

2010

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Recommended Citation

Mallory, Jeremy G. (2010) "Still Other People's Money: Reconciling Citizens United with Abood and Beck," *California Western Law Review*: Vol. 47 : No. 1 , Article 2.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol47/iss1/2>

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CALIFORNIA WESTERN LAW REVIEW

VOLUME 47

FALL 2010

NUMBER 1

STILL OTHER PEOPLE'S MONEY: RECONCILING *CITIZENS UNITED* WITH *ABOOD* AND *BECK*

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"But even more profitable is the privilege of taking the golden eggs laid by someone else's goose."

—Louis D. Brandeis, *Other People's Money*¹

At the beginning of the twentieth century, future Supreme Court Justice Louis Brandeis captured the imaginations of the readers of *Harper's Weekly* with a muckraking exposé entitled *Other People's Money and How the Bankers Use It*.² The series of stories revealed the extraordinary power corporate managers of the time had to direct the vast resources concentrated in the corporate form for anti-competitive purposes. As a result of these articles, corporations' participation in politics came under increasingly close scrutiny. Congress passed the

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The Author would like to thank Jim Whitehead, Michael Nemeroff, Nirav Shah, Nancy Jacobson, and Richard Epstein for their comments, advice, and analysis. Special thanks to Judge Diane P. Wood for her invaluable mentorship and guidance. Last and never least, he would like to acknowledge deep gratitude to his partner, Ray Hulse.

1. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 17-18 (Frederick A. Stokes Co. ed., 1914).

2. Norman Hapgood, *Preface* to BRANDEIS, *supra* note 1, at v-vi.

Tillman Act only three years later, which prohibited the direct contribution of corporate and union funds to political candidates.³ Brandeis railed against the use of “other people’s money” for political purposes and the anger resonated widely. The desire to protect shareholder money from perceived misuse by corporate managers was later articulated by the Supreme Court in *Austin v. Michigan Chamber of Commerce*⁴ and *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*.⁵ The Court recognized that the expressive and political interests of corporate owners (shareholders) and corporate managers might diverge; the corporation was not a monolithic speaker, but rather a complex of contract and trust.⁶

The concern articulated by Brandeis and extended in these cases sustaining campaign spending restrictions expresses a coherent view of expressive rights that has extended to other areas of law, such as the use of union dues, but it has come under attack in recent decades. This concern stands in stark contrast to the central claims of the entity-based theories of free speech undergirding other seminal cases in the Court’s campaign finance jurisprudence, including *First National Bank of Boston v. Bellotti*⁷ and *Citizens United v. Federal Election Commission*.⁸ *Bellotti* provided the foundational principle that animated the majority’s opinion in *Citizens United*: “*Bellotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker’s corporate identity.”⁹ While *Bellotti* and *Citizens United* focused

3. Tillman Act, ch. 420, 34 Stat. 864 (1907).

4. 494 U.S. 652 (1990).

5. 479 U.S. 238 (1986). See Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 135-37 (1998) (describing the trajectory of the desire to protect shareholder money through *Austin* and *MCFL*).

6. See *MCFL*, 479 U.S. at 263-64 (noting that the lack of shareholders in a nonprofit organization could place it outside of a state restriction on independent spending); *id.* at 268-69 (Rehnquist, J., concurring in part and dissenting in part) (parsing the significance of the presence of shareholders as a difference in degree, not kind); *Austin*, 494 U.S. at 663 (noting that an organization’s members may feel coerced even if they are not *de jure* shareholders); *id.* at 673-75 (Brennan, J., concurring) (describing the Michigan state law as protecting shareholders).

7. 435 U.S. 765 (1978).

8. 130 S. Ct. 876 (2010).

9. *Id.* at 902 (citation omitted).

primarily on the role of the corporation as speaker and the risks of quid pro quo corruption (and accordingly struck down restrictions on campaign financing), *Austin* and *MCFL* were more deeply concerned by the very subject that motivated Brandeis: the use of “other people’s money” for speech they did not support. A set of cases involving unions, bar associations, and universities raised the concern about the use of “other people’s money” to a constitutional level, exemplified by *Abood v. Detroit Board of Education*,¹⁰ *Communications Workers of America v. Beck*,¹¹ and *Keller v. State Bar of California*.¹² In essence, these cases place limits on the degree to which a union (or bar association) may spend membership fees on political speech. Indeed, twelve years before *Citizens United*, commentator Adam Winkler argued that *Austin*, *MCFL*, and the union-dues cases¹³ weakened *Bellotti* to the point that it might no longer be good law for some propositions.¹⁴

Austin is no more, however, at least in this regard. *Citizens United* decisively and explicitly overruled it, restoring *Bellotti* to clear primacy.¹⁵ On its face, this step would seem to eradicate any basis for an “other people’s money” theory of corruption in contrast to the quid pro quo corruption that arises in connection with the singular-entity vision of the corporation. Nevertheless, the union-dues cases were never addressed by *Citizens United*, nor was the Tillman Act. On one hand, if *Citizens United* overruled these cases *sub silentio*, the results are far-reaching and dramatic.¹⁶ On the other hand, if—and the Court would likely insist so—such a drastic result would not happen *sub silentio*, then the ongoing vitality of the union-dues cases and the Tillman Act pose a threat to *Citizens United* unless the two sets of cases are harmonized. The solution that best addresses the strong claims of each set of cases would be a form of rebate or opt-out such

10. 431 U.S. 209 (1977).

11. 487 U.S. 735 (1988).

12. 496 U.S. 1 (1990).

13. For the sake of simplicity, I will refer to *Abood*, *Beck*, and *Keller* collectively as the “union-dues cases.”

14. Winkler, *supra* note 5, at 135-37.

15. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 913 (2010).

16. *Id.* at 977-78 (Stevens, J., concurring in part and dissenting in part) (addressing how thoroughly the majority forsook the anti-corruption justification focused on the use of other people’s money).

as what resulted from *Beck*, which permitted a union member to receive a rebate of any membership fees that would be used for political speech with which the union member disagreed.¹⁷ Part I of this Article considers the different theories of corruption found in the competing lines of cases and the corresponding assumption about the nature of the corporate entity: *Bellotti*'s focus on quid pro quo corruption assumes a unitary corporation, and *Austin*'s worry about other-people's-money corruption takes into account the divided nature of authority in the corporate form. Part II expands on the discussion of other-people's-money corruption in *Austin* with an exploration of the union-dues cases and why they carry persuasive force in the corporate arena as well. Part III addresses the Court's current crossroads: the line of cases beginning with *Bellotti* and culminating in *Citizens United* is starkly incompatible with the *Austin* line of cases. While *Citizens United* overruled *Austin*, it left the union-dues cases and the Tillman Act standing unquestioned. Now the Court must reckon with this unfinished business.¹⁸ Part IV suggests a possible method of handling the conflict without abandoning either *Citizens United* or the union-dues cases.

I. TWO VISIONS OF CORRUPTION AND THE CORPORATION

In 1999, then-Adjunct Professor Adam Winkler outlined the steps taken by the Court following its seminal decision in *First National Bank of Boston v. Bellotti*.¹⁹ In his article, *Beyond Bellotti*, he argued the "three pillars" undergirding the decision in *Bellotti* had been undermined by the Court's later decisions in *MCFL* and *Austin*.²⁰ In *Bellotti*, the Court struck down a Massachusetts statute that forbade

17. See *infra* Part IV.

18. This awkward situation vindicates Winkler's analysis, albeit obliquely. He argued that *Austin* and *MCFL* weakened *Bellotti*. Winkler, *supra* note 5, at 133. However, the Court in *Citizens United* reiterated *Bellotti*'s vitality. *Citizens United*, 130 S. Ct. at 913 ("We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity."). Nevertheless, if my thesis is correct, then the principles behind *Austin* still require some modification of the successful *Bellotti/Citizens United* regime.

19. Winkler, *supra* note 5, at 135-36.

20. *Id.*

corporations from spending money on ballot initiatives.²¹ Justice Powell's majority opinion found the state had an interest in preventing quid pro quo corruption, but had little or no interest in preventing the "drown[ing] out" of speech by wealthier participants in the discourse.²² The Court rejected the applicability of concern for quid pro quo corruption in an election with no candidates, such as the initiative vote before it.²³ The Court also found, "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."²⁴ These findings would later become pivotal for *Citizens United*.²⁵

Of the three pillars supporting *Bellotti* that Winkler discerned, the two most salient to this Article's inquiry are the conceptual and theoretical discussions. "Conceptually," Winkler argued, "the Justices based their judgment of the corporate initiative speech ban [at stake in *Bellotti*] on a particular understanding of 'corruption'—one that encompassed only financial quid pro quo deals between candidates and contributors"²⁶ Because no candidates would be involved in an issue-based initiative election, the *Bellotti* Court reasoned, no danger of quid pro quo corruption could arise.²⁷ The other salient pillar supporting the *Bellotti* decision was "the Court's theoretical approach to the constitutional principle of freedom of speech, which focused on the informational needs of recipients of corporate speech and extended corporate speech rights accordingly."²⁸ The Court reasoned the speech offered by corporations was valuable to the

21. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978).

22. *Id.* at 789-90.

23. *Id.* at 790.

24. *Id.* at 777.

25. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898-911 (2010). The Court rejected the contention that the nature of the speaker matters, *id.* at 898-903, and accepted *Bellotti's* explanation of the state's interest in regulating corruption, *id.* at 903-11. The discussion of the "corporate identity" of the speaker derived from *Bellotti* was referenced seven times by the opinions making up the majority voting bloc. *Id.* at 886, 902, 903, 913.

26. Winkler, *supra* note 5, at 135.

27. *Bellotti*, 435 U.S. at 789-92.

28. Winkler, *supra* note 5, at 135.

listener regardless of the source and was therefore protected speech.²⁹ Winkler and other commentators have characterized this approach as focused on the hearer's rights rather than the speaker's rights.³⁰ In making this move, the Court treated the corporation as a singular source of speech, like any other speaker.

In contrast, *Austin* and *MCFL* drew both of these core theories into question. *Austin* articulated a concern with a form of corruption more subtle than the outright quid pro quo transaction envisioned in *Bellotti*.³¹ The transaction motivating *Austin* was instead the use of "other people's money" to finance political speech with which they might disagree.³² No opinion forsakes either of these two theories of

29. *Bellotti*, 435 U.S. at 777, 782-84.

30. Winkler, *supra* note 5, at 195-96.

31. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (addressing "a different type of corruption" from that faced in *Bellotti*, specifically the possibly distorting effects of the aggregation of wealth accumulated with the help of corporate form but having little to do with the corporation's political ideas).

32. Winkler, *supra* note 5, at 155-56. Notably, while *Austin* is most often cited for the principle of equalizing voices in the political arena, this view seems to be prompted more by the dissent's characterization of the Court's opinion, rather than the majority opinion itself. Many commentators read *Austin* to prescribe an equalization of voices. *Id.* Justice Scalia's dissent described the holding as "one man, one minute." *Austin*, 494 U.S. at 684 (Scalia, J., dissenting). Twenty years later, this was the same characterization employed by *Citizens United* on the way to overturning the case. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 922 (2010). These characterizations, however, swing somewhat wide of the Court's actual opinion. The majority opinion very clearly states that the Michigan law upheld in *Austin* "does not attempt to equalize the relative influence of speakers on elections." *Austin*, 494 U.S. at 660 (emphasis added) (internal quotation omitted). *See also* Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 108-11 (quoting *Austin*, 494 U.S. at 660) (arguing *Austin* was more concerned about the connection between money and voice—"that expenditures reflect actual public support for the political ideas espoused by corporations"). The *Austin* Court was worried the equation of money and speech in *Buckley v. Valeo*, 424 U.S. 1 (1976), might become distorted. *Austin*, 494 U.S. at 659-60. Winkler further argues that drawing an equality principle from *Austin* makes little sense because upholding the Michigan law would do nothing to equalize inputs into the electoral process. Winkler, *supra* note 5, at 156. Thus, I follow Winkler in rejecting the characterization of *Austin* as merely pursuing equality of electoral voice and instead refer to it for the idea that "other people's money" should not be used for electoral speech unless there is some way to connect the money with actual political support for the speech.

corruption, but no opinion really reckons with the differences between the two either. A concern for quid pro quo corruption is forward-looking: the initial transaction (the purchase of speech with money) is only a problem if the risk of a future illicit transaction exists (the candidate who is elected because of the speech confers benefits in return). The concern with the use of “other people’s money,” by contrast, is backward-looking: the key transaction happened in the past.³³ These two visions of corruption are not mutually exclusive or even necessarily incompatible, but they pull in different directions.

The “other people’s money” conception of corruption relies on a theory of the corporate speaker at odds with the theory at work in *Bellotti*. Rather than *Bellotti*’s unitary speaker, the corporation seen in *Austin* and *MCFL* is divided between the shareholders who finance the speech and the managers who actually speak.³⁴ The very fact that the corporation is *not* unitary produces the friction that potentially infringes on free speech.³⁵ In essence, when managers³⁶ spend money on corporate electoral speech, they are expending funds entrusted to them by the owners of the corporation, the shareholders. They are spending “other people’s money” in a literal sense. Winkler posits that this expenditure constitutes a form of corruption because it breaks the

33. Indeed, Winkler refers to this use of “other people’s money” as conversion. See Winkler, *supra* note 5, at 164, 193, 216, 218. His use of the term initially seems plausible, but it may focus the discussion excessively on whether the action in question actually constitutes the common-law tort. The presence or absence of corruption is not dependent on there being an actual conversion, so this Article will avoid the use of the term.

34. Adam Winkler, “*Other People’s Money*”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 906-12 (2004) (describing the increasing separation of ownership and control of corporations through the early 20th century); *id.* at 927-37 (describing the explanatory force of agency costs as a way of understanding the progression of campaign finance law from the Tillman Act through the union-dues cases).

35. Winkler framed this friction in terms of agency costs. *Id.* at 873. The problems posed for electoral speech by the separation between ownership and control in the corporate form—and especially the applicability of the law of trusts and fiduciary duty—will be taken up in Part IV.

36. The term “managers” is being used in a generic sense here to connote the people who run a corporation’s affairs on a day-to-day basis. “Management” will also be used *infra* in the customary manner to describe a union’s counter-party in labor negotiations.

expressive chain between money and speech.³⁷ The Court in *Buckley v. Valeo* described this linkage between money and speech in depth.³⁸ *Buckley's* basic equation was later reiterated in *Abood*: “[C]ontributing to an organization for the purpose of spreading a political message is protected by the First Amendment.”³⁹ Ordinarily, individuals use their own resources to express support for a candidate by spending money to buy speech to that end. The resulting speech is calibrated to the intensity of support; the more a person supports a candidate, the more he or she will sacrifice in order to generate more speech. On this view, the speech would have a sort of special value because it directly expresses the convictions of the person who generates the resources to purchase it.⁴⁰

Winkler’s critique is based on a break in that chain. *Austin* worried that “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form” might “have little or no correlation to the public’s support for the corporation’s political ideas.”⁴¹ When a corporation buys political speech, the people expressing their views are not the ones generating the wealth, but rather the ones stewarding it. They express their views, but not with their own money.⁴² In this respect, the *Buckley* equation is skewed: speech no longer correlates to

37. Winkler, *supra* note 5, at 202-10 (analyzing the rights at stake in terms of the expressive and associational rights of the shareholders).

38. *Buckley v. Valeo*, 424 U.S. 1, 15-21 (1976).

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

40. The Lockean underpinnings of this perspective are obvious. I own myself; I own my labor; I own the fruits of my labor; I own the things the fruits of my labor produce or allow me to buy. When I purchase speech, that speech is therefore expressive of myself in a manner that matters.

41. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

42. A forceful critique of Winkler’s position would assert that corporate managers are not actually advancing their own expressive agenda but rather their interpretations of the corporation’s agenda. This argument takes seriously the role of the corporate manager, but elides the other party at issue in this question: the shareholders. The owners of a corporation arguably have a stronger claim to its voice than its managers do and should be the ones interpreting its agenda. As Brandeis memorably stated, “Serve one Master only.” BRANDEIS, *supra* note 1, at 69. The next logical response is that the managers are still acting as “good stewards” by exercising their business judgment. This argument will be taken up in Part III, dealing with fiduciary duties.

political support.⁴³ Making use of other people's money in this manner is, to Winkler, a form of corruption thrown into relief in *Austin* and *MCFL*.

Austin and *MCFL* drew into question two of the pillars undergirding *Bellotti*, positing a second form of corruption wrapped around a second conception of the corporation as a speaker. This contrast was not only found in *Austin*; a line of cases concerning the use of union dues and a still-vital federal statute instantiate this "other people's money" view of political corruption.⁴⁴ As long as these cases and the theories they embody retain vitality, *Bellotti*—and thus *Citizens United*—still rest on a contested foundation.

II. THE UNION-SPEECH CASES: *HANSON*, *STREET*, *ABOOD*, *BECK*

A conception of corruption resulting from the use of "other people's money" arises not only from *Austin* and *MCFL*, but also from a series of cases that facially seem to be of limited application to the campaign finance context because they chiefly involve union dues. These cases, however, delineate a constitutional principle that has not been limited merely to the union context. Given the fate of *Austin* in *Citizens United*,⁴⁵ these cases must be central to any reformation of Winkler's core thesis of other-people's-money corruption. The continued vitality of this line of cases in the face of *Citizens United*, along with the still unquestioned Tillman Act, preserves the core conception of corruption through the use of "other people's money."

In *Communications Workers of America v. Beck*, the Supreme Court found that section 8(a)(3) of the National Labor Relations Act of 1935 (NLRA)⁴⁶ allows a union to collect and spend only the funds required to "perform[] the duties of an exclusive representative of the employees in dealing with the employer on labor-management

43. See *Austin*, 494 U.S. at 660; Fed. Election Comm'n v. Mass. Citizens for Life (MCFL), 479 U.S. 238, 260-62 (1986).

44. See Tillman Act, ch. 420, 34 Stat. 864 (1907); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Comm'n's Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

45. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010) (overruling *Austin*).

46. National Labor Relations Act of 1935 (NLRA), ch. 372, 49 Stat. 452 (codified as amended at 29 U.S.C. § 158 (2006)).

issues.”⁴⁷ Eleven years earlier, however, the associative and expressive nature of the union had been given a constitutional gloss in *Abood v. Detroit Board of Education*.⁴⁸ Taken together, the two decisions connect political expenditures and First Amendment expression in a manner that presages the *Citizens United* decision decades later and recapitulates the theory of corruption articulated in *Austin* and *MCFL*.

A. Beck’s Predecessors: Hanson, Street, and Abood

Although “Beck rights” have become more familiar, the constitutional force behind them arises from the Supreme Court’s earlier decision in *Abood*. In *Abood*, the Court took up a constitutional question raised and avoided in earlier cases.⁴⁹ These earlier cases taken together set up the constitutional issue in *Abood*, which in turn gives *Beck* special import in the campaign finance context.

The chief background for the cases is the “union shop.” In 1951, Congress amended the Railway Labor Act (RLA) to permit the formation of union shops.⁵⁰ The provisions permitted by the amendment allow for a union to negotiate a security clause that requires all employees to be union members, or to become members within a specified period after employment.⁵¹ The union shop is a variant of the closed shop,⁵² in which only union members may be hired at all.

The plaintiffs in *Railway Employees Department v. Hanson* were employees at a union shop who simply did not desire to join the union.⁵³ They asserted that they were protected by the Nebraska Constitution, which had a “right to work” provision.⁵⁴ The defendants

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

48. 431 U.S. 209 (1977).

49. *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961); *Ry. Emps. Dep’t v. Hanson*, 351 U.S. 225 (1956).

50. *Beck*, 487 U.S. at 746.

51. See John V. Spielmans, *Bargaining Fee versus Union Shop*, 10 INDUS. & LAB. REL. REV. 609, 609 (1956).

52. *Hanson*, 351 U.S. at 231 n.3.

53. *Id.* at 227.

54. *Id.* at 228; see NEB. CONST. art. XV, § 13.

urged that the Nebraska laws should be found preempted by the federal Railway Labor Act.⁵⁵ The Nebraska Supreme Court held that the union shop agreement violated the First Amendment of the United States Constitution, leaving no valid federal law to impede the force of the Nebraska Constitution.⁵⁶ The Supreme Court did not hesitate at the permissive nature of the RLA—union shops were certainly not compelled by the law—noting that the federal statute was sufficient to ground any challenge to a union shop contract.⁵⁷ “If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. In other words, the federal statute is the source of power and authority by which any private rights are lost or sacrificed.”⁵⁸ The statutory operation was a sufficient hook for the Court’s jurisdiction, “though it takes a private agreement to invoke the federal sanction.”⁵⁹ Thus the Court dispensed with the threshold issues and reached the substantive core of the case.

With the jurisdictional and state-action issues behind it, the Court proceeded to the merits. On the merits, the Court found, “The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one.”⁶⁰ The Court broadly allowed Congress and unions to allocate union dues to different types of expenditure without interference from the courts.⁶¹ The Court noted in passing, however, that “a different problem would be presented” if dues were used “for purposes not germane to collective bargaining.”⁶²

The *Hanson* Court straightforwardly declined to address the First Amendment questions presented, specifically the problems posed by “forc[ing] men into ideological and political associations.”⁶³ On the record presented, “there is no more an infringement or impairment of

55. *Hanson*, 351 U.S. at 228-29.

56. *Id.* at 230.

57. *Id.* at 231-32.

58. *Id.* at 232 (citation omitted); see also *id.* at 232 n.4 (“Once courts enforce the agreement the sanction of government is, of course, put behind them.”).

59. *Id.* at 232.

60. *Id.* at 233.

61. *Id.* at 234.

62. *Id.* at 235.

63. *Id.* at 236.

First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.”⁶⁴ Perhaps aware of the far-reaching consequences of a broad ruling in this area, the Court limited *Hanson* to approving the exercise of Commerce Clause power by Congress permitting union shop arrangements.⁶⁵ In other words, *Hanson* noted the federal question and constitutional issue that inhered in union shop provisions, but found no constitutional violation.

A similar set of questions arose in *International Association of Machinists v. Street*.⁶⁶ Employees of the Southern Railway System were compelled to join a set of labor organizations.⁶⁷ They filed suit in Georgia state court because some portion of the dues were spent to finance political campaigns for candidates they opposed.⁶⁸ The Supreme Court of Georgia enjoined the enforcement of the union shop agreement on the ground that it violated the First Amendment.⁶⁹ Once more, a state court found a violation of the federal Constitution.

The *Street* Court took a different approach to the constitutional issues involved. It noted that the record in *Hanson* could not support adjudication of the constitutional issues, but that the record presented in *Street* was “adequate squarely to present the constitutional questions reserved in *Hanson*.”⁷⁰ Nevertheless, despite the clean presentation of the constitutional issue, the Court decided the case by interpreting section 2, Eleventh of the RLA in order to avoid the

64. *Id.* at 238. In 1990, thirty-four years after *Hanson*, a parallel question was presented to the Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990). The Court not only found that a First Amendment question was presented, *id.* at 7, but also that the First Amendment prohibited the use of fees for ideological and political goals, *id.* at 13-17 (applying *Abood* and arguing that the state bar was no different from a union in this respect). The move from the dictum in *Hanson* to the result in *Keller* is indicative of the shifts in the Court regarding both First Amendment concepts and civil rights. See Part II.C for further discussion of the ramifications of the distinction in *Hanson* and the dissolution of that distinction in *Keller*.

65. *Hanson*, 351 U.S. at 238.

66. 367 U.S. 740 (1961).

67. *Id.* at 742-44.

68. *Id.* at 744.

69. *Id.* at 744-45.

70. *Id.* at 749.

constitutional question.⁷¹ The Court simply held that “[section] 2, Eleventh is to be interpreted to deny the unions the power claimed in this case,”⁷² resolving the case solely on the basis of the statute and avoiding the constitutional problem. The narrow nature of the Court’s holding was emphasized by its remedial discussion. The Court refused to strike down union shop agreements as a whole, but did insist that the lower court find a way to remedy the use of union dues specifically for political advocacy.⁷³ The Court specifically discussed a refund of the proportion of union dues that were spent on political advocacy for employees who reported their disagreement to the union.⁷⁴

Even though a majority of the Court agreed with the disposition, the remedy and constitutional discussion provoked some disagreement. Justice Whittaker concurred with the result but dissented from the proposed remedy, and Justice Douglas concurred with the remedy *dubitante*.⁷⁵ Justice Black found section 2, Eleventh to violate the First Amendment.⁷⁶ Justice Frankfurter, joined by Justice Harlan, rejected the restrictive interpretation of the statute used by the majority to avoid the constitutional question⁷⁷ and applied *Hanson* to find the union’s use of the fees to be constitutional.⁷⁸ Justice Frankfurter believed the record in *Hanson* was sufficient to rule on the constitutional question, and the record in both cases did not amount to a violation of the First Amendment.⁷⁹ The provision did not abridge any rights because the employee was still permitted to speak

71. *See id.* at 749-50; *see also id.* at 750-70 (analyzing the legislative history and intention of Congress).

72. *Id.* at 770.

73. *Id.* at 771-74.

74. *Id.* at 774-75.

75. *Id.* at 779-80 (Whittaker, J., concurring in part and dissenting in part); *id.* at 775-79 (Douglas, J., concurring).

76. *Id.* at 791 (Black, J., dissenting); *see also id.* at 797 (“With so vital a principle at stake, I cannot agree to imposition of parsimonious limitations on the kind of decree the courts below can fashion in their efforts to afford effective protection to these priceless constitutional rights.”).

77. *Id.* at 799-800 (Frankfurter, J., dissenting).

78. *Id.* at 803-19.

79. *Id.* at 804-06.

in other venues.⁸⁰ Further, the permissive nature of the union shop provision mitigated concerns of constitutional violation.⁸¹ Overall, eight Justices found the expenditure of union dues for political advocacy to be problematic. Seven concurred in the majority opinion, at least in part, holding that the statute forbade the practice, and Justice Black would have found the practice unconstitutional. Seven Justices concurred with Justice Brennan's proposed refund remedy,⁸² one of them doubtfully.⁸³

Unlike *Hanson* and *Street*, *Abood v. Detroit Board of Education*⁸⁴ did not duck or evade the constitutional issue. *Abood* presented a factual situation that prevented further avoidance of the question. The Detroit Federation of Teachers was certified as the exclusive bargaining representative for public school teachers in Detroit.⁸⁵ Several teachers objected to the compulsory assessment of fees because they did not believe in the unionization of public employees.⁸⁶ The teachers further alleged the union engaged in political activities with which they disagreed.⁸⁷ The complaint alleged a constitutional violation, which the state courts addressed.⁸⁸ In contrast to *Street*, no federal statute, such as the RLA, was implicated, meaning the case could not be resolved by statutory interpretation.⁸⁹ *Abood* was decided straightforwardly on the First Amendment right not to be compelled to associate with speech with which one disagrees.

To compel employees financially to support their collective bargaining representative has an impact on their First Amendment

80. *Id.* at 806.

81. *Id.* at 806-07.

82. *Id.* at 771-75 (majority opinion).

83. *Id.* at 779 (Douglas, J., concurring) (agreeing with the majority's opinion "on the understanding that all relief granted will be confined to the six protesting employees").

84. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

85. *Id.* at 211-12.

86. *Id.* at 212-13.

87. *Id.* at 213.

88. *Id.* at 215.

89. *Compare id.* at 232-33, with *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768-70 (1961).

interests. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.⁹⁰

Even though *Hanson* and *Street* arose in the context of private employers and *Abood* involved public employees, the Court found, "The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights."⁹¹ *Abood* squarely dealt with the First Amendment issue avoided in *Hanson* and skirted in *Street*.

Fundamental to *Abood*'s First Amendment analysis was the compulsory nature of the "contributions." The Court cited *Buckley v. Valeo*⁹² for the basic proposition that "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment."⁹³ The Court reasoned, "The fact that the [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."⁹⁴ Rather than limiting the union's right to participate in political activity, the Court simply held "the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."⁹⁵ The employees could not avoid being associated with the political speech short of quitting their job.

The concurring opinions shed some light on the nuances of *Abood*'s holding. Justice Rehnquist concurred specifically because he disagreed with the plurality holding in *Elrod v. Burns*, which held public employees could not be fired for expressing sympathies with

90. *Abood*, 431 U.S. at 222.

91. *Id.* at 232 (concluding that *Hanson* and *Street* applied to the question before the Court).

92. 424 U.S. 1 (1976).

93. *Abood*, 431 U.S. at 234.

94. *Id.* at 234-35.

95. *Id.* at 235-36. The limited nature of the remedy becomes significant when considered in light of *Bellotti* and *Citizens United*. See *infra* Part IV.

the party out of power.⁹⁶ Although he did not directly say so, he would likely have held the union shop provision unconstitutional on the same grounds that Justice Powell would have held the patronage provision at stake in *Elrod* constitutional.⁹⁷ Justice Stevens concurred specifically to underscore the need for a trial to sort out the proper remedy.⁹⁸ Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment but rejected the equivalence between the public and private sectors maintained by Justice Stewart's lead opinion.⁹⁹ Unfettered by *Hanson* and *Street* in the public employment context, Justice Powell would instead have found the compulsory contribution to the public employees' union to violate the Constitution.¹⁰⁰ Moreover, he would have placed the burden of justifying the expenditure on the state, rather than requiring the employee to step forward and explicitly dissent and claim a pro rata share of the rebate.¹⁰¹ Although the Court in *Abood* ruled on a broader constitutional ground than *Hanson* and *Street* by finding the distinction between public and private employment irrelevant, the Court also articulated a potential narrowing principle by placing the burden on the employee to step forward, rather than on the state to justify the expenditure.¹⁰²

B. Beck

Ostensibly, *Beck* was primarily a matter of statutory interpretation, like *Hanson* and *Street*. In contrast to *Hanson* and *Street*, which focused on the interpretation of the RLA, the *Beck* Court

96. *Id.* at 242-43 (Rehnquist, J., concurring) (citing *Elrod v. Burns*, 427 U.S. 347 (1976)).

97. *See id.* at 243-44 ("I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union."). Justice Rehnquist joined Justice Powell's dissenting opinion in *Elrod*. *Elrod*, 427 U.S. at 381-88 (Powell, J., dissenting).

98. *Abood*, 431 U.S. at 244 (Stevens, J., concurring).

99. *Id.* at 250 (Powell, J., concurring).

100. *Id.* at 259.

101. *Id.* at 263-64.

102. *Id.* at 237-42 (majority opinion).

focused on a parallel provision in the text of the National Labor Relations Act (NLRA).¹⁰³ Thanks to *Street* and *Abood*, by the time the case reached the Court, the constitutional issues were inextricably intertwined with the statutory questions.

The employees of the company, then known as American Telephone and Telegraph, selected the Communications Workers of America (CWA) as an exclusive bargaining representative, under section 9 of the NLRA.¹⁰⁴ Although all employees were represented by the union and paid fees to the union, not all were union members; members paid dues, while nonmembers paid “agency fees” equal to the dues.¹⁰⁵ Twenty nonmember employees brought suit in order to challenge the use of their fees for activities other than those related to collective bargaining, such as lobbying, organizing the employees of other employers, as well as social, political, and charitable functions.¹⁰⁶ The suit was brought charging a violation of the CWA’s duty of fair representation, the statutory section of the NLRA allowing the collection of fees (section 8(a)(3)), the First Amendment right of association, and common-law fiduciary duties.¹⁰⁷

The district court initially decided the case on constitutional grounds, holding that the union was violating the nonmembers’ First Amendment right to association and ordering the reimbursement of fees not spent on representational activities.¹⁰⁸ The district court applied a clear-and-convincing evidentiary standard.¹⁰⁹

A panel of the Fourth Circuit agreed with the constitutional analysis but shied away from the district court’s reasoning, preferring to rest its decision instead on a violation of the duty of fair representation in section 8(a)(3) of the NLRA.¹¹⁰ The court of appeals rejected the clear-and-convincing standard, but found that several of

103. National Labor Relations Act of 1935 (NLRA), ch. 372, 49 Stat. 452 (codified as amended at 29 U.S.C. § 158 (2006)).

104. *Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 739 (1988).

105. *Id.* at 739.

106. *Id.* at 739-40.

107. *Id.* at 740.

108. *Beck v. Commc’ns Workers of Am.*, 468 F. Supp. 93, 97 (D. Md. 1979).

109. *Beck*, 487 U.S. at 740.

110. *Beck v. Commc’ns Workers of Am.*, 776 F.2d 1187, 1205-06 (4th Cir. 1985).

the expenditures were indisputably unrelated to representation and remanded the rest for the district court's determination under the proper standard.¹¹¹ A dissent by Chief Judge Winter found the NLRA did not address how the money was to be spent, and the portion of the contract allowing the exaction of fees was private conduct which could not violate a constitutional right.¹¹²

Upon rehearing, the en banc Fourth Circuit reached a similar conclusion.¹¹³ A majority (6-4) found jurisdiction over only the duty-of-fair-representation claim, and rendered judgment for the nonmember employees on that basis.¹¹⁴ Only five of the members—not including Judge Murnaghan, the deciding vote—would also have rendered judgment based on section 8(a)(3) of the NLRA.¹¹⁵ All six members of the en banc majority, like the panel majority, rejected the standard of review, affirmed some of the district court's findings and remanded the rest.¹¹⁶ Once more, Chief Judge Winter, along with three others, dissented.¹¹⁷

The Supreme Court quickly answered the jurisdictional question that split the en banc Fourth Circuit. The statutory claim under section 8(a)(3) of the NLRA was subject to the primary jurisdiction of the National Labor Relations Board (NLRB), but the constitutional and duty-of-fair-representation claims were amenable to decision by the federal courts.¹¹⁸ In order to decide the duty-of-fair-representation claim, however, the Court needed to address the proper interpretation of section 8(a)(3).¹¹⁹ Thus, *Beck* was not merely a statutory

111. *Id.* at 1209-13.

112. *Id.* at 1214 (Winter, C.J., dissenting).

113. *Beck v. Commc'ns Workers of Am.*, 800 F.2d 1280, 1282 (4th Cir. 1986) (per curiam).

114. *Id.* at 1282.

115. *Id.*

116. *Id.* at 1289-90 (Murnaghan, J., concurring).

117. *Id.* at 1290-93 (Winter, C.J., dissenting).

118. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 742-44 (1988).

119. *Id.* at 743-44. To an extent, this is a product of litigation choices. Ordinarily, employees "may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." *Id.* at 743. But the employees here invoked only fair-representation claims; the unions introduced the statute into the litigation by claiming that their actions were permitted by statute. *Id.* at 743-44.

interpretation case but also one delineating the judicially-created duty of fair representation.

The Court addressed the substantive questions in a little more depth, framing them as matters of statutory interpretation.¹²⁰ Reasoning that the language in section 8(a)(3) of the NLRA was drafted with explicit reference to section 2, Eleventh, of the Railway Labor Act (RLA),¹²¹ the Court held the similar language in both acts required a similar result regarding fees expended for non-organizing purposes.¹²² The Court adopted Justice Brennan's statutory analysis of section 2, Eleventh from *Street*, reasoning there was no good reason to interpret section 8(a)(3) any differently.¹²³ Explicit statements in the legislative history persuaded the Court that the two statutes should be interpreted in tandem.¹²⁴ Senator Taft made clear his concern that unions should not be able to use mandatory dues to finance political speech with which the paying members might disagree.¹²⁵ Taft even went so far as to say that the prohibition on union political expenditure was "exactly the same as the prohibition against a corporation using its stockholders' money for political purposes."¹²⁶ The key concern behind congressional action was a free rider problem: after Congress abolished closed union shops, non-union workers could benefit from the union's bargaining without paying any dues.¹²⁷ The Court later acknowledged the "twin purposes" of the legislative balance struck in the NLRA:

On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their

120. *Id.* at 745.

121. Railway Labor Act (RLA), ch. 1220, 64 Stat. 1238 (1951) (codified as amended at 45 U.S.C. § 152, Eleventh (2006)).

122. *Beck*, 487 U.S. at 746-47.

123. *See id.* at 751-54.

124. *Id.* at 745-54.

125. 93 CONG. REC. 6440 (1947) (statement of Sen. Robert Taft).

126. *Id.* *See also* Winkler, *supra* note 34, at 928-29 (describing the floor debate surrounding the NLRA).

127. *Beck*, 487 U.S. at 748 & n.5.

share of the cost.”¹²⁸

Given how clearly the legislative history displayed the intent of Congress, the Court reasoned that *Street* would effectively require the same result.

The *Beck* Court declined to address whether constitutional limitations should apply to union expenditures of fees, even though it did in *Street* and *Abood*.¹²⁹ The unions argued that the primary motivation for the interpretation of the RLA in *Street* was constitutional avoidance, and no such need presented itself in *Beck*, therefore permitting a different interpretation of the NLRA.¹³⁰ The Court declined the invitation, stating the interpretation in *Street* was adopted on its own terms, not solely for the purposes of avoiding a constitutional question.¹³¹ The Court therefore declined to decide whether there was state action in *Beck* sufficient to create a constitutional issue.¹³²

Beck and *Abood* together articulate a sense of corruption based on the use of money that essentially belongs to other people for political speech.¹³³ This core premise was elaborated and confirmed repeatedly in later interpretations and associated areas of law.

C. *Later Interpretations: Keller and Lehnert*

Despite *Beck*'s avoidance of the possible constitutional implications of its ruling, later interpretations drew on *Beck*'s reasoning, combined with *Street* and *Abood*, to articulate a right based

128. NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963) (quoting S. REP. NO. 80-105, at 6 (1947)).

129. *Beck*, 487 U.S. at 761-62.

130. *Id.* at 761.

131. *Id.* at 762.

132. *Id.* at 761.

133. See Winkler, *supra* note 5, at 204 (discussing *Abood*). Winkler also notes that Justice Kennedy—a dissenter in *Austin* and the author of *Citizens United*—found the union-dues cases applicable enough to warrant distinction. *Id.* at 205 & nn.304-05 (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 709-10 (1990) (Kennedy, J., dissenting)). The key distinction he discusses—the possibility of exit for both shareholders and union members—will be discussed *infra* at Part III, but for the time being it is very informative to note that the author of *Citizens United* has acknowledged the applicability of the union-dues cases.

on the duty of fair representation and the First Amendment right to be free from compelled association with speech.

In 1990, the Court elided the distinction between public and private employees in relation to the use of union contributions for political advocacy, overriding the concerns Justice Powell expressed in *Abood*. In *Keller v. State Bar of California*,¹³⁴ the Court faced the question whether mandatory state bar membership dues could be used for political advocacy.¹³⁵ The Court had earlier ruled a state could require membership in a state bar,¹³⁶ but had declined to rule on the free speech challenge presented.¹³⁷ When that challenge was taken up in *Keller*, the Court applied the analysis of *Abood*, explicitly extending it to the context of private-sector employment.¹³⁸ Indeed, *Keller* went on to apply *Abood* even as it rejected the argument that the state bar should be considered a public actor.¹³⁹ After *Keller*, the constitutional protections of *Abood* extended beyond public employees to employees in the private sector. Also, *Keller* was decided on the basis of *Abood* without reference to the RLA, the NLRA, or another federal statute.

In 1991, the Court outlined the First Amendment implications of *Hanson* and *Street* in *Lehnert v. Ferris Faculty Association*.¹⁴⁰ In *Lehnert*, the Court faced another challenge to the expenditures of a union representing faculty members at a public college as part of a union shop.¹⁴¹

Because the Court expressly has interpreted the RLA to avoid serious doubt of [the statute's] constitutionality, the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of

134. 496 U.S. 1 (1990). Justice Rehnquist wrote the opinion for a unanimous Court. *Id.* at 4.

135. *Id.*

136. *Id.* at 7-8 (citing *Lathrop v. Donohue*, 367 U.S. 820 (1961)).

137. *Id.* at 9.

138. *Id.* at 10 (“[T]he principles of *Abood* apply equally to employees in the private sector.”). The Court discussed and distinguished *Hanson*. *Id.* at 7-9.

139. *See id.* at 12-14.

140. 500 U.S. 507 (1991).

141. *Id.* at 511-13.

political activities through mandatory assessments.¹⁴²

The Court read *Street*, along with *Ellis*, to establish “expenses that are relevant or ‘germane’ to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees.”¹⁴³ However, “at least in the private sector, those functions do not include political or ideological activities.”¹⁴⁴ Working through negative implication—expenditures for collective-bargaining functions are constitutional, and political activities are not collective-bargaining functions—*Lehnert* read *Street* for the strong implication that expenditures for political activities are unconstitutional.¹⁴⁵ A plurality of the *Lehnert* Court further discussed the public nature of the employees’ interest at stake. “[U]nlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all.”¹⁴⁶ The burden placed on the employees’ interest was not justified by the state’s interest in “harmonious industrial relations.”¹⁴⁷ Moreover, a plurality of the Court found:

The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing [the employees’] funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as “an instrument for fostering public adherence to an

142. *Id.* at 516 (internal quotation marks and citations omitted).

143. *Id.*

144. *Id.*

145. *Id.* Despite this reading, the conclusion does not necessarily follow. Political activities are not among one category of constitutional activities, but that does not exclude the possibility that they may fall within another.

146. *Id.* at 521 (plurality opinion). This *dictum* presents the strong proposition that purchased political speech effectively operates as a form of traditional public forum. If this is so, then the applicability and force of the union-dues cases become even more important to understand post-*Citizens United*.

147. *Id.* (“Because worker and union cannot be said to speak with one voice, it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities as well as their own.”).

ideological point of view he finds unacceptable.”¹⁴⁸

The possibility of compelled public speech overrode the state's interests involved in the labor context, and the plurality opinion gave no reason that would limit the principle only to that context.

Taken together, the trajectory of cases from *Hanson* and *Street*, through *Abood* and *Beck*, to *Keller* and *Lehnert*, establishes a robust source of law to support the “other people's money” conception of corruption that Winkler found in *Austin*. Those cases also showcased a different divided conception of the corporate speaker at work, contrasting with the singular speaker of *Bellotti*.

D. Segregated Funds and Legislative Judgment

To elaborate his argument regarding the union-dues cases, Winkler also discusses a set of cases that arose in parallel regarding segregated funds (PACs)¹⁴⁹: *United States v. CIO*,¹⁵⁰ *United States v. UAW-CIO*,¹⁵¹ and *Pipefitters Local Union No. 562 v. United States*.¹⁵² Significantly, these cases mark the Supreme Court's first forays into campaign finance law¹⁵³ and a crucial point where “the Court grabbed hold of the principal/agent argument used by Congress to justify the [contribution] bans on both unions and corporations and effectively inserted it into First Amendment free speech doctrine.”¹⁵⁴ In a nutshell, the Court extrapolated from the legislative judgments behind the Tillman and Taft-Hartley Acts to find that preventing other-people's-money corruption was a significant enough state interest to warrant restrictions on contributions and expenditures from general funds, but otherwise upheld corporate political speech when these “agency costs” could be avoided.¹⁵⁵

The circumstances surrounding the enactment of the Tillman Act are well documented and show Congress's core concern for the use of

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

149. Winkler, *supra* note 34, at 930-33.

150. 335 U.S. 106 (1948).

151. 352 U.S. 567 (1957).

152. 407 U.S. 385 (1972).

153. Winkler, *supra* note 34, at 930.

154. *Id.*

155. *Id.* at 930-31.

“other people’s money.” One of the initial seeds was planted in the course of a famous bacchanal known to history as the Hyde Ball. When word reached newspapers at the beginning of 1905 that James Hazen Hyde—vice president of Equitable Life, son of its founder, and “spectacular dilettante”¹⁵⁶—“had thrown an opulent ball and charged the expenses to the company,”¹⁵⁷ popular furor erupted.¹⁵⁸ The New York State Legislature responded by convening what would later be known as the Armstrong Committee, which investigated the allegations of mismanagement and corruption in fifteen different insurance companies between September and December of 1905.¹⁵⁹ The revelations of widespread use of policyholder money—equivalent to shareholder money for insurance companies—resulted in thorough reform of insurance regulation in New York.¹⁶⁰ Beyond insurance reform, however, the Armstrong Committee’s findings also led to crucial reforms of corporate campaign spending, especially of other people’s money. What “most shocked the public” was “the use of policy-holders’ money in corrupting legislatures.”¹⁶¹ When George W. Perkins, the vice president of New York Life, testified before the Armstrong Committee that he had given \$48,000 to President

156. MARK SULLIVAN, *OUR TIMES: THE UNITED STATES, 1900-1925, PRE-WAR AMERICA* 34 (1930).

157. Winkler, *supra* note 34, at 888. Although the costume ball did happen, the accusation that Hyde charged the expenses to the company turned out to be false, initiated by the board of directors. PATRICIA BEARD, *AFTER THE BALL: GILDED AGE SECRETS, BOARDROOM BETRAYALS, AND THE PARTY THAT IGNITED THE GREAT WALL STREET SCANDAL OF 1905*, at 178 (2004) (“For an entire century, the party continued to mutate.”). Nevertheless, the investigations that followed revealed sufficiently outrageous malfeasance that the falsity of the accusations regarding the party fell by the wayside. *Id.* at 183-200; *see also id.* at 208 (political cartoon depicting Hyde as a plucked peacock whose feathers were stuffed into the pockets of “Wall Street and political ‘fat cats’”). The link between the Equitable Life battle and Wall Street—all of which came to light only because of anger over the famous ball—prompted attention from as high up as President Roosevelt. *Id.* at 210-29.

158. Winkler, *supra* note 34, at 887-88.

159. *Id.* at 888. The investigation was led by Charles Evans Hughes, who later became a Supreme Court Justice. *Id.* at 889-90. The Armstrong Committee also influenced Louis Brandeis’s *Other People’s Money* article in 1914. *See* BRANDEIS, *supra* note 1, at 16. In a sense, the Hyde Ball put two Justices on the Court.

160. *See* Winkler, *supra* note 34, at 890 & n.128.

161. Burton J. Hendrick, *Governor Hughes*, *MCCLURE’S MAG.*, Mar. 1908, at 521, 534.

Roosevelt's campaign fund, "the newspaper men ran for the nearest telephones."¹⁶²

The Armstrong Committee's Final Report brought anger at the use of "other people's money" to the foreground, which in turn ignited robust federal action. The report laid out the argument in no uncertain terms: "Neither executive officers nor directors should be allowed to use the moneys paid for the purpose of insurance in support of political candidates or platforms."¹⁶³ The outrage was directed specifically at the fact that the use of the money effectively contradicted the views of at least some policyholders: "executive officers have sought to impose their political views upon a constituency of divergent convictions . . ."¹⁶⁴ President Roosevelt—perhaps spurred into action by the revelation that he had received corporate contributions after he claimed not to have—used his State of the Union Address to propose a complete ban on corporate contributions.¹⁶⁵ Congress accepted the President's invitation and passed an outright ban—the Tillman Act.¹⁶⁶ Justice Stevens's dissent in *Citizens United* recognized the central role of anger over misuse of "other people's money" in Congress's enactment of the Tillman Act.¹⁶⁷ The final bill's prohibition was unequivocal: "It shall . . . be unlawful for any corporation whatever to make a money contribution

162. CHARLES EVANS HUGHES, *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 125-26 (David J. Danielski & Joseph S. Tulchin eds., 1973). *See also* Winkler, *supra* note 34, at 891-92.

163. J. COMM. OF THE S. AND ASSEMB. OF THE STATE OF N.Y. APPOINTED TO INVESTIGATE THE AFFAIRS OF LIFE INS. COS., REPORT, Assemb. Doc. No. 41, at 393 (1906).

164. *Id.*

165. 40 CONG. REC. 96 (1905) (Annual Message of President Theodore Roosevelt) ("[D]irectors should not be permitted to use stockholders' money for such purposes."). *See also* Winkler, *supra* note 34, at 920.

166. Tillman Act, ch. 420, 34 Stat. 864 (1907). *See also* Fed. Election Comm'n v. *Beaumont*, 539 U.S. 146, 152-53 (2003) (summarizing the origins of the ban on corporate contributions); *id.* at 149 (extending the prohibition to nonprofit advocacy corporations).

167. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 977-78 (2010) (Stevens, J., dissenting) (noting *Beaumont* endorsed the congressional judgment that the use of other people's money was a source of corruption permitting abridgement of corporate speech).

in connection with any election” involving federal candidates.¹⁶⁸ After a flood of union money helped to elect a different President Roosevelt in 1936, the ban was extended to include unions in the Taft-Hartley Act of 1947.¹⁶⁹ The ban on union contributions was explicitly intended to be “exactly the same as the prohibition against a corporation using its stockholders’ money for political purposes, and perhaps in violation of the wishes of many of its stockholders.”¹⁷⁰ The congressional intentions behind the prohibitions on corporate and union contributions were unmistakable, even though they were enacted four decades apart; Congress clearly desired to prohibit the use of other people’s money for political speech with which they might disagree.

The concerns motivating the Tillman and Taft-Hartley Acts formed the background for the evolution of a fixture of modern politics—the political action committee (PAC) or segregated fund—through a series of Supreme Court cases. The Court in *United States v. CIO* permitted unions to endorse candidates in in-house publications paid for with union dues.¹⁷¹ Because only members of the union received the endorsement, the support was considered effectively voluntary—agency costs were basically zeroed out.¹⁷² When a union purchased a television ad, the factual backdrop for *United States v.*

168. Tillman Act, ch. 420, 34 Stat. 864-65 (1907). Because the Act predated the Seventeenth Amendment, it extended to contribution to the state legislators who elected U.S. senators. Winkler, *supra* note 34, at 925.

169. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947). The ban was first imposed as a temporary measure, War Labor Disputes Act, Pub. L. No. 78-89, 57 Stat. 163 (1943), but was made permanent after the end of World War II. See Winkler, *supra* note 34, at 928. The motivations of this extension seem to be more mixed than the clear populist rage that motivated the Tillman Act. At least in part, Congress was motivated by Cecil B. DeMille’s refusal to pay a \$1.00 special assessment to the American Federation of Radio Artists. *Id.* at 929 & n.396. See also *DeMille v. Am. Fed’n of Radio Artists*, 187 P.2d 769, 772 (Cal. 1947).

170. 93 CONG. REC. 6440 (1947) (statement of Sen. Robert Taft).

171. *United States v. CIO*, 335 U.S. 106, 123-24 (1948).

172. *Id.* at 123 (“It is unduly stretching language to say that the members or stockholders are unwilling participants in such normal organizational activities....”); Winkler, *supra* note 34, at 930-31. Notably, the *CIO* Court considered union members and corporate stockholders in the same breath.

UAW-CIO,¹⁷³ the publication could no longer be considered in-house. The district court¹⁷⁴ found the expenditure fell outside the statutory prohibition because it was what we would now term an “independent expenditure” rather than a contribution to a candidate.¹⁷⁵ The Court reversed the dismissal of the charge and remanded, insisting on further fact-finding, including questions going to the voluntary nature *vel non* of the payments from which the broadcasts were financed.¹⁷⁶ After *UAW-CIO* and the insistence on the voluntary nature of the incoming money, unions began to use PACs more extensively, guaranteeing that the money spent for political advocacy would be voluntarily acquired.¹⁷⁷ When the Nixon administration attempted to curtail this use of segregated funds for political contributions in *Pipefitters Local Union No. 562 v. United States*,¹⁷⁸ the Court specifically questioned the voluntary nature of the contributions: were the unions using other people’s money, or money given for the intended purpose?¹⁷⁹ To the extent the union could show the contributions were voluntary, the use of those funds for political speech was considered constitutionally protected.¹⁸⁰ The Court’s chief concern for agency costs—whether the funds used for political speech were voluntarily given for that purpose—motivated the evolution of election law on segregated funds, providing an independent source of law. Along with *Beck* and *Abood*, the segregated-fund cases reiterate and strengthen the congressional concern for other-people’s-money corruption

173. 352 U.S. 567, 585 (1957).

174. *UAW-CIO* was heard on direct appeal from the district court, *id.* at 568, so there was no opinion from a court of appeals.

175. *Id.* at 585, 589.

176. *Id.* at 592-93. Interestingly, it is the *UAW-CIO* dissent that proposed union members be allowed to withdraw their funds from this sort of use. *See id.* at 596-97 & n.1 (Douglas, J., dissenting) (attributing such a scheme to longstanding English law).

177. Winkler, *supra* note 34, at 932 & n.413 (collecting sources).

178. 407 U.S. 385 (1972).

179. *Id.* at 414 (“We hold, too, that, although solicitation by union officials is permissible, such solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union’s institutional power.”).

180. Winkler, *supra* note 34, at 932.

showcased in the Tillman and Taft-Hartley Acts.

Street raised the possibility that the RLA might pose a risk of compelled political speech if unions were permitted to use dues raised by union shops and (perhaps presciently) avoided the constitutional matter by interpreting the RLA to preclude the troublesome expenditures. *Beck* extended the statutory analysis to the NLRA, but the National Labor Relations Board then read *Beck* into the judicially-created right of fair representation.¹⁸¹ *Abood* examined the constitutional question in the context of public employees. *Keller* confirmed that the constitutional ramifications were the same in the context of private-sector employment, and also that the same principles could apply without a federal statute in the background. By the time *Lehnert* was decided, the Court seemed to be quite comfortable with the proposition that the expenditure of union fees on political advocacy was unconstitutionally corrupt. The union-dues cases could stand alongside the segregated-fund cases to support the principles in *Austin* and *MCFL*.

III. THE CHOICE BEFORE THE COURT: *CITIZENS UNITED* AND *BELLOTTI* VERSUS *AUSTIN*, *ABOOD*, AND THE TILLMAN ACT

Whatever else may be uncertain about *Citizens United*, *Austin*'s fate was decisive: "*Austin* . . . should be and now is overruled."¹⁸² The holding in *Citizens United* was the crowning articulation of a principle the Supreme Court had been refining for decades: corporations not only speak, but have a right to free speech parallel to the right to free speech held by individuals. Moreover, *Citizens United* only recognized quid pro quo corruption as deserving the state's attention.¹⁸³ The decision marked a watershed turning point, even

181. *See* *Prod. Workers Union of Chi. v. NLRB*, 161 F.3d 1047, 1053 (7th Cir. 1998). The NLRB found that unions were required by the duty of fair representation to notify union workers of their rights under *Beck*. *See* *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), *enforced sub nom.* *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom.* *Strang v. NLRB*, 525 U.S. 813 (1998). The NLRB denominated this as a "fiduciary duty." *California Saw*, 320 N.L.R.B. at 232-33.

182. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010).

183. *Id.* at 903 (describing *Austin*'s rationale solely in terms of equalizing voice and explaining the alternative as quid pro quo corruption).

though it was characterized as a relatively small step.¹⁸⁴ The rationale and scope of *Citizens United* is an uncomfortable fit with the Court's other free speech precedents, including the union-speech cases.

The *Citizens United* majority drew primarily on an individualistic rationale for corporate political speech, eschewing possible justification as a form of expressive association.¹⁸⁵ This approach stands in contrast to the union-speech cases, which emphasized the non-unitary nature of the speaker—namely the possibility of disagreement between the union and the dues-payer, which featured prominently in *Abood*, *Beck*, and *Keller*. Such an approach emphasizes the agency costs involved with the union's political speech. Indeed, Winkler noted that concern for agency costs motivated both Congress and the courts in formulating the doctrines governing union political speech.¹⁸⁶ *Bellotti* at least gave a short discussion of agency costs, while *Citizens United* gave none at all.¹⁸⁷ In the corporate field, a concern for the use of “other people's money” had all but evaporated, resulting in a strongly individualistic focus on the corporate speaker, rather than on possible externalities.

184. *See id.* at 911-13. Such a characterization falls in line with David Strauss's theory of common-law constitutional adjudication, where small steps eventually make a major shift inevitable, even though the final step is not all that large. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 935 (1996). Arguably, the most radical step *Citizens United* took was overruling *Austin*, but the Court did so only after protesting that it had been undermined for decades. *Id.* at 911-13.

185. *See generally id.* at 896-911. *See also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 631-38 (1984) (O'Connor, J., concurring) (distinguishing between associations primarily oriented toward expression and associations that serve a primarily transactional purpose). In *Roberts*, Justice O'Connor recognized the different free speech interests that associations might manifest as well as the fact that the interests did not fall neatly into two clearly distinct categories. *Id.* at 636. However, Justice O'Connor focused only on the association's free speech rights, and not how the rights interacted with the right of the association's members not to associate with that speech. *Id.*

186. Winkler, *supra* note 34, at 929-30. *See supra* Part II.D.

187. *See* *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792-95 (1978) (discussing and rejecting a concern for protecting the shareholders from “the use of corporate resources in furtherance of views with which some shareholders may disagree”). As discussed *infra*, the Court rejected the statute but not necessarily the principle behind it. *Citizens United* gave a cursory discussion that mainly rehashed ideas the Court had rejected in the past. *Citizens United*, 130 S. Ct. at 911.

Citizens United addressed unions and corporations on the same footing. The Bipartisan Campaign Reform Act of 2002 (BCRA) prohibited direct contributions and independent expenditures from the general funds of both corporations and unions.¹⁸⁸ However, an indirect contribution from “a separate segregated fund (known as a political action committee, or PAC)” funded by voluntary contributions was permissible.¹⁸⁹ The trajectory of the *Buckley/Bellotti* line of cases found dispositive in *Citizens United* lay through the segregated-funds cases.¹⁹⁰ The holding in *Citizens United* invalidated the very provision that restrained corporations and unions on equal footing.¹⁹¹ Indeed, courts had been treating corporations and unions equivalently for decades.¹⁹² The majority opinion in *Citizens United* gestured toward treating corporations and unions differently,¹⁹³ but recognized that “the Court [did not] adopt the proposition.”¹⁹⁴ *Citizens United* presented no principled reason to exclude unions from its holding and, indeed, addressed unions and corporations on exactly the same footing.

Citizens United does address, however, the shareholder protection rationale that inheres in *Austin*, *MCFL*, and the union dues cases.¹⁹⁵ The majority opinion raises two well-trodden arguments: media

188. *Citizens United*, 130 S. Ct. at 887 (citing Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b (2006)).

189. *Id.* at 887 (citing 2 U.S.C. § 441b(b)(2)).

190. *Id.* at 900-01 (discussing *CIO*, *UAW-CIO*, and *Pipefitters*). See also *Bellotti*, 435 U.S. at 788-92 (describing the anti-corruption rationale presented in *CIO* and *UAW-CIO*).

191. *Citizens United*, 130 S. Ct. at 913 (“Section 441b’s restrictions on corporate independent expenditures are therefore invalid . . .”).

192. Winkler, *supra* note 34, at 931 & nn.408-09.

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

194. *Id.*

195. *Id.* at 911. *Bellotti* also rejected a shareholder protection justification for restrictions on corporate contributions. *Bellotti*, 435 U.S. at 792-95; see also Winkler, *supra* note 34, at 879. However, the reasoning was fully grounded in criticism of the Massachusetts statute at stake in that case and did not address any constitutional concerns. *Bellotti*, 435 U.S. at 793 (calling the statute “both underinclusive and overinclusive”). The Court concluded that the awkward fit of the statute demonstrated a weak interest, as well as a lack of “substantially relevant correlation between the governmental interest asserted” and the statutory restrictions. *Id.* at 795 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)).

corporations pose a difficulty, and shareholders can use “the procedures of corporate democracy.”¹⁹⁶ Because media corporations are inherently expressive, the majority argued, a government interest in protecting dissenting shareholders would always justify regularly abridging the speech of media corporations.¹⁹⁷ But even *Austin* recognized that media corporations were a special case where the government’s interest had to give way to broader First Amendment interests.¹⁹⁸ Moreover, seen from the perspective of preventing other-people’s-money corruption, the agency costs involved with media corporations are much lower than other corporations.¹⁹⁹ For example, a shareholder in News Corporation (the parent of Fox News) or GE (the parent of NBC and MSNBC) is more likely cognizant that his or her money will go toward a specific form of political expression (in the form of arguably ideologically-slanted news) than a shareholder of Target. Thus, when Target became one of the first companies to test out the limits of *Citizens United* by contributing \$150,000 to a group producing advertising in support of Minnesota Republican gubernatorial candidate Tom Emmer, the resulting furor forced a contrite apology from the corporation, which still faces widespread boycotts.²⁰⁰ Shareholders expect media corporations to voice opinions as part of the business they do, but do not expect the same from retail chains, resulting in much higher agency costs in the latter case. A theory of corruption concerned with the agency costs of using “other people’s money” for speech with which they disagree or do not consent would therefore be much more concerned with non-media corporations. The criticism advanced by the majority in *Citizens United* fails to reckon with the proper breadth of *Austin*’s theory of

196. *Citizens United*, 130 S. Ct. at 911 (quoting *Bellotti*, 435 U.S. at 794).

197. *Id.*

198. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666-68 (1990).

199. See *Winkler*, *supra* note 5, at 161.

200. Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, at A2; *Target Corp. Defends Political Giving*, L.A. TIMES, July 28, 2010, at AA2. A leader of OutFront Minnesota, a gay-rights group, stated, “A lot of people feel betrayed.” *Target Corp. Defends Political Giving*, *supra*. This sense of betrayal is one of the warning flags of other-people’s-money corruption, although, in this case, the sentiment was voiced by a stakeholder rather than a shareholder. Target has not as yet withdrawn the donation. Mullins & Zimmerman, *supra*.

corruption, and therefore swings wide of the mark.

The *Citizens United* majority's second criticism is the same formulation found in dissent in the union-dues cases: the ordinary forms of corporate governance, including the right of exit, adequately protect a dissenting shareholder's right not to be associated with the objectionable political speech.²⁰¹ Despite treating unions and corporations as substantially interchangeable in *Citizens United*, Justice Kennedy's dissent in *Austin* emphasized the difference between the two by arguing that a shareholder may more easily sell his or her shares than a union member can abandon his or her membership and job.²⁰² These differences, however, are thinner than they might seem. Union members, just like shareholders, can form rival groups and seek change from within. Conversely, shareholders may also face difficulties in alienating their interests in corporations or may not even be aware of what speech their money finances. Logistically, if a shareholder owns title through an intermediary, such as a pension fund or mutual fund, they may have no control over the alienation and acquisition of their stock at all.²⁰³ Finally, a shareholder can only react in this manner after his or her money has financed the objectionable speech, which greatly reduces the effectiveness of the remedy. It is tit-for-tat retaliation, because the speech has already taken place.²⁰⁴ In order for these remedies to be robust enough to protect the rights of dissenting shareholders to avoid compelled speech, they must be taken more seriously than Justice Kennedy took them in *Citizens United* or his *Austin* dissent.

By placing unions and corporations on equal footing, *Citizens United* left open the door for applying the union-speech precedents outside the union context, to the generalized corporate political speech that *Citizens United* recognized and enabled for the first time. Recognized as early as Senator Taft's speech on the floor, the two contexts are sufficiently parallel that no principled distinction exists that would prevent the cross-application of the precedents. The chief

201. *Citizens United*, 130 S. Ct. at 911, 916.

202. *Austin*, 494 U.S. at 709-10 (Kennedy, J., dissenting) (suggesting instead that dissenters can "seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own").

203. Winkler, *supra* note 5, at 205-06.

204. *Id.*

distinction is that the government has a well-defined interest in the union context that does not necessarily carry over into another context. The other elements of a First Amendment analysis, however—the applicability of the Constitution, the nature of the rights involved, and the relevant analysis—do not differ as a consequence of the different contexts.

The union's duty of fair representation runs parallel to the corporation's fiduciary duty to its shareholders. Both are judge-made duties that require the association to hold a special regard for the well-being of its members in particular ways. *Beck* assimilated the statutory duty articulated in section 8(a)(3) of the RLA to the duty of fair representation, and the NLRB ratified this interpretation in *California Saw*.²⁰⁵ The judge-made duty of fair representation thus includes the statutorily-grounded principles articulated in *Beck*.²⁰⁶

Indeed, in *Marquez v. Screen Actors Guild*, the Court specifically read *Beck* to find that the use of "other people's money" was the core of the breach of the duty of fair representation.²⁰⁷ It found that the very reason the union's actions in *Beck* violated the duty of fair representation, rather than merely pleading a statutory violation, was that the union "used that money [from mandatory dues] for purposes wholly unrelated to the grant of authority that gave it the right to collect that money, and in ways that were antithetical to the interests of some of the workers that it was required to serve."²⁰⁸ The use of other people's money turned a statutory violation into a breach of a fiduciary duty of fair representation.

Applying these discussions of the ramifications of the duty of fair representation to the parallel fiduciary duty,²⁰⁹ the corporate right to

205. See *California Saw & Knife Works*, 320 N.L.R.B. 224, 232-33 (1995).

206. See *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 43 (1998) (collecting cases linking the statutory right with the duty of fair representation). *But see id.* at 45 (finding that a statutory violation standing alone was insufficient to show a breach of the duty of fair representation). While the two are related, they are not coterminous.

207. *Id.* at 45.

208. *Id.* (citing *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 743-44 (1988)).

209. See *California Saw*, 320 N.L.R.B. at 232-33 (designating the duty of fair representation as a form of fiduciary duty). For obvious reasons, this is an analogy and not binding authority. However, the fact that an authoritative agency used a very

political speech already faces some constraints not addressed by *Citizens United*. Perhaps most importantly of all, hiding in plain sight, is the fact that the Tillman Act has not yet been struck down: corporations cannot make campaign contributions directly to candidates.²¹⁰ The legislative judgments embodied in the Tillman Act still prevail, embodying a fundamental congressional discomfort with the idea that a corporation may spend “other people’s money” on political speech.

The question of state action does not provide an adequate reason to distinguish the corporate and union contexts. In order for the First Amendment to constrain a corporation’s use of funds (for its own protected political speech), some state action must be present to invoke the Constitution.²¹¹ One of the lessons of the union-speech cases is that this state action may be fairly minimal in order to require scrutiny. *Keller* reached the constitutional question without direct state action, and set aside the public/private employer distinction as irrelevant.²¹² *Beck* itself confirmed that a government agency was not a prerequisite to suit.²¹³ The later refinements of *Abood*’s application of First Amendment principles demonstrate that those principles extend far beyond the facts of that case.

Lehnert provides another possible source of traction for constitutional analysis: it suggests the existence of a public forum.²¹⁴ If corporate political speech takes place by leave of the federal government, the requirement of state action could be met.²¹⁵ The

loaded phrase is indicative of how similarly the duties operate.

This parallel becomes important in relation to the business judgment rule. One might object to the thesis of this Article by noting that corporations may spend their money according to their sound business judgment without direct meddling by the shareholders. *See Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). The chief boundary placed around the business judgment rule, however, is the corporation’s fiduciary duty to act in its shareholders’ best interests. *See id.* at 893.

210. Tillman Act, ch. 420, 34 Stat. 864 (1907).

211. *See, e.g., Ry. Emps. Dep’t v. Hanson*, 351 U.S. 225, 231-32 (1956) (“A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of federal law on it.”).

212. *Keller v. State Bar of Cal.*, 496 U.S. 1, 9, 12-13 (1990); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455-57 (1984).

213. *See Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 742-43 (1988).

214. *See Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 521 (1991).

215. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801-

pervasive federal system creating and regulating political campaigns—and therefore opportunities for political contributions and expenditures—is like the pervasive federal regulation of labor/management relations that provided the backdrop for *Street* and *Beck*. This federalization of the field was sufficient to provoke constitutional concerns even though the federal law was permissive in nature, permitting but not requiring union shops and the expenditure of dues for political advocacy.²¹⁶ Furthermore, the enforcement of the system through the courts ratified the state action.²¹⁷ Likewise, the creation and enforcement of federal campaign regulations, such as BCRA, enforced by courts up to and including the creation or affirmation of rights (*Buckley, Citizens United*), sufficiently involves the state so that all expenditures are made with the indirect imprimatur of the government. Such an imprimatur is enough to raise First Amendment concerns.

By overruling *Austin*, *Citizens United* would seem to have rejected the possibility of other-people's-money corruption serving as a state interest for constraining corporate political speech. But its rejection is hardly thoroughgoing: *Citizens United* failed to overrule either the union-dues line of cases or the segregated-fund cases, both of which articulate a theory of corruption and conception of corporate speech that stands in stark contrast to that embodied by the *Bellotti/Citizens United* line of cases. The Court will eventually have to deal with the business left unfinished in *Citizens United*.

The Court might simply let the conflict stand, leaving unions in a regime where they must refund money to dissenting members but corporations with fewer fetters. Doing so would introduce a distinction between union and corporate speech, which the Court has consistently rejected.²¹⁸ Unaltered, this regime seems unsustainable.

Alternatively, the Court could finish the work of *Citizens United*

06 (1985) (finding a medium of communication created and used by leave of the government to be a nonpublic forum for the purposes of forum analysis).

216. *Hanson*, 351 U.S. at 232.

217. *Id.* at 232 n.4.

218. See Winkler, *supra* note 34, at 931 & nn.408-09. As noted previously, Justice Kennedy seems more comfortable with this sort of distinction. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 903 (2010). Given that he is also cognizant that “the Court [did not] adopt the proposition,” *id.*, *Citizens United* serves to reopen an issue that the Court had deemed closed for decades.

by finding that it overruled *sub silentio* both the union-dues and segregated-funds cases, giving unions the same unfettered right to free speech that corporations have. Such an action would draw into serious question the constitutionality of both the Tillman and Taft-Hartley Acts and virtually require their invalidation as a matter of logic. While this eventuality is not impossible, it would work a thoroughgoing and radical change on campaign finance regulation, setting the Court at war with over a century of Congress's legislative judgments. The Court is loath to take such drastic action *sub silentio*, preferring to wait for a case where the issue is squarely presented.

Beck provides another possibility that preserves both the right of the corporation to speak and the right of the shareholder to avoid compelled speech: opt-out. *Beck* did not foreclose political speech by unions; it merely required that it be funded by voluntary contributions.²¹⁹ The same theme was echoed in the segregated funds cases.²²⁰ If the agency costs can be reduced by ensuring the money spent on political speech was acquired for that purpose, then the rights of both the corporation and the shareholder are vindicated. Winkler's theory of agency costs provides a clear and consistent way to reconcile the conflicting lines of authority lying behind *Bellotti/Citizens United* and *Beck/Abood/Austin*. Given the alternatives, this solution may represent the most parsimonious and least invasive way to finish what *Citizens United* started.

IV. IMPLEMENTATION

Reducing the agency costs of corporate political speech presents a policy problem. The Court repeatedly split in the union-speech cases over how to remedy the wrong done, usually ending up with a middle-road refund remedy that satisfied fewer Justices as time wore on.

Street and *Beck* remedied the infringement with a rebate scheme, which required the dissenting union member to step forward, profess

219. See *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 745, 762-63 (1988).

220. See *supra* Part II.D; Winkler, *supra* note 34, at 930-33; see also *United States v. UAW-CIO*, 352 U.S. 567, 596 n.1 (1957) (Douglas, J., dissenting) ("The protection of union members from the use of their funds in supporting a cause with which they do not sympathize may be cured by permitting the minority to withdraw their funds from that activity.").

what expenditures she objected to, and claim a *pro rata* share of the funds used for the advocacy.²²¹ Such a regime was implemented by the NLRB following *Beck*.²²² Such a union-member-initiated system faced criticism because it was difficult to administer, and because it placed the burden on the individual to vindicate his or her own First Amendment rights (rather than on the state to justify the infringement). Nevertheless, it balanced the rights of both the union and member.

In the shareholder context, similar arguments apply, although the force of the objections to shareholder-initiated dissent is weaker. Shareholders could be required to claim a rebate based on professed disagreement with the political expenditures of the corporation. While a union member might legitimately fear coercion or reprisal for openly disagreeing,²²³ that possibility is considerably diminished in the corporate context: a corporation can do much less individualized harm to a single shareholder than a union could do to a single member. Thus, the criticisms of such a rebate scheme that might apply in a union context are even less persuasive in a corporate context.

Alternatively, a rebate could be initiated by the corporation in an overly-inclusive manner. A corporation could simply rebate an amount equivalent to its political-advocacy budget to all shareholders in the form of a dividend. Such a broad rebate would return money to dissenting shareholders *pro rata*, but would also return it to those who were in agreement with the corporation's speech. While this solution would satisfy the shareholder First Amendment concerns, it would be over-inclusive. If compelled by the state, it would not be sufficiently tailored to survive scrutiny on behalf of the corporation's First Amendment rights. The corporation would be forced to return more money than necessary, effectively paying a premium for its speech.

Rather than a rebate, a corporation could also allow for a preemptive opt-out by shareholders. While a corporation would not be

221. See *Beck*, 487 U.S. at 749-54 (expressing the balanced interest behind a rebate scheme); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 775 (1961) (mentioning a restitutorial remedy).

222. See *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), *enforced sub nom.* *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom.* *Strang v. NLRB*, 525 U.S. 813 (1998).

223. See *Street*, 367 U.S. at 765-67 (noting the difficulty of exit posed by potential retaliation for dissenters who expressly bucked the union's leadership).

able to predict all of its political spending *ex ante*, it could simply allow shareholders the option of protecting their investment from *all* use for political speech. Because this remedy acts before the spending occurs, it would be more effective than an *ex post* solution such as exit or internal agitation. An *ex ante* remedy would also not face the problem of an over-inclusive rebate, because the ultimate choice to exercise the option would lie in the hands of the shareholders. While it might be optimal for corporations to give a menu of planned political speech to shareholders and allow them to select which ones they refuse to support, such a prediction would be infeasible given the realities of political campaigns. Giving shareholders the option of protecting their investment from being used for any political speech respects their right not to be associated with disagreeable political speech while permitting the corporation to spend money that it possesses with the understanding that the funds will be used for political speech. While not optimally tailored from the shareholder's perspective (who might like a more finely-tuned instrument), this solution does not infringe upon the corporation's right to spend the money for political speech and still protects the shareholder's investment.

V. CONCLUSION

From the moment certiorari was granted, *Citizens United* was already recognized as a case that would have an impact far beyond its facts.²²⁴ *Citizens United* overruled *Austin*, one of the keystone cases articulating a particular vision of corruption and corporate speech that had guided Congress's intent for nearly a century. However, *Austin* was not the only case embodying that legislative judgment; a series of cases in the union dues and segregated funds contexts also instantiated the determination (both legislative and judicial) that the use of "other people's money" for political speech was sufficiently prone to

224. SCOTUSBLOG, for example, noted that the initial argument of the case could "potentially lead[] to a major alteration of constitutional law in this field." Lyle Denniston, *Preview: Movies as Political Messages*, SCOTUSBLOG (Mar. 22, 2009, 6:04 AM), <http://www.scotusblog.com/?p=9025>. By the time of the reargument, *Citizens United* was being hailed as "a truly momentous case." Doug Kendall, *Five Reasons Why Citizens United is a Truly Momentous Case*, ACSBLOG (Sept. 1, 2009, 5:29 PM), <http://www.acslaw.org/node/14030>.

corruption that the state had an interest in controlling it. *Citizens United* drew on a line of cases focusing on quid pro quo corruption and a unitary view of the corporate form, which stood in contrast to *Austin*'s principles. The Court now faces a decision about how to handle the ramifications of *Citizens United*. The most parsimonious solution would be to recognize that the principles articulated in the union-dues and segregated-funds cases apply to the corporate context, warranting a remedy such as a pre-emptive opt-out by shareholders. While these principles are in tension with those articulated in *Bellotti* and *Citizens United*, they are not mutually exclusive. The Court can—and eventually must—find a way to protect corporations' right to political speech without allowing them to spend "other people's money" to finance it.

