

UNIONS, CORPORATIONS, AND POLITICAL OPT-OUT RIGHTS AFTER *CITIZENS UNITED*

*Benjamin I. Sachs**

Citizens United upends much of campaign finance law, but it maintains at least one feature of that legal regime: the equal treatment of corporations and unions. Prior to Citizens United, that is, corporations and unions were equally constrained in their ability to spend general treasury funds on federal electoral politics. After the decision, campaign finance law leaves both equally unconstrained and free to use their general treasuries to finance political expenditures. But the symmetrical treatment that Citizens United leaves in place masks a less visible, but equally significant, way in which the law treats union and corporate political spending differently. Namely, federal law prohibits a union from spending its general treasury funds on politics if individual employees object to such use—employees, in short, enjoy a federally protected right to opt out of funding union political activity. In contrast, corporations are free to spend their general treasuries on politics even if individual shareholders object—shareholders enjoy no right to opt out of financing corporate political activity. This Article assesses whether the asymmetric rule of political opt-out rights is justified. The Article first offers an affirmative case for symmetry grounded in the principle that the power to control access to economic opportunities—whether employment or investment-based—should not be used to secure compliance with or support for the economic actor’s political agenda. It then addresses three arguments in favor of asymmetry. Given the relative weakness of these arguments, the Article suggests that the current asymmetry in opt-out rules may be unjustified. The Article concludes by pointing to constitutional questions raised by this asymmetry, and by arguing that lawmakers would be justified in correcting it.

INTRODUCTION	801
I. THE BACKDROP	809
A. Union and Corporate Spending Under Campaign Finance Law	809
B. The Law of Union Security	811
1. Union Dues and Free Riders	811
2. The Supreme Court and Union Security	813
II. POLITICAL OPT-OUT RIGHTS FOR EMPLOYEES AND SHAREHOLDERS: A CASE FOR SYMMETRICAL TREATMENT	819
A. Union Security and Sphere Separation	820

* Assistant Professor, Harvard Law School. For helpful suggestions and comments, the author thanks Lucian Bebchuk, Rachel Brewster, John Coates, Glenn Cohen, Cynthia Estlund, Jerry Frug, John Goldberg, Jack Goldsmith, Paul Kahn, Michael Klarman, Adriaan Lanni, Bruce Lerner, Daryl Levinson, John Manning, Frank Michelman, Gerald Neuman, Matthew Stephenson, Jed Shugerman, Mark Wu, and participants in the Harvard Law School Faculty Workshop. Excellent research assistance was provided by Meredith Boak, Will Dreher, Noah Grynberg, Rebecca Livengood, Philip Mayor, Erin Monju, Betny Townsend, and Kate Walro.

B. Corporate Political Spending and Sphere Separation . . .	824
III. ARGUMENTS FOR ASYMMETRY: COMPULSION, STATE ACTION, AND THE UNION/CORPORATE DISTINCTION	827
A. The Existence of Compulsion	827
1. A Definition: The Two-Pronged Theory of Coercion	830
2. Applying the Test	832
a. The Proposal Prong	833
b. The Choice Prong	833
i. The Union Context	833
ii. The Corporate Context	838
3. Conclusion	843
B. The Source of Compulsion: State Action	844
C. The Union/Corporate Distinction	851
1. Forms of Association	851
2. Differences Between the Employee/Union and Shareholder/Corporate Relationship	855
IV. IMPLICATIONS: CONSTITUTIONAL QUESTIONS AND LEGISLATIVE REFORM	858
A. A Constitutional Difficulty with the Asymmetric Rule . . .	858
B. Legislative Intervention: Extending Opt-Out Rights to Shareholders	862
C. Public Pensions: Conditioning Employment on the Funding of Corporate Political Speech	866
V. CONCLUSION	869

INTRODUCTION

For more than half a century, federal campaign finance law has bound unions and corporations to symmetrical restrictions on their ability to spend money on politics.¹ Indeed, since the mid-1940s, campaign finance legislation has spoken of corporations and labor organizations in the same breath. In 1943, the War Labor Disputes Act made it unlawful for “any corporation whatever, or any labor organization” to contribute to candidates for federal office.² In 1971, the Federal Election Campaign Act (FECA) forbade “any corporation whatever, or any labor organization” to fund with general treasury monies expenditures that expressly

1. See, e.g., *United States v. UAW-CIO*, 352 U.S. 567, 579 (1957) (noting new campaign finance law “seeks to put labor unions on exactly the same basis, insofar as their financial activities are concerned, as corporations have been on for many years”); *United States v. CIO*, 335 U.S. 106, 114–15 (1948) (discussing “congressional belief that labor unions should . . . be put under the same restraints as had been imposed on corporations”).

2. War Labor Disputes Act of 1943, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167–68 (repealed 1948).

advocated the election or defeat of a candidate.³ Most recently, the Bipartisan Campaign Reform Act (BCRA) of 2002 extended this ban on corporate and union general treasury spending to include political advertisements that refer to a candidate in the weeks and months leading up to a federal election.⁴

In *Citizens United v. FEC*, the Supreme Court held the provisions of campaign finance law prohibiting union and corporate electoral expenditures unconstitutional.⁵ Overruling its earlier decision in *Austin v. Michigan Chamber of Commerce*,⁶ the Court ruled that Congress could not restrict political speech based on a speaker's identity.⁷ Although *Citizens United* upsets much of the landscape of federal campaign finance law, the opinion accordingly maintains one longstanding feature of that regime: the symmetrical treatment of unions and corporations. Before the decision, that is, unions and corporations were equally constrained by campaign finance regulation. After the decision, campaign finance law leaves unions and corporations equally unconstrained and free to use their general treasuries to fund federal electoral expenditures.⁸

Yet, the symmetrical treatment of unions and corporations that *Citizens United* preserves masks a less visible, but equally important, way in which the law treats union and corporate political spending differently. The union's "general treasury" consists of union dues—the monthly payments made by employees covered by collective bargaining agreements. Federal law, however, prohibits unions from spending any individual em-

3. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 3, 10 (codified as amended at 2 U.S.C. § 441b(a) (2006)).

4. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 201, 203, 116 Stat. 81, 88–91 (codified at 2 U.S.C. §§ 434(f)(3)(A), 441b(b)(2)).

5. 130 S. Ct. 876, 913 (2010); see also Samuel Issacharoff, On Political Corruption, 124 Harv. L. Rev. 118, 125 & n.38 (2010) (noting "the Court has now struck down anything categorized as an expenditure limitation"). Although the case before the Court involved a corporation, the holding also renders restrictions on union political expenditures unconstitutional. See, e.g., *Citizens United*, 130 S. Ct. at 904 (stating "the worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual'" (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978))); *id.* at 919 (Roberts, C.J., concurring) ("Congress may not prohibit political speech, even if the speaker is a corporation or union."); see also *In re Cao*, 619 F.3d 410, 431 (5th Cir. 2010) (noting *Citizens United* "altered the legal landscape with respect to corporations and labor unions, because the Supreme Court held that these entities may make independent campaign expenditures free of Congressional limitations").

6. 494 U.S. 652 (1990).

7. *Citizens United*, 130 S. Ct. at 903.

8. See *id.* at 913–16. *Citizens United* left in place the ban on corporate and union campaign contributions to parties and candidates, and the expenditures it permits must be made independently of candidates and parties. Issacharoff, *supra* note 5, at 125. One federal district court has found the contribution ban unconstitutional under the reasoning of *Citizens United*. *United States v. Danielczyk*, 791 F. Supp. 2d 513, 514 (E.D. Va. 2011). As Justice Stevens put it in his separate opinion, "[g]oing forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates . . ." *Citizens United*, 130 S. Ct. at 940 (Stevens, J., concurring in part and dissenting in part).

ployees' dues on politics if those employees object to such use.⁹ Employees, in brief, enjoy a federally protected right to control the way their dues are spent and to opt out of funding union political activity. The corporation's "general treasury," for its part, consists of profits that are generated from shareholders' capital contributions and to which shareholders are, on a pro rata basis, the residual claimants. In contrast to the union context, however, corporations are free to spend these assets on politics even if individual shareholders object. Shareholders, in brief, enjoy no right to opt out of financing corporate political activity.

These asymmetric rules regarding opt-out rights for employees and shareholders imply that the symmetrical treatment of unions and corporations in campaign finance law does not produce a symmetrical campaign finance regime. To the contrary: While *Citizens United* frees both unions and corporations to *spend* general treasury money on electoral politics, the opt-out right available to employees, but not shareholders, imposes a restriction on unions' ability to *fund* these general treasuries that corporations do not face.

Nothing in campaign finance law requires that unions and corporations in fact have equal resources to spend on politics, and *Citizens United*—like *Buckley v. Valeo*¹⁰ before it—rejects the idea that a legislature could attempt to balance the economic resources available to different political speakers.¹¹ From the perspective of the campaign finance regime, then, the problem with asymmetric opt-out rights is not that unions will be outspent by corporations. The problem from this perspective is, rather, that the asymmetric rules of opt-out rights provide corporations a *legally constructed* advantage over unions when it comes to political spending. And this kind of legally conferred advantage is inconsistent with federal campaign finance law and, in particular, with that regime's insistence that unions and corporations be put "‘on exactly the same basis, insofar as their financial activities are concerned.’"¹²

Beginning with Victor Brudney's publication of *Business Corporations and Stockholders' Rights Under the First Amendment*,¹³ legal scholars have

9. As Part I will discuss, it is the interaction of labor statutes—including the National Labor Relations Act, the Railway Labor Act, and state public employee bargaining laws—and the Constitution that imposes this limitation.

10. 424 U.S. 1 (1976).

11. See *Citizens United*, 130 S. Ct. at 921 (Roberts, C.J., concurring) (citing *Buckley*, 424 U.S. at 48–49).

12. *United States v. UAW-CIO*, 352 U.S. 567, 579 (1957) (quoting Hearings on H.R. 804 and H.R. 1483 Before a Subcomm. of the H. Comm. on Labor, 78th Cong. 1 (1943) (statement of Rep. Landis)); see also Adam Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 *Geo. L.J.* 871, 931 (2004) ("This linkage, treating unions and corporations as equivalent entities . . . continues to the present day.").

13. Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 *Yale L.J.* 235, 268–70 (1981) [hereinafter Brudney, *Business Corporations and Stockholders' Rights*].

pointed to the rule of political opt-out rights for employees to support legal reforms that would give shareholders greater control over corporate political spending.¹⁴ The Court, however, has rejected the analogy between employees and shareholders.¹⁵ In fact, the Court has dismissed the union opt-out rule as “irrelevant” to the shareholder context because workers are “compelled” or “coerced” to fund union political speech while shareholder financing of corporate politics is voluntary.¹⁶

But while the rule of union opt-out rights has appeared in both the cases and the literature on corporate political spending, a complete analysis of whether or why the union rule constitutes a relevant source of authority for the corporate context remains to be developed.¹⁷ The need for such an analysis, moreover, is made acute by *Citizens United* itself. By freeing unions and corporations to spend their general treasuries on federal elections, the decision renders critical the disparity in the way such treasuries can be funded—a disparity that the asymmetric rule of political opt-out rights creates.¹⁸ This Article aims to provide this analysis and thereby to resolve whether the asymmetry in our current regime of campaign finance is justified.

The Article begins by outlining the rules regarding union and corporate political spending under campaign finance law. It then turns to describe the law governing union security agreements—the provisions in collective bargaining agreements that condition employment on a requirement that employees pay union dues. In a series of decisions starting in the mid-1950s, the Supreme Court crafted a rule, applicable in both the public and private sector, that limits the permissible scope of such agreements. Under this rule, although employment may be conditioned

14. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 *Harv. L. Rev.* 83, 114 (2010); Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 *Wm. & Mary Bill Rts. J.* 1, 47–57 (1995) [hereinafter Brudney, *Association*]; Jeremy G. Mallory, *Still Other People’s Money: Reconciling *Citizens United* with *Abood* and *Beck**, 47 *Cal. W. L. Rev.* 1, 32 (2010).

15. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

16. *Id.*

17. As suggested by notes 13–14, several authors, most notably Brudney, have offered some discussion of the question.

18. Because unions and corporations could engage in certain types of political spending with general treasury funds prior to *Citizens United*—including lobbying and electoral spending in certain states—the asymmetric opt-out rules imposed a disadvantage on unions even before the Court’s decision. But *Citizens United* dramatically increases the potential extent of the problem and makes the asymmetry relevant to federal electoral spending for the first time. See generally John C. Coates IV, *Corporate Governance and Corporate Political Activity: What Effect Will *Citizens United* Have on Shareholder Wealth?* 2 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 684, 2010), available at <http://ssrn.com/abstract=1680861> (on file with the *Columbia Law Review*) (“*Citizens United* can be expected to increase all kinds of political activity by corporations.”). For a discussion of early evidence regarding the impact of *Citizens United*, see Michael M. Franz, *The *Citizens United* Election? Or Same as It Ever Was?*, 8 *Forum*, no. 4, 2010, art. 7, available at http://mediaproject.wesleyan.edu/files/2011/01/Forum_MMF.pdf (on file with the *Columbia Law Review*).

on a requirement that employees pay dues to support the union's *economic* activity—the union's collective bargaining and contract administration functions—employment may not be conditioned on an employee's agreement to fund the union's *political* activity.

While employment in a unionized firm can be conditioned on employees' compliance with the provisions of a union security clause, investment in a corporation's stock is conditioned on shareholders delegating decisionmaking authority to firm management.¹⁹ Under current corporate law rules, this includes the requirement that shareholders delegate to firm management the authority to spend their "proportionate interest in the [firm's] collective assets" on politics.²⁰ Unlike in the union context, however, corporate law affords shareholders no right to insist that the firm use these assets only for economic, and not political, activity.²¹

After describing these asymmetric rules for political opt-out rights, the Article then moves to explore the question that is its central focus: Taking the union rule as a given for purposes of this analysis, the Article asks whether the corporate context ought to be treated symmetrically with respect to political opt-out rights.²²

19. Robert Charles Clark, *Corporate Law* § 1.2.4, at 22 (1986); Brudney, *Business Corporations and Stockholders' Rights*, supra note 13, at 268; see also Del. Code Ann. tit. 8, § 141 (2011) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").

20. Bebchuk & Jackson, supra note 14, at 87 (noting when it comes to corporation's political spending decisions there is "no role for shareholders"); Brudney, *Association*, supra note 14, at 56.

21. See Bebchuk & Jackson, supra note 14, at 87 & n.10 ("[S]hareholders are generally not able to enact binding resolutions with respect to ordinary business decisions, which currently include corporate decisions to engage in political speech."); see also Brudney, *Business Corporations and Stockholders' Rights*, supra note 13, at 264 (noting investment "requires [shareholder] to permit the use of his assets to support social views and generate social attitudes that may impinge upon his individual preferences"); *id.* at 239–40 (stating "unless investor approval is obtained, the funds of some investors are being used to support views they do not favor").

22. The Article leaves for another day an exploration of whether the union opt-out rule is justified on its own terms, and focuses instead on whether the asymmetry between union and corporate opt-out rights is justified. As discussed below, the union opt-out rule is based on a judicial conclusion that union political spending is not germane to the broader project of collective bargaining and contract administration. See, e.g., *Comm'n v. Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (holding unions may compel contributions for collective-bargaining activities but not political ones); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977) (same). This conclusion is far from obvious, however, as judicial and scholarly commentators have observed. See, e.g., Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 *Berkeley J. Emp. & Lab. L.* 1, 43, 67 (1999) (noting mandatory dues supporters' arguments that "union political activity is wholly germane to a union's work in the realm of collective bargaining, and thus a reasonable means to attaining the union's proper object of advancing the economic interest of the worker" (quoting J. Albert Woll, *Unions in Politics: A Study in Law and the Workers' Needs*, 34 *S. Cal. L. Rev.* 130, 144 (1961))).

To this end, the Article first identifies an affirmative case for symmetrical treatment. Underlying the union security cases is the principle that the union's economic power to exclude workers from employment opportunities should not be deployed to secure those workers' compliance with the union's political program. This is a type of spheres separation principle: The union's economic power is appropriately deployed only in the economic realm where it was developed, and the export of this power to the political sphere is inappropriate and unjust.²³ But this defect in the union security agreement is a special case of a more general phenomenon that occurs when the power to control access to economic opportunities is used to secure compliance with or support for the economic actor's political agenda. And, as the Article argues, the corporate context—where investors are “forced to choose between contributing to political . . . expressions with which they disagree or forgoing opportunities for profitable investment”²⁴—has this same feature.

In drawing out this separation of spheres argument, the Article distinguishes two types of interactions between economic and political power. The first is more familiar to campaign finance law and scholarship, and involves the use of economic wealth to disseminate and amplify the speaker's political message—a political use of economic wealth that *Citizens United* strongly protects.²⁵ The concern in this Article, however, is not with the use of wealth to amplify political speech, but rather with the distinct problem of conditioning access to economic opportunity on political compliance. What the Article suggests is that there are good reasons for extending *this* sphere separation principle, currently applied in the union context, to the corporate one.

In light of the Court's rejection of the relevance of the union rule to the corporate setting, and given what may be strong intuitions that these two contexts are in fact divergent, the Article then turns to investigate whether, despite the existence of an affirmative case for symmetry, there are nonetheless differences between the union and corporate contexts that justify asymmetric rules for political opt-out rights. Three prominent arguments are considered.

First, taking as a point of departure the Court's conclusion that the union security context is defined by compulsion and the corporate one by voluntariness, the Article explores, with more precision than the Court affords the issue, what it means to say that employees are compelled or

23. See *infra* Part II.A (discussing Supreme Court's union security cases); see also Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 17–20 (1983) [hereinafter Walzer, *Spheres*] (developing separation of spheres principle).

24. Brudney, *Business Corporations and Stockholders' Rights*, *supra* note 13, at 268.

25. *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010). But see *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986) (holding risk inherent in permitting corporate spending on politics was “the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace”).

coerced to pay union dues.²⁶ Given the nature of the inquiry, the analysis here is not intended to establish with certainty that compulsion exists in either or both of these contexts. But the analysis does aim to refine the questions in play and to unsettle the conclusion that only the union context is defined by compulsion.

Second, this Article takes up the possibility that even if the existence of compulsion is consistent across these two contexts, the *source* of compulsion may differ. In particular, the Article explores whether there is governmental compulsion in the private sector union context but only economic compulsion of private actors in the corporate sphere. As the Article shows, the government encourages the formation and growth of both unions and corporations, and it facilitates the negotiation of both union security agreements and corporate rules that require shareholders to delegate to management authority over political spending decisions. The Article accordingly rejects the contention that the two contexts can be distinguished on state action grounds.²⁷

Third, this Article investigates whether there are differences between the kinds of speech and associational interests that are implicated in the union and corporate contexts.²⁸ Here, the Article shows that unions and corporations—particularly post-*Citizens United*—are hybrid associations engaged in both political and economic activity, and thus that the two contexts implicate similar associational interests. Moreover, because the type of speech being financed by the union and the corporation is the same, so too are the speech interests of workers and shareholders.²⁹ The Article also argues that the defect in the union security agreement exists

26. Relying on the philosophical literature, and Alan Wertheimer's work in particular, the Article specifies and then applies a two-prong test for coercion. See *infra* Part III.A; see also Alan Wertheimer, *Coercion* 30–48 (1987) [hereinafter Wertheimer, *Coercion*] (developing two-pronged theory of coercion).

27. See *infra* Part III.B.

28. Following the Supreme Court's decisions in this area, this section assumes that even if there is no state action and the Constitution does not formally apply to private sector union workers or shareholders, the "constitutional values" of speech and association nonetheless will be relevant. *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 761–62 (1988); see also George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 *Berkeley J. Emp. & Lab. L.* 187, 233 (1994) (noting *Beck* decision "is not directly based on the First Amendment, but it makes sense only as an example of the Justices' infusing the values they find in the First Amendment into an area that they are nonetheless unwilling to decide is subject to the Constitution"); Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 *Hastings L.J.* 1, 83 (1989) ("[L]abor law . . . has statutorily protected constitutional interests of workers by balancing workers' right of free association against other competing legitimate interests [even absent state action]." (citing Clyde W. Summers, *Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 *U. Ill. L. Rev.* 689, 694–702)).

29. See *infra* Part III.C; see also Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 *Val. U. L. Rev.* 555, 565 (2006) [hereinafter Post, *Transparent and Efficient Markets*].

independently of whether the union's political speech can be attributed to the employee.³⁰ The Article further disputes that a dispositive difference can be found between the relationships between an objecting employee—as distinct from a union member—and her union, and a shareholder and her corporation.

Because the analysis here involves a set of normative arguments, this Article does not contend that any policy outcomes flow by necessity from this discussion. But the Article does address a set of potential implications to which this analysis points. The first implication is a constitutional one. More particularly, *Citizens United* holds that requiring a corporation to speak through a PAC is unconstitutional in part because of the extensive administrative and regulatory burdens that this requirement imposes on political speech.³¹ But the union opt-out rule renders the union general treasury largely analogous—with some exceptions—to a PAC: Not only is the union's political treasury limited to the “knowing free-choice donations” available to a PAC, but the administrative burdens that the opt-out rule continues to impose on unions are likely at least as extensive as those that *Citizens United* finds impermissible with respect to corporations. By imposing such substantive and administrative burdens on unions but not corporations, the current asymmetry treats political speakers differently. What the analysis here suggests is that there may be no justification for this asymmetry, and, at the least, that the Court would have to identify a distinguishing characteristic of unions that justifies the differential treatment.

Next, even if the asymmetric opt-out rule is constitutionally permissible, the aptness of the analogy between the union and corporate contexts provides Congress—and state lawmakers—with a strong, conceptually sound justification for offering shareholders a right to opt out of financing corporate political activity. Although the specifics of the institutional design question are beyond the scope of this Article, such a reform could—in broad strokes—involve a requirement that corporations offer shareholders the right to receive a dividend payment each year in an amount equal to the shareholder's pro rata share of the corporate budget that was spent on politics.³²

Finally, this Article looks beyond the private sector that is its primary focus and raises a question about the current structure of public employee pension plans. Because it is impermissible to condition employment on a requirement that employees fund union political speech, it should also be impermissible to condition employment on a requirement

30. See, e.g., Robert Post, *Compelled Subsidization of Speech: *Johanns v. Livestock Marketing Association**, 2005 Sup. Ct. Rev. 195, 221 [hereinafter Post, *Compelled Subsidization*].

31. *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010); see also *infra* Part IV.A.

32. See Mallory, *supra* note 14 at 36–38. This Article also discusses the possibility of correcting the asymmetry in opt-out rights by withdrawing the right from employees. See *infra* note 320 and accompanying text.

that employees fund corporate political speech. Yet, nearly all states impose a similar condition on public employment by mandating, as a condition of employment, that employees contribute to public pension funds—funds that invest heavily in corporate securities. Especially after *Citizens United*, this arrangement is constitutionally vulnerable. Accordingly, the Article suggests that states may need to reform their pension plans by providing employees with a mechanism to ensure that their contributions do not go to the purchase of securities issued by corporations that do not provide a political opt-out right.

The Article proceeds as follows. Part I provides the relevant background on the laws of campaign finance and union security agreements. Part II identifies an affirmative case for symmetrical treatment of employees and shareholders. Part III explores three objections to symmetrical treatment: objections grounded in the existence of compulsion, the source of compulsion, and the nature of the speech and associational interests implicated in the two contexts. Part IV discusses constitutional and legislative implications of the analysis, and Part V concludes.

I. THE BACKDROP

A. *Union and Corporate Spending Under Campaign Finance Law*

Prior to the Court's decision in *Citizens United*, campaign finance law prohibited unions and corporations from spending their general treasury funds on federal elections.³³ However, campaign finance law permitted—and still permits—both unions and corporations to establish and administer separate funds, so-called political action committees (or PACs), and through these committees to make both contributions to candidates and independent expenditures in federal elections.³⁴ The primary requirement for the segregated fund is that all contributions be “knowing free-choice donations.”³⁵

This coupling of the prohibition on general treasury spending and the authorization of spending through segregated funds captured twin

33. See, e.g., 2 U.S.C. § 441b(a) (2006) (declaring illegal campaign contributions by unions and “any corporation whatever” in federal elections, primaries, or political conventions); see also Richard L. Hasen, *Citizens United* and the Illusion of Coherence, 109 Mich. L. Rev. 581, 585–90 (2011) (discussing campaign contribution case law prior to *Citizens United*).

34. See 2 U.S.C. § 441b(b)(2)(C); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 201 (1982) (“[Section 441b] permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of ‘separate segregated funds,’ which may be ‘utilized for political purposes.’” (quoting 2 U.S.C. § 441b(b)(2)(C))); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 401 (1972) (“[A] labor organization [is not prohibited] from making, through the medium of a political fund organized by it, contributions or expenditures in connection with federal elections, so long as the monies expended are in some sense volunteered by those asked to contribute.”); see also Winkler, *supra* note 12, at 930–33 (analyzing Supreme Court treatment of PACs).

35. *Pipefitters*, 407 U.S. at 414.

congressional purposes. Since the earliest iterations of campaign finance regulation, Congress has been concerned with, first, the effects of aggregated wealth on the political process and, second, the interests of “dissenting” shareholders and employees in avoiding the obligation to fund political activity that they do not wish to fund.³⁶ Thus, for example, when Congress first prohibited corporations from making contributions in connection with federal elections, the legislation reflected both purposes: “First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of stockholders.”³⁷

When Congress extended the contribution ban to include labor unions in the War Labor Disputes Act of 1943, its purposes were parallel. As the Court put it in *United States v. CIO*, “[i]t was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose.”³⁸

These two goals were complementary. Congress, that is, was concerned with the effects of aggregated wealth on the political process, but its concern extended only to a particular type of aggregated wealth—namely, wealth aggregated in the economic arena and through economic means that was then deployed in the political realm for electoral purposes. Wealth aggregated explicitly for political purposes—from knowing and free choice donations—was permissible and indeed was “desirable in a democracy.”³⁹ By prohibiting unions and corporations from spending their general treasuries on politics, while permitting them to administer segregated and voluntary political funds, Congress would prevent the first type of wealth aggregation while allowing the second.⁴⁰

Such was the state of the doctrine prior to *Citizens United*. As we have seen, *Citizens United* invalidates the ban on corporate and union expenditures,⁴¹ and holds that the government’s interests in preventing corrup-

36. See, e.g., *id.* at 413 (articulating these “dual purposes” of Congress’s campaign finance laws).

37. *United States v. CIO*, 335 U.S. 106, 113 (1948) (footnotes omitted); see also Winkler, *supra* note 12, at 918–26 (discussing legislative history of Tillman Act).

38. 335 U.S. at 115 (footnote omitted).

39. *Pipefitters*, 407 U.S. at 404 (quoting S. Rep. No. 79-101, at 24 (1945) (statement of Sens. Ball and Ferguson)).

40. The carve-out for political spending by segregated funds emerged originally as a product of judicial construction of the legislative ban on union contributions and expenditures. See generally *Pipefitters*, 407 U.S. 385. But, in 1971, Congress incorporated the segregated fund exception into the Federal Elections Campaign Act. See 2 U.S.C. § 441b(2)(C) (2006).

41. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010); Issacharoff, *supra* note 5, at 125 & n.38.

tion of the political process and “protecting dissenting shareholders from being compelled to fund corporate political speech” are insufficiently compelling to justify the incursion on union and corporate speech rights.⁴² In reaching this holding, moreover, the Court rejected the idea that the ability to speak through a PAC is sufficient to render constitutional the prohibition on general treasury spending. This was so for two independent reasons.⁴³ First, the Court held that PACs are distinct entities from corporations, and thus allowing the PAC to speak does not allow the corporation to do so.⁴⁴ Second, speaking through a PAC was administratively burdensome, and these burdens unconstitutionally interfered with a corporation’s right to speak politically.⁴⁵

In sum, campaign finance law no longer requires corporations or unions to fund political expenditures with segregated funds and knowing free-choice donations,⁴⁶ but instead frees them to finance such expenditures with their general treasuries.

B. *The Law of Union Security*

1. *Union Dues and Free Riders.* — A labor union’s general treasury is funded with dues paid by employees. In general, these dues constitute a small proportion of the increase in wages that employees secure as a result of unionization: According to the most recent estimates, unionization brings a wage premium of approximately 17%, while dues average around 1.25% of an employee’s wages.⁴⁷ Nonetheless, unions face a collective action problem in raising dues: Because federal labor law requires that a union negotiate collective bargaining agreements on behalf of all the employees in a particular bargaining unit—and not only on behalf of employees who choose to become union members—whatever benefits the union secures accrue to all the employees in the unit.⁴⁸ This presents

42. *Citizens United*, 130 S. Ct. at 911; see also Hasen, *supra* note 33, at 595–99 (discussing government’s three arguments—antidistortion, anticorruption, and shareholder protection—in support of ban on corporate and union expenditures).

43. *Citizens United*, 130 S. Ct. at 897.

44. *Id.*

45. *Id.*

46. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 424 (1972).

47. On the wage premium, see David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?, in What Do Unions Do? A Twenty-Year Perspective* 79, 84 tbl.4.2 (James T. Bennett & Bruce E. Kaufman eds., 2007); David Card, *The Effect of Unions on the Structure of Wages: A Longitudinal Analysis*, 64 *Econometrica* 957, 974 (1996). On the average amount of dues, see John W. Budd & In-Gang Na, *The Union Membership Wage Premium for Employees Covered by Collective Bargaining Agreements*, 18 *J. Lab. Econ.* 783, 803 (2000).

48. Unions have exclusive bargaining status under the National Labor Relations Act, 29 U.S.C. § 159(a) (2006), the Railway Labor Act, 45 U.S.C. § 152 (2006), and public sector labor laws. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223–24 (1977) (applying Mich. Comp. Laws § 423.211 (1970)); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 757–58, 760–61 (1961) (applying Railway Labor Act).

a risk of free riding by employees.⁴⁹ Unions have responded to the free-rider threat by negotiating contractual provisions—union security agreements—that require employees to pay dues to the union as a condition of employment.⁵⁰ Under such agreements, if an employee fails to pay dues, the employer is obligated to discharge the employee.

The National Labor Relations Act (NLRA), which governs union organizing and labor relations for the “vast majority of employees in the private sector,”⁵¹ permits unions and employers to negotiate a limited form of union security agreement. The statute allows the parties to bargain agreements that require employees to become union members “on or after the thirtieth day following the beginning of such employment,” but it limits the type of union “membership” that may be made such a condition of employment.⁵² Section 8(a)(3) of the Act declares that employment may be conditioned only on an employee’s agreement to pay to the union “the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”⁵³ No membership requirements or obligations other than this financial one may be imposed.⁵⁴ Reflecting this limitation, employees who choose only to pay the fees and dues authorized by § 8(a)(3) are generally not members of the union at all, but are instead referred to as “fee payers,”⁵⁵ or, more simply, as “nonmembers.”⁵⁶ The Railway Labor Act (RLA), which covers the airline and railroad industries, has an analogous union security provision.⁵⁷ Thus, under RLA § 2(Eleventh), unions and employers are permitted to negotiate union security provisions, but, again, only those that condition employment on an employee’s agreement to pay the dues and fees that

49. Mancur Olson used the union context to describe what he called the “logic of collective action”: Self-interested individuals have the incentive to free ride by receiving the benefits of group membership without contributing to the group in return. Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 66–97 (1971). For some critiques of Olson’s “logic,” see, for example, Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 *Mich. L. Rev.* 71 (2003) (developing “logic of reciprocity”); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *Cardozo L. Rev.* 2685, 2738–44 (2008) (applying Kahan’s theory in workplace setting).

50. See, e.g., Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck*, 27 *Harv. J. on Legis.* 51, 57 (1990) (defining and describing union security agreements).

51. *Id.* at 58.

52. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3); see, e.g., Dau-Schmidt, *supra* note 50, at 57–58 (detailing “several forms” of union security agreements).

53. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3).

54. *Id.* As the Court put it, “[m]embership’ as a condition of employment is whittled down to its financial core.” *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963).

55. *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 243 (1995).

56. *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 738 (1987); *California Saw*, 320 N.L.R.B. at 225.

57. See RLA §§ 1–13, 45 U.S.C. §§ 151–163 (2006); *Beck*, 487 U.S. at 746 (noting Congress “expressly modeled” RLA § 2(Eleventh) after NLRA § 8(a)(3)).

are “uniformly required as a condition of acquiring or retaining membership” in the union.⁵⁸

2. *The Supreme Court and Union Security*. — Beginning in the mid-1950s, the Supreme Court entertained a series of challenges to these statutory union security provisions.⁵⁹ The Court’s first major union security case, *Railway Employees Department v. Hanson*, arose under the RLA and involved a claim that the enforcement of a union security agreement violated employees’ First Amendment rights.⁶⁰ The *Hanson* Court began by holding that the operation of a union security agreement in the railroad industry raised justiciability questions under the U.S. Constitution: Unlike the NLRA, which permits states to prohibit union security agreements entirely, the RLA preempts state law on the question, and the Court found sufficient state action in the federal law’s preemptive effect.⁶¹

Nonetheless, the Court rejected the employees’ constitutional challenge on the merits. According to the *Hanson* Court, Congress had a compelling interest in seeking to secure “[i]ndustrial peace along the arteries of commerce,” and its decision to pursue this goal by promoting unionization was a legitimate one.⁶² Allowing for the negotiation and enforcement of union-shop agreements was, in turn, an “allowable” means to promote unionization.⁶³ On the record in *Hanson*, however, there was no evidence regarding the use to which the union was putting the dues it collected through the union-shop agreement. The *Hanson* Court accordingly reserved the question of whether the First Amendment might be violated if the union security clause was used to “forc[e] ideological conformity or other action in contravention of the First Amendment.”⁶⁴

This question was presented squarely in *International Ass’n of Machinists v. Street*, another RLA case.⁶⁵ As in *Hanson*, the plaintiffs in *Street* argued that conditioning employment on an agreement to pay dues to the union violated their First Amendment rights to free association. But unlike in *Hanson*, the record in *Street* made clear that the dues the union collected through the union-shop provision were used for explic-

58. 45 U.S.C. § 152(Eleventh).

59. The Court’s jurisprudence in this area involves both public and private sector employers. Given the clear difference between *public sector* employment and corporate investment—namely, the unquestioned presence of a state actor in the public employment setting—the Article’s focus throughout will be on the private sector cases and the private sector rule. Nonetheless, because the public sector cases are necessary to understanding the private sector developments, they are discussed here.

60. 351 U.S. 225 (1956).

61. *Id.* at 231–32; see also RLA § 2(Eleventh), 45 U.S.C. § 152(Eleventh). This Article takes up the question of state action in Part III.B below. As Gillian Metzger has observed, “*Hanson*’s reasoning is hard to square with recent state action cases” Gillian E. Metzger, *Privatization as Delegation*, 103 *Colum. L. Rev.* 1367, 1468 n.349 (2003).

62. 351 U.S. at 233.

63. *Id.*

64. *Id.* at 238.

65. 367 U.S. 740, 749 (1960) (“The record in this case is adequate squarely to present the constitutional questions reserved in *Hanson*.”).

itly political purposes,⁶⁶ and the *Street* Court concluded that the political use of dues collected pursuant to a union security agreement raised constitutional questions “of the utmost gravity.”⁶⁷ Deploying the canon of constitutional avoidance, the *Street* Court thus sought a construction of RLA § 2(Eleventh) that would authorize the union-shop agreements but bar unions from spending dues for political purposes whenever an employee objects to such use.⁶⁸ The Court found such a construction in the congressional purposes behind the RLA’s union security provisions.

According to the Court, Congress prescribed collective bargaining as the optimal approach for settling disputes between railroad employers and their employees.⁶⁹ Successful collective bargaining, in turn, depended on the union’s ability to overcome the free rider threat through union security agreements.⁷⁰ The *Street* Court accordingly found in the RLA clear congressional support for the collection of union-shop dues to finance collective bargaining and contract administration activity. But, according to the Court, *political* action was unrelated to the union’s role in the collective bargaining system that the RLA established.⁷¹ When, for example, the union used dues to help elect candidates to office, it did nothing to “defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes.”⁷² Thus, the Court found no suggestion in the legislative history that Congress intended to allow unions, over an em-

66. See *id.* at 744 & n.2 (finding “substantial” amount of union dues collected were being used to contribute to political campaigns).

67. *Id.* at 749.

68. *Id.*

69. *Id.* at 760.

70. *Id.* at 761.

71. The Court’s holding on this score has rightly been subject to sustained criticism. In dissent, for example, Justice Frankfurter wrote that “[t]he notion that economic and political concerns are separable is pre-Victorian.” *Id.* at 814 (Frankfurter, J., dissenting); see also David B. Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C. Davis L. Rev. 591, 601–02 (1981) (“In many instances, union political activity is integrally related to the pursuit of union representational goals.”); Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 Tex. L. Rev. 1, 33 (1981) (“The myth that politics is distinct from economics is characteristic of Western liberal thought, and contemporary American labor law partakes of this myth.” (footnote omitted)). The practical interconnection between union political and economic activity provides grounds to challenge the opt-out rule on its own terms. This Article, however, is not concerned with the validity of the union rule on its own terms, but with the asymmetry in the treatment of the union and corporate contexts. To this extent, the Article takes the union rule as given and asks whether an analogous rule ought to apply to shareholders and corporate political spending.

72. *Street*, 367 U.S. at 768.

ployee's objection, to spend on politics the dues collected through union security agreements.⁷³

The *Street* Court, however, did not only point to the lack of congressional authorization for the political use of such dues. *Street* also found in the statute an affirmative congressional intent to prohibit such use—to insulate political objectors from what the Court described as the “compulsion of union security agreements.”⁷⁴ According to *Street*'s reading of the legislative history, Congress was concerned that the union's economic power—brought to bear through discharge—would interfere with employees' political freedoms. It was this potential for economic interference with political freedoms—the threat that “the union shop might be used to abridge freedom of speech and beliefs”⁷⁵—that prompted Congress to “incorporate[] safeguards in the statute to protect dissenters' interests.”⁷⁶

The Court's next union security decision was *Abood v. Detroit Board of Education*, a case that involved neither the NLRA nor the RLA, but rather Michigan's public employee bargaining statute.⁷⁷ *Abood* held that a union security agreement “compel[s] employees financially to support their collective-bargaining representative,”⁷⁸ but, following *Hanson* and *Street*, that such compulsion is a permissible means of overcoming the free rider problem. Again, however, the Court limited its approval to collective bargaining and contract administration activities: While compelled support for these economic functions passed constitutional muster, compelled support for union political activity did not.⁷⁹ In fact, by requiring employees to make dues payments that the union could use for political purposes, the union security clause effects two distinct First Amendment

73. See *id.* at 764 (“One looks in vain for any suggestion that congress also meant in §2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.”).

74. *Id.* at 770.

75. *Id.* at 765.

76. *Id.*; see also *id.* at 767–68 (citing legislative history).

77. 431 U.S. 209 (1977).

78. *Id.* at 222. The Court equated a condition placed on public employment with compulsion to comply with that condition, but this is not an obvious equation. See, e.g., Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. Chi. L. Rev. 1541, 1589 (2008) (“Just as no one is compelled to buy stock in a corporation, so too, no one is compelled to accept a job from an employer who has agreed to an agency-shop arrangement. Once one accepts the job, certain obligations come with it.”). Part III.A explores the idea of compulsion in detail.

79. *Abood*, 431 U.S. at 222–23. *Abood* held that even when agency fees are used to defray the costs of collective bargaining and contract administration, employees' First Amendment rights are implicated. *Id.* at 222. But, in line with *Hanson* and *Street*, *Abood* rejected the employees' First Amendment challenge to the economic use of agency fees. *Id.* at 223.

harms: It compels employees to fund political speech, and it compels them to associate with the union's political message.⁸⁰

After *Abood* was decided, the Court applied its holding to private sector union security cases arising under the RLA. Thus, in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, the Court held that the First Amendment permits RLA union security agreements that require employees to fund the union's economic activity, but not the union's political expenditures.⁸¹ *Ellis* relies on *Hanson* and *Street*'s earlier decision that union-shop clauses negotiated under the RLA involve state action because of the preemptive effect of that federal statute.⁸² But the Court soon extended the rule of *Hanson* and *Street* to a union security agreement that arose under the NLRA, a context in which the Court has never found the presence of state action.

Communications Workers of America v. Beck involved a collective bargaining agreement between AT&T and the Communications Workers of America.⁸³ The agreement contained a union security clause that required all nonmembers to pay agency fees equal to the amount of member dues, and the record made clear that the union had used some portion of these fees to finance political activity.⁸⁴ A group of twenty employees who objected to the use of their dues for political purposes filed suit alleging violations of both the First Amendment and § 8(a)(3) of the NLRA.⁸⁵

The *Beck* Court held that its decision was dictated by *Street*.⁸⁶ Because the language of NLRA § 8(a)(3) is "in all material respects identical" to the language of RLA § 2(Eleventh), *Beck* simply adopted for the NLRA context the rule and analysis that *Street* employed in the RLA context.⁸⁷ *Beck* thus holds that the NLRA authorizes union-shop agreements but only permits unions to require employees to pay for its economic activities: those that are "germane" to collective bargaining and contract administration.⁸⁸ And, following *Street*'s conclusion that political expenditures are not germane to the union's collective bargaining functions, the *Beck* Court concluded that the NLRA statutorily precludes a union from using agency fees for political purposes. *Beck* also ascribes to the 1947 Congress that amended the NLRA the same motivations that *Street* found

80. See Robert Post, *Transparent and Efficient Markets*, *supra* note 29, at 565 ("The mandated union dues at issue in *Abood* thus threatened two distinct First Amendment rights: freedom of speech and freedom of association.").

81. 466 U.S. 435, 447-48, 455-57 (1984). As the Court would later hold, *Ellis* "made it clear that the principles of *Abood* apply equally to employees in the private sector." *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1989).

82. *Ellis*, 466 U.S. at 444-45.

83. 487 U.S. 735 (1987).

84. *Id.* at 739.

85. *Id.* at 739-40.

86. *Id.* at 745.

87. *Id.*

88. *Id.*

animating the RLA amendments of 1951: “Congress,” *Beck* concludes, “enacted the two provisions for the same purpose.”⁸⁹ In short, Congress authorized “compulsory unionism” to the extent necessary to fund collective bargaining,⁹⁰ but not “to provide the unions with a means of forcing employees, over their objection, to support political causes which they oppose.”⁹¹

Street interpreted the RLA in the manner it did in order to avoid constitutional questions.⁹² Although *Beck* relies on *Street*—writing that *Street* “is far more than merely instructive here: we believe it is controlling”—*Beck* denies that it is a constitutional decision.⁹³ Scholars dispute this claim. Arguing that neither the statute nor the legislative history suggest that Congress intended to distinguish between economic and political uses of union security dues, these commentators argue that *Beck* was driven by “constitutional values.”⁹⁴ On this view, *Beck*’s holding is analogous to *Street*’s and *Abood*’s, and stands for the proposition that a union security clause—even in the private sector—compels employees to fund the union’s political activity and thereby interferes with employees’ speech and associational rights. Whether the decision is the product of constitutional avoidance, constitutional lawmaking, or simply statutory interpretation, however, the legal regime that emerges after *Beck* is the same in both the public and private sector: Employment may be conditioned on an employee’s willingness to fund a union’s collective bargaining and contract administration functions, but not on an employee’s willingness to fund the union’s political activities.

89. *Id.* at 762.

90. *Id.* at 746.

91. *Id.* at 751 (quoting *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 764 (1960)).

92. 367 U.S. at 749.

93. *Id.* at 745.

94. Hartley, *supra* note 28, at 83; see also James J. Brudney, A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process, 74 N.C. L. Rev. 939, 1028 & n.298 (1996) (describing *Beck* Court as “relying . . . implicitly on the canon of construing statutes to avoid constitutional problems”); Roberto L. Corrada, Religious Accommodation and the National Labor Relations Act, 17 Berkeley J. Emp. & Lab. L. 185, 231 (1996) (“[A]lthough [*Beck*] is expressly based on an interpretation of the NLRA, it is clear that fundamental notions of free speech and associational rights were at play . . .”); Dau-Schmidt, *supra* note 50, at 54–55 (“The Court’s interpretation of section 8(a)(3) deviates from Congress’s intent because it relies on the Court’s prior interpretation of section 2 Eleventh of the RLA and on that interpretation’s constitutionally colored view of the purpose and extent of union security agreements allowed under the RLA.”); Feldman, *supra* note 28, at 233 (“*Beck* is not directly based on the First Amendment, but it makes sense only as an example of the Justices’ infusing the values they find in the First Amendment into an area that they are nonetheless unwilling to decide its subject to the Constitution.”); Sean T. McLaughlin, A Devil in Disguise: How Paycheck Protection Legislation Violates the First Amendment, 27 Seton Hall Legis. J. 113, 120 (2002) (“Although the *Beck* Court largely avoided First Amendment issues, the decision rested on the notion that compelling dissenting workers to support all union activity violates their freedom of association.”).

In addition to establishing this rule, the Court has also taken steps to delineate the appropriate remedial procedures through which a union must ensure that objectors' dues are, in fact, used only for permissible purposes.⁹⁵ The jurisprudence that has developed to address these procedural questions is byzantine, but for present purposes, the key points are as follows. First, employees are entitled to object to the use of their dues for political purposes *in general*; they need not oppose the union's particular political stances—e.g., in favor of Democratic candidates or pro-labor legislation—and may refuse to have their dues spent on political activity of all types and valences.⁹⁶ Second, although the Court's decisions are less specific on this point, employees' right to opt out of financing union political activity extends beyond electoral spending to include many types of lobbying.⁹⁷ Third, employees who object to the political use of their dues must be provided with an *ex ante* dues reduction—in an amount proportional to the share of the union's overall budget that goes to politics—rather than an *ex post* rebate,⁹⁸ and they must be provided with information that adequately explains how the dues reduction was

95. See, e.g., 2 *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* ch. 26, at 2106–42, 2176–84, 2198–203 (John E. Higgins, Jr. et al. eds., 5th ed. 2006). In the NLRA context, the NLRB has held that the RLA and public sector cases do not determine the appropriate procedures for political objectors. As such, the Board has developed its own standards for union shop provisions under the NLRA, but the standards are much the same. *Cal. Saw & Knife Works*, 320 N.L.R.B. 224 (1995).

96. Cf. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 240–42 (1977) (“[I]n holding that as a pre-requisite to any relief each appellant must indicate to the Union the *specific* expenditures to which he objects, the Court of Appeals ignored the clear holding of *Allen*.”).

97. In *Lehnert v. Ferris Faculty Ass’n*, the Court concluded that public sector unions may charge dissenters only for lobbying related to the “legislative ratification of, or fiscal appropriations for, their collective-bargaining agreement.” 500 U.S. 507, 519 (1990); see also *Seidemann v. Bowen*, 584 F.3d 104, 114–15 (2d Cir. 2009) (stating only lobbying expenses “related to collective bargaining” are chargeable). This holding implies not only that public sector unions must allow employees to opt out of most lobbying expenses, but that private sector unions—who need not seek legislative enactment or appropriations of their collective bargaining agreements—may not fund most types of lobbying with their general treasuries. The specific types of lobbying expenditures covered by the opt-out right, however, remain the subject of some dispute. See, e.g., *United Nurses & Allied Prof’ls (Kent Hosp.)*, N.L.R.B. Case No. 1-CB-11135, at 5, 2011 WL 1187740, at *4 (ALJ Mar. 30, 2011) (noting “difficulty in establishing a dividing line between chargeable and nonchargeable” expenses and finding some lobbying expenses chargeable and others nonchargeable); *United Food & Commercial Workers Locals 951 (Meijer, Inc.)*, 329 N.L.R.B. 730, 755 (ALJ Jan. 31, 1997) (finding certain lobbying expenses nonchargeable).

98. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 443–44 (1984); see also *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 304–06 (1986) (“[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters’ funds may be used temporarily for an improper purpose.”); *Wash.-Balt. Newspaper Guild*, Case Nos. 5-CB-9252, 5-CB-9254, 5-CB-9257, N.L.R.B. Gen. Couns. Mem. 4–5 (Jan. 16, 2002), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45801b196d> (on file with the *Columbia Law Review*) (noting “the union’s charge and rebate system was unlawful” (citing *United Food & Commercial Workers*, 329 N.L.R.B. at 754)).

calculated, along with the opportunity to challenge the amount of the reduction.⁹⁹

II. POLITICAL OPT-OUT RIGHTS FOR EMPLOYEES AND SHAREHOLDERS: A CASE FOR SYMMETRICAL TREATMENT

The Supreme Court's union security cases establish that, in both the public and private sectors, employment may be conditioned on the requirement that employees pay dues to the union, but only to the extent that those dues are used to finance the union's economic activities. In neither the public nor the private sector may employment be conditioned on a requirement that employees fund union political activity. Writing more than thirty years ago, Victor Brudney used the union security cases in support of his argument for legislation requiring unanimous shareholder consent for corporate political spending.¹⁰⁰ More recently, Lucian Bebchuk and Robert Jackson have argued that legislatures would be justified in enacting corporate law rules that protect shareholders from "being forced to be associated with political speech that they do not support."¹⁰¹ Like Brudney, Bebchuk and Jackson find support for their corporate law proposals in the union security cases.¹⁰² However, while scholars have relied on the union rule in discussions of shareholder participation in corporate political spending decisions, the strength of the analogy has gone largely unexplored.¹⁰³ The next two Parts of this Article endeavor to fill this gap. This Part begins that work by asking whether there is an affirmative case for symmetrical treatment of employees and

99. *Hudson*, 475 U.S. at 310; *California Saw*, 320 N.L.R.B. at 233. In a 2007 decision, the Court held—at least with respect to public sector employees—that a state may require a union to obtain a nonmember's affirmative consent before using her dues for political purposes. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184–86 (2007). That is, both an opt-out and an opt-in regime are permissible.

100. Brudney, *Business Corporations and Stockholders' Rights*, supra note 13, at 267–74.

101. Bebchuk & Jackson, supra note 14, at 113.

102. *Id.* at 114; see also Mallory, supra note 14, at 32 (discussing parallels between corporate and union contexts).

103. Though not entirely unexplored; Brudney provides some important discussion in two articles. Brudney, *Association*, supra note 14, at 47–49, 56–57 & n.140; Brudney, *Business Corporations and Stockholders' Rights*, supra note 13, at 270. Bebchuk and Jackson note the question of state action and voluntariness in the two contexts, though they reject a distinction on these grounds. See Bebchuk & Jackson, supra note 14, at 114 (“[T]he union case and the public company case [are] distinguishable because participation may be required by law in the former but not the latter . . . [but] the volitional nature of being a shareholder . . . does not protect shareholders from the consequences of political speech they disfavor.”). Mallory also briefly discusses and dismisses distinctions on voluntariness and state action grounds, and argues that the union's duty of fair representation is analogous to the corporation's fiduciary duties to its shareholders. Mallory, supra note 14, at 32–36; see also Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 *Wm. & Mary L. Rev.* 1, 43–45 (2011) (noting differences between two contexts but arguing “selling stock could sometimes be as difficult—or even more difficult—than leaving a job”).

shareholders when it comes to the political spending practices of unions and corporations. Part IV considers objections to symmetrical treatment.

A. *Union Security and Sphere Separation*

Union security agreements, as both Congress and the Court well understood, enable unions to wield economic power. In particular, a union security clause gives the union a form of economic power that management usually possesses—namely, the power of discharge. Unions deploy the discharge power to exclude from employment workers who refuse to fund the union's operations. According to the Court, Congress believed that such economic power could legitimately be deployed to economic ends—it could, that is, be used to require employees to support the union's economic functions of collective bargaining and contract administration. But, according to the Court, Congress did not want to permit unions to deploy such economic power for political ends. In particular, the rule of *Street* and *Beck* is based on the idea that the union's power to control access to employment was not to be used as a means of securing employee compliance with or support for the union's political agenda. The *Street* Court thus finds in the legislative history of the RLA union security amendments a congressional desire to eliminate the "compulsion of union security agreements,"¹⁰⁴ but only when that compulsion is deployed to further the union's *political* program.¹⁰⁵

Street's reading of the Congressional purpose behind RLA § 2(Eleventh), a reading that the *Beck* Court imports into its construction of NLRA § 8(a)(3), thus reflects a commitment to distinguishing between and then actively separating the union's economic and political power.¹⁰⁶ In this, the Court's rule in *Street* and *Beck* is resonant with Michael Walzer's theory of distributive justice. In brief, Walzer understands society as composed of a number of distinct spheres—the market is one, politics another—and each sphere has its own set of distributive principles.¹⁰⁷ For Walzer, justice does not require an equal distribution of goods or

104. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 770 (1961).

105. *Id.* at 768–69.

106. As discussed earlier, the first premise of the Court's rule is that the union's political and economic powers are distinct from one another. See *supra* text accompanying note 71. This premise has rightfully been subject to severe criticism. See *supra* note 71 (describing Justice Frankfurter's, David Gaebler's, and Alan Hyde's criticism of Court's distinction between union's political and economic power). Because the question here is whether the normative criteria under which union security clauses are considered impermissible applies to shareholders and the funding of corporate political speech, an analysis of the Court's premise is beyond the scope of this discussion.

107. Walzer, *Spheres*, *supra* note 23, at 17–20. For a critique of Walzer's view and the theory set out in *Spheres of Justice*, see, for example, Ronald Dworkin, *To Each His Own*, N.Y. Rev. Books, Apr. 14, 1983, at 4, 6. For a response to Dworkin's critique, see Michael Walzer, "Spheres of Justice": An Exchange, N.Y. Rev. Books, July 21, 1983, at 42, 42–46.

power within any particular sphere—what he terms “simple equality.”¹⁰⁸ Instead, Walzer’s theory of distributive justice requires what he calls “complex equality.”¹⁰⁹ Central to this notion is that goods or power derived in one sphere must not translate into advantages in another sphere; power must be deployed within the sphere where it was obtained, and not exported—or “converted”—from one sphere into another.¹¹⁰

Street’s reading of the congressional purpose behind RLA § 2(Eleventh) and *Beck’s* reading of NLRA § 8(a)(3) can be understood as exhibiting a commitment to this kind of sphere separation. A union’s ability to exclude workers from employment is a form of economic power. To allow the union to exercise that economic power in the pursuit of economic ends is thus to allow the deployment of power within its own sphere. But to allow the union to exercise this power to compel support for its political views is to allow the union to convert economic into political power—to inappropriately, and unjustly, export power derived in the economic marketplace to the realm of politics.

Indeed, a commitment to this kind of sphere separation is not unique to the union security context, and can be found, first, in other areas of labor law. The NLRA, for example, entitles employees and unions to place certain forms of “economic pressure” on employers.¹¹¹ The Court has held, however, that economic pressure is protected by the labor law only when it is directed at securing economic ends over which the employer has control.¹¹² In contrast, if workers are seeking political ends, their imposition of economic pressure on the employer becomes illegal. The rule can be seen most clearly in cases involving so-called political strikes¹¹³: Although the NLRA protects workers’ right to strike to secure

108. Walzer, *Spheres*, supra note 23, at 13–17. Concentrations of goods or power within spheres may, in fact, be entirely consistent with the distributive criteria applicable there—for example, “within the distributive frame of the market, concentrated economic power is not necessarily unjust; nor is concentrated political power considered inappropriate in the political arena.” Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 44 (2006).

109. Walzer, *Spheres*, supra note 23, at 17–20.

110. *Id.* at 19.

111. NLRA § 7, 29 U.S.C. § 157 (2006). See generally Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. Pa. L. Rev. 1195 (1967) (analyzing extent of protection afforded economic pressure by NLRA § 7).

112. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 n.18 (1978) (“The argument that the employer’s lack of interest or control affords a legitimate basis for holding that a subject does not come within ‘mutual aid or protection’ is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing.” (quoting Getman, supra note 111, at 1221) (internal quotation marks omitted)); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 513–14 (1960). In a classic case, the Court held that workers who walked off the job because the factory floor was too cold were protected against discharge by the employer. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 18 (1962).

113. See generally Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 Va. L. Rev. 685, 687 (1985) (defining political strikes as “those in which workers seek to make a political point rather than to win a better labor contract”).

economic gains, the Court has held that where the object of a work stoppage is inducing the employer's compliance with the union's political agenda, the strike is illegal.¹¹⁴

The commitment to sphere separation of this kind can also be located outside the labor context. An early example of the theme can be found in the adoption of the secret ballot in U.S. political elections in the mid- and late nineteenth century.¹¹⁵ Prior to that time, voting was conducted by open ballot and in public.¹¹⁶ With the expansion of the franchise, open voting gave rise to concerns that the votes of poor and working class citizens would be influenced by the demands of their employers and landlords, or by outright bribery by party officials.¹¹⁷ Open voting, that is, enabled employers to use the threat of discharge, landlords to use the threat of evictions, and political parties to use the inducement of monetary rewards to determine the votes of low-income voters.¹¹⁸ By "rendering noncredible voters' promises" to vote in the way demanded by these actors,¹¹⁹ the secret ballot thus precluded the conditioning of economic opportunity—employment, residency, or cash—on

114. *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982). In the most recent application of this economic/political "dichotomy," the NLRB's general counsel determined that workers who imposed economic pressure on their employer in order to protest federal immigration policy were subject to discharge. See *Reliable Maintenance*, Case No. 18-CA-18119, N.L.R.B. Gen. Couns. Mem. 3 (Oct. 31, 2006), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458000d21d> (on file with the *Columbia Law Review*) ("[E]mployee pressure against even their own employer is unlawful, if there is nothing that employer can do to resolve that dispute.").

115. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 115 (2000).

116. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 *U. Chi. L. Rev.* 361, 417–18 (2004).

117. See, e.g., Bruce Ackerman & James S. Fishkin, *Deliberation Day* 38 (2004) ("[A]s the franchise widened, public voting . . . began to look like a trick by which the rich man might retain effective electoral power while formally conceding the right to vote to the unwashed."); see also Keyssar, *supra* note 115, at 115 (noting open ballots rendered votes observable to "election officials, party bosses, employers, or anyone else watching the polls"); Nadia Urbinati, *Mill on Democracy: From the Athenian Polis to Representative Government* 106 (2002) ("Just as anonymity and secrecy went hand in hand, so did responsibility and openness. [Secret ballots] reduced bribery and the subordination of economically dependent citizens to the will of the powerful . . .").

118. See, e.g., Ackerman & Fishkin, *supra* note 117, at 38 (noting result of open voting scheme was poor "could not afford to deviate from the political opinions of their economic masters"); see also Keyssar, *supra* note 115, at 115 (discussing development of secret ballot); Urbinati, *supra* note 117, at 106 (noting John Stuart Mill's argument that secret ballot could "guard electors against 'coercion by landlords, employers, and customers'" (quoting John Stuart Mill, *Considerations on Representative Government*, in *On Liberty and Other Essays* 203, 357 (John Gray ed., 1998))). Brudney raises a related point with respect to vote buying. Brudney, *Association*, *supra* note 14, at 28.

119. Vermeule, *supra* note 116, at 418.

compliance with the political agendas of employers, landlords, or party officials.¹²⁰

In the more contemporary setting, courts and commentators have understood the statutory bans on vote buying and voter intimidation as incorporating this same concern for the political abuse of economic power. Saul Levmore, for example, identifies as the “paramount objection to raw vote buying” the fear that “wealth will prevail where it should not.”¹²¹ As Pamela Karlan points out, moreover, federal voter intimidation laws have been read to reach economic acts in ways relevant here.¹²² *United States v. Beaty* provides an illustrative example.¹²³ In that case, the court held that by denying African American sharecroppers access to credit and land in order to deter their political participation, a group of banks and landowners violated § 1971.¹²⁴

Finally, the modern rules regarding solicitations for PAC contributions evince a similar congressional concern about the use of economic power to secure political compliance.¹²⁵ Thus, unions are prohibited from making employee contributions to the union PAC a condition of employment.¹²⁶ Likewise, corporations must not use or threaten “financial reprisals” when soliciting contributions to their PACs from stockholders or corporate executives.¹²⁷ And, if unions and corporations choose to solicit their own employees for PAC contributions, the protections against the exercise of economic influence are even more stringent.¹²⁸

This is, to be clear, not an argument that all areas of campaign finance law are defined by a commitment to all forms of economic and

120. Ackerman & Fishkin, *supra* note 117, at 38; see also Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* 18 (2002) (“By disrupting the black market for votes, the secret ballot became the foundation for the construction of a parallel sphere of life—in which equal citizens, rather than unequal property owners, express their political judgments.”).

121. Saul Levmore, *Precommitment Politics*, 82 Va. L. Rev. 567, 609 (1996).

122. Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 Va. L. Rev. 1455, 1457–58 & n.7 (1994) (citing 42 U.S.C. § 1971(b) (1988)) (discussing *United States v. Beaty*, 288 F.2d 653 (6th Cir. 1961), as example of how anti-intimidation laws have been read to outlaw “the use of superior physical or economic force” to compel or prevent votes).

123. 288 F.2d 653; see also Karlan, *supra* note 122, at 1458 n.7 (citing *Beaty*).

124. 288 F.2d at 654–56.

125. 2 U.S.C. § 441b (2006).

126. *Id.* § 441b(b)(3)(A) (“It shall be unlawful for [a labor union] to make a contribution or expenditure by utilizing money or anything of value secured by . . . dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment”); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 427 (1972).

127. 2 U.S.C. § 441b(b)(3)(A).

128. *Id.* § 441b(b)(4)(B) (permitting corporations and labor organizations to make two written solicitations for contributions to employees, stockholders, or union members during each calendar year subject to set of conditions). The Hatch Act, which prohibits certain public employees from soliciting political contributions from subordinate employees, reflects analogous concerns. See 5 U.S.C. §§ 7323, 7324 (2006).

political sphere separation. Most prominently, the question of the appropriate relationship between economic and political power is at the core of the Court's jurisprudence regarding restrictions on corporate and union political spending itself. Here, where the economic power exercised in the political realm is not the power to control access to economic opportunity but, instead, the power to disseminate and amplify political speech through spending, the Court's position has vacillated.¹²⁹ Prior to *Citizens United*, the Supreme Court had embraced a separation of spheres argument to support its approval of legislative restrictions on corporate campaign spending, explaining that the risk inherent in permitting corporate spending on politics was "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."¹³⁰ *Citizens United*, however, explicitly rejects this separation of spheres principle as a rationale for upholding corporate spending restrictions. In reversing *Austin* and jettisoning that decision's antidistortion rule, *Citizens United* declares it "irrelevant" that a corporation's ability to disseminate its political message is derived from resources secured in the economic market.¹³¹

When it comes to restrictions on spending, therefore, the fact that the funds used to finance political speech are derived in the economic marketplace is not a legitimate basis for restricting the resulting speech under current doctrine. But, whatever the Court's position on the force of the spheres principle in the context of political spending restrictions, where the economic power at issue is the power to control access to economic opportunity—exemplified by the union's power to control employment opportunities through union security agreements—a commitment to sphere separation remains evident. As the next section argues, there are good reasons for extending this principle from the union context to the corporate one.

B. *Corporate Political Spending and Sphere Separation*

While employment in a union shop is conditioned on a requirement that employees pay union dues, investment in the common stock of a corporation is conditioned on the investor's willingness to comply with the rules that structure the firm's decisionmaking procedures. As Bebchuk and Jackson explain, "[u]nder existing corporate law rules, po-

129. See generally Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1395–97 (1994) (discussing Supreme Court jurisprudence on campaign finance regulations).

130. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986); see also *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (holding that allowing resources derived from economic marketplace to influence political debate would "distort" political marketplace).

131. *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010). It is, the Court writes, "irrelevant for purposes of the First Amendment that corporate funds may have 'little or no correlation to the public's support for the corporation's political ideas.'" *Id.* (quoting *Austin*, 494 U.S. at 660).

litical speech decisions are by default governed by the same rules as ordinary business decisions.”¹³² This rule implies, first, that corporate decisions regarding political spending are made by firm management: When it comes to political spending decisions, there is “no role for shareholders.”¹³³ The rule also implies that management’s decisions in the area of political spending are restricted only by the business judgment rule, which entitles management to a presumption that its decisions are permissible.¹³⁴ In Brudney’s words:

[M]anagement is substantially free to use corporate assets to urge any political or social views it sees fit, so long as it can establish a plausible connection between those expenditures and a long term commercial benefit to the corporation. Given the looseness that is sufficient to establish the necessary connection, few managements are likely to fail to make it.¹³⁵

Because shareholders are the residual claimants on the firm’s assets,¹³⁶ these rules imply that shareholders are required, as a condition of investing, to delegate to management the authority to spend their “proportionate interest in the collective assets” on corporate politics.¹³⁷

Of course, employment and investment are different in several important ways, and some of these differences will be discussed in detail below. But it needs little argument to show that both employment and investment constitute significant economic opportunities in the contemporary American economic order, and that large percentages of the pub-

132. Bebchuk & Jackson, *supra* note 14, at 87.

133. *Id.* Federal rules require firms to include in their proxy statements shareholder proposals regarding disclosure of political spending. *Id.* at 88. In a recent no-action letter, the SEC also ruled that a corporation must include a shareholder proposal regarding the permissibility of such spending itself. See *The Home Depot, Inc.*, SEC No-Action Letter, 2011 WL 291324, at *1 (Mar. 25, 2011). See generally Andy Kroll, *Citizens United: The Shareholders Strike Back*, Mother Jones (June 1, 2011, 2:00 AM), <http://motherjones.com/politics/2011/05/citizens-united-home-depot-elections> (on file with the *Columbia Law Review*) (discussing shareholder effort to compel Home Depot to disclose political campaign spending). Such proposals are not binding on the corporation. Bebchuk & Jackson, *supra* note 14, at 88. Recently, however, the SEC Commissioner has expressed his view that the Commission should require disclosure of corporate political expenditures, Luis A. Aguilar, Comm’r, SEC, Address at Practicing Law Institute’s SEC Speaks in 2012 Program (Feb. 24, 2012), available at <http://www.sec.gov/news/speech/2012/spch022412laa.htm> (on file with the *Columbia Law Review*), a move urged by a number of leading corporate law scholars. See Committee on Disclosure of Corporate Political Spending, Petition for Rulemaking (Aug. 3, 2011) (on file with the *Columbia Law Review*) (arguing SEC should initiate rulemaking project to require disclosure of corporate political spending to public company shareholders).

134. Clark, *supra* note 19, § 3.4, at 123.

135. Brudney, *Business Corporations and Stockholders’ Rights*, *supra* note 13, at 258.

136. Henry Hansmann, *The Ownership of Enterprise* 11 (1996).

137. Brudney, *Association*, *supra* note 14, at 56; see also Brudney, *Business Corporations and Stockholders’ Rights*, *supra* note 13, at 264 (stating investment “requires [shareholder] to permit the use of his assets to support social views and generate social attitudes that may impinge upon his individual preferences”).

lic depend for income on both.¹³⁸ A principle of sphere separation that holds that access to economic opportunity ought not to be conditioned on compliance with or support for the economic actor's political agenda accordingly has force in the corporate as well as the union context.

There is, moreover, good evidence that both the Court and Congress have understood these two contexts as parallel in this respect and as presenting the same type of threat. As we have seen, the Court has consistently construed political spending restrictions as motivated by a congressional desire to protect both dissenting employees and dissenting shareholders from a requirement that they finance political speech they wish not to fund.¹³⁹ Thus, for example, in explaining the distinction between mandatory dues and corporate general treasury funds, on the one hand, and voluntary contributions to a corporate or political PAC, on the other, Senator Taft testified that the prohibition on "labor unions using their members' dues for political purposes . . . is exactly the same as the prohibition against a corporation using its stockholders' money for political purposes."¹⁴⁰ Similarly, discussing the Federal Election Campaign Act of 1971 and its pairing of the ban on union and corporate expenditures with authorization for union and corporate PACs, Representative Hansen explained that the "underlying theory" of the law was that "general purpose treasuries should not be diverted to political purposes . . . out of concern for the dissenting member or stockholder."¹⁴¹ Finally, the contemporary rules for PAC solicitation reflect this theme. Those rules prohibit a corporation from imposing any financial reprisal on shareholders who fail to contribute to its PAC.¹⁴² Should a corporation require shareholders, as a condition of investment, to contribute to the corporate PAC, this undoubtedly would run afoul of the statute. In the post-*Citizens United* world—where general treasury funds can be substituted for PAC spending—conditioning investment on shareholders' agreement to permit the corporation to spend their share of the collective assets on politics would seem to raise an analogous problem.¹⁴³

138. For a discussion, see *infra* Part III (noting importance of both employment and investment opportunities).

139. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 406–08 (1972).

140. *Id.* at 408 (quoting 93 Cong. Rec. 6440 (1947) (statement of Sen. Robert Taft)).

141. *Id.* at 423 (quoting 117 Cong. Rec. 43,381 (1971) (statement of Rep. Orval Hansen)).

142. 2 U.S.C. § 441b(b)(3)(A) (2006).

143. Again, *Citizens United* rejects the claim that a congressional concern for protecting dissenting shareholders constitutes a governmental interest sufficiently compelling to justify a ban on corporate political spending. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010). But, as the section above discussed, the funding of political speech presents a different set of issues than does the conditioning of economic opportunity on political support. *Citizens United*, moreover, says nothing about this latter concern. Nothing in the *Citizens United* opinion, that is, questions whether Congress in fact intended to "protect[] dissenting shareholders from being compelled to fund corporate political speech," and nothing in the opinion rejects this motivation as a legitimate congressional interest. *Id.* To the contrary, the *Citizens United* Court accepts the possibility that the

In short, the defect in a union security agreement that lacks a political opt-out right is that it allows the union to condition access to employment on the employee's agreement to fund the union's political program. But this defect is a special case of a more general phenomenon. The more general problem occurs when the economic power to control access to significant economic opportunities is deployed to secure political support for the economic actor's political agenda. This more general problem implicates not only union security agreements but also the conditioning of investment on a shareholder's agreement to delegate to management the authority to spend corporate assets on politics.

III. ARGUMENTS FOR ASYMMETRY: COMPULSION, STATE ACTION, AND THE UNION/CORPORATE DISTINCTION

Even if a commitment to sphere separation provides an affirmative reason for treating employees and shareholders symmetrically with respect to political speech, differences between the two contexts could nonetheless justify divergent rules. This Part explores three arguments in this direction. The first section takes up the argument that, while union security provisions compel employees to pay union dues, investment in corporate securities is always voluntary. The next section addresses the possibility that the *sources* of compulsion are different between the two contexts—namely, the possibility that there is state action implicated even in private sector union security provisions while there is only economic action in the corporate context. And the third section in this Part explores whether there are different speech and associational interests implicated by the two contexts.¹⁴⁴

A. *The Existence of Compulsion*

The first and primary argument against extending the union security rule to the corporate context is that employees are “compelled” or “coerced”—the Court uses the terms interchangeably, and so accordingly will this discussion¹⁴⁵—to fund union political speech while investing is

congressional concern for objecting shareholders could be addressed through other means. As the Court writes, “the remedy is not to restrict speech but to consider and explore other regulatory mechanisms.” *Id.*; see also *Bebchuk & Jackson*, *supra* note 14, at 114.

144. These are the three arguments that bear most directly on the affirmative case for symmetry identified in the previous Part, and these are the arguments that are most prominent in the literature and case law. It is possible, of course, that another distinction could be identified that would warrant asymmetric treatment—some other feature that could justify allowing corporations, but not unions, to condition economic opportunity on political compliance and support. The point here is to show that the most prominent distinctions—including those relied on by the Court and commentators to date—do not justify asymmetric opt-out rules. By doing so, the argument intends to shift the burden to those defending the asymmetric rule to offer a distinction that has yet to be identified.

145. Compare, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977) (“coerced”), with, e.g., *id.* at 222 (“compel[led]”).

fully voluntary. According to this argument, because employees are compelled to fund union politics, governmental intervention is necessary to prevent damage to employees' speech and associational interests. In contrast, because investing is voluntary, shareholders can avoid any speech or associational harms from corporate political spending without legal intervention by, for example, selling their shares or not investing in the first place.

This argument is found in multiple places, but can perhaps be seen most clearly in the Court's opinion in *First National Bank of Boston v. Bellotti*.¹⁴⁶ There, the Court reviewed the constitutionality of a Massachusetts law that forbade corporations from making expenditures in relation to certain state referenda.¹⁴⁷ The state had argued that its law protected the interests of objecting shareholders by "preventing the use of corporate resources in furtherance of views with which some shareholders may disagree."¹⁴⁸ In his dissent, Justice White contended that this shareholder protection rationale justified the law, and White relied explicitly on *Street* and *Abood* to support his argument. As he put it,

[t]he interest which the State wishes to protect here is identical to that which the Court has previously held to be protected by the First Amendment: the right to adhere to one's own beliefs and to refuse to support the dissemination of the personal and political views of others, regardless of how large a majority they may compose.¹⁴⁹

The Court's response to White's argument was that the union security cases were "irrelevant to the question presented in this case."¹⁵⁰ Why? Because union security clauses "compel[] the dissenting union member 'to furnish contributions of money for the propagation of opinions which he disbelieves.'"¹⁵¹ Such compulsion, according to the *Bellotti* Court, is simply lacking in the corporate context. Thus,

[t]he critical distinction here is that no shareholder has been 'compelled' to contribute anything. Apart from the fact . . . that compulsion by the State is wholly absent,¹⁵² the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason.¹⁵³

146. 435 U.S. 765 (1978).

147. *Id.* at 767.

148. *Id.* at 792-93.

149. *Id.* at 815-16 (White, J., dissenting).

150. *Id.* at 794 n.34 (majority opinion).

151. *Id.* (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977)).

152. A distinction addressed in section B below.

153. 435 U.S. at 794 n.34. Brudney's thought on the question is more nuanced than the Court's. In a 1995 article, Brudney wrote that while an employee's "obligation to contribute to the union is . . . compelled by social and economic pressures," Brudney, *Association*, *supra* note 14, at 49, investors purchase shares "if not wholly knowingly and willingly, at least more 'voluntarily' than those who join unions with union shop arrangements." *Id.* at 56 n.140. Similarly, in his 1981 article, Brudney concluded that "in substance, the freedom to refrain from working is not equally as exercisable as the freedom

The first, and, in some ways, most fundamental response to the compulsion argument is that conditioning economic opportunities on a political funding requirement is normatively problematic even in the absence of compulsion. Even if employees are not “compelled” to work for union employers or shareholders are not “compelled” to invest in the stock market, conditioning employment and access to corporate investment opportunities on employees’ and shareholders’ willingness to finance political speech suffers the defect identified in the previous Part.

But, taking the compulsion argument on its own terms, a close examination of the question reveals that the Court is far too quick to assume that the type of compulsion it finds in the union context does not define the corporate context as well. To see this, however, it is necessary to understand with more precision what the Court means by “compulsion” or “coercion” in the union security cases. Not surprisingly, the opinions are ambiguous on the point.¹⁵⁴ In particular, it is not obvious why the Court believes—or ascribes to Congress the belief—that by conditioning employment on a union dues requirement, a union security agreement *compels* employees to pay those dues. After all, if employees can choose to leave, or not to accept, a job covered by a union security agreement and instead work in the non-union sector (or in a union job in one of the twenty-three states where such clauses are illegal), the meaning of the claim that employees are “compelled” to pay dues to the union is not self-evident.¹⁵⁵

There may be strong intuitions that the union security context is marked by coercion: that although employees have a formal right to leave or not accept union employment, economic necessity negates the practical value of these rights.¹⁵⁶ But two things need be said about this intuition here. First, the compulsion claim in the union security context is not that employees are compelled *to work*. Rather, the claim is that employees are compelled to work *for union employers*. Whatever one’s intuitions about the economic compulsion that surrounds employment in general, the is-

to refrain from investing, because the worker’s alternatives are not as fungible as the investor’s alternatives, and because the cost of seeking alternatives is greater for the worker than for the investor.” Brudney, *Business Corporations and Stockholders’ Rights*, *supra* note 13, at 270. Nonetheless, he also believed that the shareholder’s “consenting in advance to the use of funds for expression on an infinity of subjects cannot realistically be characterized as voluntary.” *Id.*

154. Cf. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1428 (1989) (arguing Court has “never developed a coherent rationale” to explain when it does and does not find coercion).

155. See, e.g., Seidman, *supra* note 78, at 1589 (“[N]o one is compelled to accept a job from an employer who has agreed to an agency-shop arrangement.”); see also *Right to Work States*, Nat’l Right to Work Legal Def. Found., Inc., <http://www.nrtw.org/rtws.htm> (on file with the *Columbia Law Review*) (last visited Jan. 26, 2012) (listing states where union security agreements are prohibited by law).

156. Justice Kennedy, for example, suggests that a union security clause requires that employees pay dues in order to “earn a living.” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 710 (1990) (Kennedy, J., dissenting).

sue here is different. Second, and more broadly, the intuition about economic necessity simply does not constitute an adequate conception of coercion, as the employment setting itself makes clear. If economic conditions like the need to earn a living are sufficient to compel employees to accept work, then the employment relationship as a whole—and not just the union security agreement—is vulnerable on coercion grounds. But we do not make this assumption. We do not assume that the standard employment contract is a coerced one, nor do we give employees the right to opt out of the other aspects of that contract that, on this view, they are compelled to accept by economic necessity.¹⁵⁷

As this section will argue, therefore, we need a more fully specified understanding of coercion in order to assess why the Court concludes that employees are compelled to pay union dues and fund union political speech. With this understanding in place, we can then ask whether the type of compulsion that the Court attributes to the union context ought to be attributed to the corporate context as well.

1. *A Definition: The Two-Pronged Theory of Coercion.* — Although the Court has never provided an adequate theory of coercion, the philosophical literature offers a useful way to understand the Court's conclusion in the union security cases. This literature explores the conditions necessary for a determination that A has coerced B to do X.¹⁵⁸ According to Alan Wertheimer's leading account, determining whether A coerces B requires a two-part inquiry.¹⁵⁹ The first part, which Wertheimer names the "choice prong," determines whether "A's proposal creates a choice situation for B such that B has no reasonable alternative but to do X."¹⁶⁰ This prong, then, gets at the most basic and intuitive part of the coercion inquiry—does B actually have "no reasonable alternative" or "no acceptable alternative" but to do what A proposes?¹⁶¹ Importantly, the choice prong re-

157. For a discussion of the coerciveness of wage offers, see generally Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* 46–47 (1998) [hereinafter Fried, *Progressive Assault*]; David Zimmerman, *Coercive Wage Offers*, 10 *Phil. & Pub. Affairs* 121 (1981). For present purposes, this Article assumes—as the law does—that employment contracts are not all invalid on coercion grounds in order to illuminate why the law treats union shop agreements in particular as coercive.

158. In most settings, if A coerces B to do X, B is released from the normal legal consequences of having done X. Wertheimer, *Coercion*, *supra* note 26, at 267. When the Court finds coercion in the union security context, rather than providing employees with an ex post remedy, the Court provides an ex ante remedy: It grants employees a legally enforceable right to opt out of the union security provision of the contract, while nonetheless remaining entitled to the remainder of the employment bargain. Whether the remedy is ex ante or ex post, however, the analysis is the same.

159. *Id.* at 30, 172. As Wertheimer's own exhaustive survey reveals, the two-pronged theory developed in the philosophical literature is deployed across multiple areas of law. See *infra* note 170.

160. Wertheimer, *Coercion*, *supra* note 26, at 172.

161. The "no reasonable alternative" construction comes from the definition of duress in the Restatement (Second) of Contracts. Restatement (Second) of Contracts § 175(1) (1981). Wertheimer uses "no acceptable alternative." Wertheimer, *Coercion*,

quires that we ask not whether B has *some* alternative to doing X, but rather whether the alternatives available to B are *acceptable* ones.¹⁶² As such, the choice inquiry is “inescapably normative”¹⁶³: It requires a judgment as to whether the costs to B of not doing what A proposes are too high.¹⁶⁴

The determination that B has no acceptable alternative but to do X, however, is not sufficient to imply that B has been coerced in a legally meaningful sense. Indeed, as scholars working in a diverse range of theoretical traditions have recognized, there are many contexts in which B has no acceptable alternatives, and yet we do not find coercion.¹⁶⁵ Wertheimer offers the example of a surgeon who offers to perform a life-saving operation for a fair fee: Although the patient has no viable choice but to accept the surgeon’s proposal—she will die if she does not—we do not hold that the patient was coerced into agreeing to the surgery such that she should, for example, be free to repudiate the contract to pay for it.¹⁶⁶ Nor do we grant B a legal right, *ex ante*, to obtain the surgery while opting out of an obligation to pay for it.

The fact that B has no acceptable alternative but to do X is, therefore, a necessary but not sufficient condition for a finding of coercion; in order to find coercion, the second prong of the inquiry must also be satisfied. Wertheimer names this prong the “proposal prong,” and it aims to distinguish between proposals that A has and does not have a right to make.¹⁶⁷ The distinction is necessary because only proposals that A does

supra note 26, at 267. This discussion employs “acceptable” in order to better track Wertheimer’s discussion of the issue. Moreover, as noted below, “acceptable” makes the normative nature of this prong of the coercion inquiry more transparent.

162. Wertheimer, *Coercion*, supra note 26, at 267, 272–74. Indeed, even in paradigmatic cases of coercion, B will have some alternative to complying with A’s proposal: Faced with the gunman’s proposal “your money or your life,” the victim has the alternative of surrendering his life. Richard Posner, *Economic Analysis of Law* 143 (8th ed. 2011); Sullivan, supra note 154, at 1446. The victim is coerced, nonetheless, because surrendering one’s life is not an acceptable alternative to turning over one’s money. See, e.g., Wertheimer, *Coercion*, supra note 26, at 35 (noting finding of contractual duress does not turn on finding of “no choice” but on finding of “no *acceptable* alternative”).

163. Sullivan, supra note 154, at 1446.

164. Wertheimer, *Coercion*, supra note 26, at 267.

165. Charles Fried, for example, writes that “[t]he ‘no real choice’ locution is obviously unsatisfactory on its own to explain [a finding of coercion], since any consumer facing a perfectly competitive market for some necessity or set of necessities has no real choice but to pay the market price . . .” Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* 104 (1981) [hereinafter Fried, *Contract as Promise*]. Fried’s claim would seem to hold even in the absence of “perfectly competitive markets.” Robert Hale, agreeing with Fried, similarly rejected the idea that “what made an offer coercive was that the offeree was not in a position to refuse it.” Fried, *Progressive Assault*, supra note 157, at 62.

166. See Alan Wertheimer, *Exploitation in Clinical Research*, in *Exploitation in Developing Countries: The Ethics of Clinical Research* 63, 76 (Jennifer S. Hawkins & Ezekiel J. Emanuel eds., 2008) [hereinafter Wertheimer, *Exploitation*].

167. Wertheimer, *Coercion*, supra note 26, at 30 (“To show that B acts under duress, it is also necessary, but not sufficient, to show that A’s proposal is wrongful.”). Wertheimer

not have a right to make—only those that propose a wrong—are coercive.¹⁶⁸ Again, this can be seen clearly in the employment context. Even if we assume that an employee has no acceptable alternative but to take a given job—she will be destitute if she does not—an employer’s offer to pay the employee a wage only if the employee agrees to work hard and treat customers with respect is not a coercive proposal. This is so because—at least in our economic order—the employer has a right to condition employment on such requirements.¹⁶⁹ In contrast, if the employer offered the same employee a wage only if she agreed to engage in sexual relations, the proposal would rightly be viewed as coercive. Why? Because the employer has no right to condition employment on an employee’s willingness to engage in sexual activity.¹⁷⁰

2. *Applying the Test.* — The two-pronged theory outlined here thus provides a way to examine whether the union context, but not the corporate one, is defined by compulsion. To this end, the next two subsections apply both prongs of the test to the union and corporate settings. Because the proposal prong is more straightforward, and has largely been addressed by Part II, that analysis is presented first.

To pursue this discussion, it is useful to stylize the union security agreement as a proposal from the union to current and future employees. The article assumes, for purposes of the coercion analysis, that the

explains that while courts generally address the choice prong before the proposal prong, his preference is to ask the proposal question first. *Id.* at 267–68. At least for purposes of this discussion, the order of the inquiry is less important than the general conclusion that both prongs are necessary for a finding of coercion and that neither prong is sufficient. See *id.* (arguing both prongs are necessary regardless of order).

168. Fried, *Contract as Promise*, *supra* note 165, at 104; Fried, *Progressive Assault*, *supra* note 157, at 59; Wertheimer, *Coercion*, *supra* note 26, at 172.

169. See Alan Wertheimer, *Coercion*, in *Encyclopedia of Ethics* 172, 174 (Lawrence C. Becker & Charlotte B. Becker eds., 1992) (noting “employer A has a right to propose to give B a salary only if B agrees to work for A”).

170. See, e.g., Fried, *Contract as Promise*, *supra* note 165, at 97 (“A proposal is not coercive if it offers what the proponent has a right to offer It is coercive if it proposes a wrong”). Like Fried, Hale believed that the coercion inquiry turned on a determination of the “baseline entitlements and duties . . . we wish, as a moral or legal matter, to establish.” Fried, *Progressive Assault*, *supra* note 157, at 59.

As Wertheimer’s own exhaustive survey reveals, the two-pronged theory developed in the philosophical literature is deployed across multiple areas of law. In perhaps the most well known example, the Restatement (Second) of Contracts states that a contract is voidable on duress grounds when contractual assent is “induced by an *improper* threat . . . that leaves the victim *no reasonable alternative*.” Restatement (Second) of Contracts § 175(1) (1981) (emphasis added). Here, then, the “no reasonable alternative” requirement captures the choice prong and the impropriety requirement captures the proposal prong. Wertheimer also finds that the two-pronged theory of coercion explains much of tort law, along with the law of marriage, adoption and wills, confessions, searches, and plea bargaining. Wertheimer, *Coercion*, *supra* note 26, at 54–89, 121–43. Kathleen Sullivan similarly argues that such a two-pronged theory of coercion explains not only contractual duress but also the law of blackmail, certain labor law decisions regarding coercive employer speech, and rules regarding partial and two-tier tender offers in corporate law. Sullivan, *supra* note 154, at 1443–46.

employees do not enjoy a political opt-out right. Thus, the union proposes: 1. If you pay union dues, including dues that will be used to support the union's political program, you may work for the firm. 2. If you do not pay union dues, you may not work for the firm.

Likewise, the corporation's offer of stock can be understood as constituting the following proposal from the corporation to the current or prospective investor: 1. If you agree to delegate decisionmaking authority to firm management, including the authority to spend corporate assets on politics, you may invest in the firm. 2. If you refuse to delegate such decisionmaking authority to firm management, you may not invest in the firm.

a. *The Proposal Prong.* — The proposal prong asks whether these proposals are wrongful or whether the union or the corporation has a right to make them. This is a question that Part II addressed. Again, the argument presented was that the defect in the union security agreement is that it allows a union to deploy a particular form of economic power—its ability to control access to employment—to secure employee compliance with and support of its political program. While the use of economic power for economic ends is permissible, thus allowing the union to require dues to fund collective bargaining and contract administration, converting economic into political power in this way is not. On this analysis, the union proposal is not one the union has a right to make. But, as Part II also argued, the corporate proposal suffers the same normative defect. As the union security agreement allows the union to control access to employment, the corporation's rules control access to investment opportunities. The use of that control to secure support for the corporation's political spending is to convert economic into political power in a manner analogous to the union context. On the normative grounds that render the union proposal wrongful, therefore, the corporate proposal is impermissible as well. Indeed, a clear and illustrative expression of this conclusion is found in the Court's early statement that campaign finance legislation has been motivated by the view that "corporate officials ha[ve] no moral right to use corporate funds for contribution to political parties without the consent of the stockholders."¹⁷¹

b. *The Choice Prong.* — The fact that the union and corporate proposals share the same normative defect, however, does not resolve the inquiry. As the two-pronged analysis suggests, proposals can be wrongful but not coercive. Perhaps, then, it is only in the union context that individuals are actually compelled to fund political speech. To determine whether this is the case, we turn to the choice prong of the analysis.

i. *The Union Context.* — In the union security context, the choice prong calls on us to ask whether employees have available to them acceptable alternatives to employment with a firm covered by a union security clause. In the public sector, it is important to note, the Court determines

171. *United States v. CIO*, 335 U.S. 106, 113 (1948).

as a matter of constitutional law that there is no acceptable alternative to working for the unionized public employer. The employee in the public sector certainly has some alternatives to working under a union security provision—she could, for example, work for a nonunion firm in the private sector.¹⁷² But when the Court holds that the state may not force an employee to choose between maintaining her government job and “relinquish[ing]” her First Amendment rights,¹⁷³ the Court holds that—as a matter of constitutional principle—the choice of a private sector job, where no union security clause governs, is not an acceptable alternative to public employment.

In the private sector, employees have no constitutional right to work for a unionized employer rather than a nonunion one. As such, the determination that employees have “no acceptable alternative” but to work for firms with union security agreements must be an economic rather than a constitutional one. Again, employees who object to complying with the provisions of a union security agreement have some alternatives available to them: They can work for a nonunion employer or with a unionized employer in one of the twenty-three states that prohibit union security agreements.¹⁷⁴ Whether these constitute acceptable alternatives, however, requires an assessment of the costs imposed on an employee who limits herself to such jobs (jobs that, for expositional ease, this section will refer to collectively as “nonunion jobs” or “nonunion employers”).¹⁷⁵

Of the 139,000,000 jobs in the U.S. labor market, approximately ten percent—or 13,900,000—are jobs covered by union security agree-

172. See, e.g., Seidman, *supra* note 78, at 1589 (“[N]o one is compelled to accept a job from an employer who has agreed to an agency-shop arrangement.”).

173. *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1989).

174. See *supra* note 155 (collecting sources showing no one is forced to accept union employment and listing twenty-three states that prohibit union security agreements).

175. The costs of limiting oneself to nonunion employment increase with the level of unionization in the economy, and this rate changes over time. See News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members—2011, at 6 tbl.2, 7–8 tbl.3 (Jan. 27, 2012) [hereinafter Bureau of Labor Statistics, Union Members—2011], available at <http://www.bls.gov/news.release/pdf/union2.pdf> (on file with the *Columbia Law Review*) (providing earnings data by union affiliation). The analysis here proceeds on the basis of current union density rates for several reasons. First, doing so allows us to assess the actual economic consequences of accepting only nonunion employment in today’s labor market. Second, union density has declined steadily for the last fifty-five years and there is every indication that this trend will only continue in the near future. See, e.g., James J. Brudney, *Recrafting a Trojan Horse: Thoughts on Workplace Governance in Light of Recent British Labor Law Developments*, 28 *Comp. Lab. L. & Pol’y J.* 193, 195 (2007) (“Both the United States and Britain have experienced a steady erosion in union membership since the 1970s, and there is reason to believe that union density may continue to decline, especially in the private sector.”). Third, in the final analysis, what matters is that refusing to work for an employer with a union security agreement has significant economic consequences. Although the precise measure of the consequences would vary depending on the union density rate, their nature remains the same under any plausible assumption about what density rates might be.

ments.¹⁷⁶ Employees who refuse to work for an employer with a union security agreement would accordingly lose access to these 13,900,000 jobs, while the remaining 125,100,000 jobs—ninety percent of the total—would remain available. A first economic consequence of refusing to work for a union employer is therefore a job market that contracts by approximately ten percent.¹⁷⁷ This contraction would extend unemployment durations for objecting employees.¹⁷⁸ Workers receiving unemployment insurance benefits would bear the lowest costs from such increases, but even for these workers, each week of unemployment would constitute an additional burden: Unemployment benefits are capped at one-half to two-thirds of average weekly wages.¹⁷⁹

176. This estimate is derived by calculating the number of employees, in both the public and private sector, who are covered by collective bargaining agreements in non-right-to-work states. See Barry T. Hirsch & David A. Macpherson, Union Membership and Coverage Database from the CPS, www.unionstats.com (on file with the *Columbia Law Review*) (last updated Feb. 4, 2012) (providing data on union membership, coverage, density, and employment historically as well as by state and sector, metropolitan area and sector, industry, and occupation); see also Barry T. Hirsch & David A. Macpherson, Union Membership and Coverage Database from the Current Population Survey: Note, 56 *Indus. & Lab. Rel. Rev.* 349, 349–54 (2003) (describing methodology and data). Because not all collective bargaining agreements in non-right-to-work states have union security clauses, the figure overestimates the total number of jobs covered by union security provisions. See, e.g., Dau-Schmidt, *supra* note 50, at 53 (estimating ninety percent of private sector collective bargaining agreements in non-right-to-work states have union security provisions).

177. This, it is important to note, is significantly different from a ten percent contraction in the actual job market, which would occur if ten percent of jobs in the economy were lost. Because, in our context, the union shop jobs would remain available and would simply be filled by non-objecting workers, the overall consequences, and the economic consequences to the objectors, would be milder than if the economy lost ten percent of its jobs.

178. Calculating the extent of the increase in unemployment duration would be difficult, if not impossible, in large part because it would require that we know what percentage of the labor force is made up of “objectors.” It is possible to estimate the impact on unemployment durations of actual declines in the number of jobs in the labor market. For example, using Bureau of Labor Statistics data on employment levels and unemployment durations, a simple regression suggests that a loss of ten percent of the jobs in the economy would increase unemployment durations by approximately eighteen weeks. See Economic News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment Situation Summary Table A: Household Data, Seasonally Adjusted, <http://www.bls.gov/news.release/empstat.a.htm> (on file with the *Columbia Law Review*) (last modified Feb. 3, 2012) (presenting data regarding employment status by household). This figure vastly overestimates the increase in unemployment duration that would be faced by objectors who lose access to ten percent of the jobs in the economy, for the reasons discussed above in note 177. It might, however, usefully serve as an extreme outer bound on the possible extent of the increase.

179. Steven L. Willborn et al., *Employment Law: Cases and Materials* 618 (4th ed. 2007). In addition, once workers exhaust their unemployment benefits, each week of additional unemployment implies a week with no wage replacement income. New entrants to the labor force and “reentrants”—those who have left the labor force and seek to return—are ineligible for unemployment insurance benefits and would therefore face these more acute costs as well. Gillian Lester, *Unemployment Insurance and Wealth*

The ten percent of the job market that is foreclosed to objectors, moreover, is not a random ten percent. To the contrary, union jobs have a well-recognized set of advantages over similar nonunion jobs—at least from the employees' perspective—and objectors lose access to these substantive advantages as well. The most obvious of these advantages is the union wage premium: Current research suggests that union workers earn approximately seventeen percent more than their similarly situated non-union counterparts.¹⁸⁰ Union jobs are also more likely than nonunion ones to provide employees with health insurance, defined benefit pension plans, vacation pay, life insurance, and disability insurance, and to provide employees with more generous benefits in each of these categories as well.¹⁸¹ Employees in a unionized setting also can exercise a form of voice and enjoy a form of participation in the life of the firm that is more difficult to achieve in nonunion settings.¹⁸²

Further, while only ten percent of the job market as a whole is made up of union shop jobs, there are certain occupations where unionization rates are substantially higher. At the highest end of the density spectrum, for example, more than thirty-seven percent of education jobs and more than thirty-four percent of protective service jobs nationally are unionized.¹⁸³ Thus, objectors in highly unionized occupations face a more contracted *occupational* job market. There are, in addition, good reasons to

Redistribution, 49 UCLA L. Rev. 335, 346 (2001). Assuming certain labor market conditions, wages and benefits might rise in the union sector as these firms face a contracted labor supply. Similarly, wages and benefits might fall in the non-union-shop sector as firms face an expanded labor supply.

180. See *supra* note 47 and accompanying text (identifying wage premium and scholarly treatment of the premium). One recent article disputes whether unionization brings a wage premium at all. See John DiNardo & David S. Lee, Economic Impacts of New Unionization on Private Sector Employers: 1984–2001, 119 Q.J. Econ. 1383, 1383, 1431 (2004) (concluding effects of unionization on wages are close to zero, and unions have been less effective at creating wage premium in recent years). However, the vast bulk of the research suggests the premium's existence. See, e.g., Blanchflower & Bryson, *supra* note 47, at 103 (finding wage premium is lower today than in 1970s but still exists).

181. John W. Budd, The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation, in *What Do Unions Do? A Twenty-Year Perspective* 160, 177–81 (James T. Bennett & Bruce E. Kaufman eds., 2008).

182. Though, it should be said, not impossible to achieve in nonunion settings. See generally Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 Colum. L. Rev. 319 (2005) (discussing rise of corporate self-regulation and role of employees in self-regulation).

183. See Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2011, *supra* note 175, at 7 tbl.3. After education and protective services, the next most highly unionized occupations have density rates much closer to the overall rate. For example, the third most unionized occupation is construction and extraction, with an 18.8% unionization rate, and the fourth is transportation and material moving, at 17.2%. *Id.* In certain states, occupational union density is even higher. Indeed, 100% of the public school districts in Hawaii and Nevada have a collective bargaining agreement with a teacher's union. See U.S. Dep't of Educ., Schools and Staffing Survey 2007–2008: Table 7. Percentage Distribution of Public School Districts, by Specific Agreements with Teachers'

care about restrictions on an employee's ability to pursue a chosen occupation. John Rawls, for example, includes "free choice of occupation" as one of the primary goods that ought to be available to all citizens,¹⁸⁴ and freedom of occupation is explicitly protected by constitutions of multiple foreign jurisdictions.¹⁸⁵

While the preceding costs would apply to any objector in the labor market, for workers employed in unionized firms or for employees whose firm unionizes after they are employed there, refusing to work under a union security agreement would mean separation from current employment. As the economics and public health literatures reveal, a number of additional costs—the costs of "exit"—flow from such separation.¹⁸⁶ Workers who separate from their jobs involuntarily generally face, first, a reduction in earnings.¹⁸⁷ For an average worker, one earning \$50,000

Associations or Unions and State, http://nces.ed.gov/surveys/sass/tables/sass0708_2009320_d1s_07.asp (on file with the *Columbia Law Review*) (last visited Apr. 19, 2012).

184. John Rawls, *Political Liberalism* 180–81 (1993); see also Frank I. Michelman, *The Priority of Liberty: Rawls and a Warren Court Model 11* (Harvard Pub. Law Working Paper No. 11-22, 2011), available at <http://ssrn.com/abstract=1927292> (on file with the *Columbia Law Review*).

185. See, e.g., *Constitución Política de Colombia [C.P.]* 1991, art. 26 ("Every person is free to choose a profession or occupation."); *Suomen perustuslaki [Constitution]* June 11, 1999, ch. 2, § 18 (Fin.) ("Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice."); *Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz][GG][Basic Law]*, May 23, 1949, BGBl. I, art. 12 (Ger.), translated in *Inter Nationes*, <http://www.iuscomp.org/gla/statutes/GG.htm> (on file with the *Columbia Law Review*) ("All Germans shall have the right freely to choose their occupation."); *Stjórnarskrá lýðveldisins Íslands [Constitution]* June 17, 1944, art. 75 (Ice.) ("Everyone shall be free to pursue the employment of his choice."); *Grondwet voor het Koninkrijk der Nederlanden (Constitution of the Kingdom of the Netherlands) [Gw]* Feb. 17, 1983, art. XIX ("The right of every Dutch national to a free choice of work shall be recognized."). The United States Supreme Court also has stressed the importance of access to occupation, most recently in cases involving state attempts to exclude immigrants from certain occupations. See *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In an earlier era, the Court held that the right "to engage in any of the common occupations of life" was a right protected by the Due Process Clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *Meyer* relies on *Lochner v. New York*, 198 U.S. 45 (1905), so it lacks much contemporary precedential force.

186. Sarah A. Burgard, Jennie E. Brand & James S. House, *Toward a Better Estimation of the Effect of Job Loss on Health*, 48 *J. Health & Soc. Behav.* 369, 370 (2007); Daniel Sullivan & Till von Wachter, *Job Displacement and Mortality: An Analysis Using Administrative Data*, 124 *Q.J. Econ.* 1265, 1265 (2009).

187. Involuntary job losses are defined as any "discharge from paid employment for any reason when an individual would prefer to keep working." Burgard et al., *supra* note 186, at 370. For data on earnings losses, see Kenneth A. Couch & Dana W. Placzek, *Earnings Losses of Displaced Workers Revisited*, 100 *Am. Econ. Rev.* 572, 572 (2010) (reporting losses of 32–33% in period immediately following job loss). Over time, these losses diminish, but they remain substantial. For example, in a study of earnings losses of displaced workers in Connecticut, Kenneth Couch and Dana Placzek report initial earnings losses of 32–33% and losses of 7–9% six years after the separation from employment. *Id.* at 577. In a national study, Till von Wachter finds that among workers

per year, lifetime losses from these reductions can total \$110,000–\$140,000.¹⁸⁸ Second, an initial involuntary job loss is often followed by “an extended period of instability of employment and earnings,”¹⁸⁹ and a worker who experiences one displacement is likely to face additional subsequent job losses.¹⁹⁰ Third, involuntary job loss is linked to a series of health effects, including increases in the self-reporting of physical illness and a worsening of psychological symptoms like depression.¹⁹¹ Finally, employees may experience forms of psychosocial losses that flow from the stigma of unemployment and the personal disruptions that unemployment can entail.¹⁹²

ii. *The Corporate Context.* — Just as there are alternatives to employment in unionized firms, there exist a range of alternatives to investing in corporate securities. To start, individuals are generally free not to invest in such securities.¹⁹³ Individuals who wish not to have their funds used to finance corporate political speech could either not invest at all, or invest in substitutes such as Treasury bonds and Treasury bills. This decision, however, like the decision to pursue only nonunion employment, would impose economic costs on the objector. Based on data gathered from the Federal Reserve database, Aswath Damodaran provides the average an-

displaced by a mass layoff, initial earnings decline by 30%, and remain at 21% ten and twenty years after the job loss. Till von Wachter, Jae Song & Joyce Manchester, Long-Term Earnings Losses Due to Mass Layoffs During the 1982 Recession: An Analysis Using U.S. Administrative Data from 1974–2004, at 3 (2009), available at http://www.columbia.edu/~vw2112/papers/mass_layoffs_1982.pdf (on file with the *Columbia Law Review*). This study finds no long-term earnings losses for workers separating from their jobs, except during mass layoffs, though it expresses reservations about this particular finding. *Id.* at 9–10.

188. Von Wachter et al., *supra* note 187, at 16.

189. Challenges for the U.S. Economic Recovery: Hearing Before the S. Budget Comm., 112th Cong. 2 (2011) [hereinafter Hearing] (statement of Till von Wachter, Assoc. Professor of Econ., Columbia Univ.), available at http://www.columbia.edu/~vw2112/Von_Wachter_Testimony_Before_Senate_Budget_Committee_2011.pdf (on file with the *Columbia Law Review*) (citing Ann Huff Stevens, Persistent Effects of Job Displacement: The Importance of Multiple Job Losses, 15 *J. Lab. Econ.* 165 (1997)).

190. Stevens, *supra* note 189, at 171–72. These additional job losses might also be explained in part because of “persistent worker characteristics” that led to the first job loss. *Id.*

191. Burgard et al., *supra* note 186, at 371 (describing data sources). These health effects may be compounded by a loss of health insurance benefits. Sullivan & von Wachter, *supra* note 186, at 1267 n.4. Consistent with these negative health effects, moreover, Daniel Sullivan and Till von Wachter find that certain forms of displacement can increase mortality rates. See *id.* at 1266, 1302–03 (estimating involuntary job loss reduces life expectancy by one to one and a half years); accord Hearing, *supra* note 189, at 2 (statement of Till von Wachter) (“[T]hese health declines [caused by employment and earnings instability] can lead to significant reductions in life expectancy of 1 to 1.5 years.”).

192. See Burgard et al., *supra* note 186, at 371 (“An involuntary job loss could entail the loss of psychosocial assets including goal and meaning in life, social support, sense of control, and time structure.”). Such effects can also include “anxiety, insecurity, and shame.” *Id.*

193. Public employee pension plans stand as a relevant exception to this rule; this exception is discussed in Part IV.C.

nual returns for stocks, Treasury bonds, and Treasury bills from 1928–2010.¹⁹⁴ Over this seventy-two-year period, which incorporates data from stock market declines of the most recent three years, the average returns for these investment vehicles were as follows:

Stocks: 11.31%

T-Bills: 3.70%

T-Bonds: 5.28%¹⁹⁵

As such, an investor who objected to funding corporate political speech and who chose to avoid doing so by pursuing an alternative investment strategy would, based on average returns since 1928, sacrifice a substantial percentage of her investment income.¹⁹⁶ Over the course of a lifetime of investment, the income losses from this decline in annual returns would be significant: Based on these averages, at the end of a thirty-year investment period, the income from stocks will be approximately triple the income from bonds, and nearly four times the income from Treasury bills. To take one example, if an individual invests \$5000 in savings annually for thirty years, stocks would yield \$1,056,146 in total income, while bonds would produce \$348,618 and Treasury bills \$266,777.¹⁹⁷

The impact of such losses could be significant irrespective of the use to which investment income is put, but are perhaps most visible with respect to the two most central uses of investment income—retirement and college savings.¹⁹⁸ Because retirement and college costs are funded heavily with income earned on investments,¹⁹⁹ the loss of a major portion of the income stream would be difficult for many individuals to accommodate. Perhaps ironically, the loss might be hardest to bear for lower-

194. Aswath Damodaran, Annual Returns on Stock, T.Bonds and T.Bills: 1928–Current, http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histret.html#_msoanchor_1 (on file with the *Columbia Law Review*) (last updated Jan. 5, 2012).

195. *Id.*

196. *Id.*

197. These figures are calculated using a “Future Value of an Annuity” model. See Terry Lloyd & Vincent J. Love, *Practicing Law Inst., Introduction to Accounting for Lawyers* 228–30 (1993).

198. See, e.g., Sallie Mae, *How America Saves for College: Sallie Mae’s National Study of Parents with Children Under 18 Conducted by Gallup* 33 (2010), available at https://www.salliemae.com/NR/rdonlyres/460220B6-BB1D-4AE7-803D-C87BBF3BCFFE/13161/how_america_saves_100410_final.pdf (on file with the *Columbia Law Review*) (listing top savings priorities for 2010); *id.* at 10, 13 fig. 3 (detailing savings vehicles used to fund college education); see also Emily Brandon, *The 4 Biggest Sources of Retirement Income, Planning to Retire*, U.S. News & World Rep. (Jan. 12, 2010), <http://money.usnews.com/money/blogs/planning-to-retire/2010/01/12/the-4-biggest-sources-of-retirement-income> (on file with the *Columbia Law Review*) (detailing savings vehicles used to fund retirement).

199. See *supra* note 198 (citing authorities detailing sources of college and retirement savings).

income households whose ability to fund these expenses, particularly college education, is more dependent on returns from savings.²⁰⁰

Another alternative to investing in corporations that engage in political spending would exist if there were a sufficient number of corporations that pledged not to engage in such spending. Objectors might then invest in shares of these firms, or in funds consisting exclusively of such “no politics” companies. Robert Sitkoff argues that campaign finance laws designed to protect objecting shareholders are unnecessary for precisely this reason.²⁰¹ But whether or not such firms or funds might develop in the future, a topic which this section addresses below, they do not exist to any meaningful extent today—that is to say, whether or not they constitute a potential future alternative for political objectors, they do not constitute a current one.²⁰² Moreover, in the years since *Citizens United* has been decided, while some firms have faced criticism for their political spending,²⁰³ there has not been substantial corporate movement in the direction of actually forgoing such spending.²⁰⁴

200. See Sallie Mae, *supra* note 198, at 14 (noting proportion of college funds derived from investments increases with family income).

201. Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1119–20 (2002).

202. Sitkoff points to the existence of “social responsibility” funds that “assure investors that their money will not be invested in corporations engaged in certain specific forms of behavior, such as the sale of alcohol or tobacco, military contracting, abortion-related services, and so on.” *Id.* at 1119. Indeed, such funds are now relatively common. These funds generally screen corporations for what are termed “ESG factors”—the firm’s policies regarding environmental, social, and (corporate) governance issues—as well as for the corporation’s specific products. See *Socially Responsible Mutual Fund Charts: Screening & Advocacy*, The Forum for Sustainable and Responsible Investment, <http://ussif.org/resources/mfpc/screening.cfm> (on file with the *Columbia Law Review*) (last visited Jan. 26, 2012) (charting social, environmental, corporate governance, and product investment criteria considered by numerous mutual funds); see also S. Prakesh Sethi, *Investing in Socially Responsible Companies Is a Must for Public Pension Funds—Because There Is No Better Alternative*, 56 J. Bus. Ethics 99, 101 (2005) (detailing relevant criteria for socially responsible investing). But these funds do not, at least of yet, screen for political spending.

203. Target Corporation, for example, faced heavy criticism for its decision to donate \$150,000 to a Minnesota gubernatorial candidate who was an opponent of gay rights. See, e.g., Jennifer Martinez & Tom Hamburger, *Target Faces Investor Backlash*, L.A. Times, Aug. 20, 2010, at A1 (reporting backlash against Target). Although Target representatives promised to review their “decision-making process for financial contributions in the public policy arena,” *id.*, that policy still explicitly allows Target to “provide financial support to political candidates, political parties or ballot initiatives” through its general treasury. Target Corp., *Civic Activity: Political Contributions*, <http://hereforgood.target.com/learn-more/civic-activity> (on file with the *Columbia Law Review*) (last visited Jan. 26, 2012).

204. A handful of major corporations have policies precluding direct political contributions and expenditures—to both federal and state candidates and parties—from general treasury funds. See Bill de Blasio, *Pub. Advocate for N.Y.C., Where Do The Largest Corporations in America Stand on Corporate Spending in our Elections?*, <http://advocate.nyc.gov/corporate-spending> (on file with the *Columbia Law Review*) (last visited Jan. 26, 2012) (explaining *Citizens United* and outlining key corporations’ stances on spending corporate treasury money in elections). Most of these corporations, however, maintain and

There are, moreover, theoretical reasons to be skeptical that no-politics firms and no-politics funds will emerge in meaningful numbers in the future.²⁰⁵ As Bebchuk and Jackson argue, when it comes to political spending decisions, the interests of corporate directors and management can diverge from the interests of shareholders.²⁰⁶ “The basic problem,” they write, “arises from the fact that political spending decisions may be a product not merely of a business judgment regarding the firm’s strategy, but also of the directors’ and executives’ own political preferences and beliefs.”²⁰⁷ Political spending decisions, therefore, are but one example of a broader class of decisions in which shareholder and management interests diverge.²⁰⁸ With respect to each of these areas, a similar objection is often made: If shareholders desire a change, market mechanisms will provide for it. But, as Lucian Bebchuk, Jesse Fried, and others have argued, market mechanisms—including the market for capital—are often insufficient to induce management to adopt changes that share-

make considerable expenditures through their PACs. See, e.g., Dell Corp., Public Policy, http://www.dell.com/content/topics/topic.aspx/global/shared/corp/commitment/main/en/us/public_policy?c=us&l=en&s=corp (on file with the *Columbia Law Review*) (last visited Apr. 19, 2012) (noting “Dell sponsors a federal PAC”). A few of the corporations with a ban on general treasury spending—including Colgate-Palmolive and IBM—do not maintain PACs, but even these corporations spend considerably on lobbying. See Lobbying: Colgate-Palmolive Co., Opensecrets.org, <http://www.opensecrets.org/lobby/clientsum.php?id=D000032736&year=2011> (on file with the *Columbia Law Review*) (last visited Jan. 26, 2012) (outlining company’s lobbying expenditures); Lobbying: IBM Corp., Opensecrets.org, <http://www.opensecrets.org/lobby/clientsum.php?id=D000000720&year=2011> (on file with the *Columbia Law Review*) (last visited Jan. 26, 2012) (same).

While the focus in this article is electoral spending, the union opt-out rule, as noted above, is designed to ensure that objecting employees are required to finance neither electoral spending nor many types of union lobbying expenses. See *supra* note 97 and accompanying text (discussing chargeability of union lobbying expenses). Even if some number of corporations limit their electoral spending, they are far less likely to forgo lobbying. See Issacharoff, *supra* note 5, at 131–32.

205. If political objectors came to constitute a majority of the shareholders in a given firm, they might rely on the “procedures of corporate democracy” to prohibit the corporation from spending corporate assets on politics. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010). For reasons detailed in the corporate law literature, however, the mechanisms of corporate democracy are unlikely to be sufficient to ensure this type of change, even when a majority of shareholders desires it. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 676 (2007) [hereinafter *Bebchuk, Myth*]; Lucian Bebchuk & Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* 45–54 (2004).

206. Bebchuk & Jackson, *supra* note 14, at 90. John Coates provides empirical evidence in support of the claim that the interests of management diverge from the interests of shareholders when it comes to political spending. See Coates, *supra* note 18, at 14 (“[T]he relationship between [corporate political activity] and shareholder rights is clearly negative.”).

207. Bebchuk & Jackson, *supra* note 14, at 90.

208. See, e.g., Bebchuk & Fried, *supra* note 205, at 45–54 (discussing executive compensation); Bebchuk & Jackson, *supra* note 14, at 92 (noting “various situations involving a divergence of the interests of directors and executive from those of shareholders”).

holders desire.²⁰⁹ Given the potential benefits to management of political spending, and given that “[t]he chief source of capital for publicly traded firms is retained earnings, debt comes second, and equity is a distant third,”²¹⁰ the fact that there may be some available capital for firms that forswear political activity may not spur significant growth in no-politics firms.²¹¹

Finally, the preceding discussion assumes that the objecting shareholder objects to the corporation using treasury funds to finance political expenditures *in general*. It is likely that certain shareholders would object more narrowly only to political expenditures that diverge from their own political alignments, and these objectors could invest in those corporations that share their political views. Again, though, there are reasons to doubt the adequacy of this alternative. First, this alternative is not responsive to those shareholders who object to corporate political spending in general, and this is the type of objection that the union security cases allow employees to make.²¹² But even with respect to shareholders whose objections are narrower, the basic problem is that *Citizens United* permits corporations to make expenditures on behalf of *candidates*, and candidates must take positions on a wide range of issues. Thus, if a corporation wishes to support candidate A because she favors a certain tax policy, the corporation will also be expending funds in support of all the other positions that candidate A favors. For this reason, corporations often support candidates of both political parties, and the same corporation will often support candidates who take directly opposing positions on any number

209. See, e.g., Lucian Arye Bebchuk, Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments, 102 Harv. L. Rev. 1820, 1835–51 (1989) (discussing limits of market discipline); Bebchuk & Fried, *supra* note 205, at 53–58 (discussing limits of market forces).

210. Bebchuk & Fried, *supra* note 205, at 56.

211. This is Brudney’s conclusion as well. See Brudney, Association, *supra* note 14, at 57 (noting corporations that unbundle their investment and advocacy voices “will not be (and in fact are not) formed sufficiently frequently . . . to offer to passive investors any real choice”). Even should no-politics firms or funds develop, investors who limit themselves to shares in these corporations would likely incur substantial costs. Political objectors, that is, would be limited to investing only in those firms or funds that decided—for whatever reasons—to forgo political expenditures, and would remain shut out of the vast majority of the stock market. Objectors would also be excluded from the investment vehicles, including index funds, that incorporate a broad range of firms and which, for this reason, often constitute the preferred form of stock investment for investors in most income ranges. See generally Mark Kritzman, Rules of Prudence for Individual Investors 5 (2009), available at <http://www.mebanefaber.com/wp-content/uploads/2009/02/wir-winter-2009-february.pdf> (on file with the *Columbia Law Review*) (“The index fund is by far the best choice . . .”); Ian Salisbury, A Close Race, A Surprising Finish—Against Sleek ETF Rivals, Top Index Mutual Funds Use Ultra-Low Costs to Gain Performance Edge, Wall St. J., May 7, 2007, at R1 (finding low-cost index funds outperform exchange-traded funds and are better investment for small investors, due in part to low management costs).

212. See *supra* note 96 and accompanying text (explaining employees’ right to object).

of subjects that might be of import to the shareholder.²¹³ It will therefore be exceedingly difficult for any corporation engaged in political spending to commit to not supporting—or to not opposing—any specific political issue and therefore difficult for shareholders to find firms that align with their political commitments.²¹⁴

3. *Conclusion.* — In the absence of a political opt-out right, employees who object to funding union political speech would have to limit themselves to nonunion employment, and they would face economic consequences for doing so. Significant economic consequences would also flow to individuals who object to financing corporate political speech. On some measures, the consequences in the corporate context are more severe than those inherent in forgoing union employment. The loss of lifetime earnings from investment that an objecting shareholder would suffer—even for an individual who invests at modest levels—may be significantly greater than the loss of lifetime wage earnings that a union objector faces. On other measures, the consequences of avoiding stock investment are less severe than those that flow from giving up union employment. For example, the wage losses incurred in the move from a union job to a nonunion job, coupled with the sacrifice of health insurance that often accompanies such a move, may result in greater consequences than investment losses do.²¹⁵

But the relevant question is not whether the consequences of giving up union employment are more severe than the consequences of giving up stock investment, on some absolute scale. The question is whether only one of these two sets of costs is unacceptable. As the analysis here reveals, then, the argument that the union and corporate contexts can be distinguished on compulsion grounds reduces to a claim that the costs of being shut out of the stock market are acceptable, but the costs of being

213. See, e.g., Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 *Sup. Ct. Econ. Rev.* 1, 37 (1998) (“[Non-ideological campaign contributors] are indifferent between candidates so long as neither is openly hostile to their position. Indeed, they may well give money to opposing candidates.”); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 *Cardozo L. Rev.* 2583, 2616 n. 151 (2008) (“[A] desire for influence, not principles, surely explains why so many corporate donors regularly contribute to both parties.”); Vicki Kemper & Deborah Lutterbeck, *The Country Club*, *Common Cause Mag.*, Spring/Summer 1996, at 17–18 (noting many businesses and corporations make “large contributions to both political parties to guarantee access, influence and agenda-setting power no matter who’s in the White House or which party controls Congress”).

214. The narrower the shareholder’s objection, the more likely it is that she would find firms or funds suitable for investment. For example, if an investor objects only to the use of corporate assets to oppose abortion rights, there might be firms or funds willing to commit never to support a candidate that opposes those rights. As noted, though, this does not constitute an adequate alternative to shareholders with broader objections—the type of objections that the union security cases protect.

215. See, e.g., Sabrina Tavernise, *Ohio Town Sees Public Job as Only Route to Middle Class*, *N.Y. Times*, Mar. 16, 2011, at A19 (explaining substantial negative economic impact of public-sector union decline on middle class union employees).

shut out of jobs covered by a union security agreement are not. Given the very real costs involved in both contexts, however, this conclusion is not an obvious one.

It is perhaps instructive that, in related contexts, the Court has found costs unacceptable that are seemingly far less significant than those involved in either of our contexts. As Louis Seidman and Mark Tushnet point out, the Court has found coercion “when the government conditioned the right to rebuild a beachfront home on the grant of a public easement across the property.”²¹⁶ In that case, the cost to the individual of avoiding the obligation to grant the easement—without just compensation—was the inability to renovate a beach house.²¹⁷ To be sure, there is no consistency in the Court’s jurisprudence on these questions.²¹⁸ But a finding that the costs investors must bear to avoid funding corporate political speech are unacceptable, and that they would therefore satisfy a test for coerciveness, would not constitute an outlier in the Court’s own jurisprudence.

This is not to imply that there is no difference between the costs of accepting only jobs without union security agreements and the costs of avoiding stock investment. Nor is it to imply that the Court or Congress could not—or would not—use these differences to distinguish the union and corporate contexts on compulsion grounds. But the analysis here does suggest that the Court’s conclusion that there is coercion only in the union context is far from inevitable. In fact, the analysis here would support a contrary judgment: a judgment that *both* sets of costs are unacceptable, and that the two contexts are therefore defined by similar degrees of compulsion.

B. *The Source of Compulsion: State Action*

Even if asymmetric rules for political opt-out rights are not justified by a differential in the existence of compulsion, they may instead be justified by a difference in the *source* of that compulsion. Perhaps, in particular, there is a degree of state action implicated in the negotiation and enforcement of private sector union security clauses that is lacking in the corporate context.²¹⁹ Such a difference would be critical to the analysis:

216. Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* 75 (1996) (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987)). The *Nollan* Court held that the plaintiffs had been “compelled” to grant the easement in violation of the Fifth Amendment’s Takings Clause. 483 U.S. at 841. *Nollan* involved state action, and the next section addresses whether the source of compulsion is relevant here. See *infra* Part III.B (discussing state action as source of compulsion).

217. *Nollan*, 483 U.S. at 827–30.

218. See Seidman & Tushnet, *supra* note 216, at 72–90 (noting “Supreme Court Justices have taken inconsistent positions on the issue” of state coercion); Sullivan, *supra* note 154, at 1428–42 (outlining debate within Court’s coercion jurisprudence).

219. Under any definition, there is state action in the public sector union security context where the state is the employer and a party to the collective bargaining agreement that contains the union security clause. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209,

If, for example, there is sufficient state action only in the union context, political opt-out rights would be constitutionally *required* for all employees, including private sector employees, but not for shareholders.

When presented with the question of whether the actions of a private actor constitute “state action,” the Supreme Court has pursued a number of different approaches and applied a host of different tests.²²⁰ The Court will ask variously “whether the private party is performing a public or government function; whether the government compelled or significantly encouraged the challenged action; whether the government jointly participated in the action; and whether there is symbiotic interdependence between the government and the private party.”²²¹ Irrespective of the particular test, the inquiry turns ultimately on the nature of the state’s involvement in the actions of the ostensibly private actors. What, then, is the nature of the state’s involvement in the union and corporate contexts?

Federal labor law aims to ensure that employees have a free choice on the question of unionization.²²² To this end, the law aims to restrain employer actions that would impede employee efforts at unionization: The National Labor Relations Act, for example, prohibits employers from discharging or discriminating against employees who seek to unionize.²²³ Labor law also requires employers to take some affirmative steps to enable employee choice on the union question: Employers must, for example, permit employees to discuss unionization amongst themselves on the

211–13 (1977). But the relevant question here is whether there is a difference, on state action grounds, between the private sector union context and the corporate one. If there is not, then this source-of-compulsion argument cannot justify the asymmetric treatment of private sector employees, who are granted a political opt-out right, and shareholders, who are not.

220. See Seidman & Tushnet, *supra* note 216, at 49–71 (reviewing these approaches); see also Metzger, *supra* note 61, at 1411 (noting state action doctrine is “beset by inconsistency and disagreement”).

221. Metzger, *supra* note 61, at 1412. See generally Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 Va. L. Rev. 1767, 1797 n.61 (2010) (“The Supreme Court describes itself as applying three, or possibly four, distinct tests for . . . attributing the private entity’s behavior to the state.”).

222. NLRA § 7, 29 U.S.C. § 157 (2006). See generally Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv. L. Rev. 655 (2010) (discussing NLRA’s commitment to employee choice). As many labor scholars have observed with respect to the NLRA, the law does a very poor job at meeting this goal. See, e.g., Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1770 (1983) (“American labor law has failed to make good on its promise to employees that they are free to embrace collective bargaining if they choose.”).

223. NLRA § 8(a)(1)–(3), 29 U.S.C. § 158(a)(1)–(3); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1533 (2002). The analogous RLA provisions are at RLA § 2(Third), (Fourth), 45 U.S.C. § 152(Third), (Fourth) (2006). See *Adams v. Fed. Express Corp.*, 470 F. Supp. 1356, 1363–64 (W.D. Tenn. 1979) (describing rights under § 2).

employer's property during nonwork time.²²⁴ Moreover, if a majority of the employees in a particular "bargaining unit" chooses to unionize, the law then requires that the employer bargain in good faith with the union on behalf of all the employees in the bargaining unit,²²⁵ and this bargaining requirement covers union security agreements.²²⁶ The law, however, imposes no obligation that the employer ever actually reach agreement with the union on any contractual term,²²⁷ and contract terms may not be imposed in any circumstances, even as a remedy for violations of the duty to bargain.²²⁸

As labor law facilitates the formation and growth of unions, so too does corporate law facilitate the formation and growth of corporations. Most familiarly, corporate law provides investors in corporations with liability limited to the amount of their investment in the firm,²²⁹ and

224. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945). See generally Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *Colum. L. Rev.* 753, 934 (1994) ("The employer may ban all other speech about workplace governance except during work breaks." (footnote omitted)).

225. See *NLRA* § 8(a)(5), 29 U.S.C. § 158(a)(5) ("It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ."). See generally Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 *La. L. Rev.* 47 (2009). The RLA imposes an analogous duty on carriers and unions "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." *RLA* § 2, 45 U.S.C. § 152.

226. See, e.g., *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 737–38 (1963) (noting "congressional declaration of policy in favor of union-security contracts" and stating that said contracts are "mandatory subject as to which the Act obliged respondent to bargain in good faith"); *NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 133 (9th Cir. 1949) ("Union security is properly a 'condition of employment' within the meaning of § 9(a) of the National Labor Relations Act and hence, is within the statutory area of collective bargaining.").

227. See *NLRA* § 8(d), 29 U.S.C. § 158(d) (providing that obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"). The RLA rule is analogous. *ABA Section of Labor and Employ. Law, The Railway Labor Act 350–51* (Michael E. Abram et al., eds., 2d ed. 2005).

228. See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) ("[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."); see also *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 115 (1970) (criticizing present remedies as inadequately protecting employees' right to bargain). While employees may attempt to enforce their own bargaining demands through economic pressure of various kinds, most prominently through strike action, employers maintain the right to permanently replace those workers who strike. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) ("Nor was it an unfair labor practice to replace the striking employe[e]s with others in an effort to carry on the business.").

229. Clark, *supra* note 19, § 1.2, at 7–10; see also Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 *U. Chi. L. Rev.* 89, 89 (1985) ("Limited liability is a fundamental principle of corporate law.").

thereby encourages corporate investment.²³⁰ The law's grant of legal personality to the corporation similarly facilitates corporate formation and growth by allowing the corporation qua corporation to own real property, make contracts, sue and be sued, and, as the Model Business Corporations Act states, to have "the same powers as an individual to do all things necessary or convenient to carry out its business and affairs."²³¹ Corporate law also grants corporations perpetual life, enabling them to survive across changes in shareholders and management.²³² All of these features of the corporate form facilitate its success,²³³ and all are "creations of law."²³⁴

Beyond generally facilitating the corporate form, corporate law also encourages corporations to condition investment on shareholders' delegation of decisionmaking authority to firm management, including authority over political spending decisions. Section 141(a) of Delaware's General Corporation Law, for example, states that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."²³⁵ Corporate law does generally allow shareholders to depart from default rules by amending corporate bylaws, but a recent decision of the Delaware Supreme Court suggests that even this power may be limited when it comes to amendments circumscribing the board's authority to manage the firm.²³⁶ Thus, as John Coffee writes, corporate law leaves shareholders "little practical ability to limit or restrict political contributions."²³⁷

Given these forms of state involvement in the union and corporate contexts, is it correct to conclude that the two contexts can be distinguished on state action grounds? One prominent strand of constitutional

230. See Easterbrook & Fischel, *supra* note 229, at 93–97 (listing six benefits of limited liability).

231. Model Bus. Corp. Act § 3.02 (2010).

232. *Id.*; Clark, *supra* note 19, § 1.2, at 19.

233. Clark, *supra* note 19, § 1.1, at 2.

234. Kent Greenfield, *New Principles for Corporate Law*, 1 *Hastings Bus. L.J.* 87, 94 (2005). Indeed, Brudney introduces his discussion of the governmental interest in shareholder-protective legislation by asserting that state action is implicated in the rules of corporate decisionmaking. Brudney, *Business Corporations and Stockholders' Rights*, *supra* note 13, at 256.

235. Del. Code Ann. tit. 8, § 141(a) (2011).

236. See *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 234–35 (Del. 2008) ("It is well-established Delaware law that a proper function of bylaws is not to mandate how the board should decide specific substantive business decisions, but rather, to define the process and procedures by which those decisions are made.").

237. Corporate Governance After *Citizens United*: Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs., 111th Cong. 54 (2010) (statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia Law School); see also Bebachuk & Jackson, *supra* note 14, at 87 n.10 (discussing *AFSCME* decision and Professor Coffee's testimony).

scholarship would answer the question by rejecting the inquiry itself. According to leading critics of the state action doctrine, distinguishing between legal contexts in which there is and is not state action is largely a pointless task because, put simply, “state action is always present.”²³⁸

But even if we do not accept the critics’ view, and deploy the Court’s approach to the question, it is difficult to justify a conclusion that state action defines the union setting but not the corporate one. State action doctrine would call on us to ask, for example, whether, with respect to either the union security clause or the corporate rules of political spending, the government has “provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”²³⁹ As the above discussion reveals, both the union and the corporate contexts feature state “encouragement” of the organizational form in question. Both, moreover, involve some state encouragement of the particular provision at issue here—the union security clause or the corporate rules of delegated decisionmaking. But in neither respect does the state’s encouragement seem greater in the union context.²⁴⁰ If anything, there appears to be greater state involvement in the corporate context: Labor law permits the bargaining of union security provisions, but corporate law establishes a default rule according to which investment is conditioned on the delegation of political spending decisions to management and it imposes limitations on shareholders’ ability to depart from this default.²⁴¹

238. Cass R. Sunstein, *State Action Is Always Present*, 3 *Chi. J. Int’l L.* 465, 465 (2002) [hereinafter Sunstein, *State Action*]. For Sunstein, the appropriate constitutional question is whether the state’s allocation of rights to the employer—which allows the employer to discharge employees on the basis of race—passes muster. *Id.* at 467–68; see also Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *Geo. L.J.* 779, 789 (2004) (“The state action doctrine is analytically incoherent because . . . state regulation of so-called private conduct is always present, as a matter of analytic necessity, within a legal order.”). Lillian BeVier and John Harrison summarize the critics’ views. BeVier & Harrison, *supra* note 221, at 1774–85.

239. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); accord *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001).

240. It is unlikely that the government’s facilitation of either union security clauses or corporations is sufficient to convert the actions of unions or corporations into state action under current Court doctrine. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) (explaining “subtle encouragement” does not rise to level of state action); *Blum*, 457 U.S. at 1009–10 (finding regulated entity’s response to government incentives “too slim a basis” to find state action); cf. *Brudney, Association*, *supra* note 14, at 49 & n.126 (suggesting government’s compulsion of payments of union dues does not rise to level of impermissibly controlled speech). We need not resolve that question here, however. The important point is simply that there is no basis to conclude that state action is present in the union context but not the corporate one.

241. This analysis applies most forcefully with respect to existing corporations. New firms could be incorporated with charters that imposed different rules regarding political spending. See, e.g., *Del. Code Ann. tit. 8, § 141* (2011); *CA, Inc.*, 953 A.2d at 232 (discussing scope of section 141).

Some have argued that there is state action in the union context because a union is the “exclusive bargaining representative” of all the employees in a given bargaining unit.²⁴² The argument is that by granting the union the right to represent 100% of the employees in a bargaining unit, labor law bestows on the union a kind of monopoly power in the workplace, and that this grant of monopoly power is sufficient to implicate state action.²⁴³ But the argument is flawed, and for several reasons.

To start, under the Court’s state action doctrine, a government grant of monopoly status to a “private” economic actor is not sufficient in itself to implicate state action.²⁴⁴ Next, even if a government grant of monopoly status did convert the grantee into a state actor, it is not clear that labor law’s exclusivity provisions would satisfy even this test. Unlike the utility context, for example, where the state itself delegates monopoly status on a particular provider, labor law provides only that if a majority of employees elects to unionize then the minority of employees will be bound by the bargaining agent selected by the majority. And the Court has stressed repeatedly that governmental facilitation of a certain choice is unlikely to constitute state action when the choice itself is left to the relevant private actor.²⁴⁵ Further, unions are an odd kind of “monopoly.” Rather than constituting a monopoly provider of a good or service on which consumers must rely, unions are an exclusive bargaining agent. This status gives them the authority to propose contractual provisions to management on behalf of all the employees in a bargaining unit, but it does not give them authority to impose any contractual term on any employee. Moreover, in the *absence* of a union, an employer has the authority to impose on the entire workforce whatever terms the employer deems optimal,²⁴⁶ authority that, as Sunstein points out, derives from law as well.²⁴⁷ In this sense, then, a (nonunion) employer would seem to have

242. See, e.g., Dau-Schmidt, *supra* note 50, at 125–32 (reviewing and rejecting argument that exclusivity implies state action); David H. Topol, Note, Union Shops, State Action, and the National Labor Relations Act, 101 Yale L.J. 1135, 1148–57 (1992) (arguing union security agreements under NLRA should be considered state action); see also Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983) (considering and rejecting argument that exclusivity implies state action).

243. *Kolinske*, 712 F.2d at 478; Dau-Schmidt, *supra* note 50, at 126.

244. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351–52 (1974); see also *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 176–77 (1972) (holding regulatory scheme did not rise to level of state action); Dau-Schmidt, *supra* note 50, at 127–28 (finding “little hope that the union’s status as exclusive representative” would provide necessary state action nexus).

245. See, e.g., *Sullivan*, 526 U.S. at 52 (holding there is no state action where decision to withhold payments under workers’ compensation regime is “made by concededly private parties”); *Blum*, 457 U.S. at 1009–10 (holding where Medicaid rules require patient transfer or discharge under certain circumstances, but leave ultimate discharge and transfer decision to doctor, doctor’s decision to discharge or transfer patient is not state action).

246. An employer’s ability to impose terms is checked by employees’ ability to quit. Richard Freeman & James Medoff, *What Do Unions Do?* 7–8 (1984). But the ability to quit exists in the union context too and therefore checks the union’s power as well.

247. Sunstein, *State Action*, *supra* note 238, at 467.

greater monopoly control over the workforce than a union ever does, yet we do not assume that the private employer's choices regarding terms and conditions of employment constitute state action.

Finally, a few words are in order about *Hanson*. As we have seen, *Hanson* holds that there is state action in the negotiation of a union security clause in the railroad (or airline) industry because the RLA not only permits unions and employers to negotiate union security agreements but also preempts any state law that prohibits the negotiation of such agreements.²⁴⁸ *Hanson*, however, was decided at the apex of the Court's willingness to find state action implicated in private conduct,²⁴⁹ and during a period when legal scholars were arguing that both unions and corporations should be made subject to the Constitution because of the economic power they wielded.²⁵⁰ It is far from clear, however, that *Hanson*'s conclusion is valid under current doctrine. Despite the preemption of state law, the RLA merely permits the bargaining of a contractual clause, and, by doing so, the statute would not seem to effect the kind of "encouragement" required by the Court's contemporary state action decisions.²⁵¹ Additionally, even if *Hanson* does capture the appropriate conception of state action, the decision's reasoning would seem to reach not only union security clauses but also corporate rules that condition investment on shareholders' delegation of managerial authority. Although the opinion's discussion of the point is sparse, *Hanson* holds that there is state action in an RLA union security clause because the federal law requires that the bargaining of such a clause be permissible. As we have seen, however, corporate law not only requires that certain bylaw provi-

248. *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225, 232 (1956).

249. *Hanson* was decided in 1956, eight years after *Shelley v. Kraemer*—"[t]he most famous state action case of all." BeVier & Harrison, *supra* note 221, at 1798. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court held that judicial enforcement of a racially discriminatory real estate covenant constituted state action; *Hanson* cites *Shelley* as support for its state action holding. 351 U.S. at 232 n.4.

250. See Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933, 942 (1952) ("The emerging principle appears to be that the corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself."); Joseph L. Rauh, Jr., *Civil Rights and Liberties and Labor Unions*, 8 Lab. L.J. 874, 881 (1957) ("Whether Congress and the courts will ultimately treat labor organizations entirely as public bodies subject to all the requirements of due process placed upon the federal and the state governments remains to be seen. But there can be little doubt that the trend is in that direction . . ."). However, Harry H. Wellington argues that although "commentators have suggested that all or most 'powerful' private groups should be subject to all or most provisions of the Constitution" and "[t]he business corporation and the labor union have been the principal targets of these suggestions," the "analytical shortcomings" of that view "are fatal," as the Constitution is not the appropriate tool for regulating powerful nonstate entities. Harry H. Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 Yale L.J. 345, 346, 348 (1961).

251. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Thus, as Gillian Metzger has observed, "*Hanson*'s reasoning is hard to square with recent state action cases." Metzger, *supra* note 61, at 1468 n.349.

sions be permissible, in some circumstances—including those relevant here—it limits shareholders' ability to depart from these provisions.²⁵²

C. *The Union/Corporate Distinction*

In addition to arguments concerning the existence and source of compulsion, a final possible justification for asymmetric opt-out rules lies in potential differences between the kinds of speech and associational rights that are implicated in the union and corporate contexts. There are two such arguments. The first is that unions are expressive associations while corporations are commercial ones, and therefore that the mandatory financing of union politics is more troubling from a speech and associational rights perspective than is the mandatory financing of corporate politics. The second argument is that the relationship between the employee and union is, in ways relevant to speech and associational interests, different than the relationship between the shareholder and the corporation.

Of course, if there is no state action in either of these contexts, then neither private sector workers nor shareholders enjoy First Amendment rights of speech or association against their unions or corporations. But, as *Beck* itself makes clear, “constitutional values” can inform decisionmaking in this area even when the Constitution does not formally apply.²⁵³ This section accordingly considers each of these speech and associational arguments in turn, assuming that such constitutional values may be relevant even in the absence of state action.

1. *Forms of Association.* — The first of these arguments picks up a distinction, drawn in the Court's compelled association jurisprudence, between expressive and commercial associations. In her concurrence in *Roberts v. United States Jaycees*, for example, Justice O'Connor explained that expressive associations are those that engage exclusively or predominantly in expressive activity, and that these associations enjoy the highest degree of constitutional protection.²⁵⁴ Commercial associations, on the other hand, enjoy only “minimal” constitutional protection.²⁵⁵ Likewise, *Glickman v. Wileman Bros. & Elliott*²⁵⁶ established that “although there was a First Amendment right to refuse to affiliate with an association that participates in public discourse, there was no First Amendment right to re-

252. In any event, *Hanson's* reasoning is limited to the RLA; The NLRA does not preempt state laws prohibiting union security agreements, and so on its own terms *Hanson* does not reach beyond the airline and railroad industries. See NLRA § 10(b), 29 U.S.C. § 160(b) (2006).

253. See Feldman, *supra* note 28, at 233–34 (“*Beck* is not a constitutional case, although it is certainly what might be called a ‘constitutional values’ decision.”); Hartley, *supra* note 28, at 83 (discussing central role of constitutional values).

254. 468 U.S. 609, 633–37 (1984) (O'Connor, J., concurring). The case resolved whether the government can require private organizations to admit certain types of individuals to its membership. *Id.*

255. *Id.* at 634.

256. 521 U.S. 457 (1997).

fuse to affiliate with an association that engaged merely in commercial speech.”²⁵⁷

Whether this expressive/commercial distinction provides employees greater speech and associational rights than shareholders turns, however, on another, somewhat esoteric, distinction: that between “compelled speech” and “compelled association.”²⁵⁸ As the above discussion predicts, and as Robert Post has explained, the union security cases recognize two types of harm that flow from the mandatory payment of union dues.²⁵⁹ The first is an infringement on employee speech rights: By conditioning employment on the requirement that employees pay dues to the union, a union security clause—at least one that allows the union to use dues for political purposes—requires that employees fund the speech of the union.²⁶⁰ The second harm is the infringement on employee associational rights: Conditioning employment on the requirement that employees pay dues to the union requires the employee to affiliate with the union.²⁶¹

With respect to the compelled speech defect, any differences in the natures of the union and the corporation are beside the point. What matters, instead, is the *type* of speech being compelled. On the one hand, many forms of compelled speaking—take, for example, mandatory labeling of medicines or mandatory reporting of automobile accidents—raise no First Amendment concerns at all.²⁶² On the other hand, when the speech at issue involves “democratic self-governance and participation in the formation of public opinion,” concerns about compelled speaking are at their height.²⁶³ In both the union and the corporate contexts, the type of speech at issue is precisely the same: political advocacy that garners the highest degree of First Amendment protection. Thus, the compelled speech defect identified in the union security cases applies with equal force in the corporate context.

With respect to associational rights, differences in the nature of unions and corporations may be relevant. On the theory of *Jaycees* and *Glickman*, if unions are expressive associations and corporations commercial, employees would indeed enjoy stronger associational rights than would shareholders. But there are several difficulties with the argument. As a preliminary matter, the distinction between expressive and commercial associations articulated in *Jaycees* and adopted in *Glickman* is unstable

257. Post, *Transparent and Efficient Markets*, supra note 29, at 571.

258. See, e.g., *id.* (discussing *Glickman* Court’s differing treatment of “compelled speech” and “compelled affiliation”).

259. As Post puts it, “The mandated union dues at issue in *Aboud* thus threatened two distinct First Amendment rights: freedom of speech and freedom of association.” *Id.* at 565.

260. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

261. See *id.* at 222 (noting compelled dues implicate “employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit”).

262. Post, *Compelled Subsidization*, supra note 30, at 213–14.

263. *Id.* at 217.

doctrinally.²⁶⁴ In *United States v. United Foods*, for example, the Court abandoned *Glickman*'s insistence that claims of compelled association depend on the expressive nature of the association with which association is compelled.²⁶⁵ More importantly, the distinction between unions and corporations based on their commercial and expressive attributes is overdrawn.²⁶⁶ Both unions and corporations engage in expressive and economic activity and are both thus “hybrid” associations, combining instrumental and expressive characteristics.²⁶⁷ Moreover, the predominant purpose of both institutions is economic: Corporations act to advance the economic interests of their shareholders, while unions operate to advance the economic interests of their members.²⁶⁸ Campaign finance law has itself incorporated this understanding of the union (and the corporation) for at least twenty-five years. In *FEC v. Massachusetts Citizens for Life (MCFL)*, the Court distinguished unions and business corporations from expressive advocacy organizations—those that are “formed for the express purpose of promoting political ideas, and cannot engage in business activities.”²⁶⁹ The Court understood corporations and

264. There are good reasons to believe that this distinction is conceptually sound despite the recent doctrinal shift on the issue. Seana Shiffrin, for example, argues that treating commercial associations differently with respect to associational rights—at least with respect to regulations that require inclusive membership—is justified on two grounds. First, because commercial associations enable “access to material resources and mechanisms of power,” demanding inclusive membership is justified on distributive justice grounds. Second, because commercial associations function in the marketplace and are guided by the profit motive, such associations are unlikely to foster “free, sincere, [and] uninhibited . . . social interaction and consideration of ideas and ways of life”—the types of ends associational rights are meant to facilitate. Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 Nw. U. L. Rev. 839, 876–87 (2005). Post argues that abandoning the commercial/expressive distinction will lead to results that are likely untenable. Commenting on *United Foods*, Post explains that “[i]f the Court means to hold that all organizations that engage in commercial speech are expressive associations, such that First Amendment rights of affiliation and deaffiliation apply to them, the Court has crafted a rule that threatens to constitutionalize much of the law of corporations and business organizations.” Post, *Transparent and Efficient Markets*, *supra* note 29, at 585.

265. 533 U.S. 405, 411–16 (2001). That case involved a federal statute that established the Mushroom Council, and allowed it to charge all handlers of fresh mushrooms assessments that would be used to fund advertisements promoting the sale of mushrooms. *Id.* at 408. The Court sustained the compelled association challenge to the statute, despite the fact that the association in question engaged solely in commercial speech. *Id.* at 410; see also Post, *Transparent and Efficient Markets*, *supra* note 29, at 580–81 (“*United Foods* is the first decision to conceive an association as expressive even though it engages *only* in commercial speech.”).

266. Cf. Stuart White, *Trade Unionism in a Liberal State*, in *Freedom of Association* 330, 332–36 (Amy Gutmann ed., 1998) (distinguishing “expressive” associations from “instrumental” associations and finding unions to be more instrumental in character).

267. Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* 7 (1998).

268. *Id.* at 216–21. As Stuart White writes, “the primary purposes of a trade union, qua trade union, are essentially instrumental in kind: to increase members’ access to certain all-purpose goods such as employment and income.” White, *supra* note 266, at 335.

269. 479 U.S. 238, 264 (1986).

unions, unlike expressive organizations, as organized for economic ends: Thus, in the Court's words, union members and shareholders "contribute investment funds or union dues for economic gain."²⁷⁰ Had the *MCFL* Court viewed unions as expressive associations rather than economic ones, expenditure restrictions as applied to unions would have been unconstitutional since 1986.

Nonetheless, the associational natures of unions and corporations do matter in a different way. While both unions and corporations engage in economic and political activity, unions perform an associational function that corporations traditionally have not. As Seana Shiffrin writes, certain associations "provide sites in which the thoughts and ideas of members are formed and in which the content of their expressions is generated and germinated . . . not merely concentrated and exported."²⁷¹ That is, while both unions and corporations engage in the *expression* of political ideas and messages, unions are also the site for the *development* of political ideas among their memberships. Unions engage in this political development work through extensive political education programs, which include facilitated discussions among union members about particular candidates or legislative issues, preparation and distribution of educational material regarding candidates and issues, direct contact between members and candidates, and phone calls and house visits to union members by political organizers.²⁷² While corporations quite clearly engage in the expressive work of political association, there is little evidence that they perform a similar political development role among shareholders.²⁷³ In

270. *Id.* at 260.

271. Shiffrin, *supra* note 264, at 865; see also *id.* (noting associations are "places where ideas are formed, shared, developed, and come to influence character").

272. See, e.g., Tracy F.H. Chang, *Electoral Activities of Southern Local Unions in the 2000 Election*, 28 *Lab. Stud. J.* 53, 54 (2003) ("[A] local union provides an important social, institutional, and political context within which union members make political decisions and choices."); see also Robert Bruno, *From Union Identity to Union Voting: An Assessment of the 1996 Election*, 25 *Lab. Stud. J.* 3, 25 (2000) (noting union plays role as political educator). During the 2000 presidential campaign, for example, the AFL-CIO trained more than 1000 political "coordinators" to conduct election-related educational efforts among the federation's national membership. AFL-CIO, *Executive Council Report 25* (2001), available at <http://www.aflcio.org/content/download/7339/79027/version/1/file/2001ecreport01.pdf> (on file with the *Columbia Law Review*). The Federation also distributed more than 26,000,000 pieces of election-related literature at worksites and through the mail, and made approximately 8,000,000 phone calls to union households. Chang, *supra*, at 56. The purpose of these educational efforts is to "stimulate discussion in the union of the candidates and issues and influence members' opinions and, ultimately, their vote choice." *Id.*

273. There is some evidence that corporations are beginning to play a type of political-developmental role among their employees. In one of the more widely publicized examples, Wal-Mart managers held meetings with employees across the country during the 2008 presidential election to discuss then-candidate Obama's support for the Employee Free Choice Act—a bill that would have eased the rules for union organizing—and to encourage employees to help defeat that bill by, allegedly, voting against Obama's election. Kris Maher & Ann Zimmerman, *Unions Seek Probe of Wal-Mart over Election Law—At*

fact, shareholders are generally defined by their wide dispersal from one another and by their rational apathy toward the corporation's decisionmaking.²⁷⁴

The range of political work in which unions and corporations engage does not alter the conclusion that both types of organizations engage in expressive activity and, therefore, that associational rights attach to each. But the scope of political activity is relevant to the inquiry into political opt-out rights. In particular, a right to opt out of the political activity of a union or corporation should extend not only to the expressive political speech of such an association, but to the political-educational or developmental work of such associations as well.²⁷⁵ This implies that if, as has traditionally been true, unions engage in a broader range of political activity than do corporations, workers would be entitled to a political opt-out right that is broader in scope than the one to which shareholders ought to be entitled.

2. *Differences Between the Employee/Union and Shareholder/Corporate Relationship.* — While the previous argument was grounded in asserted differences between the associational natures of unions and corporations, the next argument is based on asserted differences in the relationship between, first, employees and unions and, second, shareholders and corporations. One form of this argument is that union membership implicates more and deeper parts of an individual's identity than does shareholding, and that employees accordingly have stronger interests in avoiding union political speech than shareholders have in avoiding corporate political speech. There is undoubtedly truth to the claim that the relationship between a union *member* and a union is different than—and often more

Issue Is Talk with Employees on Vote Impact, Wall St. J., Aug. 14, 2008, at A3; Ann Zimmerman & Kris Maher, Wal-Mart Warns of Democratic Win—Unions Stand to Gain from November Victory, Managers Around U.S. Are Told, Wall St. J., Aug. 1, 2008, at A1; see also Paul M. Secunda, Addressing Political Captive Audience Workplace Meetings in the Post-*Citizens United* Environment, 120 Yale L.J. Online 17, 19 & n.9 (2010), <http://yalelawjournal.org/images/pdfs/887.pdf> (on file with the *Columbia Law Review*) (collecting and analyzing other examples).

274. Clark, *supra* note 19, § 9.5.1, at 391–92; Stephen M. Bainbridge, *Unocal* at 20: Director Primacy in Corporate Takeovers, 31 Del. J. Corp. L. 769, 782–83 (2006) (noting “shareholders’ widely divergent interests and distinctly different levels of information”). To the extent that shareholders engage in political advocacy vis-à-vis their corporations, moreover, such advocacy is far more likely to be in opposition to the corporation's policies than it is to be a product of corporate educational or political development efforts. See Jeffrey N. Gordon, The Mandatory Structure of Corporate Law, 89 Colum. L. Rev. 1549, 1575–76 (1989) (noting for all shareholders, even large public shareholders, “the individually rational course is to be uninformed” with respect to proposed amendments because of high costs of acquiring and disseminating information and low returns of informed vote).

275. Although it has not addressed the question in full, the Supreme Court has suggested that this is in fact the rule with respect to union dues. See, e.g., *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 451 (1983) (“If the union cannot spend dissenters’ funds for a particular activity, it has no justification for spending their funds writing about that activity.”).

salient than—the relationship between a shareholder and a corporation.²⁷⁶ And if union security agreements made union *membership* a condition of employment, this difference would be relevant to the analysis of the associational interests at issue here. But, as the above discussion shows, union membership is never required of anyone. Instead, the objecting employee can only be required to pay dues to the union—membership is “whittled down to its financial core.”²⁷⁷

A related argument holds that employees are more likely to associate with the political positions of their union than shareholders are with the politics of their corporations, or, similarly, that union political speech is more likely to be attributed to workers than corporate political speech is to be attributed to shareholders. The first thing to be said about this argument is that the distinction between the union and corporate contexts in this respect is, again, overdrawn. It is not clear, for example, why the political activity of a union would reasonably be attributed to an employee who pays dues to the union only because she is required to do so as a condition of employment. As Shiffrin argues, “[i]f a certain speech act is required of everyone and it is publicly known that it is required, it would be unwarranted for any reasonable observer to infer that any particular utterance reflected the sincere, genuine thoughts of the particular speaker.”²⁷⁸ In the corporate context, moreover, scholars have concluded that shareholders’ First Amendment interests are indeed implicated by the political activity of the firm. Thus, for example, Bebchuk and Jackson

276. Jack Fiorito, Gregor Gall & Arthur Martinez, *Activism and Willingness to Help in Union Organizing: Who Are the Activists?*, 31 *J. Lab. Res.* 263, 277–82 (2010); Ed Snape & Tom Redman, *Exchange or Covenant? The Nature of the Member-Union Relationship*, 43 *Indus. Rel.* 855, 855–61 (2004) (surveying different approaches to defining “member-union” relationship). For a detailed discussion of the history of the member-union relationship, see generally Rick Fantasia, *Cultures of Solidarity* (1988); Steven Henry Lopez, *Reorganizing the Rust Belt: An Inside Story of the American Labor Movement* (2004).

277. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963).

278. Shiffrin, *supra* note 264, at 853. In *Rumsfeld v. FAIR*, the Court rejected an attribution argument in a manner directly applicable here. See 547 U.S. 47 (2006). In rejecting a First Amendment challenge to the Solomon Amendment—a law that requires universities to admit military recruiters to campus even if the military’s hiring policies conflict with the university’s nondiscrimination policies—the Court held that there was no risk that the military’s policy on gays and lesbians would be attributed to a university who admitted military recruiters to campus. This was so *because* the university was legally required to admit the military to campus. See, e.g., Erwin Chemerinsky, *Why the Supreme Court Was Wrong About the Solomon Amendment*, 1 *Duke J. Const. L. & Pub. Pol’y* 259, 267 (2006) (“[S]tudents surely could understand that schools were not endorsing the military or its exclusion of gays and lesbians.”). As the Court explained, “We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school.” *Rumsfeld*, 547 U.S. at 65. If students should be able to distinguish a university’s own message from one imposed upon it, the relevant community should be able to distinguish a worker’s own views and speech from the views of an organization that the worker is compelled to finance.

argue that “shareholders may attach expressive significance to corporate political speech,” and therefore that shareholders have a “First Amendment interest in not being forced to be associated with political speech that they do not support.”²⁷⁹ Similarly, the SEC requires firms to include on the corporate proxy nonbinding shareholder proposals relating to certain social and political issues—including political contributions—in recognition of the “depth of interest among shareholders in having an opportunity to express their views” about the firm’s relationship to these issues.²⁸⁰

Moreover, although the Court has stressed that likelihood of attribution can be key to the First Amendment analysis in certain settings,²⁸¹ the union security cases are not concerned with the likelihood that the union’s political speech will or will not be attributed to workers who finance it. This is because the harm to the workers’ First Amendment interests exists independently of whether the union’s political speech is attributable to the worker.²⁸² To see why this is so, it is helpful to identify another distinction, this one between “compelled speech” and “compelled subsidization of speech.”²⁸³ Although the line between these two categories is not a clean one, the basic idea is that compelled speech involves a requirement that an individual actually “express a message” he wishes not to express.²⁸⁴ In contrast, “compelled subsidy” cases are those in which the individual need not personally express anything, but is in-

279. *Bebchuk & Jackson*, supra note 14, at 96, 113.

280. *Id.* at 96 (quoting Amendments to Rules of Shareholder Proposals, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998)).

281. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 581 (1995) (finding First Amendment violation where speech at issue was likely to be attributed to compelled speaker); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 20–21 (1986) (same); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (finding no constitutional violation where “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner”). See generally Abner S. Greene, (Mis)Attribution, 87 *Denv. U. L. Rev.* 833 (2010) (discussing attribution in First Amendment doctrine); Gregory Klass, The Very Idea of a First Amendment Right Against Compelled Subsidization, 38 *U.C. Davis L. Rev.* 1087, 1120 (2005) (“[T]he *sina qua non* of a First Amendment compelled speech problem is a strong likelihood that the compelled message will be *associated* with the person required to carry it.”).

282. *Abood*, for example, never mentions attribution. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); see also Greene, supra note 281, at 839 (“Because the assessed persons don’t have to say anything or carry anyone’s message, and because the private group’s ideological speech doesn’t identify the assessed persons by name, there is no obvious route to misattribution.”); Post, *Compelled Subsidization*, supra note 30, at 223–24 (discussing *Abood*).

283. See, e.g., *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005) (distinguishing between “true ‘compelled-speech’ cases, in which an individual is obliged personally to express a message he disagrees . . . and ‘compelled subsidy’ cases, in which individual is required by the government to subsidize a message he disagrees with, expressed by a private entity”).

284. *Id.*

stead required only to finance the speech of another.²⁸⁵ Both compelled speech and compelled subsidization of speech can violate the First Amendment. What is important here is that where there is the potential for attribution, a claim of compelled subsidization of speech also becomes a claim of compelled speech itself: If an individual is compelled to fund the speech of another, and the speech of that other will be attributable to the funder, it is as if the funder has herself been compelled to speak.²⁸⁶

In the absence of attribution, however, while compelled subsidization of speech does not become the equivalent of compelled speech, it nonetheless remains a potential independent constitutional problem.²⁸⁷ If, then, attribution is more likely in the union context than the corporate, workers might have both compelled speech and compelled subsidization of speech type objections to union security provisions. Shareholders, on the other hand, would have only the latter type of objection. Again, though, either type of objection is sufficient for First Amendment purposes.

IV. IMPLICATIONS: CONSTITUTIONAL QUESTIONS AND LEGISLATIVE REFORM

In light of the affirmative case for symmetrical treatment of the union and corporate contexts and the relative weakness of the objections to such symmetry, this Part considers three potential implications that flow from the current interaction between campaign finance law and the rules of political opt-out rights.

A. *A Constitutional Difficulty with the Asymmetric Rule*

Citizens United holds that political speech may not be restricted based on the identity of the speaker.²⁸⁸ Thus, because the state may not stop

285. *Id.*

286. See Post, *Compelled Subsidization*, *supra* note 30, at 218 (“[W]henever subsidizing objectionable speech puts an individual in the position of appearing to endorse that speech[,] . . . claims of compelled subsidization of speech merge into claims of compelled speech.”).

287. Claims of compelled subsidization of speech—which lack an attribution element—are assessed according to what Post calls the “Symmetry Principle”: If the state may not restrict the right of individuals to pay for the speech of another, then the state may not require that individuals pay for that speech either. *Id.* at 220–21. *Abood*, as we have seen, is adjudicated on these grounds. *Abood* relies on *Buckley*’s holding that contributions “to an organization for the purpose of spreading a political message” are protected by the First Amendment and then concludes that “the fact that the [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement on their constitutional rights.” 431 U.S. at 234–35 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). Where the symmetry principle is in play—where constitutional protection for funding the speech in question implies that compelled subsidization of the speech is impermissible—there is harm to the funder’s speech interests whether or not the speech might also be attributed to the compelled funder. See Post, *Compelled Subsidization*, *supra* note 30, at 223.

288. See *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010).

individuals from spending money to engage in political speech, it may not prohibit corporations or unions from spending their general treasury funds on politics. Justice Stevens, in his dissent, argues that the Court's holding sweeps too broadly on this point, and he notes that the Court has upheld a host of speech restrictions based on the speaker's identity. As Justice Stevens shows, when legitimate reasons exist for distinguishing between political speakers with different identities, the Court has upheld legislation that treats those speakers differently, even in the arena of electoral speech.²⁸⁹ Despite their disagreement about the scope of the identity-neutrality principle, however, the majority and dissent would agree on one point: If Congress is going to treat political speakers differently, it must at least have a reason for doing so.²⁹⁰

When the law treats political speakers differently and without justification—without some basis grounded in a “special characteristic” of the speaker—the appropriate inference is that the differential treatment is impermissible.²⁹¹ Indeed, such unjustified differential treatment contravenes not only *Citizens United's* principle of identity neutrality, but also the more general principles of neutrality that animate much of First Amendment jurisprudence.²⁹² What the analysis in this Article suggests, however, is that the asymmetric rule of political opt-out rights may now have this feature.

As we have seen, prior to *Citizens United*, unions and corporations could make expenditures related to federal elections only with PAC funds—those that came from “knowing free-choice donations.”²⁹³ *Citizens United* holds that requiring a corporation to speak politically through a PAC is unconstitutional and frees the corporation to finance political speech with general treasury funds. But the opt-out rights that unions must grant employees mean that, with respect to political spending, the union general treasury still resembles a PAC.²⁹⁴ Most directly, the NLRA

289. *Id.* at 945–47 (Stevens, J., dissenting) (listing, among others, laws permitting state-run broadcasters to exclude independent candidates from televised debates and forbidding government employees, but not others, from contributing or participating in political activities).

290. See, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (requiring that State “assert a counterbalancing interest of compelling importance” if it wants to tax press at rates differential from other taxpayers).

291. *Id.*

292. See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46 (1987).

293. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414 (1972).

294. With some exceptions. Employees must, generally, opt *out* of having their dues used for political purposes, whereas contributors must opt *in* to financing a PAC. Recent work highlights the importance of this distinction. Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 178 (2008). Nonetheless, the Court has now held that employers—at least in the public sector—may require employees to affirmatively grant unions permission to spend their dues on politics. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 189–92 (2007). Thus, in some union treasuries, the funds available for use on politics will come only from employees who

and RLA—as interpreted by *Beck* and *Street*—continue to require unions to finance their political expenditures only with funds voluntarily and knowingly donated for political purposes. Labor law, that is, continues to impose on unions the funding requirement that *Citizens United* has removed from corporations.

This substantive requirement, moreover, brings with it a significant set of administrative and procedural burdens that, again, unions but not corporations face. Indeed, in striking down the general treasury spending ban, the *Citizens United* Court held that a corporation’s ability to fund political speech through a PAC was not sufficient to cure the ban’s First Amendment defect. This was true, in part, because “PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.”²⁹⁵ For example, the Court stressed that PACs must “keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.”²⁹⁶ They are also obligated to “file detailed monthly reports with the FEC” that contain a host of information concerning the PAC’s financial activities.²⁹⁷

But the political opt-out rule imposes enormous administrative burdens on unions, burdens that would appear to be at least as extensive as, if not more extensive than, those imposed by the PAC requirement.²⁹⁸ To start, the opt-out rule requires a labor union to classify each and every one of its activities according to whether it is “germane” to collective bar-

affirmatively opt into such use. Even with respect to unions that afford opt-out rights, the premise of the union security cases is that the opt-out rights granted to employees ensure that all dues available for political use are paid voluntarily for this purpose. On this assumption, the limitation still in place on unions resembles fairly closely the limitation that the Court has invalidated with respect to corporations.

295. *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010). According to *Citizens United*, the ability to fund election expenditures through a PAC is not sufficient to satisfy the First Amendment for two reasons. One is that a PAC is a distinct entity from the corporation—a “separate association”—and so allowing the PAC to speak does not permit the corporation or union to speak. *Id.* This concern is not applicable here: When the union spends treasury money on politics, even though that money must come only from voluntary contributions, the union is itself still speaking. But the Court’s concern with administrative and regulatory burdens is quite apposite.

296. *Id.*

297. *Id.*

298. *Nielsen v. Int’l Ass’n of Machinists, Local Lodge 2569*, 94 F.3d 1107, 1116 (7th Cir. 1996); see also Garden, *supra* note 103, at 43 (noting opt-out rule and PAC reporting requirements are “similarly burdensome”); Daniel G. Helton, *Beck* and the National Labor Relations Board: An Analysis of Agency Fee Objection Law and a Suggested Approach for the Board, 1990 *Detroit C. L. Rev.* 633, 634–35 (describing opt-out rule as imposing “unpredictable and labyrinthine administrative procedures”); Robert Pear, *Bush Attacks Way Unions Are Using Nonmembers’ Fees*, *N.Y. Times*, Apr. 12, 1992, at A1 (quoting general counsel of International Association of Machinists as stating opt-out plan would impose “a tremendous burden” on unions); Frank Swoboda, *Union Security Clauses at Risk in Challenge to Dues*, *Wash. Post*, May 19, 1991, at H2 (reporting unions’ estimate of *Beck*’s compliance costs in “millions of dollars”).

gaining or not.²⁹⁹ Once the union establishes which of its activities fall on each side of the germaneness line, it must then classify every dollar it spends as either “chargeable” or “nonchargeable” to political objectors.³⁰⁰ Unions must also establish processes through which employees can register their objection to political spending, and through which they can challenge the union’s classification of any particular expense as chargeable or not.³⁰¹ Next, in conformity with the extensive Board and Court case law on the subject, unions must develop a procedure for reducing employee dues in proportion to the amount of expenses that are nonchargeable.³⁰² Finally, the union is required to file detailed reports with the Department of Labor in which it discloses all of the foregoing accounting activity: That is, the union must provide to the Department of Labor an accounting of its expenditures, including its classification of those expenditures as chargeable or not, and a reporting of the number of objectors and the amount of dues returned to them.³⁰³

The asymmetric rule of political opt-out rights thus imposes on unions substantive and administrative burdens that corporations, as a result of *Citizens United*, no longer bear. As the analysis above shows, however, there may be no justification for this differential application of the political opt-out rules—no “special characteristic” of unions or union security agreements that justifies treating unions and corporations differently in this respect.

Such differential treatment of political speakers is problematic in its own right, but it also raises a second—albeit related—concern. As the Court has recognized, there is often a predictable correlation between identity-based distinctions and content- or viewpoint-based distinctions. In *Citizens United* itself, the Court wrote that “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”³⁰⁴ Indeed, by treating unions and corporations differently, the asymmetric opt-out rules will have a predictable effect on viewpoint. In particular, by imposing restrictions on unions that corporations no

299. *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988); *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 233 (1995).

300. *California Saw*, 320 N.L.R.B. at 237–39.

301. See, e.g., *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986) (“[T]he constitutional requirements for the Union’s collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”); *California Saw*, 320 N.L.R.B. at 233 (requiring that nonmembers have rights “(1) to object to paying for union activities not germane to the union’s duties as bargaining agent . . . (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections”).

302. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 443–44 (1984); *United Food & Commercial Workers Locals 951 (Meijer, Inc.)*, 329 N.L.R.B. 730, 754 (1999).

303. See *Emp’t Standards Admin., U.S. Dep’t of Labor, Form LM-2 Labor Organization Annual Report (2003)* (requiring detailed account of union’s finances).

304. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

longer face, the asymmetric opt-out rules will have the effect of favoring the corporate viewpoint over the union one when those viewpoints conflict.³⁰⁵

Accordingly, the asymmetric opt-out rule threatens to treat political speakers differently without justification, and is constitutionally suspect for this reason. The impact that this differential treatment likely will have on viewpoint compounds the potential constitutional problem. This is not to predict how the Court would, in fact, respond to a First Amendment challenge based on the asymmetry in opt-out rules, and the nature of First Amendment jurisprudence would leave the Court discretion to respond in any number of ways. But such a challenge would, at the least, place the burden on the Court to identify a distinguishing characteristic of unions that justifies the differential treatment. It would require the Court to provide such a characteristic, moreover, against the backdrop of a regime that has long treated unions and corporations as equivalents.³⁰⁶

B. *Legislative Intervention: Extending Opt-Out Rights to Shareholders*

Even if the current asymmetry in political opt-out rights is permissible as a constitutional matter, the aptness of the analogy between the union and corporate contexts suggests that Congress, along with state lawmakers, has a strong justification for correcting the asymmetry.³⁰⁷ Again, when it comes to political speech, the principles that justify the grant of an opt-out to employees also justify such a grant to shareholders. And, objections to such an extension of the rule on compulsion grounds, state action grounds, and speech and associational grounds are relatively weak. *Citizens United*, moreover, makes clear that legislators remain free to explore “regulatory mechanisms”—other than the prohibition on corporate political spending—to advance the interests of objecting shareholders.³⁰⁸ The union political opt-out rule offers such a mechanism.

Both Brudney and Bebchuk and Jackson have argued for different forms of legislative intervention to increase shareholder control over corporate political spending. Brudney, for example, raised the possibility of a unanimous consent requirement as a mechanism to protect objecting

305. This is not to assume or imply that there is a monolithic “corporate viewpoint”—there is not. But there are occasions when a significant percentage of corporate speakers coalesce around a certain policy position, and that policy position often conflicts with the union view. Indeed, this explains the successful fundraising efforts—and subsequent political spending—of organizations like the Chamber of Commerce.

306. See, e.g., Winkler, *supra* note 12, at 931 (noting Court has “unhesitatingly equated unions and corporations”); see also *supra* note 1 (collecting cases).

307. Because the union opt-out rule is established by federal law, individual state interventions could not achieve complete symmetry. But states—Delaware, in particular—could make significant progress in this direction.

308. 130 S. Ct. at 911; see also Bebchuk & Jackson, *supra* note 14, at 114 (citing *Citizens United*).

shareholders from funding corporate political speech.³⁰⁹ While such a rule would insulate objectors from a political funding obligation, it would also render the majority of shareholders captive to the interests of the minority. Indeed, a unanimity requirement would give a single objecting shareholder the ability to stop the corporation from spending corporate assets on politics, even if all other shareholders approve of such expenditures, and would “make corporate political speech practically impossible.”³¹⁰ The union security cases do not, in fact, support a mechanism that has this effect. To the contrary, the union opt-out rule is designed to enable the union to speak politically despite opposition from dissenting employees; it seeks only to ensure that the dissenters need not finance that political speech.³¹¹

In place of a unanimity requirement, Bebchuk and Jackson propose a supermajority voting rule.³¹² Thus, rather than requiring that 100% of a corporation’s shareholders approve of political speech, these authors suggest—following other supermajority rules in corporate law—that some percentage greater than fifty be required for such authorization. While this proposal has the advantage of freeing the corporation from the control of a single objecting shareholder, it is not adequately responsive to the interests that the union opt-out rule seeks to protect. Even if the supermajority requirement was set quite high—say, at ninety percent—the rule would still require that ten percent of shareholders finance political speech that they wish not to. As such, Bebchuk and Jackson’s proposal minimizes the extent to which shareholders suffer the harm that the political opt-out rule prevents in the union context, but the proposal does not eliminate that harm.

Instead of either a unanimity or supermajority voting rule for corporate political speech, the union security cases suggest a different mechanism: namely, extending to shareholders the same type of political opt-out right that union members currently enjoy.³¹³ This is a mechanism,

309. See Brudney, *Business Corporations and Stockholders’ Rights*, *supra* note 13, at 259–60, 271–74. Brudney discusses the possibility of a “rebate” for shareholders, but does not endorse it. *Id.* at 272–73.

310. Bebchuk & Jackson, *supra* note 14, at 115.

311. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977); see also *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 770 (1961) (“Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money.”).

312. See Bebchuk & Jackson, *supra* note 14, at 115–17.

313. Mallory makes a similar suggestion. Mallory, *supra* note 14, at 37–38. In the union context, the opt-out right extends to lobbying expenses that are not “related to collective bargaining.” *Seidemann v. Bowen*, 584 F.3d 104, 114–15 (2d Cir. 2009); see also *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 519 (1990) (holding objectors may be charged only for lobbying directed toward “legislative ratification of, or fiscal appropriations for, [a] collective bargaining agreement”). A symmetrical opt-out rule for shareholders would therefore extend to some types of corporate lobbying expenses, with the exception of lobbying that could be deemed analogous to union efforts “related to

moreover, that the Court has not only approved, but suggested may be constitutionally required in a context that is analogous to the corporate one. The design of a shareholder opt-out mechanism is beyond the scope of this Article, but, in very basic terms, shareholders would gain the right to object to the corporation's use of their pro rata share of corporate assets for political purposes.³¹⁴ The firm would be required, as unions are, to determine what percentage of its overall annual expenditures are political ones.³¹⁵ Each objecting shareholder would then be entitled to an annual dividend equal to their pro rata share of these political expenditures.³¹⁶

It is possible that such a rule would be difficult to administer, and it would be burdensome for corporations.³¹⁷ Such is the effect of the political opt-out rule on unions. The Court's judgment—or the judgment it

collective bargaining." *Seidemann*, 584 F.3d at 114. Again, the specific types of lobbying expenses covered by the union opt-out rule is still the subject of dispute, see *supra* note 97, and thus the question of which corporate lobbying expenditures would be covered by a symmetrical rule also remains to be determined.

314. Among the institutional design issues to be resolved is whether or how opt-out rights could be exercised by short-term owners of a corporation's stock. One possibility would be to grant opt-out rights only to shareholders who own the stock for some period of time—one year, for example. Given that many investors hold their shares through mutual funds, an opt-out mechanism also would have to be designed for mutual funds. One relatively straightforward possibility would involve investors informing the fund that they wish to exercise their opt-out right in each corporation where the fund invests the investors' money. The fund would then aggregate the opt-outs of its investors and exercise them each time it invested in a corporation. The corporations would return the pro rata share of planned political expenditures to the fund as a dividend, and the fund would either return that money to the investor or reinvest the money.

315. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306–07 (1986).

316. One possible objection to the opt-out mechanism is that many shareholders would exercise the opt-out right on the view that the dividend would be worth more to them than their share of the projected value of the corporation's political expenditures. As such, without the ability to condition investment on support for the corporation's political spending, the corporation's ability to fund its political program would be compromised by a free rider problem. Whether or not provision of the opt-out right in the corporate context would have this effect, however, this type of collective action problem is precisely the one that unions are prohibited from solving—out of concern for the speech and associational interests of employees—by using mandatory dues to fund political expenditures. If corporations face a free rider problem in the funding of political speech, symmetry would demand that they overcome it without conditioning investment on a requirement that shareholders finance that speech.

317. Under current law, corporations do not have an obligation to pay dividends to shareholders at any set time or based on any particular set of financial circumstances. See generally *United States v. Byrum*, 408 U.S. 125, 140–41 (1972) (discussing board of directors' "broad discretion" in awarding dividends). As such, a political opt-out right that took the form of a mandatory dividend would be novel in U.S. law. Nonetheless, mandatory dividend payments are a feature of corporate law in multiple foreign jurisdictions, and are understood as justified where shareholder control rights are otherwise weak. Ilya Beylin, *Tax Authority as Regulator and Equity Holder: How Shareholders' Control Rights Could Be Adapted to Serve the Tax Authority*, 84 *St. John's L. Rev.* 851, 887–88 & n.137 (2010). Accordingly, providing the control mechanism of a mandatory dividend could be justified given that, under current corporate law rules in the

has ascribed to Congress—is that these administrative burdens are the necessary cost of protecting employees from a requirement that they fund political speech that they do not wish to fund. Given the analysis in this Article, a similar conclusion is appropriate with respect to corporations and the interests of objecting shareholders. If it should turn out that a political opt-out right is more than simply burdensome but, in fact, impossible to administer in the corporate context, then the proposal offered by Bebchuk and Jackson constitutes a potential alternative.³¹⁸

Of course, the fact that the analysis here gives Congress a conceptually strong reason to extend the opt-out rule to corporations does not suggest that Congress will in fact do so. Whether Congress acts in accordance with this analysis is a political question whose outcome is impossible to predict, and which is certainly beyond the purview of this Article. One political dynamic, however, is worth noting: A proposal to extend the union opt-out rule to corporations would align the interests of a set of political actors that do not always act in concert. In particular, such a move would garner the support of the labor movement, some significant portion of the institutional investor and shareholder advocacy communities, as well as the campaign finance reform community. This is not to suggest that such a coalition would be sufficient to move Congress to action, and the fate of bills like the DISCLOSE Act raises doubts that it would.³¹⁹ But should concern about the effects of corporate political spending continue to grow, the environment might become more amenable to a proposal that would have political support from these diverse groups and that would find conceptual support in the arguments presented here.

A note is in order about these first two sets of implications. If, as this Article suggests, asymmetry in political opt-out rights is a problem, the asymmetry could be corrected in either of two ways: Opt-out rights could be extended to shareholders, or the opt-out right could be withdrawn from employees. Symmetry itself, that is, demands only that the rule be the same in the two contexts; it does not dictate what the rule should be.

United States, there is “no role for shareholders” in corporate political spending decisions. Bebchuk & Jackson, *supra* note 14, at 87.

318. This is not to suggest that any particular approach to achieving symmetry would necessarily survive a First Amendment challenge. Although the *Citizens United* Court explicitly leaves the door open to regulatory alternatives to spending restrictions, *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010), the Court could reject those alternatives if and when presented with the question.

319. See *Democracy Is Strengthened by Casting Light on Spending in Elections Act*, H.R. 5175, 111th Cong. (2010) (regulating federal elections spending by, *inter alia*, “establish[ing] additional disclosure requirements with respect to spending in such elections”); accord *Democracy Is Strengthened by Casting Light on Spending in Elections Act*, S. 3628, 111th Cong. (2010) (identical language). The bill passed in the House, but was filibustered on both attempts to bring it to a vote in the Senate. Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 Wm. & Mary Bill Rts. J. 983, 986 & n.27 (2011).

Two factors, however, suggest that resolving the asymmetry by extending opt-out rights to the corporate context is both the better, and the more likely, way forward. First, the discussion here shows that, in the absence of an opt-out right, both employees and shareholders must pay a considerable price to avoid funding political speech they wish not to fund. The affirmative grant of opt-out rights in both contexts would, therefore, advance the speech and associational interests of employees and shareholders. Second, the Court has long construed both the NLRA and RLA as mandating opt-out rights for employees, and Congress has shown no interest in demurring from this judgment. Given Congress's view that employees ought to have a political opt-out right, it is likely that Congress—whether on its own accord or prompted by a judgment of the Court—would be inclined to resolve the asymmetry by extending, rather than withdrawing, this right.³²⁰

C. *Public Pensions: Conditioning Employment on the Funding of Corporate Political Speech?*

Looking beyond the private sector that has been the focus in this Article, a final implication of this discussion relates to public employee pension plans. As the Article has shown, the Court has held that a state may not condition public employment on an employee's agreement to fund political speech that the employee wishes not to fund. Given this

320. Employees who object to political expenditures are often classified as "nonmembers" by the unions to which they pay dues. See, e.g., *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 738 (1988) (describing objectors as "dues-paying nonmember employees"); *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 231 (1995) ("nonmember employees"). Such nonmembers maintain the right to demand, and then vote in, elections to certify or decertify the union to which they must pay those dues—they can participate in the decision, that is, to vote a union in or out. But unions, while certified, often deny nonmembers the right to vote in elections of union officers. Where this is the case, shareholders will possess a formal right that nonmember employees give up when they exercise their opt-out; namely, the right to elect the governing body that makes decisions regarding political spending. As corporate law commentators have noted, however, the ability of shareholders to exercise control over the firm through such franchise rights is markedly limited. See generally *Bebchuk, Myth*, *supra* note 205 (describing obstacles to shareholder control). In addition to these particular problems, voting rights cannot protect objectors from the obligation to fund political speech when those objectors constitute a minority—even a very large minority—of the electorate. Indeed, if voting rights were sufficient to alleviate the problem of compelled political funding, the entire regime of union opt-out rights would be unnecessary: The right to vote in union elections would have sufficed. Finally, objecting employees can always choose to claim their voting rights and participate in union governance in the manner that shareholders participate in corporate governance, a choice employees can exercise by forgoing the political opt-out. Nevertheless, while symmetry is not achieved by granting voting rights to shareholders and opt-out rights to employees, if opt-out rights are extended to shareholders, symmetry might also call for internal voting rights to be extended to nonmember employees who pay dues to a union. Harry H. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 *U. Mich. J.L. Reform*, 447, 465–66 (2000).

rule, however, a state should not be permitted to condition public employment on an employee's agreement to fund corporate political speech. But states routinely structure public employment in such a way. Legislation in forty-four states establishes that public employee participation in the state's pension plan is "a condition of employment," "mandatory," or "compulsory."³²¹ Of all state and local workers who participated in a public pension plan in 2010, moreover, seventy-nine percent were required by law to make financial contributions from their salaries to the plan.³²² Because public pensions are defined benefit plans, rather than the defined contribution plans more familiar in the private sector, the contributing employees do not determine how their contributions are invested.³²³ Instead, the trustee of the plan—or some other fiduciary—makes these decisions.³²⁴ Not surprisingly, public pension funds invest heavily in corporate securities: In 2008, \$1.15 trillion of the \$3.19 trillion in assets held by public pensions—or thirty-six percent—was invested in corporate stock.³²⁵

321. In Arkansas, for example, with some exceptions, "all state employees . . . shall become members of the Arkansas Public Employees' Retirement System as a condition of employment," Ark. Code. Ann. § 24-4-301 (2011), while participation in the Florida Retirement System is "compulsory for all . . . employees," with specified exemptions, Fla. Stat. § 121.051 (2011), and in Pennsylvania "[m]embership in the system shall be mandatory . . . for all State employees" outside certain categories, 71 Pa. Cons. Stat. § 5301 (Supp. 2005). An appendix containing the legislation from each of the forty-four states is on file with the author.

322. See U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, National Compensation Survey: Employee Benefits in the United States, March 2010, at 354–55 tbl.3 (2010), available at <http://www.bls.gov/ncs/ebs/benefits/2010/ebbl0046.pdf> (on file with the *Columbia Law Review*) (surveying pension plan contribution requirements for state and local government workers); see also Keith Brainard, Nat'l Ass'n of State Ret. Adm'rs, Public Fund Survey Summary of Findings for FY 2008, at 12 (2009), available at http://www.publicfundsurvey.org/publicfundsurvey/pdfs/Summary_of_Findings_FY08.pdf (on file with the *Columbia Law Review*) ("Nearly all employees of state and local government are required to make contributions to defray the costs of their retirement benefit."). All states in which membership is a condition of employment also make contributions a mandatory condition of employment.

323. See generally Edward A. Zelinsky, The Defined Contribution Paradigm, 114 Yale L.J. 451, 455–58 (2004) (contrasting defined contribution plans and defined benefit plans).

324. See, e.g., Susan J. Stabile, Paternalism Isn't Always a Dirty Word: Can the Law Better Protect Defined Contribution Plan Participants?, 5 Emp. Rts. & Emp. Pol'y J. 491, 494 (2001) (describing defined benefit pension plans as those in which "a trustee or other fiduciary appointed by the employer makes the decision how to invest . . . contributions to grow the trust").

325. U.S. Census Bureau, Table 4a(1). Cash and Investment Holdings of State and Local Public Employee Retirement Systems by State and Level of Government: Fiscal Year 2008, <http://www.census.gov/govs/retire/2008ret04a-1.html> (on file with the *Columbia Law Review*) (last revised Mar. 11, 2010); U.S. Census Bureau, Table 4a(3). Cash and Investment Holdings of State and Local Public-Employee Retirement Systems by State and Level of Government: Fiscal Year 2008, <http://www.census.gov/govs/retire/2008ret04a-3.html> (on file with the *Columbia Law Review*) (last revised Mar. 23, 2010).

The discussion here raises significant questions about the permissibility of this arrangement. In particular, and especially in the post-*Citizens United* world, the state's use of mandatory employee contributions to purchase corporate securities raises the type of compelled speech and association concerns implicated in *Abood*.³²⁶

There are, certainly, some distinctions between a requirement that employees fund a pension plan and a requirement that they directly invest in the shares of a corporation, and these distinctions would be relevant to the constitutional inquiry. Most obviously, in the pension context, employees who contribute the funds that the plan uses to purchase corporate securities are not themselves the legal owners of those securities. The owner is, instead, the pension trust administered for the employees' benefit.³²⁷ This formal intermediation of the trust between the employee and the corporation, however, would not seem to change the substantive dynamic. Despite the existence of the pension fund, it is the employee's salary that is being used to invest in corporate stock. It is also the contributing employee who is the "true party in interest"—the party on whose behalf the stocks are purchased, held, and voted.³²⁸

None of this is to imply that mandatory contributions to public employee pension plans are themselves constitutionally problematic. What *Abood* and its progeny call into question is the requirement that public employees make contributions that could be used, against their objection, for the purchase of corporate securities and the financing of corporate political speech. If, then, public employers provide employees with a mechanism that enables them to ensure that their contributions are not used for such purposes, the plans would be insulated from such a First Amendment challenge.

Such a mechanism could consist, again, of a right that enables employees to register their objection to political spending by corporations in which the fund invests. Pension plans could then aggregate the opt-out rights of all contributing employees, and require that corporations in which the plans invest return to the plan the aggregate pro rata share of the corporation's planned political budget. These returned funds could

326. Eric John Finseth makes a related argument about the voting of shares by public pension funds. See generally Eric John Finseth, Shareholder Activism by Public Pension Funds and the Rights of Dissenting Employees Under the First Amendment, 34 Harv. J.L. & Pub. Pol'y 289 (2011). His claim, entirely consistent with the argument here, is that *Abood* and its progeny give public employees a First Amendment right to "opt out of having their pro rata portion of shares of publicly traded corporations held by public pension funds voted with respect to political or ideological matters in a manner with which the dissenting employees disagree." *Id.* at 293. Thus, while Finseth's argument pertains to the votes of the shares held by the pension fund, the argument here is with respect to the political spending of the corporations in which the funds invest.

327. See, e.g., Stabile, *supra* note 324, at 493–94 (describing operation of defined benefit pension plans).

328. Finseth, *supra* note 326, at 317.

then be reinvested according to the investment strategy chosen by the plan's trustees.

V. CONCLUSION

Citizens United has generated significant controversy. A large part of the ire derives from perceptions about what the decision's political effects will be and what its political motivations were. Defenders of *Citizens United* respond to these critiques by pointing to the decision's equal treatment of corporations and unions: The decision cannot favor corporations, or the Republican Party, or conservative economic policy because it enables unions to spend just as freely as corporations.³²⁹

This defense of *Citizens United* has a serious flaw, however, and it is the flaw identified in this Article. It is true that *Citizens United* frees unions to spend their treasuries on federal electoral politics, just as it frees corporations to do so. But another, far less visible, component of the legal regime leaves unions hamstrung in their ability to fund such treasuries, and hamstrung in a manner that corporations are not. As this Article has shown, a union that wants to take advantage of *Citizens United* and spend its treasury funds on politics can do so only after allowing every employee who pays dues to object. A corporation, in contrast, can take advantage of *Citizens United* without asking a single shareholder for permission. Indeed, it is precisely because *Citizens United* enables general treasury spending that this asymmetric limitation is so significant.

It is too early to predict the effect that the asymmetry in political opt-out rules will have on the balance of political power between unions and corporations or on the policies and politics that these two groups support. The difficulty stems from the fact that the interaction between *Citizens United* and the opt-out rule will be a dynamic one. In particular, as unions increase their political spending, the incentive that employees have to object to such spending will increase as well. In combination, then, *Citizens United* and the political opt-out right have a noose-like effect: The more the union seeks to take advantage of *Citizens United*, the more restrictive the political opt-out rule is likely to become. Meanwhile, nothing in the law imposes these restrictions on corporations or on corporate political spending.

If Congress or the Court intends unions and corporations to be on equal footing with respect to campaign finance, *Citizens United* leaves work to be done. This Article provides support for the proposition that unions and corporations ought to be treated symmetrically when it comes to political opt-out rights. The Article thereby provides support for an intervention by either Congress or the Court that would remedy the current asymmetry and ensure that the law in fact treats these parties equally.

329. Editorial, A Free Speech Landmark, *Wall St. J.*, Jan. 22, 2010, at A18.