

CITIZENS UNITED AND THE FIRST AMENDMENT OF LABOR LAW

Charlotte Garden*

I. INTRODUCTION

As the Supreme Court handed down its decision in *Citizens United v. Federal Election Commission*,¹ the dissenting justices forecasted a surge of money in politics.² These predictions proved largely accurate. For example, “[d]uring the 2012 cycle, . . . non-party outside spending tripled 2008’s total and topped \$1 billion for the first time”; super-PACs accounted for nearly two-thirds of this amount.³ Further, more than one quarter of this spending came from “dark money” groups, which do not disclose their donors.⁴ However, some post-*Citizens United* commenters argued

* © 2014, Charlotte Garden. All rights reserved. LL.M., *with distinction*, Georgetown University Law Center, 2010; J.D., *cum laude*, New York University School of Law, 2003; B.A., *with great distinction*, McGill University, 2000. I would like to thank the editors of the *Stetson Law Review* for their careful work on this Article, which was prepared in connection with the Stetson University College of Law symposium, *Taking Stock of Citizens United: How the Law Has (and Has Not) Changed Four Years Later*. I would also like to thank the organizers of that symposium, particularly Professors Ciara Torres-Spelliscy and Jason Bent.

1. 558 U.S. 310 (2010).

2. *Id.* at 460 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (warning that the Court’s decision “unleashes the floodgates of corporate and union general treasury spending” on judicial elections).

3. Andrew Mayersohn, OpenSecretsblog, *Four Years after Citizens United: The Fallout*, available at <http://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout.html> (Jan. 21, 2014, 12:00 a.m.). “[T]he top 32 Super PAC donors . . . matched the \$313.0 million that President Obama and Mitt Romney raised from all of their small donors combined.” Blair Bowie & Adam Lioz, *Billion Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections* 9, http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf (Jan. 2013).

4. Mayersohn, *supra* n. 3 (“Dark money’ groups [are] nonprofits that don’t disclose their donors publicly but enjoy the same right to make independent expenditures as for-profit corporations. Such groups spent \$256 million, or just over a quarter of all non-party

that concerns over unlimited independent spending (and its potential partisan implication) were overblown because labor unions were also freed of restrictions on political spending. Their argument went as follows: business interests often split their independent spending between Democrats and Republicans, whereas unions give almost exclusively to Democrats; therefore, if anything, Democrats will receive a net benefit as a direct result of *Citizens United*.⁵ In other words, the argument went, *Citizens United* was actually a boon for the political left more than for the right. That argument was grounded by the observation that, while *Citizens United* itself hardly mentioned unions, the decision nonetheless applied equally to corporations and unions; both were freed from the challenged provisions of the Bipartisan Campaign Reform Act (BCRA), which imposed limits on certain independent political spending and communications.⁶ However, while the doctrinal premise was accurate, the prediction was not, and the overwhelming majority of independent spending unleashed by *Citizens United* has favored Republicans.⁷

outside spending, in the 2012 elections; how much of that money came from corporate treasuries is unknown.”).

5. See Eric Boehm, *Labor Unions Benefit More from Citizens United Than Big Conservative Donors*, <http://watchdog.org/129000/citizens-united-koch-brothers-elections/> (Feb. 17, 2014) (“An analysis by the Sunlight Foundation, a nonprofit that tracks political spending, of groups and individuals who wrote checks of more than \$10,000 to super PACs and other political committees found big labor outspent big business by a margin of more than 2-to-1 during 2013.”); William McQuillen, *Unions Gain under Citizens United Decision They Seek to Overturn*, <http://bloomberg.com/news/2012-07-18/unions-gain-under-citizens-united-decision-they-seek-to-overturn.html> (July 18, 2012, 12:00 a.m. ET) (“The AFL-CIO, the largest U.S. labor federation, will send more than 400,000 volunteers to campaign for President Barack Obama, aided by a decision known as *Citizens United* that removed limits on independent spending by corporations and unions.”).

6. See *Citizens United*, 558 U.S. at 365 (overruling *Austin* and “effectively invalidat[ing] . . . BCRA Section 203”). See also Bipartisan Campaign Reform Act (BCRA) Pub. L. No. 107–155, § 203 (2002) (amending the Federal Election Campaign Act of 1971 and regulating the purchase of electioneering communications).

7. Michael Beckel & Russ Choma, OpenSecretsblog, *Super PACs, Nonprofits Favored Romney over Obama: Citizens United Decision Helped Romney Neutralize Obama’s Fundraising Advantage*, <http://www.opensecrets.org/news/2012/10/super-pacs-nonprofits.html> (Oct. 30, 2012, 6:42 p.m.) (“Super PACs and nonprofits unleashed by the *Citizens United* Supreme Court decision have spent more than \$840 million on the 2012 election, with the overwhelming majority favoring Republicans, particularly GOP presidential nominee Mitt Romney. An estimated \$577 million, or roughly 69 percent, was spent by conservative groups, compared with \$237 million spent by liberal groups, or about 28 percent, with the remainder expended by other organizations.”).

At the same time, other legal academics and I called attention to inconsistencies between *Citizens United's* reasoning and earlier cases about the First Amendment rights of labor unions.⁸ These critiques focused primarily on two areas of law, discussed in more detail in Part II: first, caselaw upholding restrictions on certain union picketing and boycotting in the face of First Amendment challenges;⁹ and second, First Amendment doctrine governing the extent to which bargaining unit members can be compelled to pay for the costs of union representation.¹⁰ Accordingly, I proposed shortly after the decision that *Citizens United* might contain a “silver lining for labor”¹¹—a basis upon which unions could successfully challenge decades-old restrictions on their speech, expanding both “what unions are permitted to say” and “with what money they can say it.”¹²

Yet, in the four years since *Citizens United*, the opposite has occurred. Instead of applying *Citizens United's* core First Amendment principles to rationalize the First Amendment treatment of labor unions, the Court has deepened the misalignment between unions and other associational speakers. The remainder of this Article explains how this came to be. It begins by briefly recapitulating the tension between *Citizens United* and earlier First Amendment cases concerning labor unions. Then, it turns to several of the Court's post-*Citizens United* First Amendment cases, illustrating how they have failed to reconcile that tension, and in at least one case, exacerbated it. The Article closes with some observations about this term's First Amendment cases, which again have the potential either to begin to close this gap or to widen it even more.

8. E.g. Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?* 53 Wm. & Mary L. Rev. 1 (2011); Joseph L. Guza, Student Author, *A Cure for Laryngitis: A First Amendment Challenge to the NLRA's Ban on Secondary Picketing*, 59 Buff. L. Rev. 1267 (2011); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-out Rights after Citizens United*, 112 Colum. L. Rev. 800 (2012); Zoran Tasić, Student Author, *The Speaker the Court Forgot: Re-evaluating NLRA Section 8(b)(4)(B)'s Secondary Boycott Restrictions in Light of Citizens United and Sorrell*, 90 Wash. U. L. Rev. 237 (2012); Ciara Torres-Spelliscy, *Taking Opt-in Rights Seriously: What Knox v. SEIU Could Mean for Post-Citizens United Shareholder Rights*, 74 Mont. L. Rev. 101 (2013).

9. *Infra* pt. II(B).

10. *Infra* pt. II(C).

11. Garden, *supra* n. 8, at 1.

12. *Id.* at 46.

II. CITIZENS UNITED AND UNIONS: THE INITIAL TENSION

As is now well known, the *Citizens United* Court overturned a provision of BCRA that banned unions or corporations from spending their general treasury funds on communicating certain political messages in particular ways.¹³ This Part briefly articulates key portions of the *Citizens United* Court's reasoning before turning to the tension between that reasoning and the Court's pre-*Citizens United* First Amendment jurisprudence.¹⁴

A. *Citizens United*'s Rationale

Significantly, the *Citizens United* Court stressed that the challenged campaign finance restriction was “a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.”¹⁵ In other words, that BCRA left unions and corporations the possibility of speaking through a political action committee (which would be subject to a separate regulatory regime, including restrictions on funding sources) was insufficient to cure any First Amendment violation.¹⁶ This was in part because PACs are “separate association[s]” from sponsoring corporations, but also because PACs are “burdensome alternatives” that “are expensive to administer and subject to extensive regulations.”¹⁷ The Court reasoned that this regulatory regime imposed burdens that ultimately deterred political speech, and was therefore subject to strict scrutiny.¹⁸

The Court emphasized that BCRA's independent expenditure limits applied only to certain speakers—namely corporations and unions, though the Court focused almost exclusively on corporations. This troubled the majority, which emphasized its skepticism of “[s]peech restrictions based on the identity of the

13. 558 U.S. at 365. The relevant portions of BCRA covered independent expenditures that qualified as “speech defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidate.” *Id.* at 318–319 (citing 2 U.S.C. § 441b (2006)).

14. I discuss the *Citizens United* Court's rationale in greater detail in Garden, *supra* n. 8, at 6–11.

15. 558 U.S. at 337.

16. *Id.*

17. *Id.*

18. *Id.* at 339–340.

speaker¹⁹ by employing the well-trod marketplace of ideas metaphor.²⁰ “By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”²¹ Accordingly, that many of the corporate speakers subject to BCRA likely sought to gain advantage in the literal marketplace through their participation in the metaphorical one did not diminish the strength of their First Amendment claim.²²

The Court did acknowledge that some previous cases had upheld “speech restrictions that operate to the disadvantage of certain persons,” citing a string of cases.²³ These cases, according to the Court, were distinguishable from *Citizens United* because they involved “an interest in allowing governmental entities to perform their functions.”²⁴ While two of the cases the Court cited involved labor movement plaintiffs, neither concerned what one might think of as traditional labor law. Rather, *Jones v. North Carolina Prisoners’ Labor Union, Inc.*²⁵ was a First Amendment challenge to a set of prison regulations that prohibited union meetings, membership solicitations, and mass mailings;²⁶ *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*²⁷ was a challenge to the Hatch Act’s prohibition on federal employees’ participation in certain political activity.²⁸ Thus, the Court did not acknowledge, much less grapple with, the cases discussed below,²⁹ which accept that unions receive less First Amendment protection than other entities engaged in

19. *Id.* at 340.

20. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821, 824–825, n. 7 (2008) (“Never before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law.”). The marketplace of ideas metaphor has also been subject to significant and persuasive critique. *Id.* at 831.

21. *Citizens United*, 558 U.S. at 340–341.

22. *See id.* at 470 (Stevens, J., dissenting) (stating that “the corporation must engage the electoral process with the aim ‘to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities’”).

23. *Id.* at 341.

24. *Id.*

25. 433 U.S. 119 (1977).

26. *Id.* at 121.

27. 413 U.S. 548 (1973).

28. *Id.* at 550.

29. *Infra* pts. II(B), (C).

similar speech based on their identity and apparent economic purpose.

The Court also rejected three potential compelling state interests, holding they were insufficient to satisfy strict scrutiny.³⁰ Two of these, the “antidistortion” and “shareholder protection” rationales, are relevant to this Article.³¹ First, the Court held that the antidistortion rationale (the state’s interest in equalizing speakers’ resources to prevent one especially well-funded voice from drowning out competing voices) was simply invalid because it “interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”³² Second, the Court also rejected the government’s interest in protecting shareholders from having their investments used to fund political speech with which they disagree.³³ Here, the Court’s discussion was relatively brief, and it focused primarily on the difficulty of allowing the government to restrict the speech of media corporations based on this interest.³⁴ However, the Court also maintained that there was “little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”³⁵

Thus, the Court struck down the challenged independent expenditure provisions of BCRA (though it upheld BCRA’s disclosure and disclaimer requirements).³⁶ Much of the commentary that followed focused on how *Citizens United* would affect the political process. However, some legal academics also drew attention to the ways in which *Citizens United*’s articulation of First Amendment principles stands in tension with certain First Amendment cases arising in the context of labor law.³⁷ That commentary focused on two areas: labor picketing and boycotts;

30. *Citizens United*, 558 U.S. at 349–362.

31. The third proposed and rejected rationale rested on the government’s interest in avoiding public corruption. *Id.* at 360–361. The Court concluded that there was no empirical evidence supporting the proposition that independent expenditures led to corruption. *Id.*

32. *Id.* at 354 (citing *N.Y. St. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

33. *Id.* at 361.

34. *Id.*

35. *Id.* at 361–362 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

36. *Id.* at 365, 371.

37. *Supra* n. 8.

and the extent to which union-represented employees could be required to pay union dues and fees.

B. Labor Protest and *Citizens United*

The National Labor Relations Act (NLRA) contains a number of restrictions on when, why, and how labor unions can picket, boycott, and strike.³⁸ For example, unions face significant restrictions on picketing designed to achieve particular goals, such as to encourage an employer to recognize and bargain with an employee.³⁹ Likewise—and of importance for purposes of this Article—unions may not engage in or picket in support of certain secondary strikes and boycotts.⁴⁰ Nonetheless, the Court has consistently rejected First Amendment challenges to these limits.

The Court initially rejected First Amendment challenges to labor law's limits on union protest tactics based on the idea that those tactics, including labor picketing, were at least part coercive conduct.⁴¹ However, as the Court began to protect picketing as core First Amendment activity in other contexts, especially the civil rights context, it also distinguished earlier labor picketing cases, leaving their holdings intact. The Court drew a distinction between “[p]ublic-issue picketing” “on issues of broader social concern,”⁴² and labor picketing, which the Court viewed as retaining a “private and economic character.”⁴³ In addition, the Court has applied similar reasoning in the context of strikes and boycotts. For example, when the FTC sought to impose antitrust liability on a group of striking attorneys, the Court rejected the group's First Amendment defense on the ground that the strikers'

38. 29 U.S.C. § 158(b), (e) (2012).

39. *Id.* at § 158(b)(7).

40. *Id.* at § 158(b)(4). A “secondary boycott” is a boycott of an employer with whom the union does not have a labor dispute, but who does business with the employer with whom the union has a dispute. The goal of a secondary boycott is to convince the secondary (neutral) employer to exert pressure on the primary employer by, for example, withdrawing its custom. *Id.*; Garden, *supra* n. 8, at 22 n. 84 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912–913 (1982)).

41. Garden, *supra* n. 8, at 19.

42. *Carey v. Brown*, 447 U.S. 455, 465–466 (1980).

43. *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 n. 17 (1976).

goals were economic, even if their rhetoric might have been compatible with loftier goals.⁴⁴

Thus, even while it has held that the First Amendment robustly protects protest activity by other social movement groups, the Court has also upheld significant limits on similar activity by labor unions.⁴⁵ As I have previously explained in greater detail, this apparent different treatment has often been based on the Court's perception that labor union activity has a primarily economic motive, in contrast to that of other social movement groups.⁴⁶

Alone, this principle might be reconciled with *Citizens United*, albeit with some difficulty. The *Citizens United* Court focused on speech that was, on its face, political, even if it was motivated by economic concerns.⁴⁷ Thus, it might be the case that the Court was simply distinguishing election-related speech from speech about a private labor dispute. However, the Court has also rejected First Amendment challenges to the application of the NLRA to overtly political protest by unions, calling such activity "more rather than less objectionable" because it was in pursuit of a "random political objective" that was beyond the union's appropriate role.⁴⁸ Thus, for this distinction to hold explanatory force, it would have to turn on the presence of election speech, rather than political speech more broadly—a distinction that seems tenuous at best and that, as I discuss in the next part, is ruled out by later cases.

44. *Fed. Trade Comm'n v. Super. Ct. Tr. Laws. Ass'n*, 493 U.S. 411, 425–428 (1990).

45. Compare *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 225–227 (1982) (concluding that the NLRA prohibition on secondary activity did not violate the First Amendment in context of the secondary strike of a Soviet shipping company aimed at pressuring Soviet government over invasion of Afghanistan) with *Claiborne Hardware*, 458 U.S. at 912–913 (overturning on First Amendment grounds tort liability imposed on NAACP as result of secondary picketing and consumer boycott).

46. Garden, *supra* n. 8, at 23–26.

47. See *Citizens United*, 558 U.S. at 339, 351 (discussing the restriction of corporate expenditures resulting in a ban on political speech and the economics involved in political speech).

48. *Int'l Longshoremen's Ass'n*, 456 U.S. at 225–226 (quoting the circuit court's opinion in *Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n*, AFL-CIO, 640 F.2d 1368, 1378 (1st Cir. 1981)). See also Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 Va. L. Rev. 685, 736 (1985) (arguing that, contrary to the Supreme Court's approach, "[m]ost of labor law . . . should extend to political as well as to bargaining activity"). Moreover, as discussed below, the Court has recently extended *Citizens United's* principle of speaker neutrality to the context of commercial speech.

Accordingly, it is, to say the least, difficult to reconcile labor protest cases with the Court's insistence in *Citizens United* that government should not distinguish among speakers, except in the narrow circumstances in which one category of speakers uniquely affects government functioning.⁴⁹ Moreover, the *Citizens United* Court squarely rejected any suggestion either that economic speakers' political interventions were less worthy of protection than those of other types of speakers or that the presence of an economic motive should affect the amount of First Amendment protection afforded to speech.⁵⁰ Instead, *Citizens United* was clear that the content of the speech alone should determine whether and how the First Amendment applies. Accordingly, in the wake of *Citizens United*, I wrote that

the Court has repeatedly held that unions' and workers' "economic" goals mean that their speech is entitled to less First Amendment protection than tactically similar—but, in the Court's view, politically motivated—speech. In contrast, the *Citizens United* Court held that the fact that the goal of corporate political speech was profit did not detract from its level of First Amendment protection.⁵¹

Thus, in the wake of *Citizens United*, the Court has four possible paths available to it in the event that it considers a renewed challenge to restrictions on union protest. First, it could articulate a new ground on which to distinguish unions from other speakers (or union speech from others' speech); second, it could apply the First Amendment more robustly to union expression, possibly striking down limits on union speech; third, it could limit *Citizens United*; fourth, it could leave the different

49. *Citizens United*, 558 U.S. at 340–341.

50. *Id.* at 351, 353–354.

51. Garden, *supra* n. 8, at 26–27. Others, too, have observed this apparent discrepancy between the First Amendment law of labor and the *Citizens United* Court's emphasis that a speaker's identity as a for-profit corporation could have no bearing on the First Amendment protection afforded to the corporation's speech. Guza, *supra* n. 8, at 1299–1300 (arguing that *Citizens United* is inconsistent with secondary boycott prohibition and reasoning that "[s]ince labor speech can be considered to be fundamentally political in nature, labor communications should be afforded the same protection as other types of political speech under the First Amendment"); Tasić, *supra* n. 8, at 239–240 (arguing that, after *Citizens United*, "it follows that union speech, whether on political or economic matters, should be treated no differently by the Court than similar speech by corporations, non-corporate institutions, and individuals").

rules in place without explanation. To date, the Court has not considered a case squarely raising a First Amendment challenge to limits on union protest tactics, so it remains unclear which option the Court will choose. However, other cases suggest the third option is unlikely; the Court has rejected multiple opportunities arising in different contexts to limit the First Amendment principles articulated in *Citizens United*. I discuss these cases below, showing how they have only deepened the tension between labor's First Amendment principles and other First Amendment doctrine.

C. Union Fees and *Citizens United*

A second area of tension between labor's First Amendment principles and *Citizens United* arises in the context of union dues and fees, specifically the Court-created procedure designed to protect public sector workers who object either to union membership or to paying union dues.

Labor unions in both the public and private sector almost always represent groups of workers (known as "bargaining units") on an exclusive basis. This means that, if a union is duly elected by a majority of workers within a bargaining unit, it then represents every worker in the unit—including those who voted against representation—in bargaining and during the life of the contract.⁵² In part because individual bargaining unit members cannot opt out of union representation and negotiate independently, the NLRB and the Supreme Court have imposed on unions

52. In the private sector, unions and employers are permitted to agree to "members only" representation in which the union represents only those employees who elect representation. *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 239 (1938). However, such an arrangement requires the consent of both the union and employer. Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 Comp. Lab. L. & Policy J. 47, 57 (1998) ("[a]lthough there is no duty on the employer to bargain with a minority union, if a minority union is able to obtain a contract, a 'members only' contract is legal and enforceable in the absence of a majority union"). In the public sector, nearly all jurisdictions require exclusive representation. See Martin H. Malin, *Life after Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?* 96 Marquette L. Rev. 623, 640 (2012) (noting that the exclusive representation system was "adapted to the public sector in most public employee labor relations acts"); Joseph E. Slater, *Public-Sector Labor Law in the Age of Obama*, 87 Ind. L.J. 189, 228 (2012) (observing that "public-sector labor laws have many fundamental rules in common with each other," including "using an exclusive majority representative chosen by the employees").

a duty of fair representation—a duty that is breached if a union represents one or more bargaining unit members arbitrarily, discriminatorily, or in bad faith.⁵³

Because fairly representing workers can lead unions to incur considerable expense, many American jurisdictions permit unions to negotiate union security agreements,⁵⁴ which require represented workers to pay for the costs of representation. In the public sector (and also in the context of private employment governed by the Railway Labor Act), these agreements have been held to implicate the First Amendment rights of workers and consequently have been the subject of a string of Supreme Court cases.⁵⁵ Over the course of these cases, the Court has struck a balance between interests of workers, employers, and unions. The leading case in this area, *Abood v. Detroit Board of Education*,⁵⁶ held that union-represented public sector workers could be required to pay the costs of core union activities—bargaining, grievance administration, and similar activities.⁵⁷ However, *Abood* continued, workers could not be required to pay their share of the costs of other union activities that were both particularly significant infringements of workers' First Amendment rights and also peripheral to union representation at individual workplaces—such as lobbying governments or supporting political candidates.⁵⁸ In sum, union-represented workers can be required to pay their share of expenses that are germane to workplace representation, but not other union costs including union political speech.

53. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

54. In contrast, “right to work” states forbid unions and employers from agreeing to require employees to pay anything to a union as a condition of employment. See *Lincoln Fed. Lab. Union v. N.W. Iron & Metal Co.*, 335 U.S. 525, 530–531 (1949) (upholding validity of right to work laws in NLRA context).

55. In the public sector and in the context of the Railway Labor Act (RLA), the Court has squarely held that the First Amendment is implicated when workers are required to pay for union representation. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455 (1984) (RLA); *Abood v. Det. Bd. of Educ.*, 431 U.S. 209, 229–232 (1977) (public sector); *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 232 (1956) (RLA). In the private sector, the Court has held that the same analysis applies as a matter of constitutional avoidance. *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 761–762 (1988).

56. 431 U.S. 209.

57. *Id.* at 225–226, 232.

58. *Id.* at 234–235.

In a 1991 case, Justice Scalia explained the reasoning behind this balance, addressing why the Court did not simply hold that objectors had an absolute right to refuse to pay for any costs of union representation:

Our First Amendment jurisprudence therefore recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. . . . In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.⁵⁹

Where public sector unions and employers do agree to require bargaining unit members to pay their fair share of the costs of union representation (known as the agency fee), the Supreme Court has also mandated that the unions implement a set of procedural protections designed to assist employees in exercising their rights to pay only the agency fee and not other costs incurred by the union.⁶⁰ These protections, known as *Hudson* procedures, involve annual notice of bargaining member rights as well as an opportunity to exercise those rights to opt out of paying the full amount of union dues.⁶¹ In addition, unions must provide a procedure for “reasonably prompt” review of the union’s calculation of the agency fee by an “impartial decisionmaker,” among other protections.⁶² Further, the Court recently held that, in the context of mid-year dues increases, unions may not require all bargaining unit members who do not opt out to pay the full

59. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part).

60. *Chi. Teachers Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 301–302 (1986).

61. *Id.* at 305–306.

62. *Id.* at 310.

amount of union dues; instead, unions must presume objection and charge full freight to only those bargaining unit members who indicate a preference to pay.⁶³ (This decision, which post-dates *Citizens United*, is discussed in greater detail below.)

While union objectors are not identically situated to the shareholder objectors that the Court discussed in *Citizens United*, there are some important similarities between the two groups.⁶⁴ First, the nature of their objection is similar—both object to paying money to a private organization (a corporation or a union) if the money might be used for political expression.⁶⁵ Second, both sets of objectors have generally affiliated with the corporate or labor organization because of the prospect of economic gain.⁶⁶ Yet, whereas the Court has carefully protected dissenting bargaining unit members, the *Citizens United* Court was dismissive of the asserted interest in protecting dissenting shareholders.⁶⁷ In little

63. *Knox v. Serv. Employees Int'l Union, Loc. 1000*, 132 S. Ct. 2277, 2306 (2012).

64. There is much to say about the strength of the correlation between union and shareholder objections. Benjamin Sachs persuasively argues that the bases upon which the corporate and union contexts might be distinguished are insufficient to compel different First Amendment analyses. Sachs, *supra* n. 8, at 858–862. Similarly, Catherine Fisk and Erwin Chemerinsky argue that “at the very least, corporations and unions should be treated the same in terms of their speech rights as entities and the rights of dissenting shareholders and members.” Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. SEIU, Local 1000*, 98 Cornell L. Rev. 1023, 1080 (2013). However, Todd Pettys argues that “one can sensibly resist the premise that dissenting shareholders and dissenting employees are comparably situated for First Amendment purposes.” Todd E. Pettys, *Unions, Corporations, and the First Amendment: A Response to Professors Fisk & Chemerinsky*, 99 Cornell L. Rev. Online 23, 32 (2013). Pettys argues that there are two key differences between dissenting shareholders and dissenting bargaining unit members. First, that, “[u]nlike dissenting employees who immediately feel the financial bite of a union’s political activities,” corporate political advocacy may not actually cost anything because political speech may not devalue the company. *Id.* at 30. Second, that there is a greater likelihood that a listener would associate a union’s speech with a bargaining unit member than a corporation’s speech with a shareholder. *Id.* at 30–31. This important debate is largely beyond the scope of this Article. Rather, it is sufficient for my purposes to note that there are significant similarities between the two contexts and that individual union members and shareholders may have a relatively easy or difficult time avoiding the risk of funding objectionable political speech. For example, just as some shareholders will find that their shares are not devalued by corporate political speech, some bargaining unit members will find that collective bargaining results in a raise that dwarfs the amount of union dues or fees. Similarly, listeners who are familiar with the principle of exclusive representation will know not to attribute union speech to individual bargaining unit members, though whether such awareness is prevalent is an empirical question.

65. Sachs, *supra* n. 8, at 809–810.

66. *Id.* at 825–826.

67. *Id.* at 802–803.

more than one paragraph, the Court reasoned that shareholder democracy was a sufficient bulwark against unwanted political spending; yet, this does not explain the different treatment, given that bargaining unit members also possess democratic rights.⁶⁸

A further inconsistency between the two lines of cases lies in how the Court weighs—or fails to weigh—union First Amendment interests in cases about objectors’ rights under *Hudson* and related cases.⁶⁹ Specifically, the *Citizens United* Court was clear that procedural burdens on speech implicate the speaker’s First Amendment rights.⁷⁰ Yet the Court has not considered unions’ First Amendment rights to speak using funds paid by willing members in *Hudson* or subsequent cases, instead focusing on: (1) the objectors’ rights to avoid funding unwanted speech; and (2) government interests in promoting labor peace by preventing objectors from free riding on the union’s efforts on behalf of the entire bargaining unit.⁷¹

This Part has reviewed key inconsistencies between *Citizens United* and union-related First Amendment doctrine. In the next Part, I turn to post-*Citizens United* cases, explaining how they have failed to resolve, or in some cases exacerbated, existing doctrinal tensions.

III. FOUR YEARS LATER: GROWING TENSIONS

In the four years since *Citizens United*, the Court has decided several more First Amendment cases. Three of these arose in the context of campaign finance, giving the Court square opportunities to either underscore or to limit *Citizens United*; in each, the Court reaffirmed *Citizens United* in a sharply divided opinion.⁷²

68. Fisk & Chemerinsky, *supra* n. 64, at 1081–1084 (comparing shareholder and union democracy). In addition to the aspects of union democracy that Fisk and Chemerinsky point to, bargaining unit members may also attempt to decertify their union. See 29 U.S.C. § 159(c)(1)(A)(ii) (2012) (providing for decertification election); see also Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev. 351, 437 (2002) (describing “[t]he possibility of a decertification election”).

69. Fisk & Chemerinsky, *supra* n. 64, at 1084.

70. 558 U.S. at 337–339.

71. Garden, *supra* n. 8, at 40–41.

72. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014); *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491–2492 (2012) (holding unconstitutional a Montana statute regulating independent expenditures); *Ariz. Free Enter. Club’s Freedom*

This Part, however, focuses on First Amendment cases arising outside of the election law context in which the Court emphasized the First Amendment principles from *Citizens United*, discussed above. These cases mostly did not involve labor speakers and so did not present an opportunity to *reconcile* labor's First Amendment principles with *Citizens United* principles—with the significant exception of *Knox v. Service Employees International Union, Local 1000*,⁷³ in which the Court extended its agency fee jurisprudence in spite of the logical tension with *Citizens United*.⁷⁴ Taken together, then, these post-*Citizens United* cases show that while *Citizens United* is robust precedent for corporate and other associational speakers, the same has not yet proven to be true for labor union speakers.

A. Strengthening Corporate and Associational Speech Rights

One of the most significant recent cases for corporate speakers, *Sorrell v. IMS Health Inc.*,⁷⁵ saw the Court extend *Citizens United*'s reasoning into the commercial speech context.⁷⁶ *Sorrell* involved a Vermont law restricting the sale or use of certain pharmacy records that revealed doctors' prescribing practices.⁷⁷ While these records could be used for a number of purposes, the law forbade their use for marketing purposes by pharmaceutical companies.⁷⁸ Specifically, the Vermont law targeted the practice of pharmacies mining and selling data from individual prescriptions that, in the aggregate, revealed doctors' prescribing habits.⁷⁹ Pharmaceutical manufacturers then purchased this data and used it to tailor their marketing to indi-

Club PAC v. Bennett, 131 S. Ct. 2806, 2811, 2828–2829 (2011) (holding unconstitutional an Arizona statute making additional public financing available to candidates whose opponents and their supporters spent above a threshold amount). *McCutcheon* is discussed in greater detail in Part IV.

73. 132 S. Ct. 2277 (2012).

74. *Id.* at 2295–2296.

75. 131 S. Ct. 2653 (2011).

76. Tasić, *supra* n. 8, at 268–278. Tasić makes a similar argument about the extension of *Citizens United* into the commercial speech context in *Sorrell* and the exclusion, to date, of unions from the emerging First Amendment principle against speaker-based distinctions. *Id.* at 272–278.

77. 131 S. Ct. at 2659.

78. *Id.*

79. *Id.*

vidual doctors (a practice known as “detailing”).⁸⁰ Data miners and an association of pharmaceutical manufacturers brought suit,⁸¹ claiming that the law violated their First Amendment rights. Their fundamental claim was that Vermont prohibited commercial activity (the sales or use of the prescribing information) based on the content of the manufacturers’ speech—marketing speech, rather than speech for another purpose.⁸²

Without citing *Citizens United*, Justice Kennedy—who wrote for the majority both in that case and *Sorrell*—used very similar language and legal reasoning to articulate why the Vermont law violated the First Amendment. As he described the case, the key problem was that “Vermont’s law enact[ed] content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.”⁸³ He added that “[t]he law on its face burden[ed] disfavored speech by disfavored speakers.”⁸⁴ The Court then applied “heightened scrutiny,” though it did not decide with precision what version of heightened scrutiny applied—as the Court saw it, there was no need to decide because the statute failed even under the more permissive commercial speech test.⁸⁵ However, the Court’s language suggests that the principle that only intermediate (and not strict) First Amendment scrutiny applies in the context of commercial speech is, at minimum, eroded in the context of content- or speaker-based distinctions.⁸⁶

As in *Citizens United*, the Court in *Sorrell* was indifferent to the fact that the affected speech was economically motivated, observing that “a great deal of vital expression” results from an

80. *Id.*

81. *Id.* at 2661.

82. *Id.* at 2662.

83. *Id.* at 2662–2663.

84. *Id.* at 2663.

85. *Id.* at 2664, 2667 (stating that “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied”).

86. *Id.* at 2677 (Breyer, J., dissenting) (observing that the majority is “suggesting a standard yet stricter than *Central Hudson*”); Samantha Rauer, Student Author, *When the First Amendment and Public Health Collide: The Court’s Increasingly Strict Constitutional Scrutiny of Health Regulations That Restrict Commercial Speech*, 38 Am. J.L. & Med. 690, 706 (2012) (“If *Sorrell* controls future decisions, the traditional intermediate commercial speech doctrine may disappear entirely.”); *Recent Cases*, 127 Harv. L. Rev. 795, 799–800 (2013); Nat Stern, *Secondary Speech and the Protective Approach to Interpretive Dualities in the Roberts Court*, 22 Wm. & Mary Bill Rights J. 133, 147–148 (2013).

economic motive.⁸⁷ Further, the Court rejected the argument that the sale of prescriber-identifying information was conduct rather than speech, reasoning that the process of obtaining information was necessarily intertwined with speech⁸⁸ so that banning the prior was equivalent to banning the latter: “Vermont’s statute could be compared with a law prohibiting trade magazines from purchasing or using ink.”⁸⁹ *Sorrell* thus underscores the proposition from *Citizens United* that speaker-based distinctions are subject to close First Amendment scrutiny, further undermining the Court’s previous cases distinguishing between union picketing and civil rights picketing based on unions’ apparent economic motives or roles.

Sorrell is not the only post-*Citizens United* case that bears on the ongoing validity of the union picketing cases. In addition, there is *Snyder v. Phelps*,⁹⁰ in which the Court held that the First Amendment precludes imposition of tort liability for intentional infliction of emotional distress on funeral picketers.⁹¹ In short, *Snyder* undermines the union picketing cases to the extent that they rest upon reasoning that union picketing can be regulated because of the response it is likely to cause.⁹²

Snyder arose following the Westboro Baptist Church’s picketing at a soldier’s funeral.⁹³ The soldier’s family successfully

87. 131 S. Ct. at 2665.

88. *Id.* at 2665, 2667 (stating that “[a]n individual’s right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’”) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)).

89. *Id.* at 2667.

90. 131 S. Ct. 1207 (2011).

91. *Id.* at 1220.

92. In *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring), Justice Stevens reasoned that labor picketing could be distinguished from other picketing because the former “calls for an automatic response to a signal, rather than a reasoned response to an idea.” Justice Stevens relied on an earlier labor picketing decision in which Justice Douglas wrote in a concurrence that “[p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.” *Id.* (citing *Bakery Drivers v. Wohl*, 315 U.S. 769, 776–777 (1942)). Other commentators and I have criticized this analysis. *E.g.* Michael C. Harper, *The Consumer’s Emerging Right to Boycott*: NAACP v. Claiborne Hardware and Its Implications for American Labor Law, 93 Yale L.J. 409, 440–441 (1984).

93. 131 S. Ct. at 1213–1214.

sued Westboro, and a jury awarded nearly \$11 million in compensatory and punitive damages.⁹⁴ Striking down the imposition of liability, the Court stated in strong terms that the likely effects on listeners or viewers did not qualify as reasons to restrict speech:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.⁹⁵

While *Snyder* concerned harmful speech that listeners hoped to avoid, the Court confirmed in *Sorrell* that the inverse was also true: the First Amendment is inconsistent with limiting speech because it is too effective. Thus, citing *Snyder*, the *Sorrell* Court held that effects on doctors—the risk that pharmaceutical marketers would “undermine[] the doctor-patient relationship by allowing detailers to influence treatment decisions” through “unwanted pressure” and even more egregious conduct—could not support Vermont’s ban.⁹⁶ Though the Court questioned whether these effects were likely, it ultimately decided that the answer did not matter because “this asserted interest is contrary to basic First Amendment principles. . . . If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive.”⁹⁷ This language in particular undermines the signal picketing analysis inasmuch as it reflects the Court’s unwillingness to look behind doctors’ prescribing decisions, even in the face of the argument that pharmaceutical marketers engaged in conduct amounting to manipulation in order to persuade doctors.

In sum, while the Court has not had occasion to consider a labor picketing case since *Citizens United*, its First Amendment decisions continue to chip away at the reasoning of the Court’s previous labor protest cases. In the next Subpart, I turn to agency

94. *Id.* at 1214. The district court later reduced the punitive damages award from \$8 million to \$2.1 million. *Id.*

95. *Id.* at 1220.

96. 131 S. Ct. at 2670 (internal quotation marks omitted).

97. *Id.*

fee cases—an area in which the Court has spoken post-*Citizens United*.

B. Agency Fees, Public Employees, and Structuring Costs

As described above, the Court's agency fee cases stand in significant tension with *Citizens United*. This is for at least two reasons: first, the Court has failed to account for unions' own First Amendment interests in engaging in political speech; and second (and closely related), the Court has not treated the burdens associated with the *Hudson* procedures as burdens on speech.⁹⁸

These tensions were exacerbated, rather than resolved, when the Court addressed a question related to *Hudson* procedures in *Knox*.⁹⁹ *Knox* involved a mid-year dues increase charged by Service Employees International Local 1000 (SEIU) to represented public employees.¹⁰⁰ The SEIU did not offer covered employees a new opportunity to exercise their *Abood* rights to object to paying the nonchargeable portion of dues, though it did honor previous opt-outs.¹⁰¹

The Court held that the dues increase unconstitutionally infringed the First Amendment rights of the objectors because the union had not ensured an adequate opportunity to object to paying the nonchargeable portion of the increase.¹⁰² However, like in the (pre-*Citizens United*) *Abood/Hudson* line of cases, the Court focused only on the rights of objectors, ignoring union First Amendment rights that were also implicated in the case.¹⁰³ This stance—that there were First Amendment rights at stake on just one side of the case—led the Court to observe that “[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something

98. *Supra* n. 64 and accompanying text.

99. 132 S. Ct. at 2284.

100. *Id.* at 2285. Although the increase was earmarked for a “Political Fight-Back Fund,” the money ultimately was used for collective bargaining costs for which objectors may be required to pay. *Id.*

101. *Id.* at 2286.

102. *Id.* at 2295–2296.

103. *Id.* at 2284.

of an anomaly—one that we have found to be justified by the interest in furthering ‘labor peace.’”¹⁰⁴

As a result, the Court widened the incongruity between *Citizens United* and the law of union fees yet further. It held that unions assessing mid-year dues increases were required to obtain affirmative consent from employees rather than requiring objectors to opt out of paying.¹⁰⁵ Further, the Court strongly implied that it would adopt the same rule for all union dues assessments in a future case; indeed, there is little basis upon which to distinguish a mid-year dues increase from an annual dues assessment.

Finally, as Catherine Fisk and Erwin Chemerinsky have demonstrated, there exists a further, and related, tension in the First Amendment of labor law, which stems from the Court’s differing approaches to public employees’ First Amendment rights in and out of the union context.¹⁰⁶ While this tension does not relate directly to *Citizens United*, it is worth briefly addressing because it has also been continued in a recent First Amendment case.

In *Garcetti v. Ceballos*,¹⁰⁷ the Court held that “there is no First Amendment protection against adverse employment action for the speech of government employees made on the job and . . . within the scope of their duties.”¹⁰⁸ Yet the Court’s agency fee cases start from the premise that employees’ First Amendment rights are infringed when their employers agree to require employees to pay a fee to their unions; as Fisk and Chemerinsky put it, “the government employees in *Knox* were being asked to pay the assessment precisely because they were government employees and were speaking in this capacity through their union.”¹⁰⁹ The tension, then, is that while public employees’ “on the job” speech receives no First Amendment protection in most cases, the Court robustly protects employees from having to pay union dues as a condition of public employment.

104. *Id.* at 2290.

105. *Id.* at 2296.

106. Fisk & Chemerinsky, *supra* n. 64, at 1064.

107. 547 U.S. 410, 426 (2006).

108. Fisk & Chemerinsky, *supra* n. 64, at 1064–1065.

109. *Id.* at 1066.

Then, in *Borough of Duryea v. Guarnieri*,¹¹⁰ the Court again considered the limits on public employees' First Amendment rights.¹¹¹ Whereas *Garcetti* concerned speech that occurred squarely in the course of the plaintiff's employment, *Borough of Duryea* involved alleged retaliation against an employee for filing a union grievance and then a federal lawsuit, in violation of his right to petition the government.¹¹² The Court rejected the claim, concluding that public employees may successfully invoke the First Amendment right to petition only when their petition addresses a matter of public concern.¹¹³ The Court emphasized that public employers must have substantial leeway to manage their employees: "The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected."¹¹⁴

Moreover, while not deciding whether the Plaintiff's own petition involved a matter of public concern, the Court indicated that many petitions involving working conditions will not rise to that level.¹¹⁵ Thus, even if an obligation to pay dues or fees to a union does not qualify as speech made on the job and within the scope of public employees' duties, *Borough of Duryea* suggests that it could nonetheless receive "relatively little" protection.¹¹⁶ However, the Court in *Knox* analyzed the public employee plaintiffs' First Amendment rights without citing either *Garcetti* or *Borough of Duryea* (or earlier cases concerning public employees' First Amendment rights), without discussing the reason for its reliance on cases arising outside the public employment context (where "government has significantly greater

110. 131 S. Ct. 2488 (2011).

111. *Id.* at 2491.

112. *Id.* at 2492.

113. *Id.* at 2491. The public concern test was first announced in the context of public employee speech; *Duryea* extended that test to the petition context. *Id.* at 2493 (citing *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968)).

114. *Id.* at 2497.

115. *Id.* at 2501 ("The right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process. It is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts.")

116. Fisk & Chemerinsky, *supra* n. 64, at 1066.

leeway¹¹⁷), and without explaining why it did not afford its usual leeway to public employers to manage their workforces.

Thus, in the agency fee context, the divide wrought by *Citizens United* has only increased. Further, *Knox's* implication—that the current Court does not consider *Citizens United's* principles to be translatable into the labor union context—could carry over to the First Amendment law of labor protest.

IV. CONCLUSION

The growing doctrinal inconsistencies between *Citizens United* and the cases that have followed it and the First Amendment of labor law are cause for concern. They mean that even the limited formal equality between corporate and union speakers that exists under *Citizens United* is illusory. Further, two First Amendment cases before the Court this term could increase this misalignment. First, in *McCutcheon v. Federal Elections Commission*,¹¹⁸ the Court struck down biennial limits on contributions to certain political action committees controlled by candidates or political parties as violations of the First Amendment.¹¹⁹ The Court held that the only legitimate government justification that can justify limits on campaign contributions is the prevention of corruption, which the Court also defined narrowly.¹²⁰ Though the challenged provisions applied to individuals, the reasoning of cases like *Citizens United* and *Sorrell* suggests that the Court will later extend the same principles to corporate and union speakers. Second, in *Harris v. Quinn*,¹²¹ the Court will reconsider the balance struck in *Abood*, potentially holding that dissenters cannot be compelled to pay for even the core costs of union representation. If the Court does so hold, many unions will be required to spend money which could have otherwise been contributed to candidates on fulfilling their

117. *Duryea*, 131 S. Ct. at 2497 (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 599 (2008)).

118. 134 S. Ct. at 1434.

119. *Id.* at 1442.

120. *Id.* at 1450 (“Congress may target only a specific type of corruption—‘quid pro quo’ corruption,” as well as its appearance).

121. 656 F.3d 692, 699–700 (7th Cir. 2011), *cert. granted*, 131 S. Ct. 48 (2013).

duties to fairly represent all bargaining unit members, including those who have chosen to free ride.

If the Court strikes down both the contribution limits and *Abood*, unions will be further disadvantaged in their relative abilities to engage in political speech, while other wealthy speakers will have increased opportunities for such speech. This misalignment will mean fewer chances for workers to have their interests represented in government, with wide-ranging policy consequences.

