

CORPORATIONS, UNIONS, AND THE ILLUSION OF SYMMETRY

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Prominent corporate and labor law scholars claim that corporations and unions should be treated symmetrically when it comes to spending money on ideological activities. Citizens United v. FEC recognized this symmetry in one respect, by holding that both corporations and unions can spend unlimited amounts of money on politics. But Citizens United ignored the fact that dissenting employees have a right to avoid paying for union spending with which they disagree, while dissenting shareholders have no such right. Sensing that the Supreme Court might expand union dissenters' rights in Friedrichs v. California Teachers Ass'n, these scholars intensified their calls for legal reform to bring the disparate treatment of corporations and unions into line.

This Article argues against the idea of moving towards greater union-corporate symmetry. The strength of arguments for symmetry depends on accurately identifying the principle underlying dissenters' rights. On this score, existing accounts propose several candidates—from the idea that it is illegitimate to use power in the economic sphere to achieve goals in the political sphere, to the view that dissenters should not suffer misattribution of ideological beliefs, to claims about the corruption that comes from using other people's money for political speech. But none of these principles hold up to scrutiny.

In their place, this Article argues—on both doctrinal and normative grounds—that dissenters' rights are best seen as grounded in concerns for individual freedom of conscience. It then shows how the freedom-of-conscience principle undermines the case for union-corporate symmetry. The structure of modern corporations—and in particular the nature of modern capital markets—severs the link between shareholders' wallets and their consciences. And when compared to the direct connection between dissenting employees and unions, threats to shareholder con-

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science are remote. Recognizing this fundamental difference between corporations and unions provides reason to be skeptical of various arguments for legal reform based on appeals to symmetry and clears the way for more persuasive claims to take their place.

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INTRODUCTION

OVER the last four decades, various corporate and labor law scholars have advanced the claim that corporations should be treated more like unions in the context of spending on ideological activities.¹ In many respects, campaign-finance law already reflects this symmetric view. In

¹ See, e.g., Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 819–58 (2012); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 Harv. L. Rev. 83, 111–15 (2010); Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 Yale L.J. 235, 268–95 (1981); see also Brief of Corporate Law Professors as *Amici Curiae* in Support of Respondents at 4–5, 38–39, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 7068957 [hereinafter Brief of Corporate Law Professors] (highlighting asymmetric treatment of unions and corporations); Leo E. Strine, Jr., *Corporate Power Ratchet: The Court’s Role in Eroding “We the People’s” Ability to Constrain Our Corporate Creations*, 51 Harv. C.R.-C.L. L. Rev. *40–46 (forthcoming 2016) (endorsing the view that unions and corporations should be treated symmetrically); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich. L. Rev. 169, 185 n.84 (2015) (same); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 Cornell L. Rev. 1023, 1078–91 (2013) (same);

Citizens United v. FEC, for example, the Supreme Court held that both corporations and unions can make unlimited independent expenditures on politics.² But symmetry theorists point out that this equal treatment hides a deep and longstanding asymmetry, namely, that dissenting employees have a right to “opt out” of paying for union spending with which they disagree, while corporate shareholders have no such right. On their view, there is no principled justification for this asymmetry, and legal reform is necessary to bring the disparate treatment of corporations and unions into line.

This Article argues against the idea of moving toward greater union-corporate symmetry. It begins by attempting to identify the normative principle that underlies dissenting employees’ right to opt out of funding union speech with which they disagree. Over the years, symmetry theorists have proposed several candidates. On one view, dissenting employees’ rights are grounded in the idea that it is illegitimate to use power in the economic sphere to achieve goals in the political sphere.³ On another view, those rights are based on employees’ interests in avoiding misattribution of ideological beliefs.⁴ On still another view, those rights recognize that using other people’s money for ideological purposes is a form of corruption.⁵ According to symmetry theorists, each of these principles applies, *mutatis mutandis*, to corporate shareholders, and so the treatment of corporations and unions should be equalized.

Against these views, this Article argues—on both doctrinal and normative grounds—that union dissenters’ rights are best seen as grounded in concerns for *freedom of conscience*. These concerns focus on allowing individuals to preserve their ethical integrity—their freedom to believe and not be coerced to violate their moral identities. They are claims, in other words, to live consistently with projects, beliefs, and commitments with which people identify and not be complicit in activities that they abhor. As the Supreme Court put it in *Abood v. Detroit*

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, 112–29 (2013) (same); Charlotte Garden, Citizens, United and *Citizens United*: The Future of Labor Speech Rights?, 53 Wm. & Mary L. Rev. 1, 32–45 (2011) (same); Jeremy G. Mallory, Still Other People’s Money: Reconciling *Citizens United* with *Abood* and *Beck*, 47 Cal. W. L. Rev. 1, 28–38 (2010) (same).

² 558 U.S. 310, 362–66 (2010).

³ See *infra* Section II.A.

⁴ See *infra* Section II.B.

⁵ See *infra* Section II.C.

Board of Education: “[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”⁶

Having identified the conscience principle underlying union dissenters’ rights, this Article then tests its application to corporate shareholders.⁷ In doing so, it argues that the analogy between dissenting employees and dissenting shareholders is flawed. The structure of modern capital markets, including massive equity holdings through diversified institutional investors, works to distance shareholders from public corporations’ ideological activities and attenuate the link between shareholders’ funds and their consciences. When compared to the direct connection between dissenting employees and unions, threats to shareholder conscience are remote. Viewing dissenters’ rights in terms of conscience, then, should make lawmakers skeptical of their extension into the modern corporate context.

Taking a wider view, the case against symmetry has implications for related debates in labor law and election law. In labor law, it indicates that unions may have stronger claims to autonomy in matters of internal governance than typically assumed. And in election law, it suggests that the Supreme Court was correct to reject arguments based on shareholders’ rights in *Citizens United*, but that there remain powerful objections to unlimited corporate political spending.

This Article proceeds in four Parts. Part I describes the law’s asymmetric treatment of unions and corporations and surveys prominent criticisms of that asymmetry. Part II distills the normative principles underlying critics’ arguments for symmetry and demonstrates why each is unsatisfying. Part III advances an alternative account of union dissenters’ rights grounded in the freedom of conscience and argues that such

⁶ 431 U.S. 209, 234–35 (1977).

⁷ Following various arguments for symmetry and related reform proposals, this Article focuses on publicly traded corporations. See, e.g., Bebchuk & Jackson, *supra* note 1, at 86 (“[W]e focus on political speech decisions by large, publicly traded companies, which deploy a significant fraction of corporate capital in the United States and are often subject to a distinct set of corporate law rules.”); Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010) (relating to political activities of firms covered by the Securities Exchange Act of 1934). I also follow those arguing for symmetry in focusing on corporate shareholders. See, e.g., Bebchuk & Jackson, *supra* note 1, at 84–85. For a helpful discussion of how notions of compelled support might apply to other corporate participants, including employees and consumers, see Matthew T. Bodie, Labor Speech, Corporate Speech, and Political Speech: A Response to Professor Sachs, 112 Colum. L. Rev. Sidebar 206, 213 (2012).

an account provides a coherent and attractive justification for treating unions and corporations differently. Part IV then suggests how the case for asymmetric treatment of union and corporate dissenters ought to inform debates in adjacent areas of law.

I. ASYMMETRY AND ITS CRITICS

This Part surveys the law's asymmetric treatment of corporations and unions and introduces scholarly criticism of that asymmetry. It begins by demonstrating how, despite an apparent commitment to parity, lawmakers continue to provide union dissenters with rights that are denied to their corporate counterparts. It then traces criticism of that asymmetric treatment from its inception to its contemporary academic prominence.

A. *Legal Asymmetry*

For more than seventy years, American campaign-finance law has reflected an abiding commitment to the symmetric treatment of corporations and unions. In the 1940s, largely out of concern for the rising power of organized labor, Congress sought to subject unions to the same political restrictions that had long applied to corporations.⁸ It did so first by passing the War Labor Disputes Act of 1943 (“WLDA”), which temporarily banned union contributions to federal candidates.⁹ That provision matched the restriction on corporate contributions put in place by the Tillman Act of 1907.¹⁰ Then, in 1947, Congress passed the Labor Management Relations Act (“LMRA”)—better known as Taft-Hartley—which made permanent the ban on union campaign contributions, while also extending previous regulation by placing symmetric restrictions on corporate and union *expenditures* on federal elections.¹¹

Various legislative statements and judicial interpretations in that early period embraced the goal of union-corporate symmetry. For example,

⁸ See David J. Sousa, “No Balance in the Equities”: Union Power in the Making and Unmaking of the Campaign Finance Regime, 13 *Stud. Am. Pol. Dev.* 374, 381 (1999).

⁹ War Labor Disputes Act, Pub. Law No. 78-89, 57 Stat. 163 (1943) (codified as amended at 50 U.S.C. § 1501 et seq. (2012)).

¹⁰ Tillman Act of 1907, Pub. Law No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2012)).

¹¹ See Labor Management Relations Act (Taft-Hartley) of 1947 § 304, 80 H.R. 3020, Pub. L. No. 80-101, 61 Stat. 136, 159 (codified as amended in scattered sections of 29 U.S.C.); Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law, 92 *Geo. L.J.* 871, 928 (2004).

during consideration of the WLDA, Congressman Clare Hoffman of Michigan stated that “[A]s long as we have a law which prohibits corporations from making political contribution, I know of no reason . . . why as a matter of self-preservation we do not place . . . labor organizations on the same plane as corporations and individuals.”¹² Senator Robert Taft explained that the proposed ban on unions spending treasury money on elections was “exactly the same as the prohibition against a corporation using its stockholders’ money for political purposes.”¹³

The push for union-corporate symmetry was not lost on judges tasked with interpreting these statutes. For example, in *United States v. CIO*, the Supreme Court issued a strong statement endorsing union-corporate symmetry, essentially accepting the proposition that any campaign-finance rule that applies to one should apply to the other.¹⁴ Nearly a decade later, in *United States v. UAW-CIO*, the Court echoed these sentiments, highlighting a legislative statement that the campaign-finance law at issue “seeks to put labor unions on exactly the same basis, insofar as their financial activities are concerned, as corporations have been on for many years.”¹⁵

Over the next couple of decades, a consensus seemed to solidify around the idea of equal regulation of corporations and unions.¹⁶ For example, in 1962, President John F. Kennedy’s Commission on Campaign Costs endorsed what it took to be congressional policy “to restrain equally without exception or discrimination the activities of corporations and labor unions with respect to political contributions and expendi-

¹² See 89 Cong. Rec. 3353 (1943) (statement of Rep. Hoffman); see also Sousa, *supra* note 8, at 382 (discussing Rep. Hoffman’s remarks).

¹³ See 93 Cong. Rec. 6440 (1947) (statement of Sen. Taft); see also Mallory, *supra* note 1, at 19 & n.125 (discussing Senator Taft’s statements); Winkler, *supra* note 11, at 929 (same). Shortly before he made this statement, Senator Taft also said that a union’s use of dues for a newspaper advertisement in support of a candidate “is exactly as if a railroad itself, using its stockholders’ funds, published such an advertisement in the newspaper supporting one candidate as against another.” See 93 Cong. Rec. 6436–37 (1947) (statement of Sen. Taft).

¹⁴ 335 U.S. 106, 121–22 (1948); see also Winkler, *supra* note 11, at 931 (discussing *United States v. CIO*).

¹⁵ 352 U.S. 567, 579 (1957) (citation and internal quotation marks omitted).

¹⁶ See Sousa, *supra* note 8, at 389.

tures.”¹⁷ The Report went on to recommend that the “present equal legislative treatment of these organizations” be maintained.¹⁸

In 1971, Congress passed the Federal Election Campaign Act (“FECA”), which, along with amendments to the Act in 1974 and 1976, sought to improve disclosure of federal candidates’ funding and place limits on contributions made to their campaigns.¹⁹ Although the political history of FECA is complicated, Congress’s commitment to union-corporate symmetry persisted. The Act and its implementing regulations treated unions and corporations equally, from their collection of money through political action committees (“PACs”), to their communication with stakeholders, to the disclosure of their electoral activity.²⁰

The next major wave of campaign-finance reform came in 2002 with the passage of the Bipartisan Campaign Reform Act (“BCRA”), popularly known as McCain-Feingold.²¹ BCRA ushered in several significant legal reforms, including the prohibition on spending union or corporate treasury funds on “electioneering communications”—broadcast advertisements in the run up to elections that refer to federal candidates, but do not technically qualify as express advocacy prohibited by FECA.²² The congressional policy in favor of union-corporate symmetry, however, remained as strong as ever.²³

In 2010, the Supreme Court issued its decision in *Citizens United*, which struck down BCRA’s prohibition on corporate and union sponsorship of electioneering communications.²⁴ *Citizens United* changed the campaign-finance landscape in deep and important ways. It unleashed corporations and unions to spend unlimited amounts of money on politics, provided that they do not coordinate with candidates, and precipitated the rise of so-called “Super PACs,” which are political organizations that can accept and spend unlimited sums from union and

¹⁷ See President’s Comm’n on Campaign Costs, Financing Presidential Campaigns: Report of the President’s Commission on Campaign Costs 20 (1962), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-093-002.aspx> [https://perma.cc/UZ5W-4XWR].

¹⁸ *Id.* at 21.

¹⁹ Federal Election Campaign Act of 1971, Pub. L. No. 92–225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431 et seq. (2012)).

²⁰ See Sousa, *supra* note 8, at 390–92.

²¹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (codified as amended at 2 U.S.C. § 431 et seq. (2012)).

²² See *id.* § 203 (codified at 2 U.S.C. § 441b).

²³ See Torres-Spelliscy, *supra* note 1, at 117–18.

²⁴ 558 U.S. at 365.

corporate treasuries.²⁵ But once again, these campaign-finance law developments left union-corporate symmetry intact. Before *Citizens United*, unions and corporations were equally regulated in their spending on politics; after *Citizens United*, they were equally unregulated.²⁶

As many commentators have noted, however, this longstanding commitment to symmetry hides at least one important way in which the law does not treat unions and corporations the same. While unions and corporations are subject to symmetric regulations regarding political spending, they are not treated equally with regard to how that money is obtained.²⁷ More specifically, modern labor law provides employees in unionized workplaces with a right to avoid paying for ideological speech with which they disagree, while corporate law provides no analogous right to dissenting shareholders.

This asymmetry emerged from a variety of developments in labor law and subsequent Supreme Court interpretations of that law. Starting in 1935, Congress passed the National Labor Relations Act (“NLRA”), which permitted employers and unions to enter “closed-shop” agreements requiring employers to hire only union members.²⁸ In 1947, however, Congress effectively outlawed these closed-shop agreements as part of the LMRA.²⁹ Cognizant of the free-riding threat that this new legislation created, Congress at the same time permitted employers and unions to enter into “union shop” agreements, which ostensibly require employees to become union members after they are hired, but ensure that the benefits of membership can only be conditioned on payment of dues and fees required of members.³⁰ This same basic arrangement was also permitted under amendments to the Railway Labor Act (“RLA”),

²⁵ See *SpeechNow.org v. FEC*, 599 F.3d 686, 692–96 (D.C. Cir. 2010).

²⁶ See Sachs, *supra* note 1, at 802 (explaining that before *Citizens United*, corporations and unions were “equally constrained by campaign-finance regulation,” and after the decision, they were “equally unconstrained and free to use their general treasuries to fund federal election expenditures”).

²⁷ See *id.* at 803 (noting asymmetry between corporations and unions with regard to funding political speech); see also Mallory, *supra* note 1, at 30 (same); Torres-Spelliscy, *supra* note 1, at 101–06 (same); Garden, *supra* note 1, at 4–6 (same); Fisk & Chemerinsky, *supra* note 1, at 1026 (same); Brief of Corporate Law Professors, *supra* note 1, at 4–5 (same).

²⁸ See National Labor Relations Act § 8(3), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a) (2012)).

²⁹ See Labor Management Relations (Taft-Hartley) Act of 1947 § 8(a)(3), Pub. L. No. 80-101, 61 Stat. 136, 140–41 (codified as amended at 29 U.S.C. § 158(a)(3) (2012)).

³⁰ See *id.*; Sachs, *supra* note 1, at 812; Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law Unionization and Collective Bargaining* 898–900, 921 (2d ed. 2004).

which specifically governs labor relations in the railroad and airline industries.³¹

Not long after enactment of these legislative changes, a group of non-union railroad employees challenged their legality, arguing that requiring employees to join a union violated their First Amendment rights. The Nebraska Supreme Court initially accepted this claim, but the U.S. Supreme Court reversed in *Railway Employees' Department v. Hanson*.³² After determining that private-sector union security agreements constitute state action under the RLA, the *Hanson* Court rejected the claim that paying fees to a union for collective-bargaining activities violates the First Amendment.³³ In the Court's view, there was little reason to think that compelled support of ordinary union activities imposes a cognizable First Amendment burden.

Several years later, the Supreme Court addressed a question that it had reserved in *Hanson*, namely, whether compelled support of a union's *ideological* activities violates the First Amendment.³⁴ Invoking the doctrine of constitutional avoidance, the Supreme Court held in *International Ass'n of Machinists v. Street* that although the RLA permits unions to use dissenting employee money for collective-bargaining purposes, it does not authorize use of their funds for ideological activity to which they object.³⁵

In 1977, the Supreme Court took this same basic approach in the context of public-sector employment. In *Abood*, the Court upheld Michigan's "agency shop" provision—which required employees who did not wish to join the union to pay a substitute fee equivalent to dues—but held that dissenting employees' funds may not be used to support the union's political or ideological activities.³⁶ Although *Hanson* and *Street* involved challenges to union-security agreements in the private sector, the *Abood* Court relied heavily on those decisions to reach the same conclusion in the public sector.³⁷

³¹ See 64 Stat. 1238 (1951) (codified at 45 U.S.C. § 152 (Eleventh)); Gorman & Finkin, *supra* note 30, at 899.

³² 351 U.S. 225, 238 (1956).

³³ *Id.* at 232–38.

³⁴ See *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 742–44 (1961).

³⁵ See *id.* at 763–70.

³⁶ 431 U.S. at 234–36.

³⁷ *Id.* at 220–23.

For decades after *Abood*, the Supreme Court continued to affirm its basic logic.³⁸ And in 1988, in *Communication Workers of America v. Beck*, the Court imported the logic of *Hanson*, *Street*, and *Abood* into the context of the NLRA as a matter of statutory interpretation.³⁹ As a result, the basic framework for union dissenters' rights is essentially uniform across all areas of federal law. Where state law allows, unions and employers are permitted to enter into agreements by which employees are compelled to subsidize union activities, but no portion of that funding may be used on ideological activities to which an employee objects.

In several recent cases, the Supreme Court has signaled interest in unsettling *Abood's* basic dichotomy, at least in the context of public-sector employment. First, in *Knox v. Service Employees International Union, Local 1000*, the Court went out of its way to question the constitutionality of mandatory fees in public-sector employment, while ultimately not reaching the issue.⁴⁰ And only two years later, in *Harris v. Quinn*, the Court held that a fair-share fee arrangement violated the First Amendment rights of in-home personal care assistants.⁴¹ Again, the Court indicated in dicta that the *Abood* regime may not sufficiently protect the constitutional rights of public-sector employees to avoid being compelled to subsidize unions, even for ordinary collective-bargaining activities.⁴² That issue was squarely presented in *Friedrichs v. California Teachers Ass'n*, but after Justice Scalia's death in February 2016, the Court issued a *per curiam* opinion affirming judgment for the union by an equally divided court.⁴³

The Court's jurisprudence on union-security agreements, therefore, has created a significant asymmetry in regulation of union and corporate political activity. Unions are not permitted to use funds from dissenting employees to pursue political or ideological objectives. Yet there is no corresponding restriction on the use of shareholder money. In other words, unions may only use employee funds on ideological activities

³⁸ See, e.g., *Locke v. Karass*, 555 U.S. 207, 213–14 (2009); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516–26 (1991); *Chi. Teachers Union, Local No.1 v. Hudson*, 475 U.S. 292, 301–06 (1986); see also Brief for the United States as Amicus Curiae Supporting Respondents at 5, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 7252631 (discussing Supreme Court cases affirming *Abood's* logic).

³⁹ *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 745–62 (1988).

⁴⁰ 132 S. Ct. 2277, 2287–93 (2012).

⁴¹ 134 S. Ct. 2618, 2632–38 (2014).

⁴² *Id.*

⁴³ 136 S. Ct. at 1083.

with their *consent*, while corporations may use shareholder money without regard to dissenting shareholders' views.

B. The Critics

Not long after the Court's decision in *Abood*, scholars began to take note of the legal asymmetry between rights of dissenting employees and dissenting shareholders.⁴⁴ In a groundbreaking article published in the *Yale Law Journal*, Professor Victor Brudney offered the first sustained argument for an analogy between the union context and the corporate context. In his argument for greater union-corporate symmetry with respect to dissenters' rights, Brudney drew heavily on the union-security cases to support his claim that dissenting shareholders deserve greater protection. His claim, in other words, was that dissenting shareholders and dissenting employees are similarly situated—that their interests are “comparable”—and that the law regulating corporations ought to reflect that symmetry.⁴⁵

Nearly thirty years later, the Supreme Court's decision in *Citizens United* prompted scholars to revisit Brudney's thesis, particularly his analogy from union-security cases to the corporate context.⁴⁶ As discussed above, *Citizens United* maintained surface-level symmetry between unions and corporations with regard to political spending. But these scholars highlighted the continuing tension between conventional assumptions of union-corporate symmetry and asymmetric treatment of dissenting employees and dissenting shareholders.⁴⁷

⁴⁴ See, e.g., Brudney, *supra* note 1, at 268–95. The Supreme Court addressed the question of asymmetry in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978), but more or less summarily dismissed it by noting that unlike dissenting employees, dissenting stockholders can simply sell the shares of any corporation whose spending conflicts with their beliefs. I address this notion of shareholders' freedom to exit, and subsequent scholarly criticism of that notion, in greater detail below. See *infra* Section III.B.

⁴⁵ See Brudney, *supra* note 1, at 270. Justice Brennan cited Brudney's article with approval in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 675 (1990) (Brennan, J., concurring).

⁴⁶ See, e.g., Sachs, *supra* note 1, at 809–58; Bebhuk & Jackson, *supra* note 1 at 111–15; Mallory, *supra* note 1, at 28–38; Torres-Spelliscy, *supra* note 1, at 112–29; see also Garden, *supra* note 1, at 32–45 (noting tension between the Court's decision in *Citizens United* and the union-security cases and arguing for greater union speech rights); Fisk & Chemerinsky, *supra* note 1, at 1088 (same); Estlund, *supra* note 1, at 185 n.84 (endorsing Sachs's argument for symmetric treatment of corporations and unions with regard to political opt-out rights).

⁴⁷ Sachs, *supra* note 1, at 805; Mallory, *supra* note 1, at 9–20, 30; Bebhuk & Jackson, *supra* note 1, at 114.

Finding little to justify this state of affairs, these symmetry theorists renewed Brudney's call for legal reform. Although contemporary symmetry theorists share the basic view that unequal treatment of unions and corporations is anomalous and unjustified, they propose several possible remedies. Following Brudney's initial inclination, some symmetry theorists propose that shareholders be given greater authority to control when and how corporations spend money on politics.⁴⁸ For example, in the immediate aftermath of *Citizens United*, two prominent corporate law commentators proposed a supermajority voting requirement, whereby any political spending decision would have to be approved by some percentage of shareholders above 50%—perhaps 60%, 66%, 75%, or 80%.⁴⁹ On this view, corporate law could protect the interests of dissenting shareholders in not having their money used for political speech with which they disagree—the same interests that the law has long protected in the context of dissenting employees.

Other symmetry theorists offer an even more provocative proposal. In their view, shareholders should be given the right to “opt out” of having their funds used for ideological speech with which they disagree, the same way that dissenting employees can opt out of subsidizing ideological union expenditures under the *Abood* regime.⁵⁰ For example, one prominent commentator proposed that corporations be required to provide dissenting shareholders with a dividend payment equal to the pro rata amount that the corporation spends on politics in a given year.⁵¹ Under this arrangement, shareholders would receive the same kind of protection that has long been afforded to union dissenters, while corporations would retain the ability to spend willing shareholders' money on politics.

⁴⁸ See, e.g., Bebchuk & Jackson, *supra* note 1, at 115–17 (proposing various reforms to empower shareholders).

⁴⁹ See *id.* at 116.

⁵⁰ See, e.g., Sachs, *supra* note 1, at 808 (arguing for shareholder opt-out right); Mallory, *supra* note 1, at 3–4, 36–38 (same); see also David A. Grossberg, Comment, The Constitutionality of the Federal Ban on Corporate and Union Contributions and Expenditures, 42 U. Chi. L. Rev. 148, 158 (1974) (“[S]tockholders who do not wish to participate in corporate political contributions could request a pro rata rebate in the form of a special dividend.”).

⁵¹ See Sachs, *supra* note 1, at 808, 864 n.314 (providing details on how a dividend might be distributed when investors hold their shares through institutions such as mutual funds). Professor Richard Briffault criticizes Sachs's proposal as unrealistic without disagreeing with his basic normative argument for symmetry. See Richard Briffault, The Uncertain Future of the Corporate Contribution Ban, 49 Val. U. L. Rev. 397, 432–33 (2015).

Still other symmetry theorists argue that there should be an “opt-in” requirement for corporate political spending.⁵² Under this view, shareholders should be given an opportunity to express willingness to have their money spent on corporate political activities through the corporation’s annual proxy vote.⁵³ Rather than tracking the traditional union-security arrangements, this proposal hews more closely to the Supreme Court’s decision in *Knox*, which held that dissenting employees must be given the opportunity to “opt-in” to union special assessments.⁵⁴

Despite their differing views on the precise shape of legal reform, symmetry theorists share the same basic normative assessment of current law. Although *Citizens United* appears to treat unions and corporations the same, that symmetry with respect to political spending is superficial and obscures important asymmetries lying just beneath the surface of campaign-finance law. Those asymmetries are a product of the law governing union-security agreements and the Court’s jurisprudence on the rights of dissenting employees to avoid funding ideological activities with which they disagree. Furthermore, critics contend, the principles underlying the law of union security can be translated into the corporate context, and there is no principled justification for treating corporations differently than unions.⁵⁵ As a consequence, based on the analogy to the rights of dissenting employees, legal reform is necessary to bring the rights of corporate shareholders into line.

Even more recently, the argument for union-corporate symmetry has reemerged in what might seem like an unlikely place. In *Friedrichs*, a group of public school teachers challenged the basic framework for dissenting employee opt-out rights, at least in the context of public-sector employment.⁵⁶ The teachers claimed that the use of dissenting employees’ money by public-sector unions on *any activities*—whether or not they are related to the union’s collective-bargaining responsibilities—

⁵² See, e.g., Torres-Spelliscy, *supra* note 1, at 129 (arguing that shareholders should have a right to opt into corporate political spending through the shareholder voting system).

⁵³ *Id.*

⁵⁴ See *id.* at 104–06, 129 (discussing *Knox*, 132 S. Ct. at 2293–96).

⁵⁵ See, e.g., Sachs, *supra* note 1, at 819–58, 869; Bebchuk & Jackson, *supra* note 1, at 114 (rejecting a distinction based on the “volitional nature of being a shareholder”); Torres-Spelliscy, *supra* note 1, at 115; Mallory, *supra* note 1, at 30, 32 (“[T]he two contexts are sufficiently parallel that no principled distinction exists that would prevent the cross-application of precedents.”).

⁵⁶ Brief for the Petitioners at 2, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915), 2015 WL 5261564.

violates their First Amendment rights.⁵⁷ The claim, in other words, was that *Abood* should be overruled and that public-sector unions should only be able to spend employee money when those employees voluntarily contribute to the union.

In this context, nineteen of the nation's most prominent corporate law professors revisited the arguments of symmetry theorists and injected new energy into the push for greater union-corporate symmetry.⁵⁸ Much like the symmetry theorists who wrote in the wake of *Citizens United*, the corporate law professors highlighted legal differences between the rights of dissenting employees in unionized workplaces and the rights of dissenting shareholders in business corporations. With regard to the *Friedrichs* case, the corporate law professors urged the Court not to expand the rights of dissenting employees, lest the asymmetry between their rights and the rights of corporate shareholders become even more pronounced.⁵⁹ Implicit in this argument, though, is the broader claim that union-corporate asymmetry is unjustified and that legal reform is necessary to bring an end to it.⁶⁰

The recent resurgence of the argument for union-corporate symmetry is not limited to the halls of the academy. Indeed, one of the most prominent corporate law jurists in the country has joined the ranks of symmetry theorists and endorsed the analogy from union dues cases to support corporate law reform.⁶¹ At a time when the rights of union dissenters have been headed in one direction and those of dissenting shareholders have been headed in another, the argument for symmetry is now being raised with even greater urgency and enthusiasm.

From their inception in the early 1980s, resurgence after *Citizens United*, and reemergence in *Friedrichs*, the arguments for union-corporate symmetry have differed in their details, but they have shared several key features. One of those features has been a nuanced and sophisticated rejection of conventional wisdom on why unions may be treated differently than corporations. Most importantly, symmetry theorists have successfully rebutted the claim—endorsed in passing by the

⁵⁷ See *id.* at 16–51.

⁵⁸ See Brief of Corporate Law Professors, *supra* note 1.

⁵⁹ See *id.* at 39.

⁶⁰ See *id.* at 5, 39 (implicitly criticizing asymmetry in treatment of unions and corporations).

⁶¹ See Strine, *supra* note 1, at 40–46.

Supreme Court⁶² and casually assumed by others⁶³—that corporate shareholders can easily sell their shares if they want to avoid funding corporate political activity. In the modern age of investment through diversified portfolios managed by large institutional investors, the claim of easy exit no longer holds true.⁶⁴ Having swept away the conventional justifications for treating unions and corporations differently, symmetry theorists are then in a position to make their claim that such asymmetry is unjustified and that legal reform is necessary to bring regulation of corporations into line with that of unions.

II. PRINCIPLES OF SYMMETRY

As discussed in the previous Part, symmetry theorists argue in favor of an analogy from the union-dues context to the corporate context. Their basic claim is that corporate shareholders who do not wish to subsidize the ideological activities of the corporations in which they invest find themselves facing a situation similar to that of employees who do not wish to support such activities by the union that represents them. The strength of that analogy, however, depends on how one formulates the principle that grounds union dissenters' rights to avoid funding causes with which they disagree.⁶⁵ That is, to know whether dissenting shareholders should be treated more like dissenting employees, one first needs to be clear about what values justify those employees' rights in the first place.

This Part identifies and distills three distinct principles underlying various arguments for union-corporate symmetry. Some symmetry theo-

⁶² See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

⁶³ See, e.g., Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right that Big Corporations Should Have but Do Not Want*, 34 *Harv. J.L. & Pub. Pol'y* 639, 649 (2011); Michael J. Goldberg, *Democracy in the Private Sector: The Rights of Shareholders and Union Members*, 17 *U. Pa. J. Bus. L.* 393, 399 (2015).

⁶⁴ See, e.g., Sachs, *supra* note 1, at 806, 838–40; Bebhuk & Jackson, *supra* note 1, at 113; Torres-Spelliscy, *supra* note 1, at 125; Strine, *supra* note 1, at 30–33; Brief of Corporate Law Professors, *supra* note 1, at 5, 9–11, 23, 34; see also Garden, *supra* note 1, at 44–45 (discussing obstacles to effective use of shareholder exit rights); Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 *Seattle U. L. Rev.* 1299, 1327–29 (2012) (discussing difficulty of exit from mutual fund investments).

⁶⁵ See Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 577 (1987) (arguing that the decision about what makes one situation similar to another in relevant respects depends on formulating an organizing standard or theory of relevance).

rists are explicit about the principle from which they are working,⁶⁶ while others leave that normative grounding implicit.⁶⁷ But all arguments for symmetry depend at the very least on a working idea of what union dissenters' rights are all about.

Although each of these three principles holds some intuitive appeal, all of them ultimately fail to offer a coherent and attractive view of union dissenters' rights. The remainder of this Part shows why existing accounts of union dissenters' rights are inadequate. The next Part then proposes an alternative principle—grounded in concerns for freedom of conscience—and argues that this principle should serve as the theoretical starting point for evaluating the analogy to corporate shareholders.

A. *Sphere Separation*

One kind of argument for union-corporate symmetry is grounded in a principle of sphere separation.⁶⁸ On this view, social actors may use economic power to gain economic benefits or advantages, but they may not attempt to convert economic power into political support.⁶⁹ To do so would destroy the integrity of the political sphere by distributing political goods according to inappropriate criteria drawn from another sphere.⁷⁰

In the context of union-security agreements, the idea here is that employees may not be forced to subsidize the union's political activities, because that would impermissibly convert the union's economic power into political support.⁷¹ This sphere-separation principle, in turn, explains the basic analytical structure of union dissenters' rights. Under *Abood* and other union-security cases, unions are permitted to use their economic power over dissenting employees to get them to subsidize the union's *economic* program—that is, their activities related to collective bargaining. But the union may not use that same economic power in an

⁶⁶ See, e.g., Sachs, *supra* note 1, at 820–27 (adopting Professor Michael Walzer's theory of sphere separation).

⁶⁷ See, e.g., Brudney, *supra* note 1.

⁶⁸ See Sachs, *supra* note 1, at 820–27; Brudney, *supra* note 1, at 269, 280, 289 (implicitly adopting a sphere-separationist view).

⁶⁹ See Brudney, *supra* note 1, at 280.

⁷⁰ See Sachs, *supra* note 1, at 820–27 (discussing the principle of sphere separation).

⁷¹ See *id.*

effort to secure dissenting employees' support for the union's own political and ideological positions.⁷²

The argument regarding sphere separation draws support from analogies to other areas of the law in which the principle is thought to operate. For example, under modern labor law, employees are not permitted to use their own form of economic power—the ability to go on strike—in order to achieve political goals.⁷³ And even outside of labor law, the principle appears vibrant. The prohibition on vote buying can be seen as a straightforward recognition that economic power should not be so easily converted into political support.⁷⁴

The most sophisticated rendering of the sphere-separation argument for union-corporate symmetry is anchored in a particular theory of distributive justice. More specifically, the sphere-separation argument adopts a “conventionalist” approach, which works from within existing social practices to determine appropriate distributive criteria for each distinct sphere.⁷⁵ Our existing social practices—including our legal practices—can tell us the proper distributive principles for different spheres and provide us with the guidance we need to live up to our joint commitments to live together with one another in political community.⁷⁶

At bottom, the philosophical argument for sphere separation is an argument from political equality.⁷⁷ It resists the idea of “simple equality,” arguing that justice in political communities does not demand equal distribution of all resources.⁷⁸ What political equality demands, by contrast, is only distribution in each sphere according to that sphere's implicit distributive criteria and policing against conversion of power from one sphere to another.⁷⁹

Although initially attractive, the argument regarding sphere separation suffers from several shortcomings. To begin with, it appears to be at odds with the rationales of union-dissenter cases themselves. In those

⁷² See *id.*

⁷³ See *id.* at 821–22 (citing *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982)).

⁷⁴ See *id.* at 821–23 (discussing the prohibition on vote buying).

⁷⁵ See *id.* at 820–21 (citing Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 17–20 (1983)). For use of the term “conventionalist” to describe Walzer's argument, see Brian Barry, *Books: Intimations of Justice*, 84 *Colum. L. Rev.* 806, 807–08 (1984) (reviewing Michael Walzer, *supra*).

⁷⁶ See Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* xiv (1983).

⁷⁷ *Id.* at 13–26.

⁷⁸ *Id.* at 13–17.

⁷⁹ *Id.* at 17–20.

cases, the Court does make a distinction between dissenters' compulsory subsidization of the union's collective-bargaining activities—which is permissible—and dissenters' subsidization of the union's ideological activities—which is not.⁸⁰ Sphere separationists read this distinction as vindicating the principle of rigid division of spheres. But the Court has denied that compelled subsidy of collective-bargaining activities is without First Amendment implications. Instead, the Court has found that such compelled subsidies *do* infringe on significant First Amendment interests, but that they are *justified* by the state's strong interest in facilitating labor peace by ensuring that unions are not destroyed by employees' structural incentives to free-ride.⁸¹ In other words, the Court's blessing of compelled subsidies for collective bargaining has been the result of a *balancing* approach, rather than an endorsement of distributive criteria within the economic sphere.⁸²

More generally, there appears to be significant tension between existing campaign-finance law and the idea that we should prevent conversion of economic power into political power. *Citizens United*, in particular, seems to stand strongly against this proposition. In *Austin v. Michigan Chamber of Commerce*, the Court did seem to endorse some version of the sphere-separation principle, upholding a state law that prohibited use of corporate treasury money to support or oppose candidates in the state's elections.⁸³ In his opinion for the Court, Justice Thurgood Marshall wrote that the law was justified by the state's interest in avoiding "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁸⁴ Although formally cast as an anti-corruption interest, this account has clear affinities with the sphere-separation view of

⁸⁰ See *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988); *Abood*, 431 U.S. at 233–37; *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 767–70 (1961); *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 235–38 (1956).

⁸¹ See, e.g., *Abood*, 431 U.S. at 224 (discussing the State's interest in avoiding free riders on union activity).

⁸² See Micah Schwartzman, *Conscience, Speech, and Money*, 97 Va. L. Rev. 317, 346–54 (2011) (arguing that the Court has adopted a balancing approach to questions of compelled subsidization of speech).

⁸³ 494 U.S. 652, 659–60 (1990).

⁸⁴ *Id.* at 660.

political equality.⁸⁵ But this is precisely the view that the Court rejected in *Citizens United*.⁸⁶

To be sure, proponents of the sphere-separation view recognize the uneasy fit between the anti-conversion principle and the law of unlimited corporate and union expenditures on politics.⁸⁷ In response, one commentator has refined the sphere-separation principle by narrowing its scope of application.⁸⁸ The reformulated account distinguishes the principle from *Citizens United*—that economic power may be converted into political power with regard to *amplifying* a speaker’s voice—and the narrower principle from the union-dues cases—that economic actors may not condition *access to significant economic opportunities* on compliance with the economic actor’s political agenda.⁸⁹

Although this reformulation avoids particular tensions with *Citizens United*, it still seems to run against the grain of the Court’s broader campaign-finance jurisprudence going back to *Buckley v. Valeo*.⁹⁰ In *Buckley*, the Court distinguished limits on individual campaign *contributions*—which are consistent with the First Amendment—and limits on individual campaign *expenditures*—which are subject to the highest level of judicial review. In doing so, the Court rejected the idea that campaign-finance laws could be justified on political equality grounds, insisting that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁹¹

⁸⁵ See David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L. Rev. 1369, 1369–70 (1994); David A. Strauss, What Is the Goal of Campaign Finance Reform?, 1995 U. Chi. Legal F. 141, 143; see also Richard L. Hasen, Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections 73 (2016) (reading *Austin* as grounded in interests of political equality) [hereinafter *Plutocrats United*]; Julian N. Eule, Promoting Speaker Diversity: *Austin* and Metro Broadcasting, 1990 Sup. Ct. Rev. 105, 108–11 (same); Richard L. Hasen, Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers, 84 Calif. L. Rev. 1, 41 (1996) (same); Adam Winkler, Beyond *Bellotti*, 32 Loy. L.A. L. Rev. 133, 155 (1998) (collecting sources for equality view of *Austin*).

⁸⁶ *Citizens United*, 558 U.S. at 365 (overruling *Austin*, 494 U.S. 652).

⁸⁷ See Sachs, *supra* note 1, at 821; Victor Brudney, Association, Advocacy, and the First Amendment, 4 Wm. & Mary Bill Rts. J. 1, 28–29 (1995).

⁸⁸ See Sachs, *supra* note 1, at 824.

⁸⁹ *Id.*

⁹⁰ 424 U.S. 1 (1976) (per curiam).

⁹¹ *Id.* at 48–49.

The Court's rejection of political-equality rationales in campaign-finance law has been given wide berth in recent cases.⁹² Indeed, in *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, the Court seemed to treat even the slightest hint of egalitarian motivations as sufficient to render any campaign-finance law unconstitutional, even when that law places no limits on amplifying speech.⁹³ The result is that arguments based on political equality in this area are typically considered to be dead on arrival in any U.S. court.⁹⁴ Given this state of affairs, it seems hard to square a robust sphere-separation view of union dissenters' rights with the rest of First Amendment law.

Moreover, the reformulated principle of sphere separation is an uneasy fit with federal law's tolerance of employment discrimination on the basis of political affiliation. Federal law prohibits employment discrimination on a number of grounds, including race, sex, religion, and disability, but most private employers remain free to take adverse action against an employee based on that employee's politics.⁹⁵ To be sure, several states and municipalities prohibit this kind of discrimination,⁹⁶

⁹² *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011); *Citizens United*, 558 U.S. at 379.

⁹³ *Ariz. Free Enter.*, 131 S. Ct. at 2825–26 (referring to egalitarian motivation behind matching-funds program as a “dangerous enterprise”); see also *id.* at 2845 (Kagan, J., dissenting) (criticizing the majority opinion for applying a “special rule of automatic invalidation” for statutes with any connection to equality); Transcript of Oral Argument at 48, *Ariz. Free Enter.*, 131 S. Ct. 2806 (No. 10-238), http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-238.pdf [<https://perma.cc/LM4W-8ARZ>] (transcribing Chief Justice Roberts' suggestion that statement on government website that law was passed to “level the playing field” constituted “clear evidence that it's unconstitutional”); Hasen, *Plutocrats United*, *supra* note 85, at 84–86 (discussing Chief Justice Roberts' comments at oral argument).

⁹⁴ Professor Richard Hasen has expressed optimism that a change in the Supreme Court's composition might revive political equality as a compelling state interest. See Hasen, *Plutocrats United*, *supra* note 85, at 176–89.

⁹⁵ See U.S. Equal Emp't Opportunity Comm'n, *Discrimination by Type*, <https://www.eeoc.gov/laws/types/> [<https://perma.cc/TNX3-5P8P>] (listing various types of discrimination prohibited by federal law). Professor Eugene Volokh argues that § 1985 of the Civil Rights Act may provide private employees a remedy for employer retaliation based on employees' speech advocating for a federal candidate, but acknowledges that the only court to seriously consider this argument has twice rejected it. See Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 *Tex. Rev. L. & Pol.* 295, 321–25 (2012).

⁹⁶ See Volokh, *supra* note 95 (offering comprehensive discussion of state and municipal statutes that prohibit discrimination against private-sector employees on the basis of political activity).

and there are good normative reasons for doing so.⁹⁷ But at least as the law currently stands, economic actors are often empowered to condition significant economic opportunities on compliance with their political agendas.⁹⁸

These conflicting legal conventions highlight a deeper problem with reasoning from cultural interpretations of our political traditions.⁹⁹ Rather than starting from ideal theories of personhood or political community, the argument from sphere separation begins with the actual practices of particular societies and attempts to draw out moral and political principles that those societies have already committed themselves to.¹⁰⁰ Although this methodology might help to address persistent worries about practical implementation of political theory, it suffers from a deficiency in justification. If theories of justice are simply derived from existing practices and particular cultural agreements, it is hard for such theories to escape charges of moral relativism.¹⁰¹ That is, if a theory relies on conventional understandings of distributive criteria within spheres—and, more importantly, the shape of the boundaries that separate different spheres—then there is no independent moral principle that explains why conversion of power in one sphere into power in another is a bad thing. As Ronald Dworkin famously put it, conventionalist approaches fail to recognize that “justice is our critic not our mirror.”¹⁰²

Perhaps more importantly, when there are conflicting understandings of the principles to which our political community is committed—which is surely the case when it comes to money, speech, and elections in the

⁹⁷ See Samuel Bagenstos, *Employment Law and Social Equality*, 112 Mich. L. Rev. 225, 254–59 (2013) (offering a convincing argument that the law ought to protect private-sector employees from discrimination based on political activity).

⁹⁸ See Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 Hofstra Lab. & Emp. L.J. 75, 86 (2012) (“Employers in most circumstances continue to have the right to fire employees based on their speech.”); see also Bagenstos, *supra* note 97, at 257 (explaining that employment law “do[es] not go far enough” in protecting employees from adverse actions based on their political activities).

⁹⁹ See Walzer, *supra* note 76, at xiv, 313, 320.

¹⁰⁰ To draw on Plato’s famous metaphor, the theory starts from “inside the cave” rather than relying on any idealized, objective, transcendent view of justice. See *id.* at xiv; Plato, *Republic* bk. VII (G.M.A. Grube trans., Hackett Publishing Co., Inc. 1992).

¹⁰¹ See Joshua Cohen, *Book Reviews*, 83 J. Phil. 457 (1986) (reviewing Walzer, *supra* note 76); Barry, *supra* note 75, at 807–08; Ronald Dworkin, *To Each His Own*, N.Y. Rev. Books, Apr. 14, 1983, at 4, 4–6 (reviewing Walzer, *supra* note 76); Lyle A. Downing & Robert B. Thigpen, *Beyond Shared Understandings*, 14 Pol. Theory 451, 455 (1986).

¹⁰² See Dworkin, *supra* note 101, at 6.

United States—there are no independent criteria to which we can appeal in order to adjudicate those disagreements. That is, when different conventions cut in different directions, then there is no principled way to arrive at a “shared understanding” of our common commitments. Given these interpretive shortcomings, the sphere-separation principle should not serve as a starting point for investigating the attractiveness of union-corporate symmetry.

B. Avoiding Attribution

Another kind of argument for union-corporate symmetry relies on the principle that individuals—be they employees in unionized workplaces or corporate shareholders—have an interest in not being wrongfully associated with the political positions expressed by their organizations.¹⁰³ While this interest in avoiding unwanted “association” with a political position can be understood in different ways, one view is that the First Amendment protects people’s interest in controlling the way they present themselves and their own viewpoint to the world.¹⁰⁴ But if an organization can use individuals’ money to support ideas that they abhor, there is a significant risk that those ideas will be attributed to the individuals themselves.¹⁰⁵ That attribution, in turn, would create a “false image” of those individuals’ beliefs, thereby inflicting First Amendment harm.¹⁰⁶

¹⁰³ See, e.g., Bebhuk & Jackson, *supra* note 1, at 96; Lucian A. Bebhuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 *Geo. L.J.* 923, 943 (2013) [hereinafter *Shining Light*]; see also Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 *Loy. L.A. L. Rev.* 439, 463–65 (2014) (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) and *Rumsfeld v. Forum for Acad. and Institutional Rights*, 547 U.S. 47 (2006), and arguing that the harm to union dissenters is in misattribution of political views).

¹⁰⁴ See David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 *N.Y.U. L. Rev.* 70 (2012) (arguing that the First Amendment protects the right to control one’s public persona). For the view that compelled subsidies for speech violate the First Amendment because they are a form of political establishment, see Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 *U.C. Davis L. Rev.* 1087, 1130 (2005).

¹⁰⁵ See Bebhuk & Jackson, *Shining Light*, *supra* note 103, at 943 (arguing that individuals may be associated “by proxy” with the positions taken by companies).

¹⁰⁶ See Abner Greene, *(Mis)Attribution*, 87 *Denv. U. L. Rev.* 833, 836 (2010) (explaining the view that the harm in compelled subsidy is one of misattribution and then criticizing that view); see also Todd E. Pettys, *Unions, Corporations, and the First Amendment: A Response to Professors Fisk and Chemerinsky*, 99 *Cornell L. Rev. Online* 23, 30–32 (2013) (analyzing dissenting-employee and shareholder First Amendment interests in terms of misattribution).

On closer analysis, the argument from misattribution faces several problems. To begin with, as a matter of doctrinal fit, the misattribution argument finds little or no support in the union-dues cases themselves. In fact, as commentators have long observed, the *Abood* Court makes no mention of any worry about false attribution of ideas to dissenting employees.¹⁰⁷ Without this doctrinal anchor, symmetry theorists have a hard time showing that union dissenters' rights are grounded in concerns for misattribution.

But beyond the problem of doctrinal grounding, there are several additional reasons to be suspicious of the argument from misattribution. First of all, it is worth distinguishing compelled subsidies for speech from compelled speech, even though cases dealing with the latter issue are sometimes relevant and helpful in dealing with the former. While cases like *West Virginia State Board of Education v. Barnette*, involving compelled pledges to the American flag,¹⁰⁸ and *Wooley v. Maynard*, involving use of mandatory license plates carrying the phrase "Live Free or Die,"¹⁰⁹ deal with compelled speech, union security agreements do not require dissenting employees to speak at all.¹¹⁰ Recognizing this distinction makes it harder to credit the claim that such agreements alter the way that union dissenters can present themselves to the world through their own expression.

Perhaps more importantly, it seems hard to explain the mechanism by which any reasonable observer would get a false impression of union dissenters' views based on speech by the union representing their interests. Any reasonably informed observer would know that union fees are compulsory and that, as a consequence, union speech does not necessarily represent the viewpoints of all those required to make payment.¹¹¹

¹⁰⁷ See, e.g., Klass, *supra* note 104, at 1112–17; Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 Sup. Ct. Rev. 195, 209–10 [hereinafter Post, *Compelled Subsidization of Speech*]; Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 Val. U. L. Rev. 555, 563–64 (2006); Greene, *supra* note 106, at 835–36.

¹⁰⁸ 319 U.S. 624 (1943).

¹⁰⁹ 430 U.S. 705 (1977).

¹¹⁰ Cf. Sachs, *supra* note 1, at 858 (arguing that if speech can be attributed to one who provides funds for that speech, then claims of compelled subsidy merge with claims of compelled speech); Post, *Compelled Subsidization of Speech*, *supra* note 107, at 218 (same).

¹¹¹ See Seana Valentine Shiffrin, *Essay, What is Really Wrong with Compelled Association?*, 99 Nw. U. L. Rev. 839, 853 (2005) ("If a certain speech act is required of everyone and it is publicly known that it is required, it would be unwarranted for any reasonable ob-

This general awareness of compulsion would be much like the situation in *Wooley*, in which the state mandated that automobile operators use license plates that carry the state's motto.¹¹² It is hard to imagine observers thinking that, by operating a car with the legally mandated license plate attached, drivers were endorsing the state's view.¹¹³ The harm identified in *Wooley* was something quite different—being forced to serve as a “mobile billboard” for the state's message—not the implausible risk of misattribution.¹¹⁴

Even more troublesome for the misattribution view are the typical procedures that dissenting employees must follow to opt out of subsidizing political spending. In general, before dissenting employees may opt out of funding union spending with which they disagree, they must first be “nonmembers.”¹¹⁵ That is, before dissenters can avail themselves of the option not to participate financially in the union's ideological activities, they must decisively establish their nonmembership. And even after doing so, the Court still insists that there is First Amendment harm in using nonmembers' money to support causes with which they disagree,¹¹⁶ strongly indicating that misattribution was never the Court's constitutional worry in the first place.

Finally, the Court has repeatedly taken note of the fact that union dissenters remain free to speak in their own private capacities, but has given that fact virtually no weight in its constitutional analysis. In the context of *compelled association*, the Court has relied on the idea that an actor's own ability to speak essentially obviates any concern about misattributed beliefs.¹¹⁷ But in the context of compelled subsidies for a union's ideological activities, dissenting employees' ability to clarify

server to infer that any particular utterance reflected the sincere, genuine thoughts of the particular speaker.”); see also Sachs, *supra* note 1, at 856–58 (criticizing misattribution arguments for maintaining asymmetric treatment of unions and corporations).

¹¹² 430 U.S. at 707.

¹¹³ See Greene, *supra* note 106, at 836; Post, *Compelled Subsidization of Speech*, *supra* note 107, at 209.

¹¹⁴ 430 U.S. at 715.

¹¹⁵ See *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988); Gorman & Finkin, *supra* note 30, at 920–21.

¹¹⁶ See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012).

¹¹⁷ See *Rumsfeld v. Forum for Acad. and Institutional Rights*, 547 U.S. 47, 69–70 (2006) (accepting the idea that there was a diminished burden on the Free Speech rights of law schools because they remained free to speak out in support of their own view).

their own views through individual speech is beside the point.¹¹⁸ What this shows, once again, is that there is a different principle underlying union dissenters' rights that has little to do with risk of misattribution.

C. Other People's Money

Another argument for union-corporate symmetry is that use of "other people's money" for ideological purposes constitutes a form of corruption.¹¹⁹ On this view, union dissenters' rights are grounded in the idea that employee contributions to unions are meant to enable unions to represent their economic interests in the process of collective bargaining. But if union managers were allowed to use those funds to achieve political goals without employees' consent, those actions would be illegitimate. That same form of corruption, the argument goes, is present when corporate managers use shareholder money for political speech without their consent, and thus legal reform is necessary to protect dissenting shareholders in the same manner as dissenting employees.

This argument from corruption can be elaborated in at least two distinct ways. On one account, when union leaders use employee money on politics, they are *diverting* that money from its proper purpose.¹²⁰ This worry about diversion would seem to track the traditional economic account of agency costs. According to this view, union leaders have a natural incentive to use employee money in their own interest, rather than in the interest of employees. If the law does not police against this form of managerial opportunism, then employees will suffer from inefficient use of their financial resources.¹²¹

Although policing for agency costs, either in the context of unions or corporations, is appealing as a policy matter, it is hard to square this concern over economic diversion with the nature and strength of union dissenters' opt-out rights. The anti-diversion argument is one about economic efficiency. It holds that without a mechanism to police union

¹¹⁸ See, e.g., *Abood*, 431 U.S. at 230.

¹¹⁹ See Mallory, *supra* note 1, at 9–20 (arguing that the union-dues cases stand for the proposition that use of other people's money for political purposes is an illegitimate form of corruption); see also Winkler, *supra* note 85, at 172; Winkler, *supra* note 9, at 928.

¹²⁰ See Mallory, *supra* note 1, at 23 (discussing "other-people's-money corruption" as a problem of agency costs); see also Winkler, *supra* note 11, at 928–33 (discussing concerns about agency costs when union management uses "other people's money").

¹²¹ Cf. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976) (offering the foundational economic account of agency-cost analysis).

leaders against using employee funds in their own political interests, those leaders will make inefficient spending choices because they will experience the benefits of such spending without internalizing the costs. Putting aside the implicit principal-agent view of unions—which might be contested—the interest in efficient operation of unions would appear to have very little to do with the interests protected by the First Amendment. To put it another way, policing for inefficient union management by eliminating the temptation to self-deal may very well be a worthy policy goal, but it would be strange to think that dissenting employees have a First Amendment right to maximize the economic returns from their union representation.

A second way to understand the other-people's-money argument is that it is concerned with *distortion* of the political process, rather than diversion of money from its proper uses.¹²² On this account, the problem with unions using employee money on politics is that it will skew public debate by inflating the impact of certain political positions supported by management without being calibrated to actual support among represented employees.¹²³ And just as in the union context, when corporate managers use corporate treasury money on politics, they distort the political process by misrepresenting the amount of support enjoyed by certain positions or candidates.

In contrast to the anti-diversion argument, the *anti-distortion* version of the other-people's-money problem has historical and theoretical connection to the First Amendment. More specifically, such arguments appeared in *Austin*¹²⁴ and are well-grounded in First Amendment theory that gives pride of place to preserving the political preconditions for authentic and meaningful self-government—and in particular to preserving a well-functioning process for conducting democratic elections.¹²⁵

But in addition to its explicit doctrinal rejection in *Citizens United*, the anti-distortion view faces at least two more problems. To begin with, it seems to ignore the modern turn in First Amendment law toward emphasizing the interests of *listeners* in hearing different viewpoints and

¹²² See Winkler, *supra* note 85, at 156; Mallory, *supra* note 1, at 8–9.

¹²³ See Mallory, *supra* note 1, at 8–9.

¹²⁴ 494 U.S. at 659–69.

¹²⁵ See Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* 44–94 (2014) (arguing that the state has a compelling interest in maintaining “electoral integrity”); cf. Hasen, *Plutocrats United*, *supra* note 85, at 187 (expressing doubt that “electoral integrity” is a constitutional interest distinct from political equality).

making up their own minds on matters related to democratic government. That is, even if using other people's money on political speech gives that speech an outsize presence in the political marketplace, modern First Amendment law has tended to brush off such concerns by asserting that listeners remain free to evaluate that speech and give it the weight that they think it deserves.¹²⁶ While this proposition might be contested as an empirical matter, the anti-paternalist view of listeners' First Amendment interests further undermines the argument from distortion.

Perhaps more importantly, the anti-distortion version of the other-people's-money argument is critically underinclusive. That is, it cannot account for the many ways in which political ideas gain outsize influence. To take one example, the modern dynamics of interest-group politics show that groups can attain influence disproportionate to their size through a combination of organizational discipline and issue prioritization.¹²⁷ More broadly, individual wealth inequality gives outsize and unrepresentative influence to some political ideas without any use of other people's money. So, if the problem with spending other people's money on politics is one of political distortion, a narrow focus on union and corporate spending would fail to account for other contexts in which that same problem appears to be much more acute. Once again, a principle underlying symmetry theorists' claims falls flat.

III. AGAINST SYMMETRY

Having identified how existing accounts of union dissenters' rights fall short, this Part advances an alternative principle in their place. That alternative principle—grounded in concerns for freedom of conscience—offers a more faithful reading of legal doctrine and a normatively superior conception of the interests at stake in avoiding compelled subsidization of speech with which one disagrees. The conscience principle, in turn, establishes firmer grounds on which to test the soundness of the union-corporate analogy proposed by symmetry theorists. After articulating, elaborating, and defending the conscience principle, this Part then shows how it provides a strong justification for treating union and corporate dissenters differently.

¹²⁶ See, e.g., *Citizens United*, 558 U.S. at 371.

¹²⁷ See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 53–65, 141–48 (1965).

A. The Conscience Principle

In seeking to discern the interests that ground union dissenters' rights, perhaps the best place to start is the Supreme Court's opinion in *Abood*. As discussed above, *Abood* involved a challenge brought by a group of public school teachers to an agency-shop agreement, which required dissenting employees to make a financial contribution to the union equivalent to union dues.¹²⁸ The teachers argued that the agency-fee arrangement should be invalidated on the grounds that it violated their First Amendment rights to freedom of association. Recognizing that such arrangements might burden First Amendment interests, the Court held that agency fees may be used to support the union's collective-bargaining activities, but may not be used by the union to fund ideological activities with which dissenting employees disagree.¹²⁹

The Court's opinion in *Abood* offers the canonical account of union dissenters' rights. In explaining the basic interests at stake, the Court wrote, "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."¹³⁰ This articulation of an individual's freedom to believe and not be coerced against conscience, according to the Court, "is no incidental or secondary aspect of the First Amendment's protections," but is instead integral to maintaining the conditions necessary for a free society.¹³¹

In addition to this famous and oft-quoted language, the authorities on which the *Abood* Court relied indicate that its concern was primarily with preserving individual conscience rights. To begin with, immediately preceding the key language quoted above, the Court explicitly referred to James Madison's *Memorial and Remonstrance against Religious Assessments* and Thomas Jefferson's preamble to the Virginia Bill for Establishing Religious Freedom.¹³² Madison's *Memorial* argued against a proposed property surtax to support clergy in Virginia and

¹²⁸ *Abood*, 431 U.S. at 211.

¹²⁹ *Id.* at 233–37.

¹³⁰ *Id.* at 234–35.

¹³¹ See *id.* at 235 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))).

¹³² See *Abood*, 431 U.S. at 234 n.31.

stands to this day as one of the most important and influential arguments for religious liberty.¹³³ In the opening paragraphs of the *Memorial*, Madison insists that matters of religious belief “must be left to the conviction and conscience of every man” and that “the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment[] may force him to conform to any other establishment in all cases whatsoever.”¹³⁴ After quoting this language from Madison, the Court followed with a similar passage from Jefferson’s preamble: “[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”¹³⁵ These selected quotes make it hard to deny that freedom of conscience was foundational to the *Abood* Court’s analysis.

Moreover, in the paragraph following the key passage quoted above, the Court drew on its analysis in *Torasco v. Watkins*, further grounding its reasoning in freedom-of-conscience principles.¹³⁶ *Torasco* involved a challenge to Maryland’s public oath law, which required individuals who wished to hold public office to declare their belief in God.¹³⁷ In a unanimous opinion, the Court held that Maryland’s law violated freedoms of belief and religion guaranteed under the First Amendment.¹³⁸

To be sure, the *Abood* Court also discussed a case outside the religious liberty context, *Elrod v. Burns*,¹³⁹ alongside *Torasco*. In *Elrod*, the Court held that a political patronage law, which required affiliation with the political party in power, also violated First Amendment rights of belief and association.¹⁴⁰ But rather than undermine the freedom-of-conscience reading of *Abood*, the Court’s citation to *Elrod* merely shows that the Court viewed dissenters’ interests in following their consciences as covering the freedom to believe in both religious and nonreligious matters.¹⁴¹

¹³³ See Vincent Blasi, *Ideas of the First Amendment* 164 (2d ed. 2012).

¹³⁴ James Madison, *Memorial and Remonstrance Against Religious Assessments*, in James Madison, *Writings* 29, 30–31 (Jack N. Rakove ed., 1999).

¹³⁵ *Abood*, 431 U.S. at 234 n.31; see Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in 2 *The Papers of Thomas Jefferson* 545, 545, 552 (Julian P. Boyd et al. eds., 1950).

¹³⁶ *Abood*, 431 U.S. at 235 (citing *Torasco v. Watkins*, 367 U.S. 488 (1961)).

¹³⁷ *Torasco*, 367 U.S. at 488, 489.

¹³⁸ *Id.* at 494–96.

¹³⁹ *Elrod v. Burns*, 427 U.S. 347 (1976).

¹⁴⁰ *Id.* at 356.

¹⁴¹ *Abood*, 431 U.S. at 234–35 (citing *Elrod*, 427 U.S. at 356–57, 363–64, n. 17).

Although the *Abood* case was important in articulating the principles that ground union dissenters' rights, it is far from the Court's only word on the subject. To begin with, *Abood* explicitly built on private-sector union cases that dealt with dissenting employees' rights as a matter of statutory interpretation. For example, in *Railway Employees' Department v. Hanson*, the Court held that a private-sector union shop agreement did not violate railroad employees' freedom of conscience, because the record contained no evidence that the union's assessments were "used as a cover for forcing ideological conformity" in violation of the First Amendment.¹⁴² In a subsequent case, *International Ass'n of Machinists v. Street*, the Court discussed dissenters' rights in terms of Congress' concern for employees' "freedom of speech and beliefs," but this time held that the use of employee funds for political purposes infringed on those interests.¹⁴³

In his concurring opinion in *Street*, Justice Douglas made the conscience principles at issue even more plain. Noting that individuals should not be required to relinquish rights of "conscience, belief, or expression" when they are compelled to join groups, Douglas insisted that these individuals should be allowed to enter "with [their] own flag flying, whether it be religious, political, or philosophical."¹⁴⁴ This wide view of dissenters' conscience rights was further reinforced by Douglas' citation to the famous passages from Madison's *Memorial* and Jefferson's preamble to support the claim that compelled subsidy for political projects against which an employee is "in rebellion" violates the First Amendment.¹⁴⁵

Even Justice Black's dissent, which disagreed with the majority's reliance on the constitutional avoidance canon to resolve *Street* on statutory grounds, focused intently on dissenters' conscience interests. Much like Justice Douglas, Justice Black drew on freedom-of-conscience language from Madison and Jefferson to derive the relevant First Amendment principle.¹⁴⁶ But his opinion also invoked *Everson v. Board of Education*, a Religion Clauses case involving busing subsidies for parents who sent their children to religious schools,¹⁴⁷ to support the proposition

¹⁴² 351 U.S. 225, 236–38 (1956).

¹⁴³ 367 U.S. 740, 765 (1961).

¹⁴⁴ *Id.* at 776 (Douglas, J., concurring).

¹⁴⁵ *Id.* at 778.

¹⁴⁶ *Id.* at 790 (Black, J., dissenting).

¹⁴⁷ 330 U.S. 1 (1947).

that the First Amendment “deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other.”¹⁴⁸ Doubling down, Justice Black continued, “It should not be forgotten that many men have left their native lands, languished in prison, and even lost their lives, rather than give support to ideas they were conscientiously against.”¹⁴⁹ Again, a broad conscience principle—resonant with the Court’s protection of religious conscience, but applied to a wider category of deeply held beliefs—was a critical component in analyzing union dissenters’ rights.

The idea that dissenters’ rights are based on a concern for individual conscience has been reinforced by the Court’s subsequent treatment of *Abood*. Sticking with union-dues cases, the Court has repeatedly returned to principles from *Abood* for guidance in determining the precise scope of union dissenters’ rights and the proper remedies for their infringement. In *Chicago Teachers Union, Local No. 1 v. Hudson*, for example, the Court discussed *Abood* at length in the course of reviewing a challenge to the procedure for calculating nonmember employees’ proportionate contribution toward the union’s collective-bargaining activities.¹⁵⁰ The *Hudson* Court drew heavily on the key passage from *Abood*, which emphasized concerns for freedom of conscience,¹⁵¹ and returned to *Abood*’s discussion of principles found in the writings of Madison and Jefferson.¹⁵² The Court then held that, in part because of the possibility that dissenters’ funds might be used temporarily on ideological activities while a rebate is in process, the procedure for collecting those funds violated the First Amendment.¹⁵³

Along similar lines, in *Lehnert v. Ferris Faculty Ass’n*, the Court once again appealed to freedom-of-conscience principles drawn from *Abood*.¹⁵⁴ *Lehnert* involved a challenge by dissenting employees to an agency-shop agreement entered pursuant to Michigan’s Public Employ-

¹⁴⁸ *Street*, 367 U.S. at 791 (Black, J., dissenting).

¹⁴⁹ *Id.* at 796.

¹⁵⁰ *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

¹⁵¹ *Id.* at 302.

¹⁵² *Id.* at 305.

¹⁵³ *Id.* at 302–09. Other shortcomings of the procedure included the failure of the union to provide adequate information about the advance reduction of dues and to provide a reasonably prompt decision by an impartial adjudicator. *Id.* at 306–09.

¹⁵⁴ *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991).

ment Relations Act.¹⁵⁵ In the course of holding that unions cannot use objecting employees' funds to cover certain lobbying expenses, the *Lehnert* Court emphasized the nexus between employees' deeply held views and their interests as dissenters. The Court explained that although the First Amendment's protections are not limited to speech on ideological matters, union dissenters' interests in not subsidizing speech with which they disagree—in not becoming “an instrument” for promoting views they reject¹⁵⁶—are strongest when the subject of the subsidized speech is one about which dissenters have deeply held beliefs.¹⁵⁷ These deeply held views—those subject to claims of conscience—undergird dissenters' claims and account for their considerable strength.

Outside the context of union dissenters' rights, the Court has interpreted and applied *Abood* in terms of freedom of conscience. Perhaps most prominently, the Court has worked out the implications of *Abood*'s principles in a trilogy of challenges to mandatory assessments for commercial advertisements. The first installment in the trilogy was *Glickman v. Wileman Brothers & Elliott, Inc.*, in which the Court heard a challenge brought by California fruit producers to an order promulgated by the Secretary of Agriculture that required them to pay for generic fruit advertisements.¹⁵⁸ Writing for the Court, Justice Stevens relied on the union-dues cases, and specifically on the freedom-of-conscience principles from *Abood*, to reject the fruit growers' First Amendment claim.¹⁵⁹ At the core of the Court's reasoning was the view that, rather than standing for some broad notion that the First Amendment prohibits compelled support for any organization's expression, *Abood* recognized individuals' right not to be forced against their conscience to support an organization whose expressive activities conflict with their beliefs.¹⁶⁰ Finding that assessments to support generic fruit advertisements “cannot be said to engender any crisis of conscience,” the Court found that the dissenters' interests described so eloquently in *Abood* were not at risk.¹⁶¹

¹⁵⁵ Id. at 511–12.

¹⁵⁶ Id. at 522 (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)) (internal quotation marks omitted).

¹⁵⁷ Id. at 521–22.

¹⁵⁸ 521 U.S. 457, 460–61 (1997).

¹⁵⁹ Id. at 471–74.

¹⁶⁰ Id. at 471.

¹⁶¹ Id. at 472.

Only four years later, in *United States v. United Foods, Inc.*, the Court appeared to reverse course from *Glickman*.¹⁶² This time around, the First Amendment challenge came from a group of mushroom growers who objected to assessments used to pay for generic mushroom advertisements. Holding that the compelled subsidies at issue violated the First Amendment, the Court departed from *Abood*'s distinction between ideological and nonideological speech, noting that speech need not be related to politics in order to be eligible for First Amendment protection.¹⁶³ And, in an effort to distinguish *Glickman*, the Court observed that the compelled subsidies for fruit advertisements in that case were "ancillary to a more comprehensive program restricting marketing autonomy,"¹⁶⁴ but the compelled subsidies for mushroom advertisements were "the principal object of the regulatory scheme."¹⁶⁵ As many commentators have observed, this distinction is less than satisfying, not least because it seems to imply that the more a party is regulated, the less protection it receives from the First Amendment.¹⁶⁶ But in any event, *United Foods* did not overrule *Glickman*, and as a result created significant confusion in the doctrine by departing from *Abood*'s freedom-of-conscience grounding.¹⁶⁷

Although *United Foods* had potentially disruptive implications for compelled-subsidy doctrine, the Court quickly cabined it in *Johanns v. Livestock Marketing Ass'n*.¹⁶⁸ In *Johanns*, the Court's final installment in the trilogy of compelled advertising subsidy cases, the Court heard yet another challenge to a generic marketing scheme, this time one that contained a targeted assessment of beef producers.¹⁶⁹ Near the end of the *United Foods* opinion, the Court noted the possibility that compelled subsidies for generic advertisements were "government speech," but declined to reach that question because it was not adequately raised in the lower courts.¹⁷⁰ In *Johanns*, however, the Court took up the government

¹⁶² *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

¹⁶³ *Id.* at 413.

¹⁶⁴ *Id.* at 411.

¹⁶⁵ *Id.* at 412.

¹⁶⁶ See, e.g., Klass, *supra* note 104, at 1107; Shiffrin, *supra* note 111, at 879 n.100; see also *United Foods*, 533 U.S. at 420 (Breyer, J., dissenting) (criticizing the majority's effort to distinguish *Glickman*).

¹⁶⁷ See Klass, *supra* note 104, at 1098 (arguing that *United Foods* jettisoned *Glickman*'s freedom-of-conscience approach to problems of compelled subsidization of speech).

¹⁶⁸ 544 U.S. 550, 562–67 (2005).

¹⁶⁹ *Id.* at 553–54.

¹⁷⁰ *United Foods*, 533 U.S. at 407.

speech claim, found that the targeted assessments at issue were in fact government speech, and therefore rejected the beef producers' First Amendment claim.¹⁷¹ In the Court's view, the First Amendment does not prohibit compelled subsidy for the *government's own* speech, and therefore the beef marketing program was not unconstitutional.

Although some commentators have claimed that *Johanns* is continuous with *United Foods* and its apparent departure from *Abood*,¹⁷² it should be seen instead as a return to *Abood's* core conscience principles. There is strong evidence for this reading of *Johanns*, both in the majority opinion and in the principal dissent. Starting with the majority opinion, Justice Scalia distinguished the concepts of compelled speech and compelled subsidy, writing that the latter "invalidates an exaction not because being forced to pay for speech that is unattributed violates personal autonomy, but because being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy."¹⁷³ This view of personal autonomy—the freedom to develop one's own beliefs and not be coerced to violate one's conscience—was central to the Court's reasoning in *Abood* and its progeny.¹⁷⁴

These comments in the majority opinion came in response to the principal dissent, which noted that the case was "on all fours" with *United Foods* and denied that the speech involved was the government's own.¹⁷⁵ What is crucial to note here is that Justice Kennedy was the author of the Court's opinion in *United Foods*, but he joined the principal dissent in *Johanns*, strongly indicating that the Court was in fact changing course.¹⁷⁶ Rather than undermining the conscience principles articulated in *Abood*, then, the Court's compelled advertising subsidy cases reinforce their continued doctrinal pull.

One might be tempted to object at this point that the Court's most recent union dues cases—*Knox v. Service Employees International Union, Local 1000*, *Harris v. Quinn*, and *Friedrichs v. California Teachers*

¹⁷¹ *Johanns*, 544 U.S. at 562–67.

¹⁷² See, e.g., Wesley J. Campbell, Speech-Facilitating Conduct, 68 Stan. L. Rev. 1, 36 (2016).

¹⁷³ *Johanns*, 544 U.S. at 565 n.8.

¹⁷⁴ See *id.* (citing *Abood*, 431 U.S. at 234–36, and *Keller v. State Bar of Cal.*, 496 U.S. 1, 15–16 (1990), as support for this personal-autonomy view).

¹⁷⁵ *Id.* at 570–71 (Souter, Stevens, and Kennedy, JJ., dissenting).

¹⁷⁶ *Id.* at 570; *United Foods*, 533 U.S. at 408.

Ass'n—cast serious doubt on the continued viability of *Abood*.¹⁷⁷ Indeed, in *Friedrichs*, the Court was explicitly considering whether to overrule *Abood*¹⁷⁸ and seemed to come one vote short due to Justice Scalia's death. But even if the Court were to revisit this issue and rule in favor of union dissenters, it would only strengthen the conscience principles recognized in *Abood* by giving them an even broader scope of application than the *Abood* Court appreciated. So, although the bifurcation between compelled support for a public-sector union's ideological speech and its collective-bargaining speech may be on shaky ground, the conscience principles underlying the longstanding concern for dissenting employees' interests remain strong.

Moving beyond doctrinal fit, some commentators have called into question the coherence or normative desirability of the conscience principle.¹⁷⁹ One kind of claim—call it the *specialness objection*—holds that the real problem with the conscience principle is that it does not identify what is special about compelled subsidization of *speech* as opposed to compelled subsidization of nonexpressive activity.¹⁸⁰ On this view, for the conscience principle to succeed, it needs to explain why dissenters have an interest in withholding funds used for an organization's expressive activities but not funds used for its nonexpressive activities.

This is a serious objection, but it applies to all of First Amendment law, not just to questions of compelled subsidy.¹⁸¹ To this day, we still do not have a convincing explanation as to why speech is special as compared to other forms of human activity. But we do have a widespread normative consensus that speech deserves a high level of constitutional protection. In light of this considered judgment, it seems permissible to reason from principles that support free speech rights, even if those principles might have a broader scope of application, and to bracket larger debates about whether speech is special in the first place.

One might plausibly reformulate the *specialness objection* in the following way. Even if speech were special because of its tight link to the development of moral personhood, the mere act of *paying* for speech

¹⁷⁷ See *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016).

¹⁷⁸ *Friedrichs v. Cal. Teachers Ass'n*, 135 S. Ct. 2933 (mem.) (2015) (granting certiorari on question of whether *Abood* should be overruled).

¹⁷⁹ See *Klass*, *supra* note 104, at 1110–17; Post, *Compelled Subsidization of Speech*, *supra* note 107, at 226 n.134.

¹⁸⁰ See *Klass*, *supra* note 104, at 1114.

¹⁸¹ See Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U. L. Rev. 1284 (1983).

with which one disagrees does not threaten these same interests.¹⁸² On this account, being forced to utter speech interferes with freedom of conscience, but compelled subsidies carry too little “moral content” to do the same.¹⁸³

It is true that one’s interests in avoiding compelled speech are not co-extensive with one’s interests in avoiding compelled *subsidization* of speech. For example, compelled speech may be harmful in part because it interferes with the authenticity of one’s own mental processes,¹⁸⁴ a harm not imposed to the same degree by compelled subsidy. But even without the specter of mental manipulation, compelled subsidy can still pose a serious threat to moral personhood. Indeed, many people are genuinely aggrieved when their money is used for causes with which they disagree. And that moral injury cannot be fully explained by those individuals’ disagreement with the policies that are thereby advanced. Rather, these individuals experience a heightened moral aggravation at being used as instruments in advancing causes that they abhor.¹⁸⁵ Unless we wish to ignore this very real experience in circumstances of direct subsidy, it seems hard to maintain that compelled support is too “morally thin” to implicate conscience.

Another kind of claim—call it the *anarchy objection*—is that if we view dissenters’ rights as grounded in conscience interests, then there is no natural stopping point to such claims. That is, claims of conscience can be raised about virtually anything—they are “potentially indiscriminate”¹⁸⁶—and so we will be forced to accept virtually all claims against compelled subsidy. This is perhaps the most serious objection to the conscience reading, and so it must be handled with care. In doing so, it is first necessary to explicate with a greater degree of precision—and

¹⁸² See Klass, *supra* note 104, at 1115; cf. Schauer, *supra* note 181, at 1290–92 (arguing that speech is not special on grounds of self-fulfillment or self-realization).

¹⁸³ Klass, *supra* note 104, at 1116.

¹⁸⁴ See Vincent Blasi & Seana V. Shiffrin, The Story of *West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought, in *First Amendment Stories* 99 (Richard W. Garnett & Andrew Koppelman eds., 2012).

¹⁸⁵ See Schwartzman, *supra* note 82, at 376–80; Amy J. Sepinwall, Conscience and Complicity: Assessing Pleas for Religious Exemptions in *Hobby Lobby’s* Wake, 82 U. Chi. L. Rev. 1897, 1899–1959 (2015).

¹⁸⁶ See Post, *Compelled Subsidization of Speech*, *supra* note 107, at 226 n.134.

more precision than the Court has thus far offered explicitly—the conception of conscience with which we are working.¹⁸⁷

The remainder of this Section will argue that union dissenters’ freedom-of-conscience interests—repeatedly recognized in Supreme Court doctrine—are best seen as interests in preserving *ethical integrity*.¹⁸⁸ Before delineating these interests, it is important first to observe that this is a “wide view” of conscience. Although the value of conscience is most often invoked in conversations about *religious liberty*,¹⁸⁹ it is by no means limited to religious claims. Rather, individuals’ interests in freedom of conscience encompass diverse moral, philosophical, and religious commitments that people hold.¹⁹⁰ The wide view recognizes that, under conditions of freedom, people endorse many different conceptions of the good, some of which are religious and some of which are not, and that there are no principled grounds on which to distinguish among those beliefs in a liberal society.¹⁹¹ This wide view is both consistent with the Court’s treatment of conscience interests in the context of union dissenters’ rights—which are by no means limited to religious objections—and normatively preferable to a view that privileges religious claims of conscience over nonreligious claims.

Moving to the heart of the matter, the conception of conscience as *ethical integrity* can be best understood in terms of the value of maintaining identity. Individuals have an interest in self-authorship—that is, people have an interest in selecting from available beliefs and projects and committing to those beliefs by making them core aspects of who they are. It is in this process of selecting beliefs and projects and com-

¹⁸⁷ For different views of conscience, see Thomas E. Hill, Jr., *Four Conceptions of Conscience*, in *Integrity and Conscience* 13 (Ian Shapiro & Robert Adams eds., 1998) (detailing and evaluating four historical conceptions of conscience).

¹⁸⁸ For development of the concept of ethical integrity, see Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 *L. & Phil.* 581, 596–99 (2015); see also Ronald Dworkin, *Religion Without God* 86–88 (2013) (discussing the value of integrity); Elizabeth Sepper, *Taking Conscience Seriously*, 98 *Va. L. Rev.* 1501, 1528 (2012) (discussing the concept of “moral integrity”); Schwartzman, *supra* note 82 at 352–54 (same).

¹⁸⁹ See, e.g., Martha C. Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (2008); cf. Post, *Compelled Subsidization of Speech*, *supra* note 107, at 226 n.134 (asserting that the value of conscience is not well-explored in free speech literature).

¹⁹⁰ See Schwartzman, *supra* note 82, at 355–56.

¹⁹¹ See Micah Schwartzman, *What If Religion Is Not Special?*, 79 *U. Chi. L. Rev.* 1351, 1377–1403 (2012); Brian Leiter, *Why Tolerate Religion?* 5–25 (2013); Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 51–77 (2007).

mitting to them that people form the moral core of their identity and constitute their moral personhood.¹⁹²

On this view, rights of conscience are grounded in the value of individual autonomy and investment.¹⁹³ If we value individual autonomy, it means that we respect people's capacity to form and revise their own conceptions of the good, and that when individuals do constitute their moral identities by committing to certain beliefs and ways of life, their claims to live consistently with those commitments call for our respect.¹⁹⁴ The value of one's ethical integrity, then, is essentially about preserving a relationship with the self—in acting consistently with the core ethical commitments that are constitutive of identity.¹⁹⁵ These deep commitments are, in an important sense, what makes us who we are and allow for a sort of normative “wholeness” in our lives.¹⁹⁶

The process of self-authorship is not necessarily limited to an initial set of choices, but often involves an ongoing process of refinement and reformulation. When we commit to certain ideas and projects, we entrench them to some degree and insulate them against casual revision. But that entrenchment need not be permanent, and the process of telling our own story can involve changes of heart, reordering of priorities, or even outright transformation. If people retain their capacities not only to form a conception of the good, but also to revise it in light of experience and deliberation, then there is every reason to think that an individual's moral personhood will be dynamic rather than static.

At this point, it might be helpful to observe a few things that conscience as ethical integrity *is not*. First, maintaining our ethical integrity

¹⁹² See Timothy Macklem, *Independence of Mind* 68–118 (2006); Sepinwall, *supra* note 185, at 1949–51; Sepper, *supra* note 188, at 1528; Laborde, *supra* note 188, at 589; James D. Nelson, *Conscience, Incorporated*, 2013 *Mich. St. L. Rev.* 1565, 1575–83.

¹⁹³ See Macklem, *supra* note 192, at 116. On the relationship between these values and institutional claims of conscience, see Nelson, *supra* note 192, at 1575–619.

¹⁹⁴ See Macklem, *supra* note 192, at 68–118; cf. Leiter, *supra* note 191, at 68–91 (arguing that claims of conscience deserve only a weak form of respect akin to toleration).

¹⁹⁵ See Mark R. Wicclair, *Conscientious Objection in Medicine*, 14 *Bioethics* 205, 213–14 (2000); Harry G. Frankfurt, *The Importance of What We Care About: Philosophical Essays* 159–76 (1988).

¹⁹⁶ See Macklem, *supra* note 192, at 101 (arguing that deep commitments lend “narrative unity” to our lives); see also Nelson, *supra* note 192, at 1577–78 (discussing the connection between conscience and personal identity).

does not fundamentally turn on the beliefs that others attribute to us.¹⁹⁷ That is, maintaining ethical integrity is not about protecting the outward perception of our actions and beliefs, but instead it is about protecting one's inward relationship to oneself. Although social attitudes and perceptions can certainly have a profound effect on how we see ourselves,¹⁹⁸ the ultimate measure of ethical integrity is how we judge our own actions in light of the internal standard we have set for ourselves.

Second, maintaining ethical integrity is not centrally about changing substantive outcomes in the world.¹⁹⁹ For example, in the field of medical ethics, conscientious refusals to participate in a certain procedure are not typically aimed at preventing a patient from receiving that medical treatment, but are instead invoked as a way to avoid personal implication in a practice to which individuals have a moral objection.²⁰⁰ In other words, the interest being protected is that of the objectors' relationship to themselves. Likewise, borrowing from a famous example in the philosophical literature, a scientist who exercises a conscientious objection to working in a laboratory devoted to biological warfare is not principally trying to stop the development of biological weapons. Indeed, if that were the goal, the scientist would probably be better off taking the job and not pursuing the laboratory's goals as zealously as her replacement might.²⁰¹ Instead, the scientist is seeking to avoid the alienation that would come from participating in the laboratory's work. The conscientious objectors in these examples are not taking on the role of civil disobedient whose objective is to stop *anyone* from engaging in a practice they regard as immoral. They are instead seeking to avoid *personal implication* in the activities to which they object.

Having articulated what is *not* at stake in claims to maintain ethical integrity, we are now in a better position to appreciate the precise nature

¹⁹⁷ See Macklem, *supra* note 192, at x; see also Schwartzman, *supra* note 82, at 352 (locating the harm in compelled support for positions one abhors in agents' own internal judgments of themselves).

¹⁹⁸ Foundational works on the interaction between social attitudes and individual identity include George Herbert Mead, *Mind, Self & Society: From the Standpoint of a Social Behaviorist* (1934), and Erving Goffman, *The Presentation of Self in Everyday Life* (1959).

¹⁹⁹ See Sepinwall, *supra* note 185, at 1949; Bernard Williams, *A Critique of Utilitarianism*, in *Utilitarianism: For and Against* 93, 97–99 (J.J.C. Smart & Bernard Williams eds., 1973).

²⁰⁰ But see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *Yale L.J.* 2516, 2554–58 (2015) (arguing that healthcare refusal laws allow organized religious groups to enforce traditional sexual norms against third parties).

²⁰¹ See Williams, *supra* note 199, at 97–99.

of those claims. At their core, claims to maintain ethical integrity—to not be personally involved in activities that violate one’s conception of the self—are claims to avoid moral *complicity*.²⁰² If people have an interest in being able to craft a narrative about themselves—to be the authors of their own lives—then they have an interest in being able to tell a story about themselves in which they are not tainted by involvement with activities that they abhor.²⁰³ That is, people have an interest in being able to craft a narrative about their lives that does not include implication in activities that cut against the core of their identity. If that interest is not protected, it will be harder for people to maintain a conception of themselves as people who are not involved in certain sorts of things that they despise.²⁰⁴

This concern about avoiding complicity, then, is the harm or injury against which rights of conscience protect. That is, the violation of one’s ethical integrity comes in the feeling of self-alienation or self-betrayal.²⁰⁵ When one is forced to be complicit with activities, beliefs, or projects that violate one’s identity, there is a sort of schism of the self—a “loss of integrity or wholeness”²⁰⁶ of one’s moral personhood. As an impairment of ethical integrity, complicity undermines our ability to craft a desirable account of who we are and what we wish to become.

Although complicity can work a serious moral injury, it is not by its nature a binary concept.²⁰⁷ Instead, complicity is a relational concept that links an agent to a wrong (or a perceived wrong) that is *mediated* by other agents. On this view, complicity is a matter of degree, and one can be more or less complicit in an activity that one deems morally objectionable depending on the level of mediation between the agent and the wrong.²⁰⁸

²⁰² For important work on the concept of moral complicity, see Sepinwall, *supra* note 185.

²⁰³ *Id.* at 1949 (“[T]he idea might be that one has an interest in having a life story that does not include an episode in which one acted against one’s convictions.”).

²⁰⁴ See *id.*; Macklem, *supra* note 192, at 104–13; Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* 41–42 (2000).

²⁰⁵ See Laborde, *supra* note 188, at 589; Wicclair, *supra* note 195, at 214; Sepper, *supra* note 188, at 1528.

²⁰⁶ See Sepper, *supra* note 188, at 1528 (quoting James F. Childress, *Conscience and Conscientious Actions in the Context of MCOs*, 7 *Kennedy Inst. of Ethics J.* 403, 404 (1997)) (internal quotation marks omitted).

²⁰⁷ See Kutz, *supra* note 204, at 2.

²⁰⁸ *Id.* at 11–12; see also Sepinwall, *supra* note 185, at 1944–59 (examining the role of proximity in assessing complicity and criticizing its use in adjudicating claims for religious exemptions).

To be sure, there is no precise measure for degrees of complicity. But it is common to think in terms of more or less substantial threats to one's ethical integrity.²⁰⁹ As agents acting in the world, we bear a causal connection to a vast number of events, many of which we may consider wrong. But only a small subset of those events is salient to us, and that salience is a function both of our relationship to others and our relationship to the wrong in question.²¹⁰

When it comes to compelled support for views that we may despise, claims of complicity will lie on a spectrum ranging from the most proximate threats to ethical integrity to the most remote. To make this idea more concrete, consider the cases of Al and Betty, two ethically committed vegetarians. For Al and Betty, the humane treatment of all animals is at the core of their identities, and all of their activities—including diet—are arrayed around this commitment and made to be consistent with it. In the first case, if Al were forced directly to fund the “pro-meat” speech of another private individual, that compulsion would palpably implicate Al's ethical integrity and inflict serious injury on his freedom of conscience.

But in the second case, if Betty is merely compelled to pay her ordinary income taxes, and then after a series of decisions by various legislators and governmental bureaucrats, a small portion of those funds are used to pay for advertisements supporting America's cattle ranchers, the threat to Betty's freedom-of-conscience interests is rather remote.²¹¹ In these circumstances, the impingement on Betty's ethical integrity lacks the direct intimacy of being compelled to subsidize another individual's speech, and the burden on her conscience is correspondingly attenuated.²¹²

As this example helps illustrate, the key variable at work in producing morally disparate evaluations of complicity is the degree of *mediation*

²⁰⁹ The best example here is probably the “substantial burden” inquiry in religious freedom law. See, e.g., Religious Freedom Restoration Act of 1993, Pub. L. 103–141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb–1 (2012)) (requiring strict judicial scrutiny of any law that “substantially burden[s] a person's exercise of religion”).

²¹⁰ Kutz, *supra* note 204, at 40.

²¹¹ See Schwartzman, *supra* note 82, at 370; Steven D. Smith, Taxes, Conscience, and the Constitution, 23 Const. Comment. 365, 376 (2006); see also *Johanns*, 544 U.S. at 575 (Souter, J., dissenting) (noting that taxpayers have a highly attenuated interest in revenues raised from general taxes).

²¹² Schwartzman, *supra* note 82, at 352–53; Smith, *supra* note 211, at 376; Kutz, *supra* note 204, at 11–12.

between the provision of funds and the morally objectionable speech. The more relational distance there is—or the more links there are in the causal chain²¹³—the weaker the complicity claim and, thus, the more remote the burden on conscience.

Returning now to the idea that claims of conscience are “potentially indiscriminate,” we can offer a more sophisticated response. It is true that claims of conscience, viewed in terms of ethical integrity, are not in principle limited in terms of their *content*. But once we take into account the idea that moral complicity is a matter of degree, and that more direct threats to ethical integrity carry greater normative weight than do remote threats, claims of conscience are no longer as vulnerable to the *anarchy objection* as they may have at first appeared.²¹⁴ Strong claims of conscience will indeed demand the state’s respect and call for some kinds of legal accommodations, but weaker claims can be defeated by a variety of state interests.

B. The Corporate Analogy

Having identified the freedom-of-conscience interests underlying union dissenters’ rights, this Section tests the strength of the union-corporate analogy in terms of those interests. In doing so, it argues that the degree of intermediation in public equity markets puts significant relational distance between shareholders and public corporations and thereby attenuates the link between shareholders’ funds and their consciences.²¹⁵ Accordingly, this section concludes that thinking about union dissenters’ rights in terms of freedom of conscience provides a principled reason to reject the corporate analogy.

For many decades, corporate law and theory has been shaped by a view of public corporations defined by “the separation of ownership and control.” This view of the modern corporation was initially developed by Adolf Berle and Gardiner Means in their seminal work, *The Modern*

²¹³ Sepinwall, *supra* note 185, at 1940–41; see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (holding that intervening choices by private individuals break “the circuit” between governmental action and religion).

²¹⁴ See Schwartzman, *supra* note 82, at 341–59.

²¹⁵ Commentators often refer to this form of shareholding as “indirect.” See, e.g., Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 *Vand. L. Rev.* 639, 677 (2016); Tucker, *supra* note 64, at 1318.

Corporation and Private Property.²¹⁶ In that work, Berle and Means describe the wide dispersion of equity ownership in modern firms and the tension that dispersion creates between the interests of shareholders and the professional managers that administer corporate affairs. Because individual shareholders do not own enough shares to police management effectively, and because of pervasive collective-action problems that prevent shareholder coordination, corporate managers are insufficiently responsive to shareholder interests.²¹⁷

Although the image of the Berle-Means firm continues to resonate to this day, in many ways its main story has become outdated.²¹⁸ In its original formulation, the separation of ownership and control featured widely dispersed retail investors with shares too small to pose any real threat to the dominant management team. But in the last several decades, the facts on the ground have changed dramatically. The new stock market structure is one in which the majority of public equity is held by *institutions* rather than by individuals. These institutions pool investments from many different individuals into investment funds, which are then allocated as equity capital to a wide variety of public firms.²¹⁹

In the modern stock market, then, *intermediation* is the new normal. To begin with, more than two-thirds of public equity is now held by institutional investors.²²⁰ Among the top 1,000 public firms, the numbers are even more striking. In 2009, 73% of the outstanding equity in these firms was controlled by institutions.²²¹ Moreover, the twenty-five largest institutional investors hold an increasing percentage of equity in the largest public companies, including 44.1% of Google, 37% of Apple,

²¹⁶ Adolf A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* (1932).

²¹⁷ *Id.* at 6.

²¹⁸ See Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 *Colum. L. Rev.* 863, 864–65 (2013); Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 *Minn. L. Rev.* 1822, 1828 (2011); Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 *Seattle U. L. Rev.* 877, 879 (2010).

²¹⁹ See Rodrigues, *supra* note 218, at 1828–38.

²²⁰ See Marshall E. Blume & Donald B. Keim, *The Changing Nature of Institutional Stock Investing* 4 (Nov. 12, 2014) (unpublished manuscript), <https://fnce.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=9094> [<https://perma.cc/KQ4G-8U8D>]; Brief of Corporate Law Professors, *supra* note 1, at 26.

²²¹ See Gilson & Gordon, *supra* note 218, at 874–75; Matteo Tonello & Stephan Rabimov, *The 2010 Institutional Investment Report: Trends in Asset Allocation and Portfolio Composition* 22, *The Conference Board* (2010), <https://www.conference-board.org/topics/publicationdetail.cfm?publicationid=1872> [<https://perma.cc/TV79-9QZB>].

and 35.8% of JP Morgan Chase & Co.²²² In short, public equity holdings have been concentrated in institutions, and a vast system of financial intermediation has eclipsed the widely dispersed retail investor of yesteryear.

Although there are many different kinds of institutional investors—including mutual funds, pension funds, bank trusts, insurance companies, and foundations—most public equity is now held through institutional investors like mutual funds and pension funds.²²³ To give a sense of the size of the mutual fund industry, today such funds hold around sixteen trillion dollars in assets.²²⁴ Those assets are also highly concentrated in the largest mutual funds. As things currently stand, the largest twenty-five mutual fund complexes control approximately 75% of total assets under management.²²⁵ The growth in the mutual fund industry has also brought a much wider swath of the American public under its investment umbrella. Since 1980, the percentage of U.S. households investing through mutual funds has jumped from 5.7% to over 46%.²²⁶

Pension funds also control an enormous amount of investment capital in the United States. For example, 401(k) plans held an estimated 4.4 trillion dollars in assets as of 2014. That number marks a sharp rise from 2.2 trillion dollars in 2004. The current total of assets under management accounts for approximately 18% of all U.S. retirement assets, which also include Individual Retirement Accounts (“IRAs”) and annuities.²²⁷

Scholars have noted several causes of the rise in intermediation in public markets. One major factor was the transition from defined benefit pension plans—in which employers promise to pay a specified monthly amount to employees upon retirement—to defined contribution plans—in which employers promise only to contribute a certain amount of money or percentage of salary to an investment account.²²⁸ And when em-

²²² Gilson & Gordon, *supra* note 218, at 875.

²²³ *Id.* at 865.

²²⁴ See Inv. Co. Inst., 2016 Investment Company Fact Book: A Review of Trends and Activities in the U.S. Investment Company Industry i (2016), http://www.icifactbook.org/deployedfiles/FactBook/Site%20Properties/pdf/2016_factbook.pdf [<https://perma.cc/4DZ9-33BT>]; William A. Birdthistle, *Empire of the Fund: The Way We Save Now* 23 (2016).

²²⁵ See Inv. Co. Inst., *supra* note 224, at 17.

²²⁶ See *id.* at 112.

²²⁷ See Inv. Co. Inst., *Frequently Asked Questions About 401(k) Plans*, https://www.ici.org/policy/retirement/plan/401k/faqs_401k [<https://perma.cc/6H55-U3LM>].

²²⁸ See Gordon & Gilson, *supra* note 218, at 882.

ployees choose how to allocate those funds, they typically elect to invest in mutual funds.²²⁹

Modern advances in investment strategy have also contributed to heightened financial intermediation.²³⁰ Today's standard financial advice is to invest in a broad portfolio of many different, diversified stocks and to hold them passively.²³¹ This standard financial advice follows modern portfolio theory, which teaches that diversified investments improve risk-adjusted returns and that, due to their advantage in constructing diversified portfolios, investing through intermediaries is a cost-effective way to achieve diversification.²³²

A final factor supporting the rise in public equity intermediation was the Employee Retirement Income Security Act of 1974 ("ERISA").²³³ ERISA set minimum standards for private pension plans and included a requirement that benefit plan assets be held in trust rather than merely noted on corporate books.²³⁴ As one might imagine, this requirement meant that there would be a significant increase in funds flowing to the capital markets.

Although these factors are interrelated and complex, the end result is rather simple. The world looks very different than it did for Berle and Means. Rather than dispersed retail investors directly providing equity capital to public corporations, there are now large, sophisticated institutional investors that serve as intermediaries. Sometimes these institutions add additional "layers" of intermediation, for example through a "fund of funds" approach, in which the investment fund purchases shares in other investment funds.²³⁵ But even without these additional layers, the rise of institutional investors means that shareholder investments in public companies are highly intermediated.

That intermediation, in turn, proves important when it comes to evaluating the burden on shareholders' consciences from having their money used for speech with which they disagree. The money that shareholders put in institutions to invest on their behalf is typically mixed with the fi-

²²⁹ See *id.* at 881; Birdthistle, *supra* note 224, at 22–24.

²³⁰ Gilson & Gordon, *supra* note 218, at 885–86.

²³¹ See Richard A. Brealey et al., *Principles of Corporate Finance* 197–217 (11th ed. 2014); Brief of Corporate Law Professors, *supra* note 1, at 24, 29–30.

²³² See Birdthistle, *supra* note 224, at 25; Gilson & Gordon, *supra* note 218, at 885–86; Tucker, *supra* note 64, at 1317.

²³³ Pub. L. 93–406, 88 Stat. 829 (1974) (codified in part at 29 U.S.C. ch. 18 (2012)).

²³⁴ See Gilson & Gordon, *supra* note 218, at 879–80; 29 U.S.C. § 1103(a).

²³⁵ See Birdthistle, *supra* note 224, at 167.

nancial contributions of hundreds or thousands of other individuals and then continually redeployed across a broad range of firms to suit investor needs, including financial return and adequate diversification. Here we might imagine Al's corporate counterpart—call him Cal—who is invested in one of Vanguard's broad-based, diversified mutual funds. Like Al, Cal is a committed vegetarian, but he is also interested in growing his money for retirement while managing the risk associated with investment. To achieve this end, Vanguard puts Cal's money in thousands of individual stocks and bonds to reduce the risk of overall loss. As time goes on, professional fund managers then ensure that Cal's asset mix matches his evolving risk profile, while Cal escapes the burden of having to balance and rebalance his own portfolio.²³⁶

As a consequence of this common investment strategy, the situation faced by Cal bears very little resemblance to that of Al, who is forced to fund directly the “pro-meat” speech of another private individual. In contrast to Al's unmediated subsidization, the flow of funds from Cal's wallet to the speech of public corporations is interrupted by a series of deliberate intervening acts, including the pooling, commingling, and re-deployment of funds to achieve his investment goals. The result is that Cal's situation looks a lot more like Betty's, in which the government uses her general income tax payments for many different public projects, some of which might offend her. That is, the same kind of attenuation that diminishes Betty's complicity in the activities of her government also operates to diminish Cal's—and other public shareholders'—complicity in the speech of corporations in which they invest.

It is worth noting at this point that some prominent symmetry theorists have invoked these same observations about intermediation in service of their own arguments.²³⁷ Their claim is that modern capital markets promote significant investment through institutions, which further deprives individuals of control over how their money is invested. To put the point more starkly, modern institutional intermediation deprives

²³⁶ See, e.g., Vanguard Target Retirement Funds, Vanguard, <https://investor.vanguard.com/mutual-funds/target-retirement/#/> [<https://perma.cc/72ZQ-877D>]. For a discussion of “socially responsible investment,” and how it tends to resemble ordinary institutional investment, see Nelson, *supra* note 192, at 1590–91.

²³⁷ See, e.g., Brief of Corporate Law Professors, *supra* note 1, at 6–38; Leo E. Strine, Jr. & Nicholas Walter, Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and *Citizens United*, 100 *Cornell L. Rev.* 335, 341–42 (2015).

people of control over how their funds are used, which in turn makes the case for beefing up dissenters' rights.²³⁸

But the case for dissenters' rights cannot be made on the basis of disempowerment alone. That is, just because modern shareholders own most of their shares indirectly through powerful institutions does not mean that their interests are impermissibly burdened. What is missing from that argument is normative grounding in particular kinds of interests protected by rights against funding speech with which one disagrees.

As we saw in Section III.A, the best account of dissenters' rights locates that normative grounding in individual *freedom of conscience* interests, and in particular one's interests in maintaining ethical integrity. Symmetry theorists are onto something when they point out developments in modern capital markets and the rise in investment through pension funds and mutual funds, because it shows that the simplistic rejection of union-corporate symmetry based on freedom of corporate exit is not quite right.²³⁹ In many cases, to avoid funding speech with which they disagree, modern shareholders would have to exit the stock market entirely, which would impose enormous financial losses.²⁴⁰ But that point remains some distance short of a normative argument for shareholder rights of dissent.

Instead of supporting their case, then, the degree of intermediation in modern capital markets actually undercuts claims for symmetry. Intermediation puts more layers of separation—it puts more “distance”—between the money shareholders invest and the eventual corporate speech with which they may disagree. That distance does not make it impossible that a shareholder could still care about what happens to her money down the road. But it does render claims of shareholder complicity much less compelling.²⁴¹

²³⁸ See Brief of Corporate Law Professors, *supra* note 1, at 27–28; see also Anne Tucker, Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in *Citizens United*, 61 Case W. Res. L. Rev. 497, 533–41 (2011) (arguing that there is a heightened threat of compelled speech for shareholders who invest through intermediaries).

²³⁹ See, e.g., Brief of Corporate Law Professors, *supra* note 1, at 23–37 (demonstrating that modern shareholders do not have a realistic opportunity to avoid funding corporate political speech); Sachs, *supra* note 1, at 827–44 (same); Tucker, *supra* note 64, at 1327–29 (demonstrating that exit is not practically feasible for mutual fund investors).

²⁴⁰ See Brief of Corporate Law Professors, *supra* note 1, at 34–37; Sachs, *supra* note 1, at 838–44; Strine, *supra* note 1, at 31–33.

²⁴¹ For an argument that general patterns of affiliation with corporations justify a rule-based approach to legal doctrine, see Nelson, *supra* note 192, at 1610–13.

No comparable system of financial intermediation breaks the chain between unionized employees and union speech. Unions receive money from represented employees in the form of dues, fees, and assessments, and unions deposit that money into union bank accounts. That money is then disbursed by the union in a variety of ways, including for political advocacy. It is that use of funds to which dissenting employees may object, not the speech of any separate organization that receives disbursements from the union.

Moreover, unionized employees are directly connected to *particular* unions. In fact, employers are only required to bargain with a single bargaining agent elected by a majority of bargaining unit employees.²⁴² This system of exclusive representation stands in stark contrast to the wide dispersion of shareholder funds. Rather than having their money parceled out to thousands of separate corporations, each with its own set of intervening actors, union-dissenter money goes to one specific and identifiable union.²⁴³

For the corporate analogy to succeed, corporate shareholders need to show that there is a sufficiently direct connection between their money and the speech of particular corporations. But intermediation in capital markets attenuates the link between shareholders' wallets and their consciences and undermines the case for robust dissenting-shareholders' rights.

C. The Hobby Lobby Objection

The analysis presented to this point is subject to a potential objection, namely, that it is legally impermissible to judge an individual's level of complicity from an objective point of view. The main claim of this Part has been that dissenting shareholders do not face the same threat of complicity when their corporations speak as do union dissenters when the union speaks and, as a consequence, the analogy from union dissenters' rights to corporate dissenters' rights is flawed. This approach, a critic might argue, improperly substitutes the judgment of a legal decision-maker for that of individual dissenters as to whether they do, in fact, feel complicit.

²⁴² See 29 U.S.C. § 159(a) (2012).

²⁴³ See Abner S. Greene, *A Secular Test for a Secular Statute*, 2016 U. Ill. L. Rev. 34, 39 (emphasizing the importance of "conscious, intentional, intervening act[s]" in breaking the causal chain of complicity in various areas of First Amendment law).

At first it might seem that this objection gained considerable strength from the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*²⁴⁴ In *Hobby Lobby*, the Court ruled that for-profit business corporations are eligible to claim federal statutory rights to religious liberty, and that businesses owned by religious individuals who object to paying for insurance plans that cover contraceptives for their employees are substantially burdened by laws requiring them to offer those plans.²⁴⁵ In rejecting the government's argument that the burden on religious business owners is too attenuated to qualify for an exemption, the Court noted that it would be inappropriate to second-guess the sincere judgments of religious business owners and that it must defer to the owners' subjective beliefs about whether they are complicit.²⁴⁶ The *Hobby Lobby* Court, in other words, seems to have ruled out just the kind of external, objective evaluation of complicity that this Article encourages.

On closer inspection, however, this objection fails for at least two reasons. To begin with, the *Hobby Lobby* case involved a claim about *religious* complicity. In matters of religious belief, the law not only protects the free exercise of religion, but it also prohibits the state from making judgments about the reasonableness of religious beliefs or from adjudicating religious questions.²⁴⁷ If the government were to say, for example, that the religious business owners were not complicit because it would be ridiculous for them to believe such a thing or because they misunderstood the tenets of their own religion, that would constitute a rather straightforward violation of the Religion Clauses. But no such legal prohibition applies outside of religious-liberty doctrine. More specifically, in the context of union or corporate-dissenters' rights, there is no secular analogue to the "no religious questions" rule that would preclude the law from making distinctions regarding degrees of moral complicity. And although one might question the normative desirability of treating religious complicity claims with greater deference than comparable secular claims, the legal principles in *Hobby Lobby* do not extend beyond the domain of religious liberty.

Second, the *Hobby Lobby* case itself recognized the problem with extending complicity-based claims to public corporations. In a revealing

²⁴⁴ 134 S. Ct. 2751 (2014).

²⁴⁵ *Id.* at 2768–75.

²⁴⁶ *Id.* at 2778.

²⁴⁷ See Christopher C. Lund, Rethinking the "Religious-Question" Doctrine, 41 *Pepp. L. Rev.* 1013, 1014–19 (2014) (describing the religious-question doctrine).

passage, the Court observed that “it seems unlikely” that public corporations would claim religious exemptions, in part because it is “improbable” that shareholders, including institutional investors, would agree to run a corporation according to religious commitments.²⁴⁸ To be sure, it is hard to square this analysis with the Court’s statutory interpretation of the word “person,” and the Court left the door open to future religious liberty claims by public corporations. But the thrust of the Court’s argument for a distinction between public corporations and close corporations remains critical for our purposes. When it comes to rights against complicity, analysis of claims by and within public corporations must take account of their distinguishing features, including their highly intermediated investment structure.

The law’s treatment of complicity—including its highly deferential approach to religious liberty claimants in *Hobby Lobby*—does not preclude judgments about the proximity of subsidized speech or the magnitude of threats to ethical integrity. If anything, *Hobby Lobby* recognizes that the relationship between shareholders’ money and public-corporation speech is convoluted. The *Hobby Lobby* objection, therefore, fails to undermine the case for maintaining different treatment of unions and corporations.

IV. IMPLICATIONS OF ASYMMETRY

The previous Part argued against the rising tide of academic opinion and demonstrated that there is a convincing justification for the law’s asymmetric treatment of unions and corporations. This argument was confined to the issue of dissenters’ rights, and in particular the rights of dissenting employees and shareholders to avoid subsidizing speech with which they disagree. But the normative justification for asymmetry—that using employee money for union speech poses a more serious threat to conscience than using shareholder money for corporate speech—has significant implications for related debates in labor law and election law.

A. Labor Law

The bulk of this Article has focused on one aspect of labor law’s interaction with First Amendment norms, namely, the rights of dissenting employees to avoid subsidizing union activities with which they disa-

²⁴⁸ *Hobby Lobby*, 134 S. Ct. at 2774.

gree. But that is not the only important interface between labor law and the First Amendment. This Section briefly sketches the related, but distinct doctrine of expressive association, and explores how recognizing the rights of *individual* dissenting employees might in turn support a robust form of *organizational* autonomy for unions themselves. More specifically, it suggests that if union speech is so connected to those who provide subsidies, then union members ought to retain significant control over the processes through which the union develops its own positions.

To see how this argument might work, it is useful to begin by distinguishing between two kinds of autonomy. The values at stake in protecting union dissenters—those relating to employees’ interests in avoiding moral complicity and thereby maintaining their ethical integrity—are core features of *individual autonomy*. To respect individual persons *as persons* means that each individual has a right to pursue his or her own conception of the good—to be the author of his or her own life story—and that the state has a responsibility to protect individuals’ exercise of that right consistent with other persons’ pursuit of the same.²⁴⁹

By contrast, *organizational autonomy* is the right of a group to control its own internal governance free from state interference.²⁵⁰ This form of autonomy is “inward looking,” in that it is concerned with the group’s ability to manage its own affairs in whatever way it deems most suitable for its selected ends. Although it is certainly true that matters of internal governance can have consequences that concern other members of society,²⁵¹ and the line between inside the group and outside the group can be blurry around the edges,²⁵² there is an important difference between regulation aimed at groups’ ordering of their own affairs and regulation aimed at preventing harm to third parties.

This distinction between individual autonomy and organizational autonomy is reflected in First Amendment doctrine. Perhaps most promi-

²⁴⁹ See John Rawls, *A Theory of Justice* 52–56 (rev. ed. 1999).

²⁵⁰ See James D. Nelson, Essay, *The Freedom of Business Association*, 115 *Colum. L. Rev.* 461, 464 n.10 (2015); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 *Minn. L. Rev.* 1639, 1648–57 (2001).

²⁵¹ Or indeed society as a whole. The practice of racial discrimination in education is among the most obvious examples.

²⁵² In the wake of *Hobby Lobby*, for example, several commentators questioned the place of employees within business organizations. See, e.g., Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *The Rise of Corporate Religious Liberty* 149, 149–72 (Micah Schwartzman et al., eds., 2016).

nently, the distinction helps to frame the Supreme Court's freedom-of-association jurisprudence, particularly its treatment of "expressive associations." In *Roberts v. United States Jaycees*, the Court distinguished between two relevant lines of case law.²⁵³ The first line forms the basis for protecting the right of intimate association, understood as the right to resist state intrusion in close personal relationships.²⁵⁴ The second line of cases protects the right of "expressive" association, understood as the right of groups to associate for purposes of promoting shared ends.²⁵⁵

In a landmark decision, *Boy Scouts of America v. Dale*, the Supreme Court sanctioned a robust form of organizational autonomy through the doctrine of expressive association.²⁵⁶ In *Dale*, the Boy Scouts of America challenged New Jersey's public accommodations law, which prohibited discrimination on the basis of sexual orientation. The Boy Scouts claimed that its exclusion of gay men as Scoutmasters was an expression of its core organizational values, and so it had a First Amendment right to resist the application of New Jersey's anti-discrimination law. In a broad holding, the Court held that application of that law to the Boy Scouts would violate the First Amendment.²⁵⁷

In the wake of *Dale*, commentators noted that the right of expressive association had turned from a focus on individuals' right to join (or not join) an association to the group's right to control its own affairs, including its decisions about membership. As one scholar noted, the right had turned "from freedom of association to freedom of *the association*."²⁵⁸ Although not all of the First Amendment rights enjoyed by groups are rights to control internal governance,²⁵⁹ this turn of phrase helpfully captures the essential distinction between individual autonomy and organizational autonomy.

²⁵³ 468 U.S. 609, 618–19 (1984).

²⁵⁴ *Id.* (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925)); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

²⁵⁵ *Id.* at 621–29.

²⁵⁶ 530 U.S. 640 (2000).

²⁵⁷ *Id.* at 661.

²⁵⁸ See Wayne Batchis, *Citizens United* and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of *the Association*, 36 N.Y.U. Rev. L. & Soc. Change 5 (2012) (capitalization omitted); see also Fisk & Poueymirou, *supra* note 103, at 479 (distinguishing the individual freedom of association from the "freedom of association qua association"); Nelson, *supra* note 250, at 464 n.10 (discussing rights of organizational autonomy).

²⁵⁹ See, for example, the corporate political speech rights protected in *Citizens United*, 558 U.S. 310.

Unions have long been categorized as expressive associations,²⁶⁰ but they do not typically enjoy the rights to control internal governance that come with that designation. That is, unions are subject to comprehensive regulation of their organizational affairs—regulation that could not constitutionally be applied to ordinary expressive associations.²⁶¹ For example, labor law currently imposes heavy administrative and financial reporting requirements.²⁶² More specifically, unions are required to provide “detailed statements” related to membership, disbursement of funds, scheduling meetings, selection of leadership, and member discipline.²⁶³ The law also regulates union elections, including procedures for nominating union officers, distribution of campaign material, the manner and timing of elections, and the conditions for removal of officers.²⁶⁴ These are only a few examples of the extensive—and often very intrusive—regulation of union internal governance.

But if unions really are expressive associations—a conclusion consonant with historical understandings and bolstered by the argument that unionized employees are directly connected to union speech—then unions ought to have a greater degree of autonomy over the organizational

²⁶⁰ See, e.g., Fisk & Poueymirou, *supra* note 103, at 471–82 (arguing that unions are “paradigmatic expressive association[s]”); Estlund, *supra* note 1, at 189 n.107 (“There is no doubt that unions are, in part, ‘expressive associations’ as that term has been elucidated by the Supreme Court . . .”).

²⁶¹ See Estlund, *supra* note 1, at 174 n.21, 175, 200–03 (identifying and discussing the “unusual restrictions on unions”); see also Catherine L. Fisk & Benjamin I. Sachs, Restoring Equity in Right-to-Work Law, 4 U.C. Irvine L. Rev. 857, 875–80 (2014); Marion Crain & John Inazu, Re-Assembling Labor, 2015 U. Ill. L. Rev. 1791, 1842; Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 275 (2001) (discussing the rights of political parties to select their own candidates). Although some commentators include restrictions on peaceful picketing among the special regulations of union internal governance, see, e.g., Estlund, *supra* note 1, at 225–28, I regard those regulations as aimed at the *external* conduct of unions and therefore outside the scope of the current discussion.

²⁶² See Catherine L. Fisk, Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers, 17 Theoretical Inquiries L. 101, 116–18 (2016) (cataloguing intensive legal restrictions on union internal governance and contrasting those restrictions with weak regulation of other nonprofit organizations); Estlund, *supra* note 1, at 202–03 (discussing intrusions on union autonomy); see also Labor Management Relations (Taft-Hartley) Act of 1947, 80 H.R. 3020, Pub. L. 80–101, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.); Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 (LMRDA), Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. 401 et. seq. (2012)).

²⁶³ See 29 U.S.C. § 431 (2012) (codifying LMRDA § 201).

²⁶⁴ 29 U.S.C. § 481 (2012).

processes through which their messages are formulated.²⁶⁵ On the flip side, given the attenuated connection between shareholders and speech by corporations in which they invest, the law's refusal to recognize commercial businesses as expressive associations is theoretically consistent.²⁶⁶ Once again, instead of straining for parity, the best path forward may be to recognize that unions and corporations are different types of organizations from a moral perspective. Doing so may not only reveal new avenues for legal reform, but also facilitate recovery of a more sophisticated conception of the value of unions in the first place.

To be sure, deeper analysis would be necessary to work out the details of particular labor law reforms.²⁶⁷ Other commentators have carefully considered various possibilities—including the formation of “members-only” unions, which would not have the legal power to serve as exclusive bargaining agents for employees in designated bargaining units, but which would be free of the burdensome internal governance regulations described above.²⁶⁸ Less drastic measures might include softening reporting and disclosure requirements or ceding some control to unions themselves to determine how to run their own elections. But the key point is that if unions are expressive associations, then it might be time to reconsider many of the ways in which the law regulates their internal governance.

B. Election Law

At first it might seem that the argument for asymmetry provides a defense of the Supreme Court's controversial decision in *Citizens United*.²⁶⁹ After all, if dissenting shareholders have only a weak interest in not subsidizing corporate speech with which they disagree, then the Court was right to not take that interest too seriously in its constitutional

²⁶⁵ Cf. Estlund, *supra* note 1, at 232 (arguing that there would be no justification for imposing special legal restrictions on union governance if unions were merely voluntary membership organizations).

²⁶⁶ See Nelson, *supra* note 250, at 464–511.

²⁶⁷ This includes what protections might be necessary to guard against unions abusing their status as the exclusive representative of individual bargaining units.

²⁶⁸ See Estlund, *supra* note 1, at 224–32 (arguing that union internal governance regulations are directly tied to their powers of exclusive representation); Fisk & Sachs, *supra* note 261, at 866–74 (arguing that members-only unions would mitigate unfairness to unions in right-to-work states); Fisk, *supra* note 262, at 125 (arguing that unions not asserting power to represent a majority of workers have strong claims to autonomy over internal governance).

²⁶⁹ 558 U.S. 310.

analysis.²⁷⁰ Although this line of reasoning is sound as far as it goes, it does not provide a full defense of the *Citizens United* decision. In other words, even if dissenters' rights are not a strong basis on which to criticize unlimited corporate political spending, there remain several powerful objections to the Court's analysis.

To begin with, many scholars have rightly criticized *Citizens United* for its dismissive stance toward societal interests in political equality.²⁷¹ In his opinion for the majority, Justice Kennedy rejected the idea that corporate political speech could be restricted in an effort to promote equality interests, quoting the Court's (in)famous statement in *Buckley v. Valeo* that such a notion is "wholly foreign to the First Amendment."²⁷² As discussed above, arguments from political equality are now complete nonstarters in courts conducting constitutional review of campaign-finance reforms.²⁷³

Nevertheless, although equality rationales are doctrinally precluded, their wholesale rejection in campaign-finance law may not be normatively defensible. To be sure, egalitarian arguments for campaign-finance reform are not without their difficulties, particularly when they run up against strong interests in promoting political speech.²⁷⁴ But it seems hard to justify their exclusion from the debate about electoral regulation altogether, especially when the campaign-finance regulations in question do not actually limit political speech.²⁷⁵ To the degree that citizens lack anything approximating an equal opportunity to influence pub-

²⁷⁰ See *id.* at 361–62.

²⁷¹ See, e.g., Hasen, *Plutocrats United*, *supra* note 85 at 63–103.

²⁷² *Citizens United*, 558 U.S. at 349–50 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (*per curiam*)).

²⁷³ See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) ("No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.'" (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748 (2011)); *Davis v. FEC*, 554 U.S. 724, 741–42 (2008); and *Buckley*, 424 U.S. at 56 (alteration in original)).

²⁷⁴ See Ryan Pevnick, *Does the Egalitarian Rationale for Campaign Finance Reform Succeed?*, 44 *Phil. & Pub. Aff.* 46, 56–64 (2016).

²⁷⁵ See, e.g., *Ari. Free Enter. Club's Freedom Club PAC*, 564 U.S. at 736 (involving challenge to program in which electoral spending above threshold amount by privately financed candidates triggered matching funds for publicly financed candidates); see also Hasen, *Plutocrats United*, *supra* note 85, at 84–86 (noting peculiarity of First Amendment challenge to campaign-finance regulations that do not involve limitations on spending).

lic policy²⁷⁶—and there is overwhelming evidence that this is now the case²⁷⁷—the Court’s decision in *Citizens United* ought to be criticized for its role in cutting off promising avenues to address this state of affairs.

In addition to criticizing *Citizens United* on egalitarian grounds, the decision is also vulnerable to the charge that it adopted a cramped view of political corruption.²⁷⁸ The Court wrote that “[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”²⁷⁹ Mere “influence” or “access,” according to the Court, is not the kind of problem that campaign-finance laws may permissibly target.²⁸⁰ Indeed, in the Court’s view, these are standard—and perhaps even desirable—features of robust democratic politics.²⁸¹

But the goal of preventing corruption need not be understood so narrowly. For example, several prominent scholars have argued that the real worry about excessive money in politics is that it tends to warp the appropriate relationship between elected officials and the public they represent.²⁸² For these scholars, the Court’s whittled-down conception of corruption is both inconsistent with the Founders’ wider view of the conditions necessary for responsible government and naïve about the perverse effects of modern electoral financing on democratic accountability.²⁸³

²⁷⁶ See Pevnick, *supra* note 274, at 47–54 (describing arguments in favor of “equal opportunity for political influence”); see also Hasen, *Plutocrats United*, *supra* note 85, at 75–77 (discussing arguments for “equality of political opportunity”).

²⁷⁷ See, e.g., Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012).

²⁷⁸ See Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* 232–34 (2014); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* 241–46 (2011); see also *McConnell v. FEC*, 540 U.S. 93, 152 (2003) (characterizing the *quid pro quo* view of corruption as “crabbed” and unrealistic).

²⁷⁹ *Citizens United*, 558 U.S. at 359.

²⁸⁰ *Id.*

²⁸¹ *Id.* (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting) for the proposition that “[d]emocracy is premised on responsiveness”); see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (“[Ingratiation and access] embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.”).

²⁸² See Lessig, *supra* note 278, at 7; Teachout, *supra* note 278, at 9–12; see also Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 138–42 (2010) (discussing “clientelist” view of corruption).

²⁸³ See Teachout, *supra* note 278, at 232–33; Lessig, *supra* note 278, at 1, 7; Michael S. Kang, *After Citizens United*, 44 Ind. L. Rev. 243, 246 (2010).

One might also fault the *Citizens United* Court for failing to recognize elections as a distinct domain within democratic governance, subject to special, context-sensitive First Amendment rules. The argument here, advanced in different forms by some of the nation's most prominent academic commentators, is that elections can—and should—be treated as exceptional, and that regulations that would not be permissible in the broader context of public discourse could be adopted to ensure that elections achieve their comparatively narrow democratic purposes.²⁸⁴ On this view, the law already recognizes that elections are special and treats them as such in many ways that are perfectly consistent with the First Amendment.²⁸⁵ But the *Citizens United* Court failed to see that BCRA's rules on corporate and union sponsorship of "electioneering communications"—a term limited by definition to a short time period leading up to elections²⁸⁶—were of a piece with other context-specific electoral regulation.

Finally, the majority opinion in *Citizens United* deserves criticism for its unrealistic understanding of corporate governance. In response to the idea that dissenting shareholders might be compelled to fund corporate political speech, Justice Kennedy appealed to the "procedures of corporate democracy" as a salve for any such worries.²⁸⁷ But of course, modern shareholders are not ordinarily in a position to avail themselves of any such procedures, not least because corporations may simply refuse to disclose information about their spending on politics.²⁸⁸ In an effort to

²⁸⁴ See Richard H. Pildes, Elections as a Distinct Sphere Under the First Amendment, *in* Money, Politics, and the Constitution: Beyond *Citizens United* 19, 19–21, 25–27 (Monica Youn ed., 2011); Frederick Schauer & Richard H. Pildes, Electoral Exceptionalism and the First Amendment, 77 *Tex. L. Rev.* 1803, 1805 (1999); see also Robert C. Post, Citizens Divided: Campaign Finance Reform and the Constitution 61–65 (2014) (discussing governmental interest in "electoral integrity").

²⁸⁵ See Pildes, *supra* note 284, at 25–26 (discussing limits on voter speech at the ballot box, campaign-finance disclosure rules, and geographical restrictions on electioneering).

²⁸⁶ See 52 U.S.C. § 30104(f)(3)(A) (2012) (defining electioneering communication as "any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office; is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate" (internal enumeration omitted)).

²⁸⁷ *Citizens United*, 558 U.S. at 361–62 (internal quotation marks omitted) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

²⁸⁸ See Bebhuk & Jackson, *Shining Light*, *supra* note 103, at 930–37.

remedy these perceived shortcomings, lawmakers have proposed several reforms that would strengthen shareholder control over corporate political spending.²⁸⁹ But it was a mistake for the *Citizens United* Court to assume that these corporate-governance mechanisms were already in place.

These criticisms of *Citizens United* are not meant to be exhaustive; they merely illustrate that the argument against shareholder conscience rights does not require endorsement of the Court's position on corporate political spending. To put this point the other way around, *Citizens United* may be flawed in any number of ways, but it is a mistake for critics to focus on the rights of shareholders.²⁹⁰ Instead, commentators who wish to criticize the Court or to propose election law reforms ought to focus on other, more forceful objections to *Citizens United*, and they should leave arguments from shareholder rights behind.

CONCLUSION

Commentators have long argued that legal reform is necessary to bring the treatment of corporate dissenters in line with that of union dissenters. This argument picked up considerable steam in the wake of *Citizens United* and took on new urgency in *Friedrichs*. Although commentators insist that there is no principled justification for treating shareholders differently than unionized employees, this Article provides such a justification. Grounded in the freedom of conscience, union-dissenters' rights protect employees from complicity in expression that infringes on their ethical integrity. But the structure of modern public corporations, including pervasive financial intermediation through institutional investors, attenuates the link between shareholders' wallets and their consciences and undermines their claims to avoid such complicity. Not only does this argument provide strong reasons to resist calls for greater union-corporate symmetry, it also suggests how related areas of the law might move towards a more coherent view.

²⁸⁹ See, e.g., Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010).

²⁹⁰ See, e.g., Francis R. Hill, Nonparticipatory Association and Compelled Political Speech: Consent as a Constitutional Principle in the Wake of *Citizens United*, in *Money, Politics, and the Constitution*, supra note 284, at 77.