

The Need to Give Workers Protection from Forced Political Contributions to Corporations*

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Kenneth G. Dau-Schmidt, JD, PhD

Willard and Margaret Carr

Professor of Labor and Employment Law

Indiana University

Maurer School of Law

Bloomington, Indiana 47405

Thanks for the invitation to speak today. I am pleased to get to testify on this important subject. As a lawyer and law professor, I have studied and taught labor and employment law for almost thirty years. Over the course of these thirty years I have been fortunate enough to teach labor and employment law not only in the U.S., but also in Germany, France, the U.K. and, most recently, China. As an economist, I have also studied the labor market and the impact of unions and collective bargaining on the distribution of wealth, the health of the middle class and the general health of the U.S. economy. I look forward to sharing what I have learned on these topics that is relevant to Committee's discussion.

I. Corporate and Union Expenditures on Political Activity After *Citizens United*

For more than half a century, federal campaign finance law bound unions and corporations to symmetrical restrictions on their ability to spend money on politics. Indeed, campaign finance legislation generally has spoken of corporations and labor organizations in parallel structure in the same provisions and sentences. The War Labor Disputes Act of 1943 made it unlawful for "any corporation whatever, or any labor organization" to contribute to candidates for federal office. 78 Cong. Ch. 144, June 25,

* This written testimony borrows heavily from Benjamin Sachs' excellent article on the subject *Unions, Corporations, and Political Opt-Out Rights after Citizens United*, Harvard Law School Public Law & Legal Theory Working Paper Series Paper No. 11-21 (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924916. If this were a law review article it would contain numerous cites to and quotations from this work.

1943, 57 Stat. 163 at § 9. Similarly the Federal Election Campaign Act of 1971 (FECA) forbid “any corporation whatever, or any labor organization” to fund with general treasury monies expenditures that expressly advocated the election or defeat of a candidate. 2 U.S.C. § 441b(a). More recently, the Bipartisan Campaign Reform Act (BCRA) of 2002 extended this ban on corporate and union general treasury spending to include political advertisements that refer to a candidate in the weeks and months leading up to a federal election. 2 U.S.C. 441b(b)(2); 2 U.S.C. § 434(f)(3)(A). Many states have enacted similar restrictions with respect to union and corporate expenditures in state elections. To deal with these restrictions, unions and corporations who wanted to engage in the proscribed political activity set up political action committees and solicited voluntary contributions for these uses.

In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Supreme Court overturned decades of legal precedent to strike down the provisions of campaign finance law prohibiting union and corporate electoral expenditures as unconstitutional. Although this ruling might at first seem even handed in its treatment of unions and corporations by allowing both to spend from their “general treasury” on elections, in fact it works to the detriment of unions and dissenting share-holders because federal law already contains significant provisions for allowing dissenting employees to “opt-out” of political spending by unions. The union’s “general treasury” consists of union dues and agency fees paid by members and represented employees covered by a union security agreement. However, federal law prohibits unions from spending any individual employees’ dues or fees on politics if those employees object to such use. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). See also *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998). In other words, employees already enjoy a federally protected right to control the way their dues are spent and to opt-out of funding union political activity. The corporation’s “general treasury” consists of profits that are generated from shareholders’ capital contributions and those capital contributions themselves. In contrast to the union context, corporations are free to spend these assets on politics even if individual shareholders object. Shareholders, including workers who have pension plan investments or stock options, enjoy no right to opt-out of financing corporate political activity.

II. Union Security Agreements and the Current Ability of Employees to “Opt-Out” of Union Political Spending

Union Security Agreements

Federal law creates a problem for unions in securing financial resources to support their activities in negotiating and enforcing collective bargaining agreements and representing employee interests in political debates. Although under federal law neither the union nor the employer can require an employee to join the union, *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), federal law also requires that the union must fairly represent all employees in the bargaining unit, whether the employee is a member of the union or not. *Aboud v. Detroit Board of Education*, 431 U.S. 209, 221 (1977), quoting *International Assn. of Machinists v. Street*, 367 U.S. at 761. See also *Steele v. Louisville*

& *Nashville R.R. Co.*, 323 U.S. 192, 204 (1944). Such fair representation can be quite expensive, perhaps even requiring the retaining of an attorney or other professionals, and the union can be sued by either the National Labor Relations Board or the aggrieved employee for failing to meet this duty. This state of affairs creates what economists refer to as a “free-rider” problem in that employees can enjoy the benefits of union representation without having to pay for them and thus “free-ride” on the union’s efforts. Imagine the problems if federal law required businesses to provide services to prospective customers without having to pay. To solve this problem, federal law allows unions to negotiate agreements with employers for “union security” that require each employee in the bargaining unit to either join the union, and pay full dues, or pay an “agency fee” to cover just the costs of representing the employee in the bargaining unit. As the Supreme Court has observed, a union security agreement “distribute[s] fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become ‘free riders’—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.” *Abood*, 431 U.S. at 221-22.

“Right to Work,” or No Fair Share Laws

Section 14(b) of the National Labor Relations Act allows states to prohibit union security agreements. 29 U.S.C.A. § 164[b]. My own state of Indiana recently became the twenty-third state to pass such a law. These laws prohibiting union security agreements are sometimes called “Right to Work” laws, but this is really a misnomer because no one gains a job or has a right to work as a result of such laws. Such laws are really more appropriately called a “No Union Security” law or a “No Fair Share” law.

Proponents of No Fair Share laws argue that employees should not be required by their employers to pay the agency fees provided for in the union security agreement and that it infringes their rights to make them pay. Under our statutory system of exclusive representation and majority rule in representation elections there will always be some workers who voted against a union and are disappointed when it won, and others who voted for a union and are disappointed when it loses, but like our system of democratic government they are bound by the decision of the majority and have to pay for their responsibilities under the system. The Supreme Court has long held that the simple requirement that non-members pay their fair share of the cost of representation does not infringe their constitutional rights. *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 238 (1956).

Proponents of No Fair Share laws also argue that these laws will increase economic growth in a state and attract new jobs, but there is no empirical support of these assertions. Separating out the impact of one condition or state policy from many is always difficult, but the best statistical analyses that control for numerous other variables show that there is no impact on the economic growth or job growth in a state with the passage of a No Fair Share act.¹ Even a simple analysis of state economic growth since

¹ Dale Belman, Richard Block, and Karen Roberts, *Economic Impact of State Differences in Labor Standards in the United States, 1998-2000*, 2001 www.employmentpolicy.org/topic/15/bllogeconomic

1977 shows that four out of the five fastest growing states allow the enforcement of union security agreements, including the two fastest—Massachusetts and Connecticut.² What is clear from the data is that a No Fair Share law lowers wages and benefits for both union and non-union employees in a state. Comparing average compensation for non-farm workers in 2011 one sees that average compensation is \$7,835 lower in No Fair Share states (\$57,732) than in states that enforce union security agreements (\$65,567).³ A more sophisticated analysis that controlled for many variables, including the cost of living, and which also looked at employee benefits, found that wages of both union and non-union workers in No Fair Share states were \$1,500 lower, while 2.6% less workers had health benefits and 4.8% less had a pension, than in states that enforce union security agreements.⁴

The Current Legal Right of Employees to “Opt-Out” of Union Political Spending

In cases arising out of states where union security agreements can be enforced, the Supreme Court has endeavored to "attain the appropriate reconciliation between majority and dissenting interests in the area of political expression," in the enforcement of such agreements, recognizing that "the majority...has an interest in stating its views without being silenced by the dissenters." *International Assn. of Machinists v. Street*, 367 U.S. at 773. Importantly, the Court stated at the outset of these cases that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Id.* at 774. Under the Court's decisions, employees who choose to be non-member "agency fee payers," as opposed to full union members, cannot be compelled to contribute toward a union's partisan political activity or its ideological and other activities unrelated to collective bargaining and contract administration—even though these employees benefit from all of the union's activities on their behalf.⁵ In fact, under the NLRA, workers who believe that a union is acting improperly in processing a Beck request may file a charge against the union with the NLRB; no lawyer is necessary to do so. If the NLRB finds merit in the charge, it will prosecute a complaint against the union—at no cost to the worker—and, if it prevails, secure for the worker an appropriate agency fee refund and a future fee reduction.

In addition to establishing this rule, the Court has also taken steps to delineate the appropriate remedial procedures through which a union must ensure that objectors' dues

impact-state-differences-labor-standards-united-states-1998-2000, accessed 1/23/11; Lonnie K. Stevans, *The Effect of Endogenous Right-to-Work Laws on Business and Economic Conditions in the United States: A Multivariate Approach*, REV. OF LAW AND ECON. 5(1), 595-612, 2009.

² Gordon Lafer, *What's Wrong With 'Right to Work,'* Economic Policy Institute, Policy Memorandum #174 (February 28, 2011).

³ Marty Wolfson, *'Right to Work' Lowers Wages – And That's a Fact!*, Higgins Labor Studies Program, University of Notre Dame Public Policy Commentary -- January 3, 2012, http://higginslabor.nd.edu/assets/56074/hlsp_commentary_jan_2012.pdf

⁴ Elise Gould and Heidi Shierholz, *The Compensation Penalty of 'Right-to-Work' Laws*, Economic Policy Institute Briefing Paper. February 17, 2011.

⁵ See generally *Aboud*, supra, (public sector); *Ellis*, supra (Railway Labor Act); *Beck*, supra (National Labor Relations Act); *Air Line Pilots Assn. v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

are, in fact, used only for permissible purposes.⁶ The jurisprudence that has developed to address these procedural questions is complex, but for present purposes, the key points are as follows. First, employees are entitled to object to the use of their dues for political purposes in general; they need not oppose the union's particular political stances – e.g., in favor of Democratic candidates or pro-labor legislation – and may refuse to have their dues spent on political activity of all types and valences. See *Abood*, 431 U.S. at 240-42. Second, although the Court's decisions are less specific on this point, employees' right to opt out of financing union political activity extends beyond electoral spending to include many types of lobbying.⁷ Third, employees who object to the political use of their dues must be provided by the union with an annual notice, known as a "Hudson notice," containing information that adequately explains how the fee reduction was calculated, along with an opportunity of at least 30 days to challenge the amount of the reduction. See *Ellis*, 435 U.S. at 443-444; *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 304-306.

Apart from the calculation of the agency fee that can be charged dissenters is the question of how those fees are collected. Although the NLRA permits unions and employers to negotiate payroll check-off authorization clauses, providing that employees—as a matter of their own convenience—may authorize the employer to deduct dues or fees from their paychecks and remit them directly to the union, no employee can be required to have money automatically withdrawn from his or her paycheck to finance any of the union's activities without the employee's permission. Without the employee's express authorization, such deductions from pay, and transfers of money from the employer to the union, are illegal. See 29 U.S.C. § 186(c)(4). A union member or other represented employee who declines to authorize a payroll deduction for membership dues or agency fee payments may fulfill his or her financial obligation to the union by other means of payment, such as mailing a check or paying at a monthly membership meeting.

As outlined above, current law already gives employees an extensive right to opt-out of union political activity and effective means to enforce that right. Even where unions negotiate an enforceable union security agreement with the employer, dissenting employees who choose to be non-member "agency fee payers" cannot be compelled to contribute toward a union's partisan political activity or its ideological and other activities

⁶ See, e.g., THE DEVELOPING LABOR LAW § 26 at 2106-2142, 2176-2184, 2198-2203 (JOHN E. HIGGINS, JR. ET AL. EDS., 5TH ED. 2006). In the NLRA context, the NLRB has held that the RLA and public sector cases do not determine the appropriate procedures for political objectors. As such, the Board has developed its own standards for union-shop provisions under NLRA, but the standards are much the same. See *California Saw & Knife Works*, 320 NLRB 224 (1995).

⁷ In *Lehnert v. Ferris Faculty Ass'n*, the Court concluded that public sector unions may charge dissenters only for lobbying related to the "legislative ratification of, or fiscal appropriations for, their collective bargaining agreement." 500 U.S. 507, 519 (1990); see also *Seidemann v. Bowen*, 584 F.3d 104, 114-15 (2d Cir. 2009) (only lobbying expenses "related to collective bargaining" are chargeable). This holding implies not only that public sector unions must allow employees to opt-out of most lobbying expenses, but that private sector unions – who need not seek legislative enactment or appropriations of their collective bargaining agreements – may not fund most types of lobbying with their general treasuries. The specific types of lobbying expenditures covered by the opt-out right, however, remains the subject of some dispute. See, e.g., *Seidemann*, 584 F.3d. at 114-15; *United Nurses & Allied Professionals (Kent Hospital)*, 2011

unrelated to collective bargaining and contract administration. Employees are entitled to object to the use of their dues for political purposes in general; they need not oppose the union's particular political stances. Once the employee identifies him or herself as an objector, the union has an obligation to provide an annual "Hudson notice," containing information that adequately explains how the fee reduction for political activity was calculated, along with an opportunity of at least 30 days to challenge the amount of the reduction. Finally, no dues or fees can be automatically deducted from the employee's paycheck without the employee's affirmative agreement, regardless of what the union and employer agree.

"Paycheck Protection," or Hobble Employee Speech Acts

Despite the already extensive protection of employees' right to opt-out of union political speech, some have proposed going further at the state or federal level be enacting so called "Paycheck Protection" acts. "Paycheck Protection", like "Right to Work", is an attractive name for proposals to render unions as impotent as possible. As a result I feel it is more appropriate to call them "Hobble Employee Speech" acts. These proposals vary a lot, but in general they seek to impose restrictions on union spending of its regular treasury funds to express employee interests by requiring advanced written authorization from all affected members or non-members for any actions or expressions that are "political." In these proposals what constitutes a "political" act or expression and thus a "political" expenditure is defined very broadly for the purpose of inhibiting collective employee speech. For example, in the Alabama Hobble Employee Speech act adopted in 2010, "political activity" was broadly defined to include: contributing to another entity that "engages in any form of political communication, including communications which mention the name of a political candidate"; "Contracting with" another entity that so engages; engaging in or paying for any such communication itself; engaging in or paying for any public opinion polling," irrespective of content; engaging in or paying for any "political advertising" (undefined) "in any medium"; "phone calling for any political literature" (undefined) "of any type"; and providing "in-kind" support for political candidate. The Alabama statute, Act 2010-761, codified at Alabama Code § 17-17-5. This statute has rightly been enjoined as trammeling employee free speech and a final adjudication of this question is in progress. *Alabama Education Association v. Bentley*, No. CV-11-S-761-NE (Memorandum Opinion)(affirmed 11th Cir). The Alabama experience is instructive because the Supreme Court has warned the congress and the state legislatures that regulation that unreasonably burdens corporate or union speech will be struck down as violating of the First Amendment. *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Given the extensive right to opt-out of union expenditures for political activities that employees currently enjoy under federal law it is hard to justify further regulation.

III. The Need to Give Workers and Shareholders an Opportunity to “Opt-Out” of Corporate Political Spending

Although federal law currently contains an extensive right on the part of employees to opt-out of paying for union political expenditures, there is *no* corresponding legal right on the part of employees, or shareholders in general, to opt-out of paying for corporate political expenditures. This state of affairs is not only unfair to dissenting employees and shareholders, but also creates a systematic bias in our political system in favor of corporate political expenditures over union political expenditures that is inconsistent with past congressional policy and a healthy democracy.

The same arguments that have traditionally been made in favor of the employee opt-out from union political spending apply equally in favor of a shareholder opt-out from corporate political activity. Proponents have argued that employees should be able to opt-out of paying for union political activity because workers should have the opportunity to work wherever they want without having to pay for union political activities they oppose. Some have made this a constitutional claim, arguing that for the state to set up a system of exclusive representation in collective bargaining and allow union security agreements in which dissenters had to pay to support the union’s political activity would constitute forced political affiliation in violation of the First Amendment. The Supreme Court has accepted this argument for public sector employers where the state action argument is strongest, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36 (1977), but avoided this question in the private sector by interpreting the Railway Labor Act and National Labor Relations Act to only admit to union security agreements that allow dissenters to opt-out of paying for the union’s political activities. *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Communications Workers of America v. Beck*, 487 U.S. 735, 745 (1988). Similarly one can argue that shareholders should have the opportunity to invest wherever they want without having to support political activity they abhor. With respect to employees and particularly public employees, one can make a good constitutional argument. Through the tax code the federal government has promoted a system of employer based pensions in which a portion of the employee’s earnings is diverted into a limited number of possible equity investments or mutual funds where they can be used by corporations for political purposes without any opportunity for the employee to opt-out. In my own case, the State of Indiana takes 10% of my income and requires me to invest it in one or more of a limited number of mutual funds, none of which identify whether the companies in the fund will use my retirement savings for political purposes or allow me to opt-out of such use. Surely if it is unfair or unconstitutional for the state to encourage or require the diversion of employee income for union political purposes it is equally unfair for the state to encourage or require the diversion of employee income for corporate political purposes. By allowing investment in a company to become an act of political support, the Supreme Court’s opinion in *Citizens United* has resulted in new policy and constitutional implications for employee pensions and stock ownership plans.

The current state of the law provides corporations with a legally constructed advantage over unions when it comes to political spending by providing employees with

an opt-out procedure from union political expenditures but denying one to share-holder dissenters. This kind of legally conferred advantage is inconsistent with federal campaign finance law, and in particular, with that regime's insistence that unions and corporations be put "on exactly the same basis, insofar as their financial activities are concerned." *United States v. United Automobile Workers*, 352 U.S. 567, 579 (1957), quoting House Committee on Labor, Hearings on H. R. 804 and H. R. 1483, 78th Cong., 1st Sess. 1 (statement of Congressman Landis). In the post-*Citizens United* world, corporations undoubtedly will be the most well-funded speakers in the electoral arena. In the 2010 election cycle, for example, the leading non-party organization that engaged in political expenditures was the United States Chamber of Commerce. The Chamber, which is funded by corporate donations, spent more than \$32,000,000 on electioneering communications during this election season, approximately 94% of which was on behalf of Republican candidates.⁸ Moreover, of the top five highest spending non-party organizations, four supported conservative political candidates and issues similar to those that the Chamber supports.⁹ It is important to the functioning of our democracy that other views and interests be heard. The voice of employees as expressed through their collective representatives is an important counter weight to corporate interests in our democracy.

IV. CONCLUSION

The problem of balancing the interests of organizations to exercise their First Amendment rights and the right of members within those organizations to dissent and avoid paying for political activity is fundamental to the success of our democracy. This problem was recently brought to a head by the Supreme Court's ruling in *Citizen's United* that corporations were people with full First Amendment rights because it made the act of encouraged or compelled investment a compelled political activity. Although there are currently in existence extensive federal laws and legal doctrine upholding the right of employees to dissent from union political activity and not pay to support such activity, there is no corresponding current legal right for employees or shareholders in general to dissent and abstain from be forced to pay for corporate political activity. This state of the law is both unfair to dissenters from corporate political speech and harmful to the functioning of our pluralistic democracy.

⁸ See Michael Franz, *The Citizens United Election? Or Same As It Ever Was?*, 8 THE FORUM at 5 tbl 1.

⁹ See Center for Responsive Politics, 2010 Outside Spending, By Groups, available at <http://www.opensecrets.org/outsidespending/summ.php?disp=O>

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