeling workers as independent contractors "motivate a good deal of arbitrary and questionable 'non-employee'

irrelevant the continuing uncertainty over what constitutes labor picketing by erasing the distinction between picketing and other types of speech.[145]

2. Workers Who Object to Union Membership

a. Labor Law's Approach to "Objectors"

In addition to undermining the bases upon which the Court has limited what labor unions can say, and how they can say it, *Citizens United* also calls into question the Court's approach to how unions can fund their political and organizing speech. This Section traces briefly the development of the Court's doctrine relating to union dues and fees paid by "objecting" workers—those who are part of a bargaining unit that is represented by a union but who do not want to join the union—before discussing how *Citizens United* might impact that approach.

The rules regulating the relationship between unions and "objectors" have been refined and expanded over the course of the last several decades. Generally, labor law allows a union chosen by the majority of employees within a particular bargaining unit to become the exclusive bargaining representative of all of the employees in that bargaining unit.[146] Ideally, then, once a labor union is elected, the members of the bargaining unit will join the union as active and involved dues-paying members, each of whom

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classification"); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 BERKELEY J. EMP. & LAB. L. 143, 149 (2005) (arguing that employees are routinely misclassified as independent contractors). However, whether they are misclassified, workers labeled "independent contractors" are unlikely to act collectively and risk ending up in the same position as the SCTLA.

145. *See generally* Timothy F. Ryan & Kathryn M. Davis, *Banners, Rats, and Other Inflatable Toys: Do They Constitute Picket Activity? Do They Violate Section 8(B)(4)?*, 20 LAB. LAW. 137 (2004) (examining the NLRB's and the courts' shifting policy as to what constitutes protected labor speech). Despite the fact that the NLRA's ban of picketing for certain purposes has been on the books for several decades now, whether particular activity constitutes picketing is still a matter of significant debate. *See, e.g.*, United Bhd. of Carpenters & Joiners of Am. Local Union No. 1506, 355 N.L.R.B. No. 159 (Aug. 27, 2010) (concluding, over a two-member dissent, that large stationary banners did not constitute picketing or its equivalent).

146. Both the NLRA and the Railway Labor Act, as well as many state labor statutes, create exclusive representation systems. 29 U.S.C. § 159(a) (2006); 45 U.S.C. § 152, Fourth, Ninth, Eleventh (2006).

the union will represent to the best of its ability. However, some employees may not want union representation, preferring to bargain with the employer individually. Among other reasons for this preference, they may object to union membership on principle or to the payment of dues.

Initially, it was left to unions and employers to bargain over how to treat employees who objected to union membership. For example, under the NLRA, employers were statutorily forbidden from discriminating against union members,[147] but unions and employers were free—though not required—to impose the closed or union shop,[148] to permit members of a bargaining unit to refrain from joining the union, or to come to some other arrangement.

Then, in 1947, Congress amended the NLRA to forbid the closed shop,[149] but left the statute silent on the union shop, so that employers and unions were free to agree to such an arrangement.[150] However, some states passed "right-to-work" laws, which outlawed the union shop by forbidding employers from firing workers who refused to join a union or pay union dues.[151] In 1949, the Supreme Court upheld the validity of such laws in the NLRA context, rejecting unions' argument that the laws infringed their First Amendment rights of speech, assembly, and petition.[152] Specifically, the unions argued that the law prevented unions and employers from agreeing that "no non-union members [could] work along with

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147. 29 U.S.C. § 158(a)(3) (stating that it is an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this [Act] ... shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein, ... if such labor organization is the representative of the employees").

148. A "closed shop" system requires new hires to be union members before they begin work, whereas a "union shop" system requires new hires to become union members within a short period of time after being hired. Kenneth G. Dau-Schmidt, *Union Security Agreement Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51, 57-58 (1990) (defining closed shop and union shop).

149. The "closed shop" system was prohibited by the LMRA, which amended Section 8(3) of the NLRA to permit, "as a condition of employment," unions and employers to require "membership [in a union] on or after the thirtieth day following the beginning of such employment." 29 U.S.C. § 158(a)(3).

150. Dau-Schmidt, *supra* note 148, at 57-59.

151. *See, e.g.*, Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 527-28 (1949).

152. *Id.* at 530-31.

union members," an agreement the unions claimed was essential to their ability to meaningfully exercise their right of self-organization.[153] Additionally, the unions argued that, whereas there was a constitutionally protected right to join a union, there was no equivalent constitutional right to work at a particular job without joining the union.[154] The Court flatly rejected this argument, apparently finding it so ridiculous as to render its conclusion self-evident: "We deem it unnecessary to elaborate the numerous reasons for our rejection of [the First Amendment argument]."[155] The Court added that "where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law."[156] Thus, the Court apparently rejected the union's First Amendment argument on the basis that making an agreement to operate as a closed or union shop was conduct, not speech.

The Court has not revisited this conclusion in recent years, and many more states have adopted right-to-work laws—at present, there are twenty-two such states.[157] But, these laws do not apply to employees and unions covered by the Railway Labor Act, which explicitly permits "union shop" arrangements between carriers and employees who fall under that statute, even in states with right-to-work laws.[158] In *Railway Employees' Department v. Hanson*,[159] the Court rejected the argument that, on their face, union shop agreements violated the First Amendment rights of employees who were forced to join unions.[160] Interestingly, though, the *Hanson* Court also concluded that the First Amendment was *implicated*, even though the agreements at issue were between private employers and unions.[161] The Court reasoned that the RLA had overridden

153. *Id.* at 530 (explaining the union's argument that closed or union shops were "indispensable to the right of self organization and the association of workers into unions" (citation omitted)).

154. *Id.* at 531.

155. *Id.*

156. *Id.*

157. *See* Nat'l Right to Work Legal Comm., *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., http://www.nrtw.org/en/rtws.htm (last visited Sept. 25, 2011) (showing a map of right-to-work states).

158. 45 U.S.C. § 152, Eleventh (2006).

159. 351 U.S. 225 (1956).

160. *Id.* at 236-37.

161. *Id.* at 232 ("[I]f private rights are being invaded, it is by force of an agreement made

state right-to-work laws, so even private union shop agreements could be made only "by force of an agreement made pursuant to federal law which expressly declares that state law is superseded.... In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed."[162] Thus, at least in right-to-work states, it was only by dint of the federal government's power that union shop agreements were permissible, and that exercise of power was enough to trigger First Amendment rights for affected employees. Years later, and without discussion, the Court expanded this principle to non-right-to-work states: "The First Amendment does limit the uses to which the union can put funds obtained from dissenting employees.... [B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights."[163]

Following *Lincoln Federal*, the Court decided a series of cases regarding the scope of objectors' rights in non-right-to-work states. First, in *International Ass'n of Machinists v. Street*,[164] a group of railway employees sought a determination that the union's campaign contributions, funded by dues paid as a condition of continued employment, violated dissenting members' First Amendment rights.[165] The Court found no facial First Amendment violation but construed the RLA to permit union shops only if members were not required to fund political causes with which they disagreed.[166] But, the *Street* Court also recognized that the union had potential First Amendment interests at stake, which had to be balanced against employees' rights:

> Whatever may be the powers of Congress or the States to forbid unions altogether to make various types of political expenditures ... many of the expenditures involved in the present case are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would

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pursuant to federal law which expressly declares that state law is superseded.").

162. *Id.* (citation omitted).

163. Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 455 (1984).

164. 367 U.S. 740 (1961).

165. *Id.* at 743.

166. *Id.* at 768-69.

> work a restraint on the expression of political ideas which might be offensive to the First Amendment.[167]

Several years later, the Court again addressed this balance in the context of public employees. In *Abood v. Detroit Board of Education*,[168] a teachers' union and school board had agreed to an "agency shop" arrangement under which teachers would not be required to join the union but would be required to pay an "agency fee" in the same amount as union dues.[169] A group of teachers sued to prevent the union from charging them for "economic, political, professional, scientific, and religious" activities that were not "collective bargaining activities."[170] The Court began by tracing the societal benefits of the exclusive representation system, including pragmatic benefits to both unions and employers.[171] However, the Court continued, those benefits had to be balanced against the resulting burden on employees' First Amendment rights.[172] After conducting that balancing, the Court held that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," government employment could be condi-

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167. *Id*. at 773.

168. 431 U.S. 209, 211 (1977).

169. *Id*. The NLRA does not cover government employees at any level. 29 U.S.C. § 152(2) (2006) (stating that the definition of "employer" under the NLRA does not include, inter alia, "the United States ... or any State or political subdivision thereof"). But many states have enacted statutes creating exclusive representation systems governing state and municipal employees. For example, in *Abood*, the Michigan statute at issue was "broadly modeled after federal law." 431 U.S. at 223.

170. *Abood*, 431 U.S. at 213.

171. *Id*. at 220-21 (identifying benefits as "avoid[ing] the confusion that would result from attempting to enforce two or more agreements," and "prevent[ing] inter-union rivalries from creating dissension within the work force," which would "eliminat[e] the advantages to the employee of collectivization").

172. *Id*. at 222 ("To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate ... or to refrain from doing so."). This problem could also be avoided, at least in part, if workers were allowed simply to refuse to join the union or pay it any money, despite its exclusive representative status. Indeed, this is the solution that so-called "right-to-work" states have adopted. But, that solution has its own problems, in that it encourages free riding, potentially destabilizing the union irrespective of its degree of actual employee support. *See* Matthew Dimick, *Paths to Power: Labor Law, Union Density, and the Ghent System*, 90 N.C. L. REV. (forthcoming 2012) (manuscript at 15), *available at* http:// papers.ssrn.com/sol3/ papers.cfm?abstract_id=1680900 (describing the free rider problem).

tioned on paying the service charge.[173] But, public-sector unions' political and ideological advocacy could permissibly be funded only by willing employees.[174] Thus, the Court struck a balance between unions—who must represent all workers within a particular bargaining unit fairly, including those who oppose the union and do not wish to be represented[175]—and objectors.[176]

The *Abood* Court refrained from deciding whether its First Amendment analysis applied equally to private sector, NLRA-governed employees.[177] That question arose again in *Communications Workers of America v. Beck*.[178] In *Beck*, a group of private-sector employee-objectors argued that their duly elected union should not be permitted to use portions of their agency fees for purposes unrelated to collective bargaining or contract administration.[179] 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.'"[180] That financial core, the Court concluded, 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.'"[181] Thus, unions representing both public- and private-sector employees were barred from spending mandatory dues or fees on their political speech.

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173. *Abood*, 431 U.S. at 225-26.

174. *Id*. at 235-36.

175. Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1952) (holding that NLRA imposes duty of fair representation); *see also* Vaca v. Sipes, 386 U.S. 171, 190 (1967) ("A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.").

176. *Abood*, 431 U.S. at 221.

177. *Id*. at 226 n.23 ("Nothing in our opinion embraces the 'premise that public employers are under no greater constitutional constraints than their counterparts in the private sector' ... or indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints." (quoting *id*. at 245 (Powell, J., concurring))).

178. 487 U.S. 735 (1988).

179. *Id*. at 739.

180. *Id*. at 745 (citation omitted); *see also* NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963) ("'Membership' as a condition of employment is whittled down to its financial core.").

181. *Beck*, 487 U.S. at 762-63 (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448 (1984)).

Since *Abood*, the Court has imposed increasingly onerous requirements on unions in order to ensure that no money paid by objectors is used for impermissible purposes.[182] For example, the Court has held that unions must take steps to avoid even the temporary use of very small amounts of dissenters' money for political purposes, forbidding "forced exaction followed by a rebate," even when that situation is the result of a mere miscalculation by a union of its anticipated political spending.[183] Likewise, the Court has rejected agency fee calculations that do not give objectors "sufficient information to gauge the propriety of the union's fee,"[184] and has required unions to provide "reasonably prompt" review "by an impartial decision-maker" other than a court, such as an arbitrator chosen jointly by the union and the objector.[185] Unions must also place in escrow any disputed funds; to use *any* of an objector's putative agency fee payment before the completion of the dispute-resolution process requires an "independent audit" and independent verification of the escrow amount.[186]

In addition to these procedural requirements, the Court has drawn fine—and sometimes unpredictable—lines governing what expenses are and are not "chargeable" to objecting employees.[187] For example, political speech and lobbying are—unsurprisingly—nonchargeable, with the exception of lobbying devoted to securing ratification of a particular collective bargaining agreement.[188] Also nonchargeable are organizing activities, even though higher union density means more leverage to improve wages and working conditions,[189] and costs associated with conducting a strike that is

182. These requirements are in addition to the reporting requirements imposed by the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 431 (2006), which requires unions to annually file detailed reports including a variety of information about their internal workings and decisions.

183. Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 305-06 (1986).

184. *Id.* at 306.

185. *Id.* at 307 & n.20.

186. *Id.* at 310 & n.23.

187. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 231-32 (2000) ("Even in the context of a labor union, whose functions are, or so we might have thought, well known and understood by the law and the courts after a long history of government regulation and judicial involvement, we have encountered difficulties in deciding what is germane and what is not.").

188. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 520 (1991).

189. Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 451-52 (1984).

ultimately deemed illegal.[190] In contrast, chargeable expenses include bargaining and processing grievances,[191] union conventions, union-sponsored social activities, those portions of union publications that discuss the union's other chargeable activities,[192] preparations for legal and illegal strikes,[193] and some litigation expenses incurred by national unions.[194]

Thus, the Court has exhibited significant concern for the First Amendment rights of union objectors and carefully sought to protect their interests while maintaining the exclusive representation system. Against this backdrop, this Article will next examine the Court's approach in *Citizens United* to the rights of dissenting shareholders.

b. Citizens United*'s Approach to Objectors*

Citizens United addressed a different group of objectors—dissenting shareholders who do not want their money spent on corporate political speech with which they disagree. There are, however, significant parallels between shareholder objectors and union objectors. In both cases, the objectors presumably hope to benefit economically from their affiliation with either the corporation or the employer, and a relatively small amount of the objectors' money can be spent on political speech. Yet, unlike in the union context, the *Citizens United* Court sided with the corporate "association" against the objector, rejecting shareholder protection as a valid basis upon which to restrict corporate political speech. The Court reasoned that the opposite conclusion would mean that the government could "ban the political speech of even media corporations,"[195] and that in any event, there existed "little evidence of abuse that

190. *Lehnert*, 500 U.S. at 531-32.

191. *Id*. at 522.

192. *Ellis*, 466 U.S. at 448-51.

193. *Lehnert*, 500 U.S. at 532.

194. Locke v. Karass, 555 U.S. 207, 217-18 (2009) (holding that a national union's litigation expenses are chargeable to local union members as long as "the subject matter of the national litigation bears an appropriate relation to collective bargaining ... [and] the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization'" (quoting *Lehnert*, 500 U.S. at 524)).

195. Citizens United v. FEC, 130 S. Ct. 876, 911 (2010).

cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[196] In other words, the *Citizens United* Court held that shareholders who preferred not to have their money used for political speech had two options—they could sell their stock, or they could try to band together with a coalition of like-minded shareholders to attempt to influence the corporation. This approach differs sharply from that taken in the *Abood-Hudson* line of cases, which emphasized that objectors should not be required to change jobs or influence union policy to avoid funding objectionable political speech.[197]

These outcomes reflect different approaches to weighing the First Amendment interests at issue in the two contexts. In particular, the *Abood* and *Hudson* line of cases balanced the objectors' First Amendment interests in refraining from undesired speech and association against the government's interests in labor peace—but not against unions' interest in engaging in political speech with minimal encumbrance.[198] This explains the Court's willingness to impose burdensome requirements on unions in order to protect objectors, even when the benefit to the objector is small. Expensive

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196. *Id*. Though the Court stated that these two reasons alone were "sufficient to reject this shareholder-protection interest," it also identified over- and underinclusiveness problems: BCRA did not ban independent expenditures that took place outside of the thirty- or sixty-day windows, even though that speech would presumably also offend the dissenting shareholders; but it did apply to independent expenditures by corporations with only one shareholder, who presumably would not disagree with his own speech. *Id*.

197. *See* Jeremy G. Mallory, *Still Other People's Money: Reconciling* Citizens United *with* Abood *and* Beck, 47 CAL. W. L. REV. 1, 30-36 (2010); *supra* text accompanying note 174.

198. For example, in *Hudson*, 475 U.S. 292 (1986), the Court stated the countervailing interests like this:

> First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee-the individual whose First Amendment rights are being affected-must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.

Id. at 302-03; *see also* Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 186 (2007) ("[O]ur repeated affirmation that *courts* have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement."). As discussed above, *supra* note 167 and accompanying text, *Street* is an exception, but apparently a short-lived one.

or onerous agency fee requirements are unlikely to undermine *labor peace*, because they leave intact the exclusive representation system. In other words, if there is no countervailing interest in union speech to weigh against additional procedural protections for objectors, then the calculation necessarily tips in favor of implementing such protections.

By contrast, in *Citizens United*, the Court weighed objectors' First Amendment interests against corporate First Amendment interests and relied on shareholders' abilities to avoid the unwanted speech without impinging on corporate speech to conclude that additional procedural protections for dissenters—the PAC requirement—were impermissible. Analogously, it should be true that unions, as associations, have significant First Amendment interests themselves, and that imposing excessive procedural or compliance burdens on union speech can amount to a First Amendment violation. Thus, the problem with the Court's agency fee jurisprudence, post-*Citizens United*, is that it places significant burdens on unions' use of their own money for political purposes.

Accordingly, courts should at minimum reweigh the value of procedures designed to protect objectors. On one side of the balance should sit unions' First Amendment interest in engaging in political speech, unencumbered by government-imposed procedural hurdles. But is there a First Amendment interest on the objectors' side of the equation? In the context of government employment, the answer seems to be a clear "yes," as the Court held in *Abood*.[199] However, in the private sector, it is less obvious that an agreement requiring employees to fund union political speech involves the requisite state action to implicate the First Amendment. The Court's conclusion in *Hanson* that state action was present even in private union-shop agreements was predicated on the fact that the RLA preempted a state right-to-work law, and the *Ellis* Court's explanation-less statement that the First Amendment applied generally also came in a RLA case.[200] But, the NLRA does not preempt state right-to-work

199. *See supra* note 176 and accompanying text.

200. *See supra* text accompanying notes 161-65. Additionally, in *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998), the Court introduced further ambiguity about the First Amendment's application in the RLA context. "The purposes for which a union may spend the 'agency fee' paid by nonmembers, however, are circumscribed by the First Amendment (when public employers are involved) and the National Labor Relations Act (NLRA) or Railway

laws, so if there is state action in the NLRA context, it must come from somewhere else.[201]

Those who argue in favor of applying the First Amendment in the NLRA context generally argue that the necessary state action can be found in the NLRA's grant of exclusive bargaining rights, because it is that status that gives rise to the union's right to bargain on behalf of objecting employees in the first place.[202] But, in the absence of any prohibition against unions and private employers voluntarily negotiating an agreement that would provide for both exclusive representation and a union shop, that argument seems to beg the question.[203]

Thus, there may simply be no First Amendment interest on the objectors' side of the equation when the objectors are: (1) in private employment; (2) that is governed by the NLRA; (3) in a state without a right-to-work law. If that is true, then it is difficult to see how unions can constitutionally be prevented from entering into union-shop agreements, even if some portion of the mandatory dues or fees will be spent on political speech—much less how unions could be compelled to comply with *Hudson*'s onerous procedural requirements.[204] This is not to say that unions have a

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Labor Act (RLA) (when private employers subject to their provisions are involved)." *Id.* at 868. In the next sentence, the Court went on to say that the union "acknowledges that it is bound by *Hudson*," without mentioning that *Hudson* arose in the constitutional context or clarifying that the Court was not deciding whether *Hudson* applies in the private sector in light of the union's concession. *Id.* at 869.

201. *See* Elena Matsis, *Procedural Rights of Fair Share Objectors After* Hudson *and* Beck, 6 LAB. LAW. 251, 259-60 (1990).

202. *Id.* at 260 n.43 (citing Brief for Respondents at 16 n.5, Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988) (No. 86-637)); David H. Topol, Note, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135, 1149-57 (1992) (arguing that exclusive representation under the NLRA implicates state action).

203. Analogously, in the school voucher context, the Court determined that the First Amendment is not violated when a parent's "true private choice" to send his or her child to a religious school is facilitated by statute, even though it would be a First Amendment violation for the government to fund religious schools directly. Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).

204. Most of the courts of appeals that have addressed the issue have nonetheless held that *Hudson* applies to unions operating under the NLRA. Tellingly, those decisions involve little reasoning. For example, the D.C. Circuit simply stated,

> [a]lthough in *Hudson* the challenge to the union agency fee was made on constitutional grounds, its holding on objection procedures applies equally to the statutory duty of fair representation inasmuch as the holding is rooted in "[b]asic considerations of fairness, as well as concern for the First Amendment

First Amendment right to agency fees. Rather, once a union acquires an entitlement to either union dues or agency fees through an agreement with an employer, *Citizens United* makes clear that unions have a First Amendment right to spend the money to which they are statutorily or contractually entitled on political speech, without excessive administrative encumbrance.

Even when employee-objectors' First Amendment rights are implicated, *Citizens United* suggests that the elaborate procedures *Hudson* imposed impermissibly burden unions' speech. The *Citizens United* Court was concerned about the difficulty of establishing a PAC, which the Court called a "burdensome alternative,"[205] requiring, among other things, appointment of a treasurer, detailed recordkeeping, and regular reporting, with which the PAC had to comply "just to speak."[206] These obligations constituted a First Amendment violation because they "necessarily reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[207] The *Hudson* reporting requirements are similarly burdensome, and the Court has never weighed their usefulness in protecting objectors against the limitations that they impose on unions' ability to engage in political advocacy.[208] At minimum, before imposing requirements

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rights at stake."

Abrams v. Commc'ns Workers of Am., 59 F.3d 1373, 1379 n.7 (D.C. Cir. 1995) (quoting *Hudson*, 475 U.S. at 306). Likewise, Judge Posner, writing for the Seventh Circuit, noted that *Hudson* was a constitutional case, but then said, "[i]t is not obvious why this should make a difference, however; in either case, the worker is entitled to reliable information about the costs of representation, which are the only costs that he is legally obligated to pay." Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 133 F.3d 1012, 1017 (7th Cir. 1998); *see also* Shea v. Int'l Ass'n of Machinists & Aerospace Workers, 154 F.3d 508, 513-15 (5th Cir. 1998) (noting dispute as to whether the First Amendment applies in the NLRA context but requiring *Hudson* procedures nonetheless). I have found only one circuit that has refused to apply *Hudson* in the NLRA context; in *Price v. Int'l Union, United Auto Workers*, 927 F.2d 88 (2d Cir. 1991), the Second Circuit held that there were "no constitutional concerns which warrant the safeguards found necessary in *Hudson*," and instead required only that the union not employ procedures for determining the amount chargeable to objectors that are "arbitrary, discriminatory, or implemented in bad faith." *Id.* at 92.

205. Citizens United v. FEC, 130 S. Ct. 876, 897 (2010).

206. *Id.*

207. *Id.* at 898 (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam)).

208. *See supra* text accompanying notes 183-86. Additionally, it is worth noting that litigation itself can be a burden on unions' associational interests. Because the Court has required that unions make extensive disclosures about their spending while placing essentially no value on either unions' First Amendment interests, or their interests in keeping

designed to protect objectors in public or RLA-governed employment, courts should ensure that the requirements are narrowly tailored and that they will be, on balance, sufficiently effective to justify the burden on unions' political speech.

One might posit that the analogy between objecting shareholders and objecting workers is not an exact one. Most importantly, an "average" objecting union member might, as a practical matter, be unable to leave a job and sacrifice his or her income while hunting for a new job. In other words, if union members have a much greater need to retain their jobs than shareholders have to retain ownership of their stock, then it will be easier for shareholders to simply avoid unwanted speech altogether.[209] Yet, it is not clear that every stockholder will be able to avoid having his or her money used for unwanted political expenditures. First, some stock is subject to restrictions on its sale, making it impossible, or at least difficult, to sell off quickly.[210] Second, for mutual fund holders, it may be difficult even to discern those corporations in which one owns stock, much less to then trace the political expenditures of each such corporation. Third, shareholders may have to choose between selling off stock at a loss, if they can find a buyer at all, and avoiding

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confidential their internal workings, it is easy for an employee with no particular reason to believe that a union has misused agency fees to tie a union up in lengthy litigation, and to learn significant amounts of information about the union's spending in the process.

209. The Court noted this difference in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978), when it distinguished dissenting shareholders from dissenting union members:

> 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.

210. *See, e.g.*, G. Edgar Adkins, Jr. & Jeffrey A. Martin, *Restricted Stock: The Tax Impact on Employers and Employees*, 107 J. TAX'N 224 (2007) (describing restrictions on sale of stock issued to a company's employees and executives). Likewise, purchasers of shares bearing a "restrictive legend" may be unable to sell their shares for some period of time, or may have to comply with a set of regulatory requirements in order to have the restrictive legend removed. *E.g.*, Salt Lake Tribune Publ'g Co. v. AT&T Corp., 320 F.3d 1081, 1084 (10th Cir. 2003) (concluding that the stock transfer restriction contained in a joint operating agreement was lawful); 12 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5455 (perm. ed., rev. vol. 2004) (discussing validity of restrictions on right to transfer stock).

unwanted speech. And some of those shareholders, such as some retirees, may be dependent on investment income for survival. Thus, as both a legal and a practical matter, selling stock could sometimes be as difficult—or even more difficult—than leaving a job.

To illustrate *Citizens United*'s potential impact on how unions in both the public and private sector should treat workers' dues and fees, one need only examine the outcomes in two of the Court's recent cases, *Davenport v. Washington Education Ass'n*[211] and *Ysursa v. Pocatello Education Ass'n*.[212]

At issue in *Davenport* was a Washington state statute that prohibited unions from using nonmembers' fees for election-related speech without the nonmembers' affirmative consent.[213] Thus, the statute in *Davenport* was more protective of objector rights than *Hudson* and *Ellis*, which put the burden on the objector to inform the union of his objection.[214] The Court first observed that Washington could have simply eliminated the requirement that bargaining unit members pay any fee by adopting a right-to-work scheme.[215] From there, the Court easily concluded that if unions have no right to agency fees in the first place, they have no right to be free from burdensome agency fee collection procedures: "[t]he constitutional floor [articulated in *Hudson*] for unions' collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions."[216] The Court continued, "[w]hat matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees."[217] Finally, the Court stated that there was "no suppression of ideas ... afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission."[218]

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211. 551 U.S. 177 (2007).
212. 129 S. Ct. 1093 (2009).
213. *Davenport*, 551 U.S. at 180.
214. *Id.* at 181; Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448 (1984).
215. *Davenport*, 551 U.S. at 184.
216. *Id.* at 185.
217. *Id.* at 187.
218. *Id.* at 190.

Ysursa also involved a state's attempt to regulate unions' use of dues and fees for political, but not other, purposes. In that case, an Idaho statute imposed criminal penalties on unions that funded political activities with money automatically deducted from government employees' paychecks.[219] Thus, although unions could use funds received through automatic paycheck deductions for nonpolitical speech, they had to collect separately any money to be used for political speech. Again, the Court upheld the law, holding that government "is not required to assist others in funding the expression of particular ideas, including political ones."[220]

It is difficult, to say the least, to reconcile *Davenport* and *Ysursa* with *Citizens United*. The "greater includes the lesser" argument —that because the states could adopt a right-to-work statute, they could also burden unions' use of dues and fees—was implicitly rejected in *Citizens United*, as follows. As the *Citizens United* dissent pointed out, corporations are creatures of law that could, in theory, be outlawed altogether.[221] Yet, corporations have First Amendment rights—and under *Citizens United*, the state cannot create corporations on the condition that they do not engage in political speech. Likewise, it would seem that states could not create an entitlement to agency fees, which could then be spent on political advocacy, but then place substantial hurdles on unions' use of those fees for political speech.

Thus, *Citizens United* has substantial potential to change not just what unions are permitted to say but also with what money they can say it. But, "substantial potential" does not always equal constitutional change. The next section discusses some possible objections to the analysis described thus far.

III. OBJECTIONS

The impact of congressionally created and judicially endorsed restrictions on labor speech has been to deprive labor of some of its more effective tools, and, to some extent, to prevent it from working effectively with other groups on issues of broad importance. For

219. Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1096-97 (2009).
220. *Id.* at 1098.
221. Citizens United v. FEC, 130 S. Ct. 876, 949-50 (2010) (Stevens, J., dissenting).

example, as the Court itself has acknowledged, picketing is an effective form of communication precisely because, unlike other forms of communication such as handbilling, it is difficult for passersby to avoid seeing the message being conveyed by simply looking away.[222] Likewise, secondary and sympathy strikes, as well as "hot cargo" agreements, can be effective methods of advocacy, not only in terms of encouraging one employer to put pressure on another, though certainly that is not to be underestimated, but also in generating cross-union solidarity. Furthermore, depriving labor of avenues to communicate with workers and put pressure on employers is bound to have an impact on unionization rates—a concern not only of labor unions but also of the large number of workers who would like to belong to a union but do not.

This Article has argued that *Citizens United*'s articulation of First Amendment principles might provide a foothold for labor unions to achieve greater First Amendment protection. However, as should be clear from the foregoing, a successful result under *Citizens United* is far from a foregone conclusion for multiple reasons. For example, even without *Citizens United*, it is difficult if not impossible to reconcile existing labor speech doctrine with First Amendment cases arising in other contexts[223]—yet the distinctions have proven resilient, albeit with shifting rationales.[224] There is certainly no reason to believe that the current Court is inclined to make decisions that benefit unions. Thus, it is entirely possible that courts will arrive at the conclusion that the real import of *Citizens United* in the labor relations context is to bolster employers' property and speech rights. This conclusion might, for example, lead them to

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222. Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 576 (1988); *see also* Ryan & Davis, *supra* note 145, at 149-50.

223. Compare, for example, *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212, 226 (1982), with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 (1982), or *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 504 (1949), with *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969). *Supra* Part II.B.1.a; *see also* Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2632-44 (2011).

224. In this doctrinal area, Chief Justice Roberts's admonition that the importance of stare decisis is undermined when "its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake," seems to have clear relevance. *Citizens United*, 130 S. Ct. at 921 (Roberts, C.J., concurring).

strengthen employers' rights to hold political "captive audience" meetings with their employees[225] or to invalidate NLRA-imposed restrictions on what employers can say to workers during union election campaigns.[226] Alternatively, the Court could simply cut back on its broad articulation of First Amendment principles by holding in a future case that *Citizens United* does not apply outside the context of election-related speech.

Finally, there is another basis upon which courts may avoid applying *Citizens United* in the manner outlined above—perhaps the most likely one. That is that maintaining the stability of commerce is a compelling interest that justifies existing restrictions on labor speech, especially secondary activity. This reasoning has a lengthy pedigree in labor law, dating back to the enactment of the NLRA. Because of its multi-decade history, this Article will describe this reasoning in more detail before suggesting a modern-day answer to it.

A. The NLRA and Protection of Commercial Stability

Labor law's impact on commercial stability has long played a role in the Court's analysis of unions' rights. Until 1932, unions were in a tenuous legal position, subject to prosecution under the antitrust laws for striking and picketing, even after the Clayton Act purported to exempt unions from antitrust liability.[227] Furthermore, the courts had demonstrated a willingness to enjoin workers' collective action.[228] Thus, unions had few legal protections until Congress passed the Norris-LaGuardia Act,[229] and then the NLRA.[230] But, the drafters of the NLRA—encouraged by many labor movement lobbyists—premised the statute on the Commerce Clause and made

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225. *See* Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-*Citizens United *Environment*, 120 YALE L.J. ONLINE 17, 17 (2010), http://yalelawjournal.org/2010/5/15/secunda.html.

226. *See, e.g.*, NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 479-80 (1941).

227. *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274, 292-96 (1908); Garden, *supra* note 223, at 2624-25.

228. ERIC FONER, THE STORY OF AMERICAN FREEDOM 123 (1998).

229. 29 U.S.C. § 104 (2006).

230. *Id.* §§ 151-69.

clear that national policy favored unionization as a path to economic prosperity and away from labor unrest.[231]

Predictably, employers resisted the NLRA, both on the street and in the courts.[232] In court, the NLRB did not attempt to re-cast the case as one about the constitutional rights of workers or unions.[233] Instead, it argued that the NLRA was valid as "an exercise of the power of Congress to protect interstate commerce from injuries caused by industrial strife."[234] As the NLRB litigated the case, the real issue was whether Congress could "anticipate" disruptions in interstate commerce caused by strikes and other labor activity —both in general and as applied to the particular employers whose conduct was at issue in the cases—or whether Congress was limited to dealing with disruptions once they had already occurred.[235]

The Court vindicated the government's position in *NLRB v. Jones & Laughlin Steel Corp*. based on the NLRA's impact on commercial stability.[236] Though the Court described the right of employees to "organize and select their representatives for lawful purposes" as a "fundamental right" necessary to "give laborers opportunity to deal on an equality with their employer,"[237] it focused primarily on the

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231. *Id*. § 151 ("It is ... the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

232. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 60-61 (2002) (describing employers' reactions to the Wagner Act, which included flatly ignoring it based on the employers' conclusion that the Act was unconstitutional and launching "campaigns of lawsuits" to enjoin the law).

233. *See* Brief for Petitioner at 10-13, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (No. 419). Constitutional rhetoric was common in the labor movement, as unions and workers articulated a vision of constitutional rights for labor, including rights to organize and strike, under the First and Thirteenth Amendments. *See, e.g.*, Pope, *supra* note 232, at 4-5. Nonetheless, there existed little or no precedent upon which the Board could have relied in support of a constitutional argument. It also would have been difficult for the government to argue that the NLRA was necessary to protect constitutional rights that were barely acknowledged in the statute itself.

234. Pope, *supra* note 232, at 10.

235. *Id*. at 10-11.

236. 301 U.S. 1 (1937).

237. *Id*. at 33.

"injury to commerce" that the NLRA sought to remedy.[238] Then, in the course of a lengthy discussion of the impacts on interstate commerce, the Court stated that "the recognition of the right of employees to self-organization and to have representatives ... is often an essential condition of industrial peace."[239] Ultimately, however, the Court concluded that it was "dealing with the power of Congress" to articulate its "particular polic[ies]."[240]

In the years following the NLRA, the Court seemed more willing to find constitutional rights where labor unions were concerned. For example, the Court held that labor picketing[241] and organizing[242] were both robustly protected by the First and Fourteenth Amendments. Moreover, the Court held that wages and working conditions were matters of public importance of the first order; thus, in *Thornhill v. Alabama*, the Court stated broadly that "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to ... shape the destiny of modern industrial society."[243]

But, this significant expansion of labor rights, including labor speech rights, was not permanent. In the mid-1940s, Congress became concerned with what it perceived as excesses committed by labor unions and passed the LMRA.[244] In the LMRA, Congress stated its finding that

> [i]ndustrial strife which interferes with the normal flow of commerce ... can be avoided or substantially minimized if employers, employees, and labor organizations each recognize ... one another's legitimate rights ... and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.[245]

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238. *Id.* at 22.
239. *Id.* at 42.
240. *Id.* at 46.
241. *E.g.*, Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940).
242. Thomas v. Collins, 323 U.S. 516, 536-37 (1945) (holding that First Amendment protects peaceful labor organizing activity and reversing criminal conviction of union organizer).
243. *Thornhill*, 310 U.S. at 103.
244. *See supra* notes 59-65 and accompanying text.
245. 29 U.S.C. § 141(b) (2006).

Thus, the NLRA's focus on commercial stability was amplified, and labor rights were expressly subordinated to the "public interest,"[246] which surely did not benefit from labor strife. Federal labor policy shifted from a pro-unionization and collective bargaining orientation—albeit one in the service of commercial stability—to a neutral one.

This policy shift was then reflected in subsequent cases. A particularly good example of such a case is *American Communications Ass'n v. Douds*, which concerned the constitutionality of the LMRA's anticommunist affidavit provision. The Court began by recounting the "constitutional justification" for the NLRA, which it characterized flatly as "the power of Congress to protect interstate commerce," and the related goal of the LMRA, to eliminate union practices that "preven[t] the free flow of goods ... through strikes and other forms of industrial unrest."[247] One such deleterious union practice was the "political strike," which "subordinat[ed] legitimate trade union objectives to obstructive strikes when dictated by [Communist] Party leaders, often in support of the policies of a foreign government."[248] Accordingly, the anticommunist affidavit requirement was tied to the "public interest" by decreasing the likelihood that a union would call a "political" strike.[249]

The Court concluded without discussion that "[t]here can be no doubt that Congress may, under its constitutional power to regulate commerce among the several states, attempt to prevent political strikes," and that lawful goal "bears reasonable relation" to the affidavit requirement.[250] Furthermore, though the Court initially acknowledged that First Amendment rights were at issue,[251] it

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246. *Id.*

247. 339 U.S. 382, 387 (1950) (quoting 29 U.S.C. § 151).

248. *Id.* at 388.

249. *Id.* at 388-89. One effect of the LMRA's affidavit requirement was to purge communist sympathizers from labor union leadership, hastening the labor movement's turn toward a narrower focus on bargaining with individual employers, rather than a broader focus on workers as a class. *See* Seymour Martin Lipset, *The Law and Trade Union Democracy*, 4 VA. L. REV. 1, 4-10 (1961) (discussing "two sides" to the labor movement, describing business unionism and social movement unionism, and discussing the role of communist leadership in unions). Thus, depending on one's perspective, the requirement created either a vicious or a virtuous cycle in which the law and unions' own leadership combined to de-politicize the labor movement.

250. *Douds*, 339 U.S. at 390-91.

251. *Id.* at 393 (noting that the requirement "lessens the threat to interstate commerce, but

concluded that the affidavit requirement itself "does not interfere with speech" because the purpose of the requirement was aimed at "substantive evils of conduct that are not the products of speech at all."[252] Most tellingly, though, the Court went on to explain that, because unions derive many of their rights from Congress in the first place, Congress must be afforded some leeway to burden unions: "[I]t is plain that when Congress clothes the bargaining representative 'with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents,' the public interest in the good faith exercise of that power is very great."[253] In other words, what Congress gave, Congress can take away—particularly when both the giving and the taking are designed to improve interstate commerce.[254]

Accordingly, it is hardly surprising that, viewed against the backdrop of the NLRA's and the LMRA's focus on commerce, the Court has been willing to restrict labor speech in service of commercial stability. Put another way, if one accepts, as the *Douds* Court did, that there is "no doubt" that Congress can ban strikes that have a political rather than economic purpose, then it would not require any particular leap of logic to conclude—as the Court did in *Allied International*[255]—that unions' politically motivated secondary strikes are entitled to less constitutional protection than economically motivated strikes, not more.

This Article has argued that the "greater includes the lesser" argument that was at work in *Douds* and cases like it is no longer tenable under *Citizens United*.[256] But in its place, the Court could hold simply that the protection of commerce is a sufficiently compelling interest to justify the incursion into unions' First Amendment rights. Although this would avoid overturning a broad

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it has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment").

252. *Id.* at 396.

253. *Id.* at 402 (quoting Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944)).

254. Though the Court eventually struck down the affidavit requirement, it did so on the ground that the statute was a bill of attainder, while simultaneously affirming that "Congress undoubtedly possesses power under the Commerce Clause to enact legislation designed to keep from positions affecting interstate commerce persons who may use such positions to bring about political strikes." United States v. Brown, 381 U.S. 437, 449-50 (1965).

255. *See supra* notes 101-03 and accompanying text.

256. *See supra* notes 221-23 and accompanying text.

swath of labor law, it would face an uphill battle in light of unions' changed circumstances since the LMRA. In short, it would be difficult to show that a blanket prohibition on union secondary activity is necessary to protect the public interest and to prevent commercial unrest, particularly in cases where the activity is secondary picketing that calls for a consumer boycott.[257] Instead, at minimum, courts should inquire as to the threats to commercial stability posed by forbidden activities, and then craft narrowly tailored remedies designed to target the harm.

CONCLUSION

Since the Court announced its decision in *Citizens United*, commentators on the left have decried the decision for its potentially far-reaching and negative impact on American democracy. But, the *Citizens United* Court's articulation of general First Amendment principles, as applied to corporations, has potentially significant consequences for labor unions in at least two areas—advocacy, including secondary activity and associated picketing, and union-shop agreements. If this promise comes to fruition, then *Citizens United* itself may ultimately result in stronger unions that are more effective corporate adversaries. Although this is by no means a complete solution to the problem of corporate and special interest spending in the American political process, it could mitigate one aspect of that problem—the amplification of only one side's voice in the political arena.

257. Some, but not all, such activity is already permissible. *Compare* NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 71 (1964) (picketing in support of secondary consumer boycott permissible under NLRA when pickets made clear that boycott was against only one item sold by retailer, and not against retailer itself), *with Safeco*, 447 U.S. 607, 614-15 (1980) (finding that *Fruit & Vegetable Packers* exception does not apply when target of picketing is the primary good or service sold by neutral employer).