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## Unions & Campaign Finance Litigation

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# UNIONS AND CAMPAIGN FINANCE LITIGATION

Charlotte Garden\*

## I. INTRODUCTION

Labor unions and federations, particularly the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), devote significant resources to litigating before the Supreme Court. This Supreme Court litigation frequently takes place in cases that reach far beyond labor law, meaning that unions help to shape the law governing many aspects of American society. Virtually no legal scholarship considers the role that unions play in these cases,<sup>1</sup> and consequently there has been no systemic attention to the positions that unions take before the Supreme Court. Yet, unions' litigation positions, especially before the Supreme Court, yield useful information about union strategies and priorities.

The labor movement frequently participates in litigation regarding the constitutionality of campaign finance law. Unions' litigation in this area is particularly important because the structure of campaign finance law plays a role in determining who is elected to office; in other words, legal developments in this area have far-reaching effects on substantive law and policy. This Essay lays the groundwork for future analysis of the important relationship between unions and campaign finance litigation. To that end, it describes how the labor movement has sought to shape campaign finance law through litigation, analyzing the contours of union positions in Supreme Court campaign finance cases as well as the outcomes of those cases. It also briefly discusses how the labor movement has adapted to modern campaign finance law, particularly after *Citizens United v. FEC*.<sup>2</sup>

## II. UNION LITIGATION IN CAMPAIGN FINANCE CASES

Two important and related issues bear on the permissible scope of unions' political advocacy. First, there is the extent to which unions may require or encourage the employees they represent to pay dues or fees that the union then uses for political advocacy. In other work, I have analyzed and critiqued the

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\* Assistant Professor, Seattle University School of Law. This Essay was written in connection with the Democracy and the Workplace symposium hosted at UNLV Boyd School of Law in February 2012. I am grateful for the helpful feedback on this topic that I received at that symposium. I would also like to thank the editors of the Nevada Law Journal for their careful work on this Essay.

<sup>1</sup> I discuss unions' litigation before the Supreme Court in other types of non-labor law cases in *Union Made: Labor's Litigation for Social Change*. Charlotte Garden, *Union Made: Labor's Litigation for Social Change*, 88 TUL. L. REV. 193 (2013).

<sup>2</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

caselaw governing this subject.<sup>3</sup> Second, there are campaign finance laws that govern political contributions and expenditures by individuals and groups, including labor unions. These laws are the focus of this Essay.

Unions' participation in cases concerning the constitutionality of American campaign finance laws has been sporadic. First, two early campaign finance cases involved union defendants. Second, the AFL-CIO has participated as a party or amicus in nearly all of the campaign finance cases that the Court has heard over the last decade. Conversely, unions generally refrained from participating at all (even as amicus) in many of the key cases that came between these two periods. This recent resurgence appears to reflect a concern on the part of the AFL-CIO with ensuring that it is permitted to communicate about political issues with officeholders and the American public, an issue that has been presented in several recent cases.

#### A. *Early Cases*

The first campaign finance statute, the Tillman Act of 1907, did not apply to unions—rather, it covered only national banks and those corporations that were “organized by authority of any laws of Congress.”<sup>4</sup> Nor were unions included when Congress closed certain loopholes in the Tillman Act by enacting the Federal Corrupt Practices Act of 1925.<sup>5</sup> Labor unions' political spending was not comprehensively regulated<sup>6</sup> until 1943, when the War Labor Disputes Act added unions to the list of entities regulated by the Federal Corrupt Practices Act, banning them from making any contribution “in connection with” most federal elections for the duration of World War II.<sup>7</sup> However, this limitation did not eliminate union participation in electoral politics altogether: shortly after the War Labor Disputes Act, the CIO created the first political action committee (PAC) in order to support labor legislation and democratic candidates, including the re-election of Franklin Roosevelt.<sup>8</sup> “Through the CIO PAC and general education expenditures, unions spent more money in the 1944

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<sup>3</sup> Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 32–39 (2011).

<sup>4</sup> Act of Jan. 26, 1907, Pub. L. No. 59-36, 34 Stat. 864.

<sup>5</sup> Federal Corrupt Practices Act, Pub. L. No. 68-506, § 313, 43 Stat. 1070, 1074 (1925).

<sup>6</sup> In 1940, Congress made it unlawful “for any person, directly or indirectly, to make contributions in an aggregate amount in excess of \$5,000 . . . in connection with any [federal] campaign.” 1940 Amendments to the Hatch Act, Pub. L. No. 76-753, § 13, 54 Stat. 767, 770. The statute further defined person to include “an individual, partnership, committee, association, corporation, and any other organization or group of persons.” *Id.* Thus, labor unions' political contributions were capped at \$5,000.

<sup>7</sup> War Labor Disputes Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167–68 (1943). This statute did not cover federal primary elections, in which labor unions continued to participate. *See, e.g.,* *United States v. UAW*, 352 U.S. 567, 579–80 (1957) (discussing a US Senate committee's investigation wherein the committee found that a union did not violate “the Corrupt Practices Act . . . on the ground that [the union] had made direct contributions only to candidates and political committees involved in . . . federal primaries, to which the Act did not apply”) (internal quotation marks omitted).

<sup>8</sup> Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 454–55 n.201 (2008).

election than ever on politics, ‘voter education,’ and communications to members.”<sup>9</sup>

Four years later, the Taft-Hartley Act expanded restrictions on corporate and union election conduct by also banning “expenditure[s] in connection with” federal elections.<sup>10</sup> The word “expenditure” proved vague and soon resulted in litigation. In *United States v. CIO*, the Supreme Court reviewed a First Amendment challenge to a criminal fine levied under that provision on the CIO and its president.<sup>11</sup> The CIO had published in its weekly newsletter, which was distributed to union members, a statement urging members to vote for a particular candidate for Congress.<sup>12</sup> It was unclear how the newsletter was funded—whether from general union dues, or from a subscription fee paid on a voluntary basis,<sup>13</sup> a fact that went to whether the expenditure “was unfair to individual union members . . . .”<sup>14</sup> Reviewing the relevant legislative history and interpreting the Act so as to avoid conflict with the First Amendment,<sup>15</sup> the Court focused on the CIO newsletter’s similarity to a traditional newspaper,<sup>16</sup> and concluded that “trade or labor union periodicals published regularly for members, stockholders or purchasers” were not covered by the Taft-Hartley expenditure ban.<sup>17</sup>

The Court’s decision reflects arguments that the CIO and other labor organizations, participating as amici, made in their briefs. For example, in its brief, the CIO argued that the expenditure ban “invades the right of a free press, because it bars free access to the political process so vital to the preservation of a democratic society.”<sup>18</sup> The CIO and its amici also argued that participation in electoral politics was a critical part of unions’ mission because “political activity is essential in order to preserve the gains achieved through self-organization and collective bargaining.”<sup>19</sup> Further, these gains had to be achieved through political activity by unions, rather than by individual members acting on their

<sup>9</sup> *Id.* at 454–55.

<sup>10</sup> Taft Hartley Act, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159 (1947).

<sup>11</sup> *United States v. CIO*, 335 U.S. 106, 108 (1948).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 111.

<sup>14</sup> *Id.* at 115. The Court noted that the legislature was also concerned with “the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.” *Id.* at 113. However, in *Citizens United*, the Court rejected the argument that this was a compelling reason in support of forbidding corporations from using general treasury funds for independent expenditures and electioneering communications. *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010).

<sup>15</sup> *CIO*, 335 U.S. at 116, 120–21.

<sup>16</sup> *Id.* at 122–23.

<sup>17</sup> *Id.* at 122–24.

<sup>18</sup> Brief for Appellees at 5, *CIO*, 335 U.S. 106 (No. 695), 1948 WL 47481, at \*5.

<sup>19</sup> *Id.* at 7. See also Brief of International Association of Machinists as Amicus Curiae at 5, *CIO*, 335 U.S. 106 (No. 695), 1947 WL 44243, at \*5 (“Higher wages won at the bargaining table would mean little if trade unions could not also urge the passage of socially beneficial legislation . . . .”); Brief on Behalf of AFL, Amicus Curiae at 4, *CIO*, 335 U.S. 106 (No. 695), 1948 WL 47483, at \*4 (“A union may not realistically bargain with an employer for higher wages and shorter hours and ignore legislation establishing minimum wages and maximum hours.”).

own,<sup>20</sup> because the voices of members of the working class were drowned out in the political arena:

[T]he national election campaigns of 1940 and 1944 show that powerful individuals and their families, prominently identified with employer interests, contributed huge amounts to political campaigns. Unless the members of labor organizations are given the right collectively to direct their political strength against the strength of these powerful individuals and family groups, the democratic framework of our entire society will be endangered.<sup>21</sup>

However, the Court did not say whether it was dispositive that the union had not distributed its newsletter to non-union houses. This distinction soon became important.

In *United States v. UAW*, the Court again reviewed an indictment against a union for its election-related communications.<sup>22</sup> The indictment charged that the union had “used union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections.”<sup>23</sup> The key difference between this case and *United States v. CIO* was that the relevant communications were not limited to union members;<sup>24</sup> thus, the Court held that the communications fell squarely within the statutory prohibition.<sup>25</sup> The UAW then called for the Court to review the statute’s constitutionality, but the Court instead remanded for the case to proceed to trial, leaving the First Amendment issues for another day.<sup>26</sup> The jury found the union defendants not guilty,<sup>27</sup> and the legal issue did not reach the Supreme Court again for many years.

### B. *Modern Cases*

The next major Supreme Court campaign finance case did not arise for another two decades. In 1976, the Court decided *Buckley v. Valeo*,<sup>28</sup> “[t]he fountainhead of modern U.S. campaign finance jurisprudence . . . .”<sup>29</sup> *Buckley* involved a range of constitutional challenges to the 1971 Federal Election Campaign Act (FECA), including FECA’s limits on both individual contributions to candidates and candidate expenditures, disclosure requirements, and public campaign funding eligibility requirements, as well as a challenge to the makeup of the Federal Election Commission itself.<sup>30</sup> This time, however, the mainstream labor movement did not participate in the litigation, even as amici. The

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<sup>20</sup> Brief for Appellees, *supra* note 18, at 9–10 (“The denial of political rights to a labor organization, such as appellee [CIO], is a denial of political rights to the millions of its members who have formed and joined appellee in order to achieve political goals which as individuals would be beyond their accomplishment.”).

<sup>21</sup> *Id.* at 10.

<sup>22</sup> *United States v. UAW*, 352 U.S. 567, 568, 585 (1957).

<sup>23</sup> *Id.* at 585.

<sup>24</sup> *Id.* at 588–89.

<sup>25</sup> *Id.* at 589.

<sup>26</sup> *Id.* at 591–92.

<sup>27</sup> Hayward, *supra* note 8, at 463.

<sup>28</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>29</sup> Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585 (2011).

<sup>30</sup> *Buckley*, 424 U.S. at 11.

only labor-related group that did participate was the Socialist Labor Party, which unsuccessfully filed a brief challenging the requirement that parties disclose the sources of their campaign contributions, as well as the eligibility requirements for parties to receive public funding.<sup>31</sup>

The labor movement's participation in campaign finance litigation after *Buckley* was limited to a single case in the 1980s,<sup>32</sup> but then the 2000s saw a surge, with labor unions and federations often seeking to overturn restrictions on certain types of communications—particularly restrictions on “issue ads,” which mentioned officeholders by name but did not urge voters to vote for or against particular candidates. The first of these cases was *McConnell v. FEC*, in which the AFL-CIO was one of a diverse list of advocacy groups, political parties, and politicians who, in a consolidated case, challenged several key aspects of the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>33</sup> These plaintiffs in the aggregate sought to have the Court strike down a long list of BCRA's provisions, such as its ban on the use of “soft money” in federal elections, its prohibition of campaign contributions from minors, and its prohibition on party donations to tax-exempt entities, among others.<sup>34</sup> However, the AFL-CIO challenged only three provisions: BCRA's ban on corporate and union treasury-funded electioneering communications,<sup>35</sup> which would have encompassed certain AFL-CIO “issue ads”; the statute's expansion of the definition of

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<sup>31</sup> Brief of Amicus Curiae of the Socialist Labor Party in Support of the Appellants Appeal at 3–4, *Buckley*, 424 U.S. 1 (No. 75-436), 1975 WL 171456, at \*3–4.

<sup>32</sup> That case, *FEC v. National Right to Work Committee*, concerned a FECA provision permitting unions and certain corporations to solicit donations from “members” for “separate segregated fund[s]” that could engage in some political advocacy. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 198, 200 (1982). Respondent, the National Right to Work Committee, took a broad view of the definition of the term “member” and, accordingly, solicited PAC donations from “some 267,000 individuals, who had at one time contributed to it.” *Id.* at 200–01. The Court concluded that the First Amendment did not require such a broad definition of “member.” *Id.* at 210–11. The AFL-CIO argued for a narrow definition of “member” so as to preclude “an anomalous grant to non-stock corporations and those entities alone of a privilege to spend unlimited amounts to solicit political contributions from individuals who have no legally recognized relationship with the soliciting organization.” Motion for Leave to File a Brief Amicus Curiae and Brief for the AFL-CIO as Amicus Curiae, *Nat'l Right to Work Comm.*, 459 U.S. 197 (No. 81-1506), 1982 WL 608648, at \*II. Evidently, the AFL-CIO sought to avoid a situation in which labor unions would be placed at a comparative disadvantage vis-à-vis groups that could fashion looser definitions of membership. *Id.* (“[B]ecause unions are true membership organizations, they cannot, in contrast to respondents, structure their affairs to attempt to take what is beneficial in § 441b without assuming corresponding obligations to their members.”).

<sup>33</sup> *McConnell v. FEC*, 540 U.S. 93, 114 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>34</sup> *Id.* at 134, 158–59, 174.

<sup>35</sup> Brief of the AFL-CIO Appellants/Cross-Appellees at i, *AFL-CIO v. FEC*, 333 F.3d 168 (2003) (No. 02-1755), 2003 WL 22002431, at \*i (presenting AFL-CIO's questions presented). BCRA defined “electioneering communication” as “broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” within sixty days of a general election or thirty days of a primary election. 2 U.S.C. § 434(f)(3)(A)(i) (2012). Except for presidential or vice presidential elections, the communications must also be “targeted to the relevant electorate.” *Id.*

“coordinated” expenditures;<sup>36</sup> and the statute’s “advance disclosure” requirement.<sup>37</sup> The AFL explained that, after the 1994 election of a Republican-controlled Congress, the Federation had run “numerous radio and television ads to mobilize union households and the general public to oppose the new Republican-controlled Congress’s attempts to enact the ‘Contract With America,’ including major cuts in federal funding for jobs, health and safety, housing, school lunches and the Medicare and Medicaid programs.”<sup>38</sup> In addition, the AFL-CIO detailed its multi-year practice of periodically running advertisements designed to support or oppose actions taken by the President or Congress, observing that these ads would have fallen under the definition of “electioneering communications” if they had run too close to a primary or general election.<sup>39</sup>

Although the *McConnell* Court rejected the AFL’s position on all three issues,<sup>40</sup> the labor movement was not dissuaded from later participation in campaign finance litigation. While no union or labor federation has subsequently appeared as a party before the Supreme Court in a campaign finance case, the AFL-CIO has filed amicus briefs in most of the significant campaign finance cases that have come before the Court since *McConnell*. In three of these cases, described below, the AFL-CIO appeared on the side of the party challenging application of campaign finance law; in a fourth case, the Service Employees International Union (a union that is affiliated not with the AFL-CIO but, instead, with the Change to Win federation) filed a brief siding with the government; and finally, several unions as well as the AFL-CIO filed briefs in support of the government in *McCutcheon v. FEC*, pending before the Court at the time this Essay was published. In fact, the only major campaign finance case, post-*McConnell*, in which there was no union participation was *Davis v. FEC*, which concerned BCRA’s “Millionaire’s Amendment,” a provision that raised the contribution cap for individuals running against certain self-financed candidates.<sup>41</sup>

The first of these four cases was *Randall v. Sorrell*, in which the Court reviewed the constitutionality of Act 64, a Vermont law that sharply limited both the amount that donors could contribute to campaigns and the amount that

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<sup>36</sup> Brief of the AFL-CIO Appellants/Cross-Appellees, *supra* note 35 at \*i (presenting AFL-CIO’s questions presented). The definition of coordinated expenditures is provided at 2 U.S.C. § 441a(a)(7)(B)–(C) (2012).

<sup>37</sup> Brief of the AFL-CIO Appellants/Cross-Appellees, *supra* note 35 at \*i (presenting AFL-CIO’s questions presented). The requirement of advance disclosure required anyone spending over \$10,000 during a calendar year on producing and airing electioneering communications to identify to the FEC the names of those who contributed and the amount spent on those communications. 2 U.S.C. § 434(f)(1)–(2) (2012). The advance disclosure requirement applied within twenty-four hours after the spender contracts to spend over \$10,000, even if the communications had not yet aired. *Id.*

<sup>38</sup> Brief of the AFL-CIO Appellants/Cross-Appellees, *supra* note 35, at 2.

<sup>39</sup> *Id.* at 5–7.

<sup>40</sup> *McConnell v. FEC*, 540 U.S. 93, 194, 201–03 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>41</sup> *Davis v. FEC*, 554 U.S. 724, 729–30 (2008). The “Millionaire’s Amendment” provided an exception to BCRA’s contribution caps in cases in which a candidate’s opponent spent more than \$350,000 of his or her own money on campaigning. *Id.*

campaigns could spend.<sup>42</sup> In addition to limiting contributions and campaign expenditures, Act 64—much like other campaign finance laws, including FECA—defined expenditures broadly so that “[a]ny expenditure made on a candidate’s behalf counts as a contribution to the candidate if it is ‘intentionally facilitated by, solicited by or approved by’ the candidate.”<sup>43</sup> However, Act 64 went further by creating a presumption that party or political committee expenditures that “‘primarily benefit[ ] six or fewer candidates who are associated with the’ [spender]” would presumptively count against contribution limits.<sup>44</sup>

In its brief, the AFL-CIO did not oppose the contribution or expenditure limits. Instead, it challenged only the presumption that political advertisements benefitting six or fewer candidates were coordinated with those candidates.<sup>45</sup> This coordination presumption “garnered much less attention” than the other provisions before the Court,<sup>46</sup> but the AFL-CIO was focused on it because of its potential to chill genuine independent expenditures, “lest [speakers] be compelled to account for themselves in court and bear the burden of proving that they acted independently from one another.”<sup>47</sup> However, the Court ultimately struck down on First Amendment grounds the contribution and expenditure caps themselves, obviating the need to decide the constitutionality of the presumption.<sup>48</sup>

Next, in *FEC v. Wisconsin Right to Life (WRTL II)*, the Court addressed an as-applied challenge to BCRA’s ban on corporate and union electioneering communications.<sup>49</sup> Wisconsin Right to Life (WRTL), a non-profit corporation,

<sup>42</sup> *Randall v. Sorrell*, 548 U.S. 230, 237–38 (2006). As the Court described:

Act 64, which took effect immediately after the 1998 elections, imposes mandatory expenditure limits on the total amount a candidate for state office can spend during a “two-year general election cycle,” *i.e.*, the primary plus the general election, in approximately the following amounts: governor, \$300,000; lieutenant governor, \$100,000; other statewide offices, \$45,000; state senator, \$4,000 (plus an additional \$2,500 for each additional seat in the district); state representative (two-member district), \$3,000; and state representative (single member district), \$2,000.

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Act 64 also imposes strict contribution limits. The amount any single individual can contribute to the campaign of a candidate for state office during a “two-year general election cycle” is limited as follows: governor, lieutenant governor, and other statewide offices, \$400; state senator, \$300; and state representative, \$200.

*Id.*

<sup>43</sup> *Id.* at 239 (citing VT. STAT. ANN. tit. 17, §§ 2809(a), (c) (2002)).

<sup>44</sup> *Id.* (citing VT. STAT. ANN. tit. 17, §§ 2809(a), (d) (2002)).

<sup>45</sup> Brief of the AFL-CIO as Amicus Curiae in Support of Petitioners at 2–3, *Randall*, 548 U.S. 230 (No. 04-1528), 2005 WL 3464473, at \*2–3 (“The ‘related campaign expenditure rule’ . . . establishes a presumption that an expenditure, by a political party or a political committee that recruits or endorses candidates, that primarily benefits six or fewer Vermont state candidates who are associated with that spender, is . . . coordinated with them.”).

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 10.

<sup>48</sup> *Randall*, 548 U.S. at 262–63 (plurality opinion).

<sup>49</sup> *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 455–56 (2007). This was the second time this case came before the Court; in 2006, the Court cleared the way for the 2007 case by holding that *McConnell* did not foreclose an as-applied challenge to BCRA’s electioneering communications provision. *Id.* at 456 (citing *Wis. Right to Life, Inc. v. FEC (WRTL I)*, 546 U.S. 410, 412 (2006)). There, the AFL-CIO filed an amicus brief in support

sought to air a series of commercials that criticized both senators from Wisconsin for filibustering judicial nominations, and asked viewers to “[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster.”<sup>50</sup> The proposed ads would have violated BCRA’s prohibition on electioneering communications if aired within thirty days of an upcoming primary election, in which Senator Feingold was running unopposed. WRTL brought a declaratory judgment action challenging the constitutionality of BCRA’s electioneering communications ban as applied to its ads.<sup>51</sup> It argued that despite mentioning a candidate by name, its ads nonetheless were not express advocacy—a significant distinction, given that the Court had previously held only that “BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent.”<sup>52</sup> Accordingly, WRTL argued both that BCRA’s prohibition could not constitutionally be applied to issue ads, and that the Court should draw a line separating issue ads that mention candidates by name from real electioneering communications.

Similarly, the AFL-CIO, as amicus in support of WRTL, emphasized that appeals to officeholders who also happen to be candidates for reelection could be genuine issue ads, rather than express advocacy or its equivalent.<sup>53</sup> It recommended that the Court adopt a six-factor test designed to separate genuine issue ads from electioneering communications.<sup>54</sup> The Court, though, arguably went further, holding that ads would fall under the definition of “electioneering communication” only if they were “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>55</sup> However, because the question of how any particular ad could be reasonably interpreted was a relatively subjective one, more litigation regarding the implementation of this standard was inevitable. Indeed, the issue returned to the Court in *Citizens United v. FEC*.<sup>56</sup>

### C. *Citizens United and Beyond*

*Citizens United* began when an advocacy group that accepted a small amount of corporate funding brought an as-applied challenge to the electioneering communications provision of BCRA, seeking a refinement of the

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of appellant Wisconsin Right to Life. Brief of the AFL-CIO as Amicus Curiae in Support of Appellant, *WRTL I*, 546 U.S. 410 (No. 04-1581), 2005 WL 3076074.

<sup>50</sup> *WRTL II*, 551 U.S. at 458–59.

<sup>51</sup> *Id.* at 460.

<sup>52</sup> *Id.* at 465.

<sup>53</sup> Brief of the AFL-CIO as Amicus Curiae in Support of Appellee at 8, *WRTL II*, 551 U.S. 449 (Nos. 06-969 & 06-970), 2007 WL 894819, at \*8.

<sup>54</sup> *Id.* at 4, 9–10. The six factors were as follows: the identified federal candidate is an incumbent; the ad discusses a current legislative or executive branch matter; the ad either calls upon the candidate to take a position or calls upon the public to urge the candidate to take a position; the ad discusses the candidate’s position only by quoting the candidate or describing the candidate’s official actions on the matter; the ad does not refer to an election or candidacy; and the ad does not refer to the candidate’s character or fitness for office. *Id.* at 10.

<sup>55</sup> *WRTL II*, 551 U.S. at 470. Three of the concurring Justices would have drawn the definition of electioneering communications even more narrowly. *Id.* at 497–99 (Scalia, J., joined by Kennedy & Thomas, J.J., concurring in part and concurring in the judgment).

<sup>56</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

Court's holding in *WRTL*.<sup>57</sup> Specifically, Citizens United argued that its documentary about Hillary Clinton should not qualify as an electioneering communication if broadcast shortly before an election, either because it was a feature-length movie rather than a short advertisement, or because the "appeal-to-vote" test from *WRTL II* should be expanded or clarified to exclude all communications that do not include a clear call for vote for or against a candidate.<sup>58</sup>

The AFL-CIO's argument went beyond both Citizens United's position and its own position in *WRTL II*: it argued that BCRA's electioneering communications provision should be struck down altogether.<sup>59</sup> Its concern was the unpredictability of the "appeal-to-vote" test: "Because the controlling opinion in *WRTL II* still leaves the AFL-CIO uncertain as to which of its public speech is potentially criminal, it has a direct interest in whether *McConnell's* facial upholding of § 203 stands."<sup>60</sup> The AFL-CIO also argued that there was no "compelling governmental interest in prohibiting union independent expenditures," as opposed to corporate expenditures, because "federal constitutional and statutory law fully enable non-members to avoid paying for union political activities they oppose."<sup>61</sup>

Following briefing and oral argument, the Court ordered supplemental briefing and reargument on the following question: "should the Court overrule either or both *Austin v. Michigan Chamber of Commerce* . . . and the part of *McConnell v. [FEC]* . . . which addresses the facial validity of § 203 of the Bipartisan Campaign Reform Act of 2002 . . . ?"<sup>62</sup> Following that directive, many amici filed supplemental briefs. However, neither the AFL-CIO nor any other labor organization did so, possibly because the AFL-CIO's earlier amicus brief expressly addressed both questions, arguing that the relevant portion of *McConnell* should be overruled, but that the Court should preserve *Austin*.

As is now well-known, the Court again went well beyond the AFL-CIO's position and struck down BCRA's ban on the use of union or corporate general treasury funds to pay for either electioneering communications or express advocacy that was not coordinated with a campaign.<sup>63</sup> Thus, while the AFL-CIO was vindicated in the sense that it was freed to release general treasury-funded issue ads at any time without fear of criminal prosecution, the Court also opened up a vast new avenue for both unions and corporations to engage in express advocacy of the defeat or election of candidates.

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<sup>57</sup> Jurisdictional Statement at i, *Citizens United*, 558 U.S. 310 (No. 08-205), 2008 WL 3851546, at \*i.

<sup>58</sup> *Id.*

<sup>59</sup> Brief of the AFL-CIO as Amicus Curiae in Support of Appellant at 3, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 2365216, at \*3 ("*McConnell* should be overruled as to § 203's facial constitutionality.").

<sup>60</sup> *Id.* at 2.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Citizens United v. FEC*, 557 U.S. 932, 932 (2009) (mem.). In *Austin v. Michigan Chamber of Commerce*, the Court upheld a Michigan statute that prohibited corporations—but not unions—from using general treasury funds to make independent expenditures to support or oppose candidates. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 656 (1990). Remarkably, no labor union or federation appeared before the Supreme Court in *Austin*.

<sup>63</sup> *Citizens United*, 558 U.S. at 365–66.

Given that the combined resources of the general treasuries of American corporations dwarfs those of unions, *Citizens United* appeared to benefit corporations much more than labor unions in terms of the ability to get out election-related messages.<sup>64</sup> Thus, it was unsurprising that the Service Employees International Union (SEIU)—which had not filed an amicus brief in the case—soon criticized the decision.<sup>65</sup> Perhaps more surprising was that the AFL-CIO has also called for a constitutional amendment to overturn *Citizens United*,<sup>66</sup> suggesting that for it, the value of the desired holding on electioneering communications was indeed significantly outweighed by the Court's broader holding on independent expenditures.

Since *Citizens United*, the Court has heard argument in two campaign finance cases: *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>67</sup> and *McCutcheon v. FEC*.<sup>68</sup> Interestingly, each case involved labor amicus participation that was wholeheartedly in support of the challenged campaign finance restrictions. First, *Arizona Free Enterprise Club* concerned the "matching funds" provision of the Arizona Citizens Clean Election Act. That provision entitled candidates who accepted public campaign funding to extra money when their privately financed opponents, together with supportive independent expenditure groups, spent more than a designated amount.<sup>69</sup> The Service Employees International Union (SEIU) filed an amicus brief in *Arizona Free Enterprise Club*. It explained that its support of the provision stemmed from its "active[ ] participat[ion] in elections at all levels of federal, state, and local government," and desire to "participate in fair and transparent electoral process . . . ."<sup>70</sup> It emphasized that although it operated a "substantial independent expenditure program," it nonetheless did not view Arizona's trigger mechanism as a deterrent to its continued engagement in election-related speech in Arizona.<sup>71</sup> And, it emphasized the law's advantages: "public financing enhances our members' and the public's sense that elections are honest and fairly conducted."<sup>72</sup> However, the Court was not convinced: it held that the Arizona law violated the First Amendment rights of privately financed candidates and their supporters who made independent expenditures.<sup>73</sup>

Finally, in 2013, the Court agreed to hear *McCutcheon v. FEC*, a case concerning the constitutionality of federal biannual aggregate limits on contri-

<sup>64</sup> I have discussed this point in greater detail in previous work. Garden, *supra* note 3, at 12–16.

<sup>65</sup> Mark McCullough, *Testimony: SEIU's Anna Burger on the Citizens United Decision*, SEIU.ORG (Feb. 2, 2010, 9:55 AM), <http://www.seiu.org/2010/02/testimony-seius-anna-burger-on-the-citizens-united-decision.php>.

<sup>66</sup> *Restoring Democracy*, AFL-CIO (Mar. 14, 2012), <http://www.aflcio.org/About/Exec-Council/EC-Statements/Restoring-Democracy>.

<sup>67</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

<sup>68</sup> *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), *prob. juris. noted*, 133 S. Ct. 1242 (2013). Oral arguments occurred on October 8, 2013, a transcript of which is available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-536\\_7148.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-536_7148.pdf).

<sup>69</sup> *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2813–14.

<sup>70</sup> Brief of Amicus Curiae SEIU in Support of Respondents at 1, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (Nos. 10-238 & 10-239), 2011 WL 688729, at \*1.

<sup>71</sup> *Id.* at 3–4.

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2828.

butions to candidates, political parties, and political action committees.<sup>74</sup> In two briefs, several labor unions and the AFL-CIO all voiced their support for these provisions. First, the Communications Workers of America and American Federation of Teachers, alongside a list of non-labor groups, made a detailed argument about how aggregate limits fight corruption and its appearance.<sup>75</sup> Second, and related, the AFL-CIO, National Education Association, SEIU, and the American Federation of State, County & Municipal Employees filed a brief arguing that the limits presented only a minor encroachment on speech, which was well-justified by the government's interest in fighting corruption.<sup>76</sup>

In sum, labor's history of union litigation in campaign finance cases reveals a continuing concern with unions' rights to talk publicly about politics. In recent years, the AFL-CIO has taken a carefully calibrated position in campaign finance cases, focusing primarily on preserving its freedom to engage in issue advocacy and lobbying. However, post *Citizens United*, the labor movement has begun to side with government in opposing challenges to the constitutionality of campaign finance restrictions. This does not seem to be the result of any sea change in the labor movement's attitudes towards such restrictions, but rather, a reflection of the fact that the most recent cases were unrelated to issue advocacy.

In the next Part, I discuss briefly the practical results of *Citizens United* and other recent developments in campaign finance law, including the D.C. Circuit's decision in *SpeechNow.org v. FEC*, which struck down limits on the amount that individuals could contribute to organizations that made only independent expenditures, thereby paving the way for the creation of the "super PAC."<sup>77</sup>

#### D. Unions in a Post *Citizens United* World

Although individual unions and labor federations criticized the outcome in *Citizens United*, they also appear to have concluded that they cannot afford to ignore it. Thus, the 2010 and 2012 election cycles saw unions both contribute to super PACs that were not related to the labor movement, such as Priorities USA Action,<sup>78</sup> and also create their own super PACs.<sup>79</sup> While labor-sponsored

<sup>74</sup> See *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), *prob. juris. noted*, 133 S. Ct. 1242 (2013).

<sup>75</sup> See generally Brief of Amicus Curiae Communications Workers of America et al. in Support of Appellee, *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 12-536), available at [http://www.fec.gov/law/litigation/mccutcheon\\_sc\\_cwa\\_amici\\_brief.pdf](http://www.fec.gov/law/litigation/mccutcheon_sc_cwa_amici_brief.pdf).

<sup>76</sup> See Brief Amici Curiae of the National Education Association et al. in Support of Appellee at 14–15, *McCutcheon*, 893 F. Supp. 2d 133 (No. 12-536), available at [http://www.brennancenter.org/sites/default/files/legal-work/McCutcheon%20National%20Education%20As%20society%20amicus\\_080713.pdf](http://www.brennancenter.org/sites/default/files/legal-work/McCutcheon%20National%20Education%20As%20society%20amicus_080713.pdf).

<sup>77</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010).

<sup>78</sup> Andy Kroll, *Hollywood and Labor Unions Pony Up for Obama Super-PAC's Record Month*, MOTHER JONES (Oct. 22, 2012, 7:40 AM), <http://www.motherjones.com/mojo/2012/10/hollywood-unions-obama-super-pac-romney>.

<sup>79</sup> For example, the National Education Association created the NEA Advocacy Fund, which spent \$4.2 million during the 2010 federal election cycle and just over \$1 million during the 2012 cycle. *NEA Advocacy Fund*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=C00489815> (last visited Mar. 6, 2014). The Service Employees International Union's Super PAC spent just over \$5.3 million during

super PACs spent far less than the largest super PACs—the largest conservative super PAC spent over \$142 million and the largest liberal super PAC spent \$65 million—two labor super PACs were nonetheless among the top twenty in terms of spending. They were the AFL-CIO sponsored Workers' Voice super PAC, which spent \$6.3 million, and the SEIU super PAC, which spent \$5.3 million.<sup>80</sup>

Interestingly, much of the money raised by the Workers' Voice super PAC was devoted to targeted door-to-door canvassing of non-union workers—an activity that could not be funded from union treasuries before *Citizens United*.<sup>81</sup> In other words, instead of massive advertising buys, Workers' Voice funded millions of conversations about the upcoming election. These efforts were particularly concentrated in the swing states of Ohio and Wisconsin, where recent attempts at public sector labor law reform (successful in Wisconsin, but not in Ohio) mobilized union members and supporters.<sup>82</sup>

### III. CONCLUSION: LOOKING FORWARD

This Essay has explored the positions taken by labor unions and federations—particularly the AFL-CIO—in campaign finance cases before the Supreme Court. This litigation reveals targeted priorities; in short, unions have been troubled by some, but far from all, campaign finance regulations. Yet, there is a potential downside of this targeted approach: outside observers may focus only on the fact that an amicus brief has been filed in support of one or more aspects of a challenge to campaign finance law and assume that the labor movement (or at least the union or federation that filed the brief) supports the challenge in its entirety. For example, after *Citizens United*, some commentators criticized the AFL-CIO for having supported the petitioners, seemingly assuming that the AFL-CIO's amicus brief indicated wholesale support for the outcome in that case.<sup>83</sup> This risk is compounded by the fact that labor unions have only recently begun filing amicus briefs in support of the government in campaign finance cases, in *Arizona Free Enterprise Club* and *McCutcheon*.

This is more than a simple potential image problem for labor; it can also alter the terms of the debate over who is served by campaign finance restrictions. Opponents of campaign finance reform can argue that their cause is non-partisan by pointing to unions; indeed, although Republican-leaning super

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the 2012 federal cycle. *2012 Outside Spending, by Super PAC*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> (last visited Mar. 6, 2014).

<sup>80</sup> *Id.*

<sup>81</sup> Molly Ball, *Did Citizens United Help Democrats in 2012?*, ATLANTIC (Dec. 1, 2012, 1:07 PM), <http://www.theatlantic.com/politics/archive/2012/12/did-citizens-united-help-democrats-in-2012/265800/>.

<sup>82</sup> *Id.* See also Ronald Brownstein, *The Ohio Twist*, NAT'L J., Nov. 3, 2012, at 38, 38–39; Ronald Brownstein, *Obama's Support in Rust Belt, Sun Belt Very Different*, NAT'L J. (Nov. 2, 2012), <http://www.nationaljournal.com/thenextamerica/politics/Obama-s-support-in-rust-belt-sun-belt-very-different-20121102>; Monica Davey & Steven Greenhouse, *Flood of Conservative Money Challenges Ohio Unions' Voter Drives*, N.Y. TIMES, Sept. 4, 2012, at A13.

<sup>83</sup> John Nichols, *Unions Can't Compete with Corporate Campaign Cash*, NATION (Jan. 24, 2011, 10:44 AM), <http://www.thenation.com/blog/unions-cant-compete-corporate-campaign-cash#>.

PACs dramatically outspent their Democratic-leaning counterparts, some Republicans implied that labor's support for Democrats resulted in an election landscape that disadvantaged Republicans.<sup>84</sup>

Labor's Supreme Court litigation in the area of campaign finance is important both for its substantive outcomes and the window that it provides into union and federation priorities. This is particularly true with respect to the AFL-CIO, which is the most active litigant in this area. However, the AFL-CIO's position had historically been defined largely in terms of campaign finance regulation that it opposes; it had remained silent (at least before the Supreme Court) regarding other campaign finance provisions under review. Thus, the union briefs in *Arizona Free Enterprise Club* and *McCutcheon* are significant because they offer a more complete picture of union views of campaign finance law. With new campaign finance cases percolating up to the Court in the wake of *Citizens United*, unions will undoubtedly have continued opportunities to make their priorities in this area clear to the Court, as well as the American public.

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<sup>84</sup> Davey & Greenhouse, *supra* note 82.