GEORGE MASON UNIVERSITY | School of Law

AMPERSAND, *TORNILLO*, AND *CITIZENS UNITED*: THE FIRST AMENDMENT, CORPORATE SPEECH, AND THE NLRB

Harry G. Hutchison,
George Mason University School of Law

***NYU Journal of Law & Liberty*,**
Vol. 8, No. 2, Forthcoming

George Mason University Law and Economics Research Paper Series

13-68

AMPERSAND, TORNILLO, AND *CITIZENS UNITED:* THE FIRST AMENDMENT, CORPORATE SPEECH, AND THE NLRB

HARRY G. HUTCHISON*

I. INTRODUCTION

Opposing the "conceit that corporations must be treated identically to natural persons in the political sphere,"[1] and appalled by the Supreme Court's putative rejection of "a century of history,"[2] which distinguished corporations from human beings, Justice Stevens stressed that not a scintilla of evidence indicates the Framers believed that the First Amendment would preclude regulation of speech based on the corporate form.[3] In offering a defense of prior case law upholding speech regulations based on the speaker's identity[4] and snubbing the possibility that the logic of prior cases would likely apply most directly to newspapers and other media firms,[5] he asserts that soulless[6] corporations have historically labored under a cloud of disfavor.[7] Notwithstanding the force of Justice Stevens' argument and his claim that the Court's failure to accept his intuition disfavoring speech rights for corporations "threatens to undermine the integrity of elected institutions across the Nation,"[8] the First Amendment rights of business organizations and employers have been sustained in a number of cases. This is true whether the free speech and free press provisions of the First Amendment ought to read separately or, alternatively, whether these provisions suggests that all individuals, whether users of mass

*Professor of Law, George Mason University School of Law. Elizabeth McKay, Joseph Hartman, Stefan Padfield, Paul Secunda, and Jeffrey Usman generously provided helpful comments on earlier drafts of this article. The usual caveat applies.

[1] Citizens United, 130 S. Ct. 876, 930 (2010) (Stevens, J. concurring in part and dissenting in part).
[2] *Id*.
[3] *Id* at 948.
[4] *Id*.
[5] *Id* at 923 (majority opinion).
[6] *Id*. at 949 (Stevens, J., concurring in part and dissenting in part).
[7] *Id*. at 948.
[8] *Id*. at 931.

communications technologies or not, have the same freedom.[9] This conclusion withstands scrutiny despite the fact "that the Press Clause of the First Amendment remains, perhaps one of the most ill-defined and least-understood rights prescribed . . . by the founders."[10] In any case, the speech/press rights of entities have prevailed against an effort to apply a state's antidiscrimination statute to a newspaper,[11] a state attempt to mandate that political candidates have the right-of-reply against adverse editorials,[12] and a federal endeavor to smother employer speech[13] during a labor union organizing and election campaign.[14]

The speech or, alternatively phrased, communication rights[15] of corporations have been recently illuminated by a cascading dispute regarding the legitimacy of the Supreme Court's decision in *Citizens United*. Although, the dissent intuits that corporations are quasi-public entities that deserve unique analysis,[16] the *Citizens United* Court majority makes clear that business organizations have First Amendment rights in the realms of advocacy and politics that are consistent with the Court's previous observation that "the worth of speech 'does not depend upon the identity of its source, whether corporation, association, union or individual.'"[17] Whether or not the Court's opinion was broader than necessary,[18] its formulation appears to be coherent with Professor Volokh's intuition that the existence of a free press means that every

---

[9] *See e.g.*, Eugene Volokh, *Freedom For the Press as an Industry, or for the Press as a Technology? From Framing to Today,* 160 U. PA. L. REV. 459, 463 (2012) (accepting a "press-as-technology" reading of the Free Press clause of the First Amendment under which all users of mass communications technologies have the same freedom of press).

[10] Seth Korman, *Citizens United and the Press*, 37 RUTGERS L. REC. 1, 2 (2010).

[11] Nelson v. McClatchy 936 P. 2d 1123, 1124-1129 (1997) 522 U.S. 866 (cert. dn.) (holding that a state employment statute cannot be constitutionally applied to limit a newspaper's right to control content).

[12] Miami Herald v.Tornillo, 418 U.S. 241, 247 (1974).

[13] NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941) (noting that nothing in the NLRA prohibits an employer "from expressing its view on labor policies or problems" unless the employer's speech is coercive within the meaning of the Act).

[14] *See e.g.*, ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 175-176 (2004) (discussing NLRB efforts to limit employer speech premised on the notion that employers are required to be neutral during an organizing campaign).

[15] Volokh, *supra* note___ at 475 (suggesting that the existence of both "freedom of speech" and "freedom of the press" are not redundant).

[16] Citizens United, 130 S. Ct. 876, 930 (2010) (Stevens, J. concurring in part and dissenting in part) (stating that "[c]orporations were created, supervised, and conceptualized as quasi-public entities, 'designed to serve a social function for the state'").

[17] *Citizens United*, 130 S. Ct. at 906 (citing *Bellotti*, 435 U.S. at 777).

[18] *Citizens United*, 130 S. Ct. at 931(Stevens, J. concurring in part and dissenting in part) (suggesting that the question decided by the Court was not properly before it and indicating that the proper scope of the case would consider an "as applied challenge" rather than a facial challenge to the statute at issue).

individual or individual entity has a right to speak or publish his (its) sentiments on the measures of government[19] or otherwise. Coherent with this observation, it is possible to claim that the *Citizens United* Court attacks federally-sanctioned special treatment for the institutional press[20] while expanding the Speech Clause of the First Amendment and deemphasizing, or perhaps eliminating, any heightened protection afforded by the Press Clause.[21] The latter observation is coherent with the fact that the most important cases touching on what the press can publish are primarily free speech cases.[22] Provoked by the *Citizen United* decision that enabled a nonprofit advocacy group funded in part by general treasury funds of for-profit corporations to bypass section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA),[23] commentators have offered a number of observations in defense of speech suppression of artificial entities.[24]

In order to uphold a nonprofit business organization's First Amendment right to speak or publish as it sees fit regardless of the source of its funds, the *Citizens United* Court overruled a particular vision of corruption that justified restrictions on corporate speech on grounds that the expressive and political interests of corporate shareholders and corporate managers might diverge.[25] Before *Citizens United*, it was possible to assert that the use of "other people's money for political speech was so prone to corruption that state had an interest in controlling it"[26] and that declaration was sufficient to justify government regulation of speech without an affirmative showing of *quid pro quo* corruption.[27] After *Citizens United*, the Court left open the question of how it should deal with the speech funded by "other people's money."[28] *Citizens United* noticeably

[19] Volokh, *supra* note___ at 466.
[20] Korman, *supra* note__ at 1.
[21] *Id*.
[22] *Id*. at 4.
[23] *See Citizens United* 130 S. Ct. at 887-888 (noting a nonprofit advocacy group sought to air a movie critical of Hillary Clinton while she was competing in primary elections during the 2008 presidential campaign).
[24] *See e.g.*, Katrina vanden Heuvel, *Is a 'Citizens United' Democracy a Democracy at All?*, THE NATION, October, 26, 2012, *available at* http://www.thenation.com/blog/170847/citizens-united-democracy-democracy-all#axzz2X4l6kiu8.
[25] Jeremy G. Mallory, *Still Other People's Money: Reconciling* Citizens United *with* Abood *and* Beck, 47 CAL. WESTERN L. REV. 1, 38 (2010).
[26] *Id*. at 38-39.
[27] *Id*. at 5.
[28] *Id*. at 3-8 (suggesting that this issue is central to freedom of speech debates spawned by union dues dissenters and members of bar associations).

concentrates the Court's analysis on the notion that a corporation or other business organization ought to be seen as a unitary speaker for purposes of First Amendment analysis.[29] Although media corporations were exempt from the reach of the statutory provision at issue[30] in the suit brought by Citizens United against the Federal Election Commission (FEC), it is also apparent that the Court's approach protects the First Amendment rights of ordinary citizens and refrains from supplying superior rights to members of the press.[31] The importance of *Citizens United* for our purposes is that it frames but does not necessarily decide the central question of this Article: if the institutional press does not necessarily have any constitutional privilege beyond that of other speakers,[32] does a for-profit media firm's free speech/free press rights trump reporters' claim to journalistic integrity within the meaning of an organizing campaign regulated by the National Labor Relations Act (NLRA)? To be sure, government regulation of speech fits Larry Alexander's description of the paradox of liberalism wherein the liberal state diminishes its credentials as a liberal state by suppressing speech that it is bound to protect.[33]

Disregarding the *Citizens United* Court's validation of a firm's speech rights, and the fear that government speech regulation could conceivably facilitate the outright regulation of the press,[34] and the *Tornillo* Court's rejection of state regulation of a newspaper's content and editorial judgment,[35] the National Labor Relations Board's (NLRB) recent opinion in *Ampersand Publishing*[36] shrinks a newspaper's First Amendment rights with regard to editorial control. Although it is both possible and contestable that the Constitution specifically selected the press

---

[29] *See id*. at 7 (comparing *Bellotti's* unitary speaker approach with other cases and disputing the Court's conclusion suggesting that a corporation is unitary).
[30] *Citizens United* 130 S. Ct. at 905 (referring to 2 U.S.C. §§ 431(9)(B)(i) & 434(f)(3)(B)(i).
[31] Volokh, *supra* note____ at 519 (citing numerous Supreme Court opinions stating that the guarantees of the First Amendment secure the rights of every citizen).
[32] *Citizens United* 130 S. Ct. at 905-906 (noting that the line between media and others who wish to comment on political and social has become blurred). *But see* Volokh, *supra* note___ at 524-534 (noting that some courts deviate from the notion of the "all-speakers-are-equal" approach and allow mass-communications firms more protection within the meaning of the Free Press Clause of the First Amendment).
[33] Larry Alexander, *Free Speech and "Democratic Persuasion": A Response to Brettschneider*, University of San Diego School of Law, Legal Studies Research Paper Series, Research Paper No. 13-122 (June 2013) *available at* http://ssrn.com/abstract=2277849, at page 1.
[34] *Citizens United* 130 S. Ct. at 905 (citing McConnell, 540 U.S., at 283 (Thomas, opinion)).
[35] *Tornillo*, 418 U. S. at 258.
[36] Ampersand Publishing, LLC D/B/A Santa Barbara News-Press and Graphic Communications Conference Int'l Bro. of Teamsters and Robert Guiliano, 357 NLRB No. 51 (2011).

to play an important role in public affairs as an antidote to government overreach,[37] the NLRB deploys its power in a way that may threaten freedom of speech as well as freedom of the press, an occurrence that mirrors progressive scholars' insistent contention that corporations ought not to have First Amendment rights since they are not legitimate participants in the marketplace of ideas.[38] The NLRB's decision in *Ampersand* fits conveniently or consciously within an arrangement illuminated by the dissent in *Citizens United.* This arrangement implies that when rights-bearing individuals pool their economic and ideological resources to form a firm that enters into commerce, their constitutional rights do not necessarily remain intact for a variety of public welfare reasons. Whether or not this claim is correct, the NLRB's *Ampersand* opinion appears to materialize as part of a wide-ranging labor movement effort to resuscitate unionization,[39] premised on the thesis that workers' yearning for an effective voice in the governance of their workplace has not waned in the face of union decline.[40] Countering the NLRB's decision, and animated by a perspective that defends employer freedom of expression rights, the District of Columbia (D.C.) Court of Appeals reversed the NLRB on grounds that the NLRA did not protect certain concerted employee activity from a healthy conception of employers' First Amendment rights.[41] The court held that although newspapers are subject to the NLRA, the NLRB's interpretation of this law is invalid when the Board encroaches on "constitutional guarantees, including the First Amendment's guarantee of a free press."[42] To be clear, the *Ampersand* case does not signify a freedom of speech clash over the use of "other people's money," nor does the case directly involve a dispute over whether the firm's identity as a

---

[37] *Tornillo*, 418 U.S. at 260 (Brennan, J. concurring) (citing Mills v. Alabama, 384 U. S. 214, 218-19 (1966). *But see* Volokh, *supra* note___ at 519-520 (indicating that Supreme Court majority in both *Pell v. Procunier*, and Nixon v. Warner Communications, (435 U.S. 589, 609) declined to accept this observation, which would imply special rights for members of the institutional press).

[38] Kent Greenfield, Daniel J. H. Greenwood, Erik S. Jaffe, Panel Discussion: *Should Corporations Have First Amendment Rights?,* 30 SEATTLE U. L. REV. 875, 876-880 (2007) (quoting Greenfield).

[39] *See e.g.*, Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approaches to Union Growth*, 50 NEW YORK L. SCH. L. REV. 337 337-349 (2005-2006) (describing the labor movement's focus on more and better organizing, changing the dynamics of organizing to reduce employer opposition, and building public support for unions). *But see,* Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause of Labor's Decline, in* EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING 41, 43 ((Samuel Estreicher ed., 1998) (showing that employees are increasingly disinterested in labor unions).

[40] Seth D. Harris, *Don't Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issue,* 50 NEW YORK L. SCH. L. REV. 303, 304 (2005-2006).

[41] Ampersand Publishing, v. NLRB 702 F. 3d 51, 56 (2012, D.C. Cir.).

[42] *Id*.

limited liability company (LLC) poses a threat to its First Amendment rights. Rather, *Ampersand* embodies the clash between two distinct groups pursuing autonomy and independence in our increasingly fractured society.[43] The first constituent of this clash features two sub-conflicts: (1) an employer organized as an LLC striving to retain editorial control and (2) employees bound together for mutual aid and protection striving to achieve editorial jurisdiction over a newspaper as part of their effort to organize within the meaning of the NLRA. The second reflects divergent conceptualizations of business organizations. One approach, consistent with Justice Stevens' understanding of business organizations in *Citizens United*, concedes the possibility that individuals may join together to exercise their speech rights but that corporations, apparently premised on the artificial entity/concession model,[44] are not seen as facilitating such associational or expressive ends.[45] As such, a corporation could not necessarily command constitutional protection in its own right. The opposite conceptualization of the corporate form appears to be tied to the aggregate/contractarian theory,[46] which insists that a firm, as an association of rights-bearing individuals, is entitled to constitutional protection from the state—including the facilitation of expressive ends—without regard to its shareholders.[47] On this view, the firm's legal personhood is entitled to constitutional protection.[48] This conflict of visions regarding the constitutional protection available to business organizations simmers below the surface of the *Ampersand* case.

Premised on the desirability of human liberty, a goal that is advanced by protecting freedom of expression and reinforced by a discussion that situates employer freedom of expression rights within the consensus versus authority debate applicable to business

---

[43] Fredrick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1197 (2005) [hereinafter, Gedicks, *Spirituality, Fundamentalism, Liberty*] (suggesting that Americans live in a society that is falling apart).
[44] Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L., 831, 835-843 (2013) [hereinafter, Padfield, *The Silent Role of Corporate Theory*] (providing a plausible taxonomy). *But see* Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WISCONSIN L. REV. 999, 1040 (2010) (asserting that both the *Citizens United* majority and the dissent adopted the real entity view of the corporation).
[45] *Citizens United*, 130 S. Ct. at 949-950 (Stevens, J., concurring in part and dissenting in part).
[46] Padfield, *The Silent Role of Corporate Theory*, *supra* note___ at 835-843.
[47] Avi-Yonah, *supra* note___ at1017. *See also*, Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People*, 44 JOHN MARSHALL L. REV. 701, 709 (2011).
[48] Shapiro & McCarthy, *supra* note____ at 709.

organizations,[49] this Article concludes that the D.C. Circuit struck the right balance when it upheld employers' speech rights in *Ampersand*, not least because it found that there is a limit to government intrusion on the rights of others. To be sure, there is a debate about whether the employer's freedom of speech or, alternatively, the First Amendment guarantee of a free press was at issue in *Ampersand*. This Article, however, builds on the intuition of First Amendment scholar Volokh, who suggests that from the Framing of the Constitution till today, the freedom of the press is nothing more or less than the right of everyone, citizen or individual, to engage in the activity of speaking through some form of mass communication.[50] This conception of the First Amendment as communicative freedom indicates that the Constitution protects the *activity* of speaking, printing, or otherwise engaging in mass communication by individuals, rather than protecting individuals and groups simply because they are *members* of the institutional press.[51] Part II supplies background. Part III scrutinizes the *Ampersand* decision. Part IV places *Ampersand* in context as part of a scaffold shaped by *Citizens United* and the analyses of a number of commentators standing in the dark shadow cast by labor's ongoing implosion. Part V offers analysis. Enriched by the clarifying intuition of scholars Shapiro and McCarthy[52] regarding the constitutional rights of business organizations, this Article defends Ampersand as a "person" within the meaning of the Constitution;[53] a "person" that is, and ought to be entitled to control the editorial content of its newspaper despite the counterclaims of reporters seeking to organize within the meaning of the NLRA. Lastly, this Article concedes that any defense of speech rights for employers must contend with the persistent efforts of labor advocates to diminish what the Constitution appears to protect. This maneuver suggests that speech rights are likely to remain contingently unstable in our postmodern world, which teeters between freedom and government coercion.

II. BACKGROUND

[49] *See* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 3-22 (2008) (showing that any organization needs a governance system that facilitates efficient decision-making, and that the two basic options are "consensus" and "authority").
[50] Volokh, *supra* note___ at 465-518.
[51] *See e.g.,* Akilah N. Folami's *Using the Press Clause to Amplify Civic Discourse Beyond Mere Opinion Sharing*, 85 TEMP. L. REV. 269, 279 (2013) (discussing the non-existence of an institutional press at the time of the founding of the Republic).
[52] Shapiro & McCarthy, *supra* note___ at 701-716.
[53] *Id*. at 702.

Members of liberal societies are waiting, but they do not know what they are waiting for.[54] Captured by a *zeitgeist* featuring the cultural climax of fourteenth and fifteenth century currents that emphasized a tradition of individual rights and liberties;[55] an occurrence perhaps made possible by the advent of metaphysical univocity,[56] Americans dream of liberation while populating various interest groups.[57] Simultaneously energized and enervated by the promise and disappointment generated by the unraveling evolution of human autonomy, many Americans have fallen prey to a postmodernist spirit that "swims, even wallows, in the fragmentary and the chaotic currents of change." [58] This move may reflect Plato's great claim that the rise of a democratic age destroys the unity of people's orientation towards any particular value.[59] Representing "the precedence of surface over depth, of simulation over the real, of play over seriousness,"[60] such moves are made more terrifying by the all too human propensity to deny the opacity of the world and accept the ravenous claims of scientism.[61] Declining to believe in meta-narratives, or universal explanations of human nature, many individuals, instead "look to the particular or accidental explanations, or sometimes to no explanation at all."[62] However enervated they may be by conflicting cultural currents, citizens as members of interest groups or as radically individuated postmoderns, today must deal with a mushrooming, if not suppressive, federal government that discriminates against the expression

---

[54] CHANTAL DELSOL, ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD xxvii (2003).
[55] SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER, 71 (1996).
[56] BRAD GREGORY, THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY, 36-73 (2012) (discussing the process of bringing God into human discussions grounded in the notion that God, creation, and human kind are basically part of same substance, a move that inevitably led to the exclusion of God through the radical separation of faith and reason and the elevation of human pursuits, including the pursuit of autonomy).
[57] Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?* 10 U. PA. J. OF BUS. & EMPL. L. 663 (2008) [hereinafter, Hutchison, *Reclaiming the First Amendment*].
[58] David Brooks, *Class Politics Versus Identity Politics*, 125 PUB. INTEREST 116, 118 (1996) (reviewing MICHAEL TOMASKY, LEFT FOR DEAD (1996)).
[59] *See e.g.*, Jeffrey Usman, 83 N. D. L. REV. 123, 198 n. 509 (2007) (citing Plato's REPUBLIC for this proposition)
[60] Pamela McCorduck, *Sex, Lies and Avatars* WIRED MAGAZINE April,1996 (describing Professor Turkle's celebration of postmodernism) *available at* http://www.wired.com/wired/archive/4.04/turkle.html.
[61] Leon Wiseltier, *Crimes Against Humanities: Now Science want to invade the liberal arts. Don't let it happen*, THE NEW REPUBLIC, September 3, 2013 *available at* http://www.newrepublic.com/node/114548/print, pages 1-9.
[62] Brooks, *supra* note___ at 118.

of views by its ideological, political, and religious opponents despite the text of the First Amendment.[63] Enervation expands due to this ostensibly transparent government taking full advantage of its powers to inspect its citizens' email, phone, and internet communication accounts on a massive and constitutionally-suspect scale[64] while attempting to disallow the disclosure of such activity in a manner that is contrary to the spirit, if not the text, of the First Amendment.[65]

Although it is difficult to find agreement regarding "a complete, transcendent, and immanent set of propositions about right and wrong,"[66] in the modern world, it is maintained that the "First Amendment creates an 'open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference."[67] Notwithstanding the nation's presumed acceptance of Enlightenment norms, varied First Amendment issues percolate inside the deeply pixelated setting of labor disputes.[68] This is true within private sector labor markets despite the fact that, as originally enacted, the NLRA addressed neither the intersection of employee organizational rights and employer speech rights[69] nor the corresponding conjunction of workers' speech rights

---

[63] *See e.g.*, Zeke J. Miller and Alex Altman, *IRS Admits to Targeting Conservative Groups Over Tax Status*, TIME.COM, May 10, 2013 available at http://swampland.time.com/2013/05/10irgs-admits-targeting-conservative-groups-over-tax-...(acessed 5/20/2013); William Bigelow, *Report: Obama's IRS Targets Jewish Organizations*, BREIBART.COM, May 12, 2013 available at http://www.breitbart.com/Big-Government/2013/05/11/Obama-s-IRS-Targets-Jewish-Orga... (accessed, 5/20/2013); Karin McQuillan, *How Obama Told the IRS to Target Conservatives*, May 20, 2013, THE AMERICAN THINKER available at http://www.americanthinker.com/printpage/?url=http://www.americanthinker.com/blog/20... (accessed May 20, 2013).

[64] *See e.g.*, Katie Glueck, *Glenn Greenwald: U.S. wants to destroy privacy worldwide*, POLITICO, June 7, 2013, http://dyn.politico.com/printstory.cfm?uuid=69F8590A-4A37-FD3f-B51E-D28144CDBD27 (accessed June 9, 2013) (explaining how the Obama administration has developed a warped interpretation of the Patriot Act that allows it to vest itself with extremist surveillance powers over American citizens, including the capture of phone records).

[65] Katherine Jacobsen, *Google Challenges Secret Court over Gag Order: Citing the First Amendment, Google files a legal motion to publish the number of FISA data request it has received*, THE CHRISTIAN SCIENCE MONITOR, CSMONITOR.COM (June 19, 2013), http://www.csmonitor.com/layout/set/print/Innovation/2013/0619/Google-challenges-secret-court-over-gag-order.

[66] Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1229 (1979).

[67] Knox et. Al., v. SEIU, Local 1000, 132 S.CT. 2277, 2288 (2012).

[68] *See e.g.*, Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 763-64 (1961) (suggesting that a dispute regarding union dues can force First Amendment issues to the surface).

[69] Chamber of Commerce of the United States v. Brown 554 U.S. 60, 67 (2008).

and the rights of labor unions designated to represent the workforce.[70] Instead, these intersections were and are patrolled by bureaucrats in the exercise of the NLRB's presumptive interpretative expertise. At the same time, provoked by the steady erosion in union density putatively caused by management's hostile influence during union organizing campaigns, the NLRB has responded by attempting to squelch employer speech prior to a representation election.[71] For employers and workers, anxiety is sharpened when the rich, after being rhetorically pummeled by America's current president,[72] still manage to increase their wealth while the poor become poorer every day.[73] Since America appears to have capitulated to corporatism, which is simply a hierarchical form of paternalism that rewards the quest for self-interested rents by entrenched interest,[74] these dispiriting events appear to be predictable.[75] Thus, the nation's dystopian turn,[76] splendidly epitomized by legions of "one percenters" (Big Business, Big Labor, and Big Lobbyists)[77] who insist on invading America's capital city while

[70] *See e.g., Knox v. SEIU* 132 S.Ct. at 2288-2296 (requiring a union to provide fresh notice of a special union assessment and precluding the extraction of funds from nonmembers without their affirmative consent, regardless of whether the special assessment is imposed for political purposes).
[71] Joseph P. Mastrosimone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech*, 52 WASHBURN L. J., 101, 101-103 (2013).
[72] *See e.g.*, Peter Ferrara, *Obama and the Pirates*, THE AMERICAN SPECTATOR, February 13, 2013 (writing that President Obama still thinks the rich do not pay their fair share).
[73] *See e.g., Under Obama, The Rich get Richer While Everyone Else Get Poorer*, INVESTOR'S BUSINESS DAILY, April 24, 2013 *available at* http://license.icopyright.net/user/viewFreeUse.act?fuid=MTcxNcxMjA%3D (showing that when President Obama first ran for office, he claimed his economic policies would "foster economic growth from the bottom up and not just the top down," but that his policies produced the exact opposite).
[74] Harry G. Hutchison *Protecting Liberty? State Secret Ballot Initiatives in the Shadow of Preemption and Federalism*, N. Y. U. J. OF L. & LIBERTY, 409, 493-494 & 495-496 (2012) [hereinafter, Hutchison, *Protecting Liberty*] (discussing the promise of corporatist authoritarianism unleashed by the linkage between progressive statists and Big Labor, Big Business, and Big Lobbyists as part of the pursuit of self-interested rents).
[75] Harry G. Hutchison, *Achieving our Future in the Age of Obama? Lochner, Progressive Constitutionalism and African American Progress*, 16 J. OF GENDER, RACE & JUSTICE 483, 522 (2013) [hereinafter, Hutchison *Achieving our Future in the Age of Obama*].
[76] *See e.g.*, Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV., 595, 619 (2003) [hereinafter, Somin, *Voter Knowledge*] (suggesting that the New Deal, arguably the beginning of the nation's dystopian turn, had only a limited connection with the goal of alleviating the Great Depression and much more to do with the pursuit of transformative policies by political elites and organized interest groups).
[77] Hutchison, *Protecting Liberty, supra* note___ at 493.

subordinating the country at large,[78] supplies an indispensable backdrop to debates regarding employers' First Amendment rights and employees' NLRA protection.

Beyond the lush paradox integral to the celebrated role of labor unions as a vehicle of workers' self-government, and in contrast to the undisputed premium that workers place on personal autonomy,[79] the case law indicates that contending parties may find their freedom-of-expression rights justifiably impinged at times within the parameters of a labor dispute.[80] Some decisions involving union political expenditures favor labor union dissenters,[81] while other cases permit employers to speak directly to their employees about the costs and benefits of unionization.[82] Alternatively, employers may realize that federal preemption rules[83] protect their speech rights from non-neutral intrusion by states that are predisposed to promote labor unions at the expense of human liberty.[84] Additional complications emerge over who ought to decide and enforce freedom of speech rights within the context of an organization when the claimants are labor unions, corporations, LLCs, or the various stakeholders in such organizations. The intensity of this cascading dispute may escalate when publishers, operating as legally-recognized business organizations, defend their asserted right to control the content of a publication, grounded in speech rights that reside within the First Amendment's guarantee

[78] John H. Fund, *The One Percenters' Fortress City,* THE AMERICAN SPECTATOR June 2012 (noting the top one-half of one percent of counties in the United States (two-thirds of the total) is dominated by counties surrounding Washington, D.C.).
[79] *See e.g.,* Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem with* Debartolo, 1990 WIS. L. REV. 149, 151-152 (explaining the contradiction between the Wagner Act, which is framed in terms that emphasize the value of associations and self-government, and the Taft-Hartley Act, which places a premium on personal autonomy).
[80] *See* GORMAN & FINKIN, *supra* note____ at 177 (discussing General Shoe Corp., 7 N.L.R.B. 124 (1948)).
[81] Communications Workers v. Beck 487 U.S. 735 (1988) (holding that nonmember/fee-payer may object to the union's use of his payments for purposes other than collective bargaining and contract administration).
[82] *See e.g., NLRB v. Virginia Electric & Power Co.*, 314 U.S. at 477 (noting that the NLRA does not prohibit an employer "from expressing its view on labor policies or problems" unless the employer's speech is coercive). *See also,* Thomas v. Collins, 323 U. S. 516, 537-38 (1945).
[83] *Chamber of Commerce v. Brown,* 554 U. S., at 65.
[84] *See e.g. id.* at 62-66 (disallowing an attempt by the state of California to, on one hand, prohibit certain employers that receive state funds, from using such funds to "assist, promote, or deter union organizing," while, on the other hand, expressly exempting "activities performed" or "expenses incurred" in connection with certain undertakings that promote unionization).

of a free press.[85] Claims and counterclaims regarding the freedom of expression rights of labor unions, union dues dissenters, corporations, and newspaper publishers are difficult to resolve since such contentions implicate constitutional doctrines and principles that may be difficult to defend.[86] The failure to defend constitutional principles for corporations and other business organizations robustly risks the formation of a world where corporations and other business organizations lose their constitutional rights. Such an outcome would enable government agents and bureaucrats to censor media firms' speech rights and confiscate their property without compensation by exercising the power of eminent domain.[87] The *Ampersand* case represents yet another permutation of the nation's ongoing struggle to resolve the conflict between constitutional principles that effectively protect business organizations or individual liberties and the erosive effect of public welfare statutes.

Regardless of the resolution of these issues, it is manifest that the *Ampersand* case occupies a much smaller stage than *Citizens United* yet remains part of a high-stakes contest over who ought to control the published content of a communications company pursuing readers in a postmodern society that is dazed, confounded,[88] and falling apart[89] amidst the enigmatic paradox of liberalism.[90] If Justice Stevens and other critics of the *Citizens United* majority are correct in concluding that identity-based restrictions on speech that is financed by the general treasury funds of corporations[91] ought to survive constitutional scrutiny,[92] and further that the nation's First Amendment tradition actually implies that corporations operate under a deserved cloud of disfavor,[93] then problems arise. There is no reason why the impetus to regulate corporate funding of political campaigns, thereby restricting corporate speech, ought necessarily

[85] *See e.g., Tornillo,* 418 U.S. at 245 (describing the Miami Herald newspaper's contention that the state right-of-reply statute was unconstitutional as an infringement on the freedom of the press).
[86] *See e.g.* Fisk & Chemerinsky, *supra* note___ at 2-6 (disputing the Supreme Court's protection of the free speech rights of corporations and opposing the Supreme Court's defense of the freedom of speech rights of union dissenters, while at the same time defending the rights of labor unions to speak on behalf of all represented workers without accounting for the views of all stakeholders).
[87] Shapiro & McCarthy, *supra* note___ at 701.
[88] James Davison Hunter, *Law, Religion and the Common Good,* 39 PEPPERDINE. L. REV. 101, 105 (2012)
[89] Gedicks, *Spirituality, Fundamentalism, Liberty supra* note___ at 1197.
[90] Alexander, *supra* note___ at 1.
[91] *Citizens United,* 130 S. Ct. at 954 (Stevens, J. concurring in part and dissenting in part).
[92] *Id*. at 945-948.
[93] *Id*. at 948-952 (disputing the notion that the original public meaning of the Constitution precludes identity-based restrictions on speech).

to stop at the water's edge marked by Justice Stevens' conviction that corporate spending can be circumscribed simply because corporations and, perhaps, other business organizations equipped with special characteristics[94] are not "real people." Instead, Justice Stevens and his fellow critics, propelled by the idea that the Constitution allows Congress to respond when changes in the American economy and political practices threaten the commonweal,[95] may well find no logical stopping point for their preferences, thus implicating the First Amendment rights of all employers who are organized as artificial but legal entities. In other words, if the First Amendment rights of an organization can be constricted because its identity perseveres as an artificial person whose constitutional status threatens the human development deemed necessary for society's flourishing, and if this identity standing alone conduces toward undue influence within the political funding arena or its status otherwise prompts Congress to respond in light of changes in the economy or the nation's political practices,[96] then it necessarily follows that the speech and press rights of such employers, as artificial organizations regulated by the NLRA, can be restricted for a variety of reasons irrespective of the text of the First Amendment that prohibits the making of any "law . . . abridging the freedom of speech."[97] Following the logic of Justice Stevens, employers who are organized as separate legal entities in order to provide speech that readers or listeners will find valuable are not deemed "real persons" and are therefore not entitled to the protection tied to a robust conception of the First Amendment. Presumably building on this intuition, a Board now has additional reason to justify a move in this direction, perhaps to uphold its pre-existing commitment to shrink employer rights in order to fulfill workers' supposed yearning for an effective voice in the governance of their workplace. However speculative this outcome may be, it seems highly possible since many labor commentators support an expansion of the regulatory state's reach in order to achieve goals that favor the predispositions of union hierarchs[98] over the liberty interests of workers[99] and employers.[100]

---

[94] *Id*. at 947.
[95] *Id*. at 953.
[96] *Id*.
[97] United States Constitution, First Amendment
[98] *See e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN L. REV. 495, 496-498 (1993) (extolling industrial and workplace democracy).

III. THE *AMPERSAND* DECISION

A. *The NLRB decision*

Before critically examining the Board's decision in *Ampersand*, three caveats command attention. First, the *Ampersand* Board is handicapped by the possibility that at least one Board member was invalidly appointed during an intrasession break. If true, then the NLRB's decision may be unsettled since three members of the Board must participate in a decision for it to become valid.[101] There is apparent authority for the proposition that Craig Becker, a member of the panel that decided *Ampersand*, was not a valid recess appointee and therefore not a valid member of the NLRB. If this is the case, then the Board's decision is moot.[102]

Second, although the Supreme Court's jurisprudence rejects an absolutist interpretation of the First Amendment,[103] meaning that speech rights can be restricted in order to further a compelling interest and are narrowly tailored to achieve that interest,[104] as we have already seen, the Court holds that the First Amendment makes no exception for corporations since it "protects speech and speaker and the ideas that flow from each."[105] This conclusion reflects the Court's rejection of one particular interpretation of the First Amendment that suggests that media firms might have Free Press Clause rights that other corporations interested in publishing material did not have.[106] Instead, the Court decided that "'the institutional press' has no

---

[99] Stewart J. Schwab, *Union Raids, Union Democracy and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 368 (1992) (noting the autocracy and entrenchment of union leaders since union elections provide members with little control over leaders).

[100] *See e.g.*, Becker, *supra* note___ at 496-498

[101] *See e.g.*, NLRB, 1199 SEIU United Heathcare Workers East, N. J. Region (intervenor) v. New Vista Nursing and Rehabilitation, Case: 11-3440, (May 16, 2013) (3rd Circuit) (holding that "the Recess of the Senate" in the Recess Appointments Clause of the Constitution refers to only intersession breaks and, hence, that the NLRB panel lacked the requisite number of members to exercise the Board's authority because one panel member was invalidly appointed during an intrasession break and, therefore, the NLRB's order was invalid).

[102] *See id*. at 5.

[103] Federal Election Comm'n v. Wisconsin Right to Life, Inc. 551 U.S. 449 at 482 (2007) (*WRTL*). *See also*, Daniel P. Tokaji & Allison R. Hayward, *The Role of Judges in Election Law*, 159 U. PA. L. REV. PENNUMBRA 273, 287-88 (2011) (noting the Court's rejection of an absolutist interpretation of the First Amendment in New York Times v. Sullivan).

[104] *WRTL* 551 U. S. at 464 (suggesting that political speech must prevail against laws that would suppress by either design or inadvertence).

[105] *Citizens United*, 130 S. Ct. at 899.

[106] Volokh, *supra* note___ at 517 (citing *Citizens United*,130 S. Ct. at 951 (Stevens, J.., dissenting)).

"constitutional privilege beyond that of other speakers.'"[107] This approach, evidently accepted by three of the four dissenters in the Court's earlier decision in *Bellotti*,[108] emphasizes speech rather than the status of the speaker as a member of the "press" for the purposes of constitutional adjudication.[109] After all, the exercise of press freedom is simply a more efficient way of speaking (via printing or some other form of mass communication) by lowering the per-listener costs of an individual's speech.[110] Since the choice of material that goes into a newspaper, the decisions made as to its size and content limitations, and its treatment of public issues constitutes the exercise of editorial control and judgment protected by the First Amendment's guarantee of a free press,[111] which is arguably an extension of the right to free speech,[112] government regulation of and interference with such editorial choice is presumptively problematic.[113] That said, First Amendment jurisprudence implies that the Court is more concerned with the potential excesses of government power rather than those of private corporations,[114] as well as the idea that the First Amendment supports our freedom to think for ourselves.[115] Proceeding with these claims in view, and borrowing from the Court's observation that government restrictions on corporate political expenditures are a form of censorship that deprives voters of information, knowledge, and opinion,[116] it is possible to intuit that government interference in a media firm's editorial

[107] Volokh, *supra* note___ at 517.
[108] *Id*.
[109] *Citizens United*, 130 S. Ct. at 913. *But see*, *Citizens United* 130 S. Ct. at 946 (Stevens, J. concurring in part and dissenting in part) (asserting that the government's interest in particular speech restrictions may be more or less compelling depending on the different classes of speakers affected).
[110]Volokh, *supra* note___ at 476 (quoting sources suggesting that printing or other forms of mass communication are simply a more extensive and improved kind speech).
[111] *Tornillo*, 418 U. S. at 248.
[112] Volokh, *supra* note___ at 467 (suggesting that an early understanding of liberty of speech and press did not describe separate rights and that press freedom is simply an extension of the right to freedom of speech that is applicable to all citizens).
[113] *Tornillo*, 418 U. S. at 248.
[114] Larry E. Ribstein, *The First Amendment and Corporate Governance*, GEORGIA ST. UNIV. L. REV. 1021 (2011) [hereinafter, Ribstein, *First Amendment*].
[115] *Citizens United*, 130 S. Ct. at 908. The Court's holding may provide an opportunity for proponents of speech restrictions to erode corporate speech protection since the opinion upheld the disclosure and disclaimer provisions of the law in question and suggested that regulation of corporate governance might pass constitutional muster. *See* Ribstein, *First Amendment*, *supra* note___ at 1021.
[116] *Citizens United*, 130 S. Ct. at 907.

autonomy risks censorship, which ultimately threatens every citizens' right to speak, or, alternatively, listen to contested speech.[117]

Third, it is worth noting that Ampersand is not a corporation but an LLC. For purposes of analysis, I will generally, but not necessarily always, assume that the logic associated with corporate speech applies to business organizations such as Ampersand despite the fact that such an organization has features that elide the distinction between corporations on one hand and partnerships on the other.[118] As discussed *infra*, there may be good reason to view Ampersand as a business entity that is more like a partnership than a corporation.[119]

Dispensing with caveats for the moment, it is possible to view the Ampersand LLC, doing business as the Santa Barbara News-Press, as an association of people[120] bound together for the purposes of expressing their views on various public issues. After becoming the subject of an organizing campaign and receiving a letter from its employees requesting the restoration of journalism ethics and separation of the paper's opinion/business side from its news-gathering side,[121] Ampersand canceled a union supporter's column; lowered evaluation scores of four union supporters; discharged a number of union supporters, many of whom had hung a banner from a footbridge urging motorist to cancel their newspaper subscriptions;[122] and engaged in additional conduct that the Board found objectionable.[123] Before issuing its Order, the NLRB agreed that the publisher raised two threshold matters that are vital to this Article's examination of employer free press/freedom of speech rights: (1) that the union organizing campaign was not protected by the NLRA in its entirety since the employees' primary demand was to protect their integrity as professional journalists, or, alternatively, that the employees lost NLRA protection

[117] Volokh, *supra* note___ at 517 (underscoring the claim that since the institutional press has no constitutional privilege beyond that of any other speakers, any restrictions that could be constitutionally imposed on non-media firms could likewise be imposed on media corporations, which implies the converse is equally true).
[118] RICHARD D. FREER & DOUGLAS K. MOLL, PRINCIPLES OF BUSINESS ORGANIZATIONS 554 (2013) (describing an LLC as a noncorporate business structure that provides its owners with limited liability, pass-through tax treatment, and contractual freedom to arrange its internal operations).
[119] *See infra* Part V. A. 1.
[120] *See* Shapiro & McCarthy, *supra* note___ at 702 (indicating that corporations are entitled to constitutional rights in order to protect the rights of individuals who have an interest in them).
[121] Ampersand Pub. and Graphic Comm., 357 NLRB No. 51, 1, 2 (2011).
[122] *Ampersand v. NLRB*, 702 F.3d at 54-55.
[123] *Id*. at 55 (explaining that the "ALJ and the Board further concluded that Ampersand violated § 8(a)(1) by coercively interrogating employees about union activity, monitoring union activity, and requiring employees to remove buttons and signs").

by engaging in disloyal conduct, even if those activities were initially protected, and (2) that government intervention on the employees' behalf would impermissibly interfere with Ampersand's First Amendment activities, namely its right to control the content of its newspaper.[124] Reflecting on these issues, the NLRB separated out issues related to the employer's ability to discharge workers (as a form of retaliation) from the workers' attempt to gain journalistic integrity,[125] which the NLRB panel saw as a bargaining issue reserved for later resolution. In reality, such issues overlap and are difficult to separate clearly.[126]

Resolving the first threshold issue—the employer's direct challenge to the protected status of the reporters' organizing campaign, reinforced by the possibility that such status was lost through disloyalty—the NLRB noted that workers have the right under Section 7 of the Act to "organize, bargain collectively, and engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection."[127] On the one hand, Ampersand saw the workers' primary purpose in organizing as an attempt to recapture journalistic integrity rather than as an effort to bargain over wages, hours, and other terms and conditions of employment. On the other hand, the NLRB first observed that, in addition to protecting their journalistic ethics and professional autonomy, the employees were seeking recognition of the union as their representative for collective bargaining purposes regarding wages, hours, and other terms and conditions of employment, an objective protected by the NLRA.[128] Further, the Board decided that the employees' attempt to *organize* for purposes of journalistic integrity could be severed from their capacity to apply bargaining pressure in the form of a strike.[129] The NLRB also found that employer-initiated changes in its editorial policy, whether correctly characterized as purely editorial or not, had a direct impact on employees' terms of employment.[130] The NLRB rebuffed Ampersand's contention that the protection of journalistic ethics was insufficiently tied to employees' interests because the management decisions at issue had and threatened to have a direct impact on the autonomy they enjoyed in performing their work consistently with

[124] *Ampersand Pub. and Graphic Comm.,* 357 NLRB No. 51 at 2-3.
[125] *Id*. at 6-9.
[126] *Ampersand v. NLRB,* 702 F.3d at 55 (quoting McDermott v. Ampersand, 2008 WL 8628728 at 12).
[127] *Ampersand Pub. and Graphic Comm.,* 357 NLRB No. 51 at 3 (citing Section 7 of the NLRA).
[128] *Id*.
[129] *Id*. at 9 (citing Nassau Insurance Co., 280 NLRB 878 fn. 3 (1986)).
[130] *Id*. at 3.

applicable professional norms.[131] On the Board's reading of Section 7 of the NLRA, the employees' activity, which was motivated by autonomy objectives, came within the "mutual aid and protection" clause of the statute and therefore ought to be protected since it was directly related to their interests as employees.[132] "But, even assuming *arguendo* that one of the employees' objectives was unprotected, there was no evidence to suggest that that was the reason for the adverse actions."[133] The NLRB also spurned the contention that the employees' campaign was unprotected because of employee disloyalty, which took the form of public disparagement reinforced by a campaign urging customers to cancel their subscription to the paper.[134] The NLRB resolved that since the employer did not even purport to discipline any of the employees for disparaging its product, the contention that employees engaged in unprotected activities as a defense to employer sanctions was nothing more than a form of post hoc reasoning.[135] The NLRB reasoned that if some of the cited employee statements were examples of disloyalty, it did not follow that the rest of the employees' organizing campaign was thereby rendered unprotected in its entirety.[136]

Turning swiftly to the second threshold issue—a claim that unambiguously challenges government intervention on behalf of the workers—the employer states "that the employees 'invoked the Act as a regulatory means to gain control over the content of the newspaper' and that any governmental endorsement or protection of that action impermissibly interferes with its First Amendment right to publish the news as it sees fit."[137] Although the employer's position was bolstered by the Ninth Circuit's decision, wherein the court cited First Amendment concerns in upholding a "district court's denial of the Regional Director's petition for Section 10(j) preliminary injunctive relief,"[138] the NLRB was both unmoved by the Ninth Circuit's grasp of the First Amendment and convinced that the court had expressly declined to decide whether the First Amendment protected or even probably protected the employer's conduct.[139]

---

[131] *Id.*
[132] *Id.* at 3.
[133] *Id.* at 4.
[134] *Id.* at 4.
[135] *Id.* at 4.
[136] *Id.*
[137] *Id.* 5.
[138] *Id.* at 5. *See also,* McDermott v. Ampersand Publishing, LLC, 593 F.3d 950 (9th Cir. 2010).
[139] *Ampersand Publishing, and Graphic Comm.* 357 NLRB No. 51 at 6 (asserting that the Ninth Circuit only decided that there was simply some risk that constitutionally-protected speech would be enjoined,

Observing that the Act's application to news organizations is settled law, the NLRB determined that a newspaper publisher has no special immunity from the application of general law and, hence, has no special privilege to invade the rights and liberties of workers.[140] Consequently, the employer has a statutory obligation to refrain from discharging employees for union activity or agitation for purposes of achieving collective bargaining.[141]

Sworn to prevent the invasion of workers' rights, the NLRB dismissed the employer's claims that if relief is granted, then state action could be found in support of its First Amendment defense and, accordingly, it ought to be free to reject the NLRB Order.[142] The NLRB found no state compulsion or First Amendment violation[143] since nothing in the Administrative Law Judge's decision or in its Order required that Ampersand actually grant the employees' demand for greater autonomy in reporting the news.[144] Even if the reporters' demand for autonomy posed a future threat to employer's constitutional rights, the NLRB perceived the demand as merely a bargaining-related matter rather than a current issue with respect to organizing. Future bargaining threats could not preclude current relief.[145] After deciding that the employer's argument (asserting that the employees' demand threatened its First Amendment rights) was pure speculation[146] and subject to an important qualification,[147] neither threshold issue barred the NLRB from ordering relief on behalf of the affected employees.[148] Accordingly, the NLRB upheld the Administrative Law Judge's finding that Ampersand[149] committed certain unfair

---

warranting application of a heightened standard for equitable relief in the injunction action before the court). *But see McDermott v. Ampersand Publishing, LLC,* 593 F.3d. at 953 (finding that the interim relief sought by the NLRB in "support of union activity aimed at obtaining editorial control poses a threat of violating the rights of the News-Press under the First Amendment").

[140] *Ampersand Pub.*, 357 NLRB No. 51 at 6.

[141] *Id*. at 8 (citing Associated Press v. NLRB 301 U. S. 103, 132 (1937).

[142] *Id*. at 7.

[143] *Id*.

[144] *Id*. at 8 (stating that the employer is free to publish its paper as it sees fit and to insist that employees, conform to its editorial decisions and standards).

[145] *Id*. at 8.

[146] *Id*. 9.

[147] *Id*. (stating that whether a strike to force the employer to agree to the employee demand concern journalistic autonomy is an issue that is not actually before the NLRB and, hence, that there is no need to preemptively withhold relief from employees who are otherwise entitled to it).

[148] *Id*. at 4-9.

[149] *Id*. at 1.

labor practices in the context of a union organizing campaign.[150] If the NLRB's analysis is persuasive, it follows that Ampersand's retaliation against employees for engaging in protected organizing activities, constituted a violation of Sections 8(a)(1) and 8(a)(3) of the NLRA.[151]

B. The D. C. Circuit, the First Amendment, and the *Ampersand* Decision.

Noting the Board's statement that the employees' concerted actions "'were not in protest against a change in the [paper's] editorial stance,'"[152] the D. C. Circuit determined that this conclusion constituted an acknowledgment of "the publisher's right to decide on such matters as political endorsements."[153] Despite the NLRB's concession that the publisher enjoys some First Amendment rights,[154] it is impossible to misunderstand the burden that the Board's decision and Order places on publishing firms. This is so because the NLRB discounts the employer's First Amendment rights by concentrating its analysis on the allegation that the management decisions crucial to the employees' protest "had and threatened to have a direct impact on the autonomy [that employees] had enjoyed in performing their work according to their perceptions of applicable professional norms as well as on their actual, day-to-day duties."[155] It is difficult to separate this fact—the reporters' response to management's decisions as a basis for employee organizing—from the employees' future and perhaps unprotected bargaining activities designed to address their protest objectives.

1. Preliminary Review

The D. C. Court noted that during the time between the issuance of the Administrative Law Judge's decision and the Board's decision, the NLRB's Regional Director petitioned for an injunction requiring Ampersand to reinstate the discharged employees but was denied by the

[150] *See* Ampersand Publishing, LLC D/B/A Santa Barbara News-Press and Graphic Communications conference International Brotherhood of Teamsters and Robert Guiliano, 2007 WL 4570524 (N.L.R. B. Div. of Judges) (2007) (finding several 8(a)(1) and 8(a)(3) violations based on the employer's campaign of retaliatory conduct).
[151] *Id.* at 9-10 (finding that the employer violated Section 8(a)(3) and (1) by canceling a reporter's column, discharging reporters for biased reporting, lowering the evaluation scores of union supporters, and discharging a union activist).
[152] *Ampersand v. NLRB*, 702 F.3d at 55.
[153] *Id.*
[154] *Id.*
[155] *Id.*

district court.[156] This denial was affirmed by the Ninth Circuit.[157] Both courts rejected the Board's parsimonious view of Ampersand's First Amendment rights[158] because "[t]he union was organized, in part, to affect [the employer's] editorial discretion and undertook continual action to do so. It therefore does not seem possible to parse . . . [Ampersand's] animus toward the Union generally from its desire to protect its editorial discretion. The motives necessarily overlapped in this case."[159] Since the employees' motives for engaging in organizing and collective bargaining activities unavoidably intersected with the employer's desire for editorial freedom,[160] the Board's analysis received scant sympathy from the D. C. Circuit. The D.C. Circuit turned next to issues controlled by the First Amendment.

2. Does the First Amendment Restrict Employees' Editorial Freedom?

Since federal courts "owe no deference to the Board's resolution of constitutional questions,"[161] the question becomes whether Ampersand's employees' organizing activities *qua* organizing are protected from employer animus by the mutual aid and protection clause of Section 7. Employees' receive shelter from the "mutual aid or protection" clause if they can demonstrate a nexus between their activity and their "interests as employees."[162] Concerted activity eludes protection when it fails to relate to genuine employee concerns about employment-related matters.[163] Moreover, the validity of employee action ends where enforcement of the Act would interfere with a newspaper publisher's "absolute discretion" to determine the contents of its publication.[164] To wit, "questions regarding what is published and not published are not generally a 'legitimate employee concern' for purposes of § 7 protection."[165] This summary of applicable rules prompts the following question: whether a dispute characterized by reporters as one premised on their concern for autonomy, journalistic ethics, and editorial control[166] provides a sufficient basis to enable the government to wrest or

---

[156] *Id.*(citing *McDermott v. Ampersand Publishing, LLC,* No. 08-1551, 2008 WL 8628728).
[157] *Id*. (citing *McDermott v. Ampersand Publishing, LLC,* 593 F.3d 950 (9th Cir. 2010)).
[158] *Id*.
[159] McDermott, 2008 WL 8628728 at 12 (quoted in *McDermott*, 593 F.3d at 961).
[160] *Id*.
[161] *Ampersand,* 702 F.3d, at 55.
[162] GORMAN & FINKIN, *supra* note___ at 404 (citing *Eastex v. NLRB*).
[163] *Ampersand,* 702 F.3d, at 55.
[164] *Id* at 56.
[165] *Id*.
[166] *Id*. at 57.

potentially wrest editorial control out of the employer's hand,[167] congruently with the First Amendment's guarantee of a free press.[168] The answer depends on who has the right to decide the shape of a newspaper's content—the owners and operators of the newspaper and their chosen representatives on the one hand or other stakeholders (employees) on the other. In this context, it is worth recalling two things: first, that the reporters sent a letter to the publisher implying that workplace governance was their primary concern;[169] and second, that editorial control implicates both the speech rights of the employer as well as its ability to mass produce its speech via the printing press. Citing *Miami Herald Publishing V. Tornillo* with approval and echoing its earlier opinion in *Passaic*, the D.C. Circuit determined that the Supreme Court has implied consistently that publishers, rather than reporters, have absolute discretion to determine the content of their paper.[170]

The D. C. Circuit elaborates its rejection of the Board's analysis by noting that the NLRB explicitly acknowledged "the First Amendment problem . . . only to dismiss it out of hand," maintaining that its Order "'raise[d] no serious questions' under the First Amendment' because nothing in it 'requires [Ampersand] to grant' the employees' demand that it 'refrain from interfering with their autonomy in reporting the news.'"[171] The court was puzzled by the Board's answer to the following question: whether the employees could, with government support, apply direct economic coercion to Ampersand in the form of a strike calculated to advance their demands. The Board responded with a recommendation not to worry; if the employees' demands were merely a permissive and not a mandatory bargaining subject, then the union would commit an unfair labor practice if it insisted on its autonomy objectives until an impasse was reached in negotiations, and, consequently, any strike would potentially be unprotected by the Act.[172] The court was underwhelmed by the NLRB's conjecture since the employees' yearning for journalistic autonomy, not wages and/or working conditions, was the focus of their concerted

[167] *Id*.
[168] *Id*. at 56 (citing *Miami Herald Publishing v. Tornillo,* 418 U. S. at 258).
[169] *Ampersand Pub. and Graphic Comm*., 357 NLRB No. 51, 1, 2 (2011) (The letter requested the restoration of journalism ethics and the separation of the opinion/business side of the paper from the news-gathering side.).
[170] *Ampersand,* 702 F.3d, at 56.
[171] *Id*.
[172] *Id*. at 56-57.

conduct.[173] Although the simultaneous pursuit of multiple goals—some protected by Section 7 and some not—posed a dilemma, the employees could not extend NLRA protections by wrapping an unprotected goal within a protected one.[174] Even assuming Ampersand's anti-union animus, it would be difficult to separate such animus from the firm's legitimate desire to protect its editorial discretion.[175] Hence, "the Board's analysis was [fatally] tainted by its mistaken belief that employees had a statutorily protected right to engage in collective action aimed at limiting Ampersand's editorial control."[176] The D. C. Circuit found the Board's order to be coercive and, as such, determined that the First Amendment bars such government pressure.[177] The next section places *Ampersand* in context, thus preparing this case for analysis.

IV. PLACING *AMPERSAND* IN CONTEXT: LABOR DECLINE, *TORNILLO AND CITIZENS UNITED*

A. *Prolegomena*: Responding to Labor's Decline.

Though the D.C. Circuit's holding signifies that employers can potentially wrap their anti-union animus in the prose of the First Amendment, particularly when employees' concerted activity represents the pursuit of something the Constitution does not require employers to concede—editorial control—the *Ampersand* case is part of a lively conversation about two important possibilities. They include the notions that (1) labor unions occupy an increasingly obsolete role in liberal societies[178] and (2) business organizations may face restrictions when they seek to speak uninhibitedly to members of the public, whether within the parameters of a labor dispute or not, merely because they speak through a business form. Admittedly, within the domain of newspaper publishing, the federal government exercises regulatory authority in deciding which concerns are permissive or mandatory subjects of bargaining within the meaning of the NLRA.[179] Hence, the NLRB has some authority to shrink a publisher's First Amendment

[173] *Id.*
[174] *Id.*
[175] *Id.* at 58-59.
[176] *Id.*
[177] *Id.* at 57.
[178] *See e.g.,* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 98 (2008) (discussing labor union decline).
[179] Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937).

rights in order to balance employers' freedom with employees' Section 7 rights, a move that complicates the role of both media and non-media companies as business organizations and as employers within the public square.

The contemporary application of NLRB power emerges against a backdrop that includes the ongoing decline in union power and influence in the workplace, a development that threatens labor union power in the employment and political arenas.[180] As collective action grows more alluring to commentators, though not necessarily to workers, a variety of pro-labor union proposals have materialized.[181] Among the instruments selected to revitalize unions are the enlargement of "workplace democracy," the redeployment of union dues as a vehicle for reclaiming the vitality of the union movement, and the democratization of firms through a "systematic program of egalitarian market reconstruction." [182] Democratization and market reconstruction may require the application of government power, either through legislative change or, more likely, through postmodern reinterpretations of existing law by bureaucrats, a development that mirrors the fact that alleviating the Great Depression had only a limited connection with the goal of easing economic dislocation and much more to do with the pursuit of transformative policies by political elites and organized interest groups.[183] Coherent with this observation, the pursuit of government power by interest groups often ends in capture, as John Gray has so richly demonstrated.[184] While proof of cause and effect remains difficult, it is conceivable that members of the NLRB are not immune to this process. Instead, it is probable that some members of the Board have been seized and held captive by the rhetoric of their progressive allies. As a consequence, NLRB members may exercise their interpretative prowess on behalf of their allies in ways that diminish the power of employers to speak or otherwise exercise control as part of an effort to reverse the plunge in labor union membership. While labor union decline is a persistent global phenomenon that defies the employer hostility

[180] Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory* 33 UNIV. OF MICH. J. OF L. REFORM, 447, 455 (2000) [hereinafter, Hutchison, *Reclaiming the Labor Movement Through Union Dues*].
[181] *Id*.
[182] *Id*. at 455-56.
[183] Somin, *Voter Knowledge, supra* note____ at 619.
[184] JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 12 (1996) (noting that far from being a device whereby the peaceful coexistence of civil association is assured, the state has become an instrument of predation and an object of capture).

thesis,[185] it appears that innovative efforts to reverse this occurrence in the United States must yield to constitutional limits.

B. The Views of Labor Advocates in the Mirror of Labor's Decline

Whether or not the commitment to reverse labor's decline must yield to the Constitution, twenty years ago, Board member Craig Becker, in his role as a law professor, summarized his capitulation to the supposed promise of the NLRA by quoting Senator Robert F. Wagner.[186] "[T]he national labor relations bill does not break with our traditions . . . It's the next step in the logical unfolding of man's eternal quest for freedom … Only 150 years ago did this country cast off the shackles of political despotism. And today, with economic problems occupying the center of the stage, we strive to liberate the common man…."[187] Correctly intuiting that Senator Wagner's proposal broke with the nation's allegiance to freedom embodied in the common law and classical liberalism, Becker proffered a labor movement panegyric that justifies the regulatory regime enacted by the NLRA on grounds of democratic governance.[188] His analysis ensues without noting that the Wagner Act was enacted by political elites over strong objections by the public,[189] which implies that this law was designed to fulfill the political ambitions of such elites rather than a majority of Americans.[190] Aspirationally, democratic governance for workers implies the necessity of industrial democracy[191] as part of the nation's commitment to democratize the employment relationship,[192] though it is difficult to validate this aspiration based on the text of the Constitution. The NLRA, whether sufficiently aspirational or not, and whether correctly enforced or not, operates as the leading edge of the nation's surrender to bureaucratic and hierarchical management patrolled by experts, an iatrogenic process that has failed to stem labor union decline. Although French philosopher

---

[185] *See e.g.*, Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, 1, 1–45 (2009), available at http:/ssrn.com/abstract= 1353305 (showing that "the levels of unionized workers have declined everywhere in developed economies, regardless of the labor law regime in effect").
[186] Becker, *supra* note____ at 496.
[187] 70 Cong. Rec. 7565 (1935) (quoted in Becker, *supra* note__ at 496).
[188] Becker, *supra* note__ at 496.
[189] Somin, *supra* note___ at 619.
[190] *Id*.
[191] Becker, *supra* note___ at 496.
[192] *Id*. at 498.

Jacques Ellul explained why decline was foreseeable more than a half-century ago,[193] the ongoing failure of the labor union movement has apparently bewildered American commentators and given rise to the contention that private sector labor law has shrunk in its reach and significance, thus impairing workers' efforts to advance their shared interest through self-organization and collective protest.[194] This allegation renews the contention that there is a "gap between the desire for and supply of collective representation in workplace governance."[195] While such claims are doubtful,[196] it is true that labor unionists and their allies are in despair and preparing to start over[197] without pausing to explore a decisive factor in the decline of labor: a change in the social attitudes of the American workforce disfavoring unionization.[198]

American workers today are increasingly enticed by expressive individualism. Consequently, they are less likely to find attractive collective action that requires individual interest to yield to group interest and solidarity, and private sector union decline appears to be irreversible.[199] Rather than responding to this attitudinal shift, labor advocates have engaged in numerous efforts to reclaim the labor movement's prior ascendancy[200] while ignoring the fact that unions are inherently undemocratic.[201] Efforts include an attempt to redeploy union dues[202] in order to fund union hierarchs' political aspirations[203] and, more importantly for our purposes,

---

[193] JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY, 357-358 (1954) (trans. John Wilkinson, 1964) (Ellul saw unions as entities that trapped workers in organizations that diminished their human personalities and independence, despite the earlier hope that unions would act as a revolutionary force that would free workers from the bureaucratic power exercised by large organizations).
[194] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2003).
[195] *Id*. at 1527.
[196] *See e.g.*, Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 *Iowa L. Rev*. 1339, 1342-43 (suggesting that since the diversity of worker viewpoints is now recognized, the notion that one should sacrifice one's identity to the communal good (labor unions) remains under review).
[197] *See* Michael H. Gottesman, *In Despair, and Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI-KENT L. REV. 59 (1993).
[198] Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want*?, 26 QUINNIPIAC UNIV. L. REV. 799, 814 (2008).
[199] *Id*. at 803.
[200] Hutchison, *Reclaiming the First Amendment, supra* note___ at 672.
[201] Schwab, *supra* note___ at 368.
[202] *See e.g.*, Jennifer Friesen, *The Cost of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing*, 15 HASTINGS CONST. L. Q. 603, 603-60 (1988) and Fisk & Chemerinsky, *supra* note___ at 60-62 (asserting that disallowing opt-out by union dues dissenters on union spending for political issues protects freedom of association).
[203] *See e.g.*, Jill Lawrence, *Democrats Ponder Labor Split's Political Effect*, USA Today, July 27, 2005, at 4A (discussing union participation in politics).

an attempt to restrict employer freedoms,[204] including employer speech rights.[205] Such efforts appear to be part of a revamped commitment to corporatism[206] that would restrict employers' and workers' liberties,[207] an outcome that appears to place in doubt Senator Wagner's moving promise to the common man.

Although Ellul shows that labor unions have now become highly technical enterprises that have trapped workers in compulsory organizations that diminish human liberty,[208] it is possible to retain some sympathy for the possibility that the labor movement initially offered a moving critique of industrial capitalism that represents an "attempt to have the democracy of Paris without the slavery of Rome."[209] Yet today, disagreements emerge over both the competence of labor unions to proffer the moral principles necessary to justify their solutions to society's ills and the legitimacy of proposed vehicles found necessary to fund this maneuver.[210] *Ampersand* signifies a new vehicle calculated to expand labor union power: the transmutation of an employer's First Amendment rights into unfair labor practices.[211] If validated by the courts, this approach may succeed in advancing labor unions' collective bargaining interests in journalistic integrity and reporter autonomy[212] or, correlatively, in managing the entire content of media or non-media companies. Despite the fact that the "First Amendment affords a publisher—not a reporter—absolute authority to shape a newspaper's content, "[213] it is possible that *Ampersand* is simply part of a wrangle that exposes the conflict between two groups: (1) those who are drawn toward renewed efforts to revitalize collectivization, union solidarity, and social transformation

---

[204] *See e.g.*, Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 212 (2008) (proposing state statutory innovation designed to restrict the bundle of rights available to employers).
[205] *See e.g.*, *id*. (favoring state-based efforts to limit the ability of employers to speak freely).
[206] Sylvester Petro, *Civil Liberty, Syndicalism, and the NLRA*, 5 TOLEDO L. REV. 447, 450 (1974) (NLRA constitutes an endorsement of a corporative state through compulsory collective bargaining).
[207] Fisk & Chemerinsky, *supra* note___ at 60 (suggesting that the coercive transfer of funds from labor union dissidents to labor unions protects freedom of association by "facilitating the speech of the majority who control the entity").
[208] ELLUL, *supra* note___ at 357-58.
[209] Richard Gill, *Oikos and Logos: Chesteron's Vision of Distributism*, 10 LOGOS: J. CATH. THOUGHT & CULTURE 64, 65 (2007).
[210] Friesen, *supra* note ____ at 639 (claiming that limiting the union majority's right to charge compulsory dues impairs activities aimed at transforming the balance of power outside the immediate workplace).
[211] *Ampersand Pub.*, 702 F. 3d. at 55-59 (rejecting the Board's parsimonious view of Ampersand's First Amendment rights).
[212] *Id*. at 54.
[213] *Id*. at 56.

that would instantiate various goals favored by labor leaders[214] rather than rank and file workers,[215] and (2) those who are moved by a robust conception of First Amendment rights calculated to prevent the subordination of workers and corporations to the political, social, and economic ambitions of labor advocates.[216]

Efforts to restore labor union clout parallel Craig Becker's predispositions. Before rejoining the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) as general counsel in 2012 and serving as a member of the NLRB panel[217] that decided *Ampersand*, Becker functioned as a labor law commentator. In *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, Becker insists that employers ought to be stripped of any legally cognizable interest in an essential component of an organizing campaign: the union representation election.[218] Not only does this move appear to be congruent with the effort to divest employers of First Amendment rights during the union's organizing campaign in *Ampersand*, but it also disregards Supreme Court holdings[219] preceding the adoption of Section 8(c), a statutory provision that expressly affirms employers' right to speak unless the expression of views contains a "threat of reprisal or force or promise of benefit."[220] Becker's philosophical predisposition also discounts Justice Jackson's conclusion in *Thomas v. Collins* that speech is protected because the founders "knew of no other way by which free men could conduct representative democracy."[221] Becker's analysis coincides with two propositions: (1) that employers ought to be denied what the Constitution protects and (2) that the NLRB, as a progressive vehicle in pursuit of workplace transformation, tends to regulate employer speech too restrictively, at least according to Congress.[222] While proving both propositions is difficult, the NLRB's decision in *Ampersand* serves as a metaphor for a debate that is concerned officially

---

[214] Hutchison, *Reclaiming the First Amendment, supra* note___ at 673 (describing goals favored by union leaders).
[215] LINDA CHAVEZ & DANIEL GRAY, BETRAYAL 19 (2004) (describing the willingness of union leaders to throw their members' interest to the wind in order to advance their own political beliefs).
[216] Hutchison, *Reclaiming the First Amendment, supra* note___ at 676-677 (critiquing union-led efforts that lead to rent-seeking, a move that is fortified by the fact that the hard left has taken over labor unions, and noting that these dual moves subordinate workers to "special interest" politics).
[217] Kevin Bogardus, *Former NLRB member returns to the AFL-CIO*, THE HILL, May 22, 2012 http://thehill.com/business-a-lobbying/228773-former-nlrb-member-returns-to-afl-cio.
[218] Becker, *supra* note___at 500.
[219] Thomas v. Collins, 323 U.S. 516 (1945).
[220] 29 U.S.C. § 158 (c) (1988).
[221] *Thomas v. Collins*, 323 U.S. at 545-46 (Jackson, J., concurring).
[222] *See e.g., Chamber of Commerce v. Brown*, 554 U.S. at 67.

with the Constitution and fundamentally with what, if anything, the federal government should do about labor's ongoing decline.

C. Finding Freedom of Speech Rights for Artificial Entities.

The intersection of employer speech rights and union decline or, alternatively, the question of whether business organizations can possibly retain speech rights of any kind, remains controversial.[223] An examination of the recent scholarship of Fisk and Chemerinsky, whose contributions intertwine with issues that implicate *Ampersand*, at least tangentially, offers a good place to start. In *Political Speech and Association Rights After Knox v. SEIU Local 1000*,[224] the authors emphasize "three interrelated strands of First Amendment jurisprudence: the right to be free from compelled speech, the expressive rights of associations, and the speech rights of government employees."[225] Fisk and Chemerinsky submit that corporations and unions must be treated the same and that both should be afforded the ability to speak.[226] The authors advance this thesis by examining a number of recent Supreme Court cases, including *Citizens United*, *Boy Scouts of America v. Dale*, and *Knox v. SEIU*. Contrasting the treatment of organizational speech rights in *Citizens United* and *Boy Scouts of America* with *Knox*, they attempt to resolve the ostensible inconsistency in the Supreme Court's compelled speech and associational speech jurisprudence.[227] Emphasizing a constitutional concern for "other people's money"[228] and "compelled speech,"[229] the authors do not present explicit insight on all of the questions that consume *Ampersand.* Still, their focus is useful. Fisk and Chemerinsky aver that recent Court "cases have given organizations a newly-robust First Amendment right to use the entity's resources and money in ways that stakeholders within the organization may find anathema and to discriminate against employees and members in order to advance the expressive interest of

---

[223] *See e.g.*, Drummonds *supra* note___ at 190-91 (discussing proposals to revitalize unions through state regulation of "captive audience" employer meetings with employees when the purpose of such activity is to discourage unionization); and Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 212 (2008) (suggesting that states should consider constraining employers' freedom of speech rights through state rules restricting employers' property rights).
[224] Fisk & Chemerinsky, *supra* note___ at 1-62.
[225] *Id*. at 22.
[226] *Id*. at 62.
[227] *Id.* at 4-6.
[228] *Id*. at 1-22.
[229] *Id*. at 23-25.

the entity."[230] Arguing that the Supreme Court's recent decision in *Knox*, which disallowed unions from charging union dues for political purposes to dissenters, when read alongside other decisions such as *Citizens United*,[231] offers dissimilar treatment of labor unions in comparison with other organizations, Fisk and Chemerinsky assert that this difference cannot be justified by law or logic.[232] On this view of the cathedral, the *Knox* Court needlessly contracts the capability of labor unions to coerce contributions from dissenting workers when such contributions advance the union's political message and thereby disadvantages union speech rights within the public square.[233] Interpreting recent Supreme Court cases, Fisk and Chemerinsky observe that "the Court's focus has been almost entirely on the free speech rights of the *entity* and little, if any, weight has been given to protecting *members* of the entity."[234] Although they examine the Court's asymmetrical protection of entity rights and scant protection for members of such entities who help pay for the entity's speech but disagree with its content,[235] in reality, they are troubled less by the Court's asymmetry and more by its ostensible inconsistency. They note that the *Knox* Court expanded the rights of union dissenters by holding that a union may extract special assessments to support political activities only if employees first opt-in,[236] whereas *Citizens United* suggests that corporations and unions are equally free "to spend general treasury money on electoral politics."[237] Thus appreciated, the *Knox* Court imposed restrictions on a public sector union's ability to fund general treasuries that corporations[238] and some associations, such as the Boy Scouts, do not face.[239] Maintaining that an organization, irrespective of its identity, has a First Amendment right to express itself over the objection of dissenters,[240] Fisk and Chemerinsky oppose the alleged dissimilar treatment afforded to a particular organization that they favor—labor unions—for a number of reasons.[241]

---

[230] *Id*. at 3.
[231] 130 S. Ct. 876 (2010).
[232] Fisk & Chermerinsky, *supra* note___ at 3-4.
[233] *Id*. at 3-4.
[234] *Id*. at 3.
[235] *Id*.
[236] *Id*.
[237] *Id*.
[238] *Id*. (emphasis added).
[239] *See id* at 36.
[240] *Id*. at 37.
[241] *Id*. at 40-42 (providing reasons).

While their analysis is disputable,[242] their scholarship remains important for three reasons. First, their piece is an allegory that recalls attempts by labor advocates "to accelerate 'social progress,' . . . [being] drawn to government power as a vehicle to ensure organizing"[243] in order to stem labor's ongoing decline and restore the clout of labor organizations,[244] largely through political action[245] or through novel interpretations of the law.[246] Second, Fisk and Chemerinsky effectively concede that the inherent worth of speech lies in its capacity for informing the public.[247] As such, the legitimacy of speech does not depend upon the identity of its source, whether it be corporation, association, union, or individual, and further, restrictions on speech premised on the identity of the speaker deprive all in society of ideas and information.[248] Once again, this analysis points to the advantages of allowing an institution to maintain its unique public voice within the marketplace of ideas. Taken as a whole, Fisk & Chemerinsky's approach vindicates the speech rights of labor unions by conceding the right of all institutions,

---

[242] Todd E. Pettys, *Unions, Corporations, and the First Amendment: A Response to Professors Fisk and Chemerinsky*, 99 CORNELL L. REV. ONLINE, 23, 25-30 (2013) (lucidly disputing Fisk & Chemerinsky's proposed equivalency between shareholders and employees through an analysis that shows that shareholders are quite different from employees represented by labor unions since corporate speech, as a general rule, does not take funds from shareholders but from revenues generated through sales to customers, whereas labor union dues necessary to fund union speech directly affects employees' wallets).

[243] Harry G. Hutchison, *Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values,* 39 SETON HALL L. REV. 779, 793 (2009) [hereinafter, Hutchison, *Liberty, Liberalism, and Neutrality*].

[244] *See e.g.*, Heidi Marie Werntz, Comment, *Waiver of Beck Rights and Resignation Rights: Infusing the Union Member Relationship with Individualized Commitment,* 43 CATH. U.L. REV. 159, 193-207 (1993) (articulating the value of dues as a vehicle to reclaim the vitality of the labor union movement) and Harry G. Hutchison, A *Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values,* 14 WM & MARY BILL RTS, J. 1309,1318 (2006) [hereinafter, Hutchison, *A Clearing in the Forest*] (stating that labor advocates believe that union organizing activities can be fashioned as a form of politics funded by compulsory union dues).

[245] *See e.g.*, Hutchison, *A Clearing in the Forest, supra* note___ at 1317-19 (describing this process and showing that if the AFL-CIO president's statements linking organizing to politics are credible, then union organizing efforts are driven by ideological and political objectives as opposed to the interests of workers).

[246] *See e.g.*, Hutchison, *Liberty, Liberalism, and Neutrality, supra* note___ at 804-812 (describing the Ninth Circuit's attempt to resuscitate labor union organizing by vindicating a California statute that circumscribed employers' free speech rights despite the express language of Section 8(c) of the NLRA that protects employers, premised on the contention that the statute does not actually grant employers' certain speech rights).

[247] Fisk & Chemerinsky, *supra* note___ at 57-58.

[248] On the other hand, there is line of cases supporting identity based restrictions. *See e.g.*, Stefan Padfield, *Rehabilitating Concession Theory,* OKLAHOMA L. REV. (forthcoming, 2013) *available at* http://ssrm/com/abtract=2259831.

irrespective of their identity, to retain First Amendment rights. This approach may hint at a plausible resolution of the issues raised in *Ampersand*.

The scholarship of Fisk and Chemerinsky is bolstered by examining both Jeremy Mallory's contribution to the nation's First Amendment debate and the Supreme Court's holding in *Miami Herald v. Tornillo*.[249] First, consider Mallory's scholarship, which contrasts *Citizens United* with the Court's decision making in union dues cases, among others. Mallory attends to the idea that corporate spending of "other people's money" on political speech is a highly questionable activity. He rightly observes that the *Citizens United* Court "drew primarily on an individualistic rationale" to justify its analysis of corporate political speech while "eschewing possible justification as a form of expressive association."[250] Mallory's scholarship leaves us with this understanding of the freedom of speech rights of an organization: following the precedents set in *Bellotti* and *Citizens United*, courts should vindicate the informational needs of speech recipients and respond sympathetically to the unitary and individualistic nature of a business firm's political, social, cultural, and ethical commitments, which undergird its editorial judgment.[251] Apparently, organizational speech that takes place by leave of the federal government signifies the presence of state action. If this overall evaluation of Mallory's contribution is correct, then his analysis would seem to advance the idea that an organization has the right to speak uninhibitedly, irrespective of its identity.

Turning to *Tornillo*, this case supplies precedent for both the freedom of press rights of newspapers as an activity directed toward mass communications and the non-press speech rights of a business entity.[252] *Tornillo* answers the following question: "whether a state statute granting a political candidate a right to equal space to reply to criticism, and attacks on his record by a newspaper, violate the guarantees of a free press."[253] After Pat Tornillo, an executive of a labor union, became a candidate for the Florida House of Representatives, the Miami Herald newspaper, operated by a division of the Knight Newspapers, Incorporated, printed editorials

[249] 418 U.S. 241 (1974).
[250] Mallory, *supra* note___ at 29.
[251] *Id*. at 7 (noting *Bellotti's* conception of the corporation as a unitary speaker but claiming that a corporation is not unitary when it spends "other people's money").
[252] Volokh, *supra* note___ at 533.
[253] *Tornillo,* 418 U. S. at 243.

that were critical of his candidacy.[254] The newspaper declined Tornillo's request that it print verbatim his reply to the editorials in question.[255] In response, Tornillo requested declaratory and injunctive relief.[256] Replying to the litigation, the Miami Herald sought a declaration that the Florida statute granting candidates the right of reply was unconstitutional.[257] The case was initially heard by the Dade County Circuit Court,[258] but after a direct appeal to the Florida Supreme Court, Mr. Tornillo prevailed.[259] On appeal to the United States Supreme Court, the Miami Herald argued that Florida's right of access statute was "void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment."[260] The Court noted that the implementation of a right of access remedy for candidates whose character has been attacked requires "some mechanism, either governmental or consensual. Governmental coercion at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[261] Quoting an earlier opinion, the *Tornillo* Court agreed with the following claim:

> The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and second, the journalistic integrity of its editors and publishers.[262]

The *Tornillo* Court denied government the power to compel editors to publish that which "reason" tell them should not be published,[263] despite the presence of the following counterargument raised and rejected in this case. Building on the *New York Times Co. v. Sullivan* Court's statement that elevated the "profound national commitment to the principle that debate

[254] *Id*.
[255] *Id*.
[256] *Id*. at 244.
[257] *Id*. at 245.
[258] *Id*. at 244.
[259] *Id*. at 245-46.
[260] *Id*. at 247.
[261] *Id*. at 254.
[262] *Id* at 255 (quoting Columbia Broadcasting v. Democratic National Committee, 412 U.S. 94 (1973)).
[263] *Id*. at 256.

on public issues should be uninhibited, robust and wide-open,"[264] Mr. Tornillo asserted that "uninhibited robust debate" cannot be guaranteed in the presence of monopoly control of the press.[265] This anti-monopoly hypothesis appears to be little more than a public welfare claim that would leave the door wide open for either state or federal regulation of a paper's content. It follows that such regulation would bring about a confrontation with the express provisions of the First Amendment.[266] Rejecting Mr. Tornillo's public welfare contention, the *Tornillo* Court maintained that Florida's right-of-reply statute operates as a command by the state in the same sense as a statute or regulation forbidding the appellant to publish specified matters.[267] The Court also noted that the statute exacts a penalty on content in two ways,[268] which would encourage the newspaper to react by simply avoiding controversy.[269] For these reasons, the Court voided the statute as a violation of the guarantee of a free press within the meaning of the First Amendment. Parenthetically, it is worth observing that the legal personhood of the Knight Newspaper Publishing Corporation (as an artificial entity), which owned the Miami Herald, could not prevent this outcome.

Mallory's scholarship, the contribution of Fisk and Chemerinsky, and the *Tornillo* case provide a scaffold that enhances this Article's discussion of *Ampersand.* Taken together, these authorities imply that media corporations potentially face dual threats to speech rights: first, threats predicated on speech restrictions linked to the identity of the speaker and, second, regulatory threats to the free press premised on the goal of advancing public welfare presumably embedded in statutes such as the NLRA. Appreciating these threats, there is authority for the proposition that organizations should have the right to speak to willing listeners, that courts should prescind from inferring that the speaker's identity is dispositive, and, finally, that the government's exercise of its coercive power within the domain bounded by press activity should face formidable hurdles when it comes to restricting the content of the speech at issue, regardless of the government's public welfare motivation.

---

[264] *Id*. at 252.
[265] *Id*.
[266] *Id*. at 252-254.
[267] *Id*. at 256.
[268] *Id*. (describing a direct penalty on the basis of content and, secondly, describing an opportunity costs penalty).
[269] *Id*. at 257.

Although it is unreasonable to warrant Supreme Court consistency or credibility within the entire range of constitutional rights, particularly because the Justices have frequently succumbed to the allure of postmodern linguistics,[270] it is nonetheless possible to state a preliminary hypothesis that a business organization, assembled as an artificial entity, ought to control its First Amendment rights against plausible counterclaims by others that are either predicated on solving the problem of labor union decline[271] or grounded in the need to attain some other public welfare objective. Still, as the next section describes, complications surface from this somewhat scrambled framework.

V. ANALYSIS

The right of a business organization to participate in political debate or, alternatively phrased, to control the content of its speech in the face of counterclaims, remains "one of the most contentious current constitutional and political issues."[272] Opposing contentions, whatever their origins may be, have sparked a tussle inflamed by the observation that "corporations should not have speech rights because they are illegitimate participants in political debate."[273] Perhaps featuring deliberate or inadvertent conflations of means and ends by opponents of corporate speech,[274] this squabble has been revitalized by *Citizens United*,[275] a decision that has provoked a number of hyperbolic claims[276] and a blizzard of scholarship.[277]

---

[270] Hutchison, *Liberty, Liberalism and Neutrality, supra* note____ at 835-842 (suggesting that neither the Constitution nor the Court's interpretation of the Constitution remain reliable in a world where political liberalism exists outside of a boundary cabined by a shared understanding of truth since this development leads to endless (postmodern) elucidation).

[271] *See also infra* Part V.

[272] Ribstein, *The First Amendment, supra* note___ at 1019.

[273] Greenfield, Greenwood & Jaffee *supra* note___ at 877-78 (quoting Greenfield's views).

[274] Somin, *Corporate Rights and Property Rights are Human Rights, supra note*____(blog post).

[275] 130 S. Ct. 876 (2010).

[276] *See e.g., Brett Arends, Death of a Democracy,* MARKET WATCH*, Oct. 19m 2010,* http://www.marketwatch.com/story/death-of-a-democracy-2010-10-19?pagenumber=1 (forecasting the imminent death of democracy).

[277] *See e.g.*, Ribstein, *First Amendment, supra* note___ at 1019-1055; Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate, available* at http://ssrn.com/abstract=2237630 (2013); Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights*?, 53 WILLIAM & MARY L. REV. 1 (2011) (disputing the claim that this decision will unleash a torrent of corporate electioneering that could drown out the countervailing voice of organized labor, and arguing instead that the case presents a possible silver lining for labor); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 495 (2011) (challenging the foundational assumption regarding corporate entities that the Court

Much of this literature can be summarized by the contention that the Constitution does not protect nonprofit corporations, for-profit corporations, or other business organizations because they are not "real" people.[278] Whether this contestable conclusion is purposefully or unconsciously misleading, it is broad enough to include most newspaper publishing firms in the United States. However broad the allegations may be, a persistent question surfaces as to whether the Constitution allows the government to make distinctions against some groups on the basis of their corporate form or identity, questions that are putatively reinforced due to the Court evolving constitutional conceptualizations of corporations.[279]

Dubious answers to such questions are driven by unreliable charges. For instance, Justice Stevens relies on his conception of the original meaning of the Constitution to support his dissent in *Citizens United*. He asserts that the Framers conceived of speech more narrowly than we now think of it.[280] Moreover, in fierce pursuit of corporation-hating quotations,[281] he states that "[t]he free speech guarantee . . . does not render every other public interest an illegitimate basis for qualifying a speaker's autonomy,"[282] which of course suggests that corporate form is ripe for regulatory speech restrictions.[283] The force of this remark thus diminishes the free speech rights of all employers who are organized as artificial entities. Whether the Framers maintained a personal affection or disaffection for the corporate form is only relevant insofar as it can be reflected in the understood meaning of the text they enacted; hence, it is probable that Justice Stevens' claims are overbroad. As Shapiro and McCarthy wisely deduce, the question of identity, or, alternatively put, whether a corporation or an LLC is or is not a real person, is arguably irrelevant to First Amendment analysis.[284] Instead, the focus should turn on the scope of protection afforded to the speech at issue.[285]

---

relied on in concluding that corporate speech should be treated the same as individual speech); and David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 NORTH CAROLINA L. REV. 1197 (2011) (suggesting that corporate governance regimes should be altered so that firms are not managed in the exclusive interests of shareholders).

[278] Shapiro & McCarthy, *supra* note___ at 701 (criticizing this conclusion).

[279] Tucker, *supra* note____ at 499-504.

[280] *Citizens United*, 130 S. Ct. at 902 at 948 (Stevens, J., concurring in part and dissenting in part)

[281] *Id*. at 925 (Thomas, J. concurring but declining to join Part IV of the Court's opinion).

[282] *Id*. at 946 (Stevens, J., concurring in part and dissenting in part).

[283] *Id*. at 948.

[284] Shapiro & McCarthy, *supra* note___ at 706.

[285] *Id*.

Before concentrating on the scope of protection afforded to artificial entities, it bears noting that the NLRB did not issue its remedial Order in *Ampersand* because the employer at issue was operating as an LLC and, therefore, was not a "real person" within the framework that gave rise to Justice Stevens' dissent in *Citizens United*. Instead, the NLRB's Order reflected its resolution of conflicting autonomy claims as the employer and its employees all sought the right to possess or bargain over the Santa Barbara News-Press' editorial content. To be sure, the employer, as an employer, sought the right to be free from government interference within its unitary conception of its First Amendment rights. Its prayers were answered in the affirmative by the D.C. Circuit Court.

The following subsections focus primarily on three questions. First, is Ampersand's business form (an LLC) within the protective envelope provided by the First Amendment?[286] Second, if Ampersand's business form is entitled to constitutional protection, then what is the scope of an employer's First Amendment protection when the employer's constitutional rights collide with the statutory rights of employees? Finally, are employer speech rights contingent on or otherwise subsumed into the presumed necessity of stemming labor union decline?

A. Is Ampersand's Business Form Protected by the First Amendment?

Numerous disagreements infect any analysis of Ampersand's right to speak or, more particularly, its right to editorial control when confronted by the poignant counter-claim to journalistic autonomy by employees who pursue the possible advantages of organizing and collective bargaining. Disagreements give rise to a set of overlapping issues that can be summarized as follows: (1) whether Ampersand, as an employer organized as a for-profit business enterprise, retains speech rights within the meaning of the First Amendment and (2) whether Ampersand, as a publisher, retains speech rights within the First Amendment's guarantee of a free press.

1. As a general matter, does Ampersand, organized as an LLC, retain speech rights?

Ascertaining whether Ampersand ought to be protected as a business form that is separate and distinct from its owners or managers depends to some extent on the complications that

[286] This question is largely independent of employer speech issues controlled by Section 8(C) of the NLRA. *See* 29 U. S. C. § 158 (C) (1988).

arise once the veil of its business form is lifted. Complications diminish once differences between corporations, partnerships, and LLCs are considered. In lifting the veil, it is important to note a few things. First, following Professor Padfield's deduction that the nature of a corporation assumes different shapes depending on the corporate theory deployed,[287] it is possible to reach a few tentative conclusions. Risking oversimplification, if a corporation is simply seen as a legal entity capable, for example, of being sued and filling suit against others in its own name, then this form of business organization can be contrasted with a general partnership, which represents little more than an aggregation of the individual owners.[288] Pursuant to the "contractarian" theory adopted by the *Citizens United* majority,[289] the corporation appears to be little more than the creature of private contracting[290] that is the product of natural individuals engaged in private initiative serving private ends.[291] This theory implies that "the circumstances in which the law will look past the corporation to its individual owners and managers are limited."[292] Since partnerships are not legal entities, the situation is reversed so that the circumstances in which the law will look to the partnership as an entity rather than to its owners and managers are constrained.[293] Ampersand operates as neither a partnership nor a corporation. Instead, it is an unincorporated business association, an LLC with speech rights that presumably mirror those of either a corporation or a partnership. "Under most statutes, an LLC is characterized as a separate legal entity whose identity is distinct from that of its owners. As a separate 'legal person,' an LLC can exercise rights and powers in its own name."[294] This analysis demands further clarification since an LLC is treated as a partnership for income tax purposes,[295] as well as for purposes of exercising apparent authority to bind the company.[296] On

[287] Padfield, *The Silent Role of Corporate Theory supra* note____ at 835-840 (examining several distinct theories regarding the nature of corporations).
[288] *Id*. at 837.
[289] *Id*. at 844-845.
[290] *Id*. at 835.
[291] *Id*. at 841.
[292] Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 55-56 (2010).
[293] *Id*.
[294] FREER & MOLL, *supra* note___ at 576.
[295] *Id*. at 555.
[296] *Id*. at 563 (explaining that in some states, members in member-managed LLCs and managers in manager-managed LLCs possess partnership-like apparent authority to bind the company).

the other hand, for the purpose of holding a liquor licenses, for instance, or acquiring legal representation in Delaware, it may be treated like a corporation.[297]

Whatever emerges from this somewhat muddled picture, an LLC is sufficiently close to the corporate form to benefit from Shapiro and McCarthy's contention that corporate speech rights are defensible because they vindicate the rights of individuals who form the organization. Shapiro and McCarthy's emphasis on the rights of the beneficiaries of the business form, is doubly true of LLCs given that such organizations appear to be closer to the partnership form, which does not enjoy a separate legal form. If this analysis is persuasive, then Ampersand, as a LLC, ought at a minimum to enjoy the speech rights held by corporations and, quite possibly, should have a stronger claim on First Amendment protection since it maintains a closer relationship to the individuals who formed it than is typically true for many large corporations. Still, whether Ampersand's business organization, as a business form, is protected by the First Amendment is perhaps a footnote to a larger debate that, on one account, implies that the Supreme Court's current analysis is a deeply flawed outcome of an expansive "conceptualization of a corporation as a legal person that enjoys a nearly full panoply of rights."[298] The Court's conceptualization culminates, rightly or wrongly, in judicial recognition and protection of the corporate voice within the marketplace of ideas.[299] Returning to an issue that appears to have been settled by *Bellotti* and *Citizens United*, namely the question of whether an organization has First Amendment rights that do not depend on its identity, it bears noting that ample authority has answered this question in the affirmative.[300] Consistent with this deduction, Fisk and Chemerinsky demonstrate that the Supreme Court's focus has been almost entirely on the free speech rights of the *entity* and that little, if any, weight has been given to protecting *stakeholders* of the entity.[301] Correspondingly, this focus, if applied by analogy to the issue of editorial control within newspapers, would seem to favor entities such as Ampersand rather than workers even if this paradigm is complicated by attempts to distinguish freedom of speech from the freedom of the press.

---

[297] *Id*. at 613-615.
[298] Tucker, *supra* note____ at 502
[299] *Id*. at 508-514.
[300] *See supra* Part IV.
[301] *Id*. at 3.

There are good reasons for defending the idea of First Amendment rights for corporations and LLCs as a general matter beyond the analyses offered by the Supreme Court in *Bellotti* and *Citizens United.* First, the contours of the debate over corporate speech often demonstrate a fundamental misunderstanding of the nature of corporations and LLCs and the freedoms protected by the Constitution.[302] In reality, corporations and other business organizations are merely useful legal fictions composed of rights-bearing individuals.[303] Equally true, "[i]t is a misconception that the concept of 'corporate personhood' has played a central role in shaping corporate speech rights in American jurisprudence" because "[n]o court has ever said that corporations are real people."[304] Instead, as Chief Justice John Marshall emphasized, a "'corporation is an artificial being, invisible, intangible and existing only in contemplation of law.'"[305] Thus understood, "corporations are formed by individuals, and those individuals have constitutional rights."[306] Although it is true that the notion of "corporate personhood" appears to have arisen without adequate explanation,[307] there is unmistakable authority for the conclusion that corporations and hence other business entities *are entitled to constitutional protection* even if such protection is not equivalent to the rights of natural citizens within every possible dimension.[308] Although Supreme Court jurisprudence subsequent to *Citizens United* reinforced the conclusion that corporations are artificial persons under the law,[309] they nonetheless are "persons that are entitled to certain constitutional rights, which sometimes approach but never exceed those of natural persons."[310] Generally speaking, Ampersand, as an artificial entity, arguably possesses the unitary right to resists reporters' attempts to gain editorial control of its newspaper.

Beyond the broad right of artificial entities to engage in constitutionally-protected speech, Shapiro and McCarthy provide clarifying analysis that fortifies the judgment that *Ampersand* and other firms have and ought to have a constitutionally cognizable personhood for a number of

[302] Shapiro & McCarthy, *supra* note___ at 702.
[303] *Id*. at 707-710.
[304] *Id*. at 703.
[305] *Id*. (quoting Dartmouth Coll. V. Woodward, 17 U.S. 518 (1819)).
[306] *Id*. at 703 (citing Dartmouth Coll. V. Woodward, 17 U.S. 518 (1819)).
[307] *Id*. at 703-704
[308] *Id*. at 704.
[309] *Id* at 705 (noting the Court's decision in FCC v. A.T. &T).
[310] *Id*. at 706

policy reasons. Legal personhood facilitates commerce and allows corporations to more effectively participate in transactions.[311] The legal fictions associated with corporations and other business organizations give rise to a personhood that constitutes not only an aggregation of rights-bearing individuals but also a nexus of contracts.[312] Personhood allows corporations to "stand for" the constantly changing groups of individuals who operate behind the scenes; accordingly, the law allows the firm, acting through its directors and officers (with the consent of investors), to speak, act, and sue in the firm's name.[313] By recognizing and constitutionalizing the business form as a protectable entity, adjudication protects the property interests of individual investors within the firm, which prevents the taking of corporate property without compensation.[314] Shapiro and McCarthy emphasize the claim that protecting constitutional rights for corporations, beyond their vindication of the individual rights of real persons who invest in the firm, have an additional public purpose. By enabling and protecting the freedom of expression of legal fictions, constitutional rights perform the laudable role of checking government power and ultimately help to preserve democracy.[315] Shapiro and McCarthy's analysis seems especially important for newspapers engaged in the activity of speaking that appears to be protected by the First Amendment's guarantee of a free press. Continuing, they point out that "the right to a trial by jury and other procedural protections prevent the government from punishing dissenters through arbitrary arrest, search, and imprisonment. Freedom of speech is equally important in that vein; it allows for the free flow of ideas without censorship and eliminates the risk of those in power suppressing criticism."[316] Corresponding with *Citizens United*'s intuition, "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[317] Corporations and other business organizations facilitate speech by enabling individuals to pool resources efficiently and to make their expression more effective; accordingly, the application of government power to constrain or threaten such speech constructively enlarges government power at the expense of individuals.[318] To be sure, the rise in the corporate form is not an unmixed blessing for freedom

[311] *Id*. at 709.
[312] *Id*.
[313] *Id*. at 709-710.
[314] *Id*. at 710.
[315] *Id*. at 711.
[316] *Id*. at 710-711.
[317] *Id*. at 711.
[318] *Id*. at 710-713.

and liberty since large enterprises, as public choice analysis amply illustrates, have become part of a triumvirate that diminishes freedom. This triumvirate—Big Business, Big Labor, and Big Lobbyists—has often appropriated government power in order to preserve and capture private benefits (economic and ideological rents), and the pernicious effects of this process is "compounded by the ongoing rise in the size and scope of government, which reflects the fact that the 'State has permeated civil society to such an extent that the two are mostly indistinguishable.'"[319] Although, the perverse possibilities associated with the rise of Big Government will continue to plague the nation regardless of the outcome of the *Ampersand* debate, this subordinating pandemic is primed to accelerate when and if the federal government constrains corporate speech.

2. Does Ampersand as a for-profit media firm retain First Amendment protection?

The effort to ascertain whether for-profit media firms retain First Amendment protection is furthered by reconsidering Professor Volokh's analysis. He observes that a proper reading of the Free Press clause of the First Amendment lends itself to the conclusion that all users of mass communications technologies have the same freedom of press.[320] This observation is bolstered by noting that most courts support the view that all speakers, whether within the context of a mass communications firm or not, are treated equally.[321] Still, it must be admitted that some courts deviate from the "all speakers are equal" approach and allow mass-communications firms more protection within the meaning of the Free Press clause. This move, if accepted, would provide a basis to exempt media firms from identity-based speech rules applicable to other speakers, a maneuver that may supply an escape hatch for firms like Ampersand to elude government interference within the parameters of the Press Clause. On the other hand, the "special rights for the institutional press" approach was rejected by the Supreme Court on a number of occasions.[322] In addition, the *Citizens United* Court specified that courts must decline to draw, and then redraw, constitutional lines based on the particular media or technology used

[319] JAMES DAVISON HUNTER, TO CHANGE THE WORLD: THE IRONY, TRAGEDY, & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD, 154 (2010) [hereinafter, HUNTER, TO CHANGE THE WORLD].
[320] Volokh, *supra* note___ at 463.
[321] *Id*. at 520.
[322] *Id*. at 529-520 (citing Pell v. Procunier and Nixon v. Warner Communications).

to disseminate speech from a particular speaker,[323] which suggests that whatever the rules may be, no exemption from them can be grounded in a speaker's distinctive connection to the media.

Putting the issue of exemptions for media firms aside for the moment and assuming the non-redundancy of the Speech Clause (referring to the spoken word) and the Press Clause (referring to printed forms of communication) of the First Amendment,[324] it is worth asking whether the two clauses are truly distinctive. In this context, it bears noting that the phrase "freedom of speech" has frequently been used to signify "freedom of expression" and to encompass all forms of mass communication including those activities engaged in by the "press,"[325] which suggests that the Press Clause is an extension of the Speech Clause. If one accepts the Supreme Court's jurisprudence, which protects the First Amendment rights of ordinary citizens and correspondingly refrains from supplying superior rights to members of the press,[326] then the pursuit of constitutional protection of speech by for-profit media firms should be placed on the same footing as real persons. On the other hand, if observers (1) accept the argument that, since the Framing of the Constitution, corporations have operated under a deserved cloud of disfavor thereby exposing them to comprehensive regulation in the service of the public welfare,[327] a viewpoint that is, more or less, in line with Justice Stevens' conception of the Free Speech Clause; and (2) are persuaded by Professor Volokh's crisp analysis, which appears to dispute Justice Stevens' contention that certain speakers and speech outlets are entitled to greater protection via the Free Press Clause;[328] then this syllogism implies that the federal government could possibly treat corporations, including those operating as media firms, as inferior institutions for First Amendment purposes. This outcome could thus set the stage for attempts by the NLRB to constrain Ampersand's editorial discretion premised on the public welfare values embedded within the NLRA. Thus, assuming that no media exemption can be found within the ambit of the Free Press Clause, and accepting Justice Stevens' claim that the Framers found the notion of protecting corporate speech to be inconceivable,[329] it appears

[323] *Citizens United,* 130 S. Ct. at 891.
[324] Volokh, *supra* note___ at 475.
[325] *Id*. at 477.
[326] *Id*. at 519
[327] *Citizens United,* 130 S. Ct. at 949-950 (Stevens, J. concurring in part and dissenting in part).
[328] *Id*. at 951-52 (suggesting that his views on newspapers should not necessarily track his views on corporations because of the protective force of the Free Press Clause).
[329] *Id*. at 951.

possible that the government would be free to censor the speech of all corporations, including for-profit media firms,[330] particularly those it disfavors. Alternatively, it would be free to simply coerce funds from disfavored organizations in order to subsidize the government's own message.[331] Taken together, these observations and conclusions are consistent with a potential retreat from a free society and a return of political despotism. This development could place Ampersand's First Amendment rights under threat.

The importance of these claims cannot be overstated since this discussion occurs against background evidence that the United States government, representing one of the greatest concentrations of power in human history and animated by distorted interpretations of law, regularly snoops without a search warrant on the email, phone calls, and other forms of Internet communication engaged in by American citizens.[332] The application of such authoritarian power is reinforced because the federal government, acting inconsistently with First Amendment values, disallows implicated entities from disclosing this practice[333] or, alternatively, deploys its taxing authority in ways that diminish the speech of disfavored organizations.[334] Surely, such a government, even one ostensibly committed to "an unprecedented level of openness,"[335] would prefer to censor news reports of its constitutionally-suspect activities. Contrary to the pregnant implications of such activities, protecting the speech and press rights of the corporate form in a manner that is coherent with the teachings of both the *Citizens United* Court and Professor Volokh, furthers human freedom by enabling organizations to advance their views, whether the entity is recognized as an official members of the press or not. Stated equivalently, a broad conception of speech and press freedom enables organizations such as the ACLU, the NRA, the Catholic Church, the HUFFINGTON POST, and Ampersand to voice their beliefs and opinions without interference and specifies that citizens, in whatever form they affiliate, should not have

---

[330] Shapiro & McCarthy, *supra* note___ at 713.
[331] *See* Alexander *supra* note___ at 12-13 (explaining this possibility).
[332] *See supra* Part I.
[333] *See supra* Part I.
[334] John Hayward, *IRS Scandal Grows Deeper*, HUMAN EVENTS, May 13, 2013, *available at* http://www.humanevents.com/2013/05/13/the-irs-scandal-grows-broader-and-deeper/ (showing that the IRS discriminatorily targets groups that (1) are involved in limiting or expanding government or (2) provided education regarding the Constitution).
[335] President Barack Obama, *Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies*, THE WHITE HOUSE, *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment (accessed June 9, 2013).

to rely on their rulers to enjoy liberty.[336] In exercising its freedom to print, Ampersand, is simply extending its freedom to think and speak about science, religion, morality and civilization and to mass produce such speech in the form of printed communication and thereby advance the its influence.[337] Since (1) business organizations like Ampersand have the desirable capacity to further human freedom/liberty and preserve democracy, (2) business entities such as LLCs and corporations are artificial forms that protect the interests of the real people (i.e., the rights-bearing individuals) who form them, and (3) no constitutional impediment to the recognition of corporate personhood can be found within Supreme Court precedents or a brief examination of the relevant scholarship, it appears that Ampersand, operating as a speaker, publisher, and LLC, is within the protective envelope provided by the First Amendment.

B. What is the Scope of Ampersand's First Amendment Protection?

Justice John Paul Steven's *Citizens United* dissent delineates a relatively common argument against corporate speech rights:

> [C]orporations have no conscience, no beliefs, no feelings, no thoughts, no desires. Corporations . . . and their "personhood" often serve as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.[338]

Beyond the question of whether this claim applies to media and non-media firms alike, it is noticeable that this contention has a certain intuitive and rhetorical appeal but entirely misses the points addressed in the prior subsection of this Article.[339] Justice Stevens' analysis demonstrates a fundamental misunderstanding of the nature of corporations and other business organizations as well as the freedoms protected by the Constitution.[340] As we have seen, business organizations are more than useful legal fictions composed of rights-bearing individuals.[341] They are legal entities that are entitled to constitutional rights in order to protect the rights of individuals who form them, but clarification is still required regarding the scope of

[336] Shapiro & McCarthy at 713-14.
[337] Volokh, *supra* note ___ at 481-482
[338] *Citizens United*, 130 S. Ct. at 972 (Stevens, J., concurring in part and dissenting in part).
[339] Shapiro & McCarthy, *supra* note__ at 702.
[340] *Id*. at 702.
[341] *Id*. at 707-710.

such protection afforded to constitutional speech.[342] The next two subsections attempt to provide such a clarification regarding the scope of Ampersand's First Amendment protection, based initially on constitutional analysis and, secondarily, on placing this controversy within a framework provided by Professor Bainbridge's scholarship.

1. Employer speech within the meaning of the NLRA

Although it is obvious that newspapers owned and operated by corporations or LLCs are subject to the NLRA,[343] and while it follows that employers do not have absolute free speech rights, particularly when such rights intrude upon employees' free choice to join a union or not,[344] it is equally clear that otherwise valid laws may be abrogated when they invade upon a publisher's First Amendment rights.[345] Interpreting section 8(c) of the NLRA as a vehicle to engender "uninhibited, robust and wide-open debate,"[346] the Supreme Court, for instance, has placed desirable limits on the capability of states and others to limit an employer's right to express its views on the benefits and costs of unionization.[347] All the same, it is possible to view opposition to speech rights for employers and union dissidents both as an essential element of the nation's First Amendment debate and as a crucial component of a strategy designed by unionists and their allies to reverse the decline in labor union membership.[348]

Despite such opposition, the Court's approach to employer speech rights promotes free debate on the issues that divide labor and management, so long as such expression is not coercive.[349] Consider *Virginia Electric*, where the employer's controversial statements and conduct were highly scrutinized by the NLRB during a representation campaign. This case provides an imperfect analogy to the facts in *Ampersand* involving employer discipline and other disputed forms of employer conduct occurring during an organizing campaign. *Virginia Electric* illustrates

[342] Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 123-24 (1992).
[343] Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937).
[344] GORMAN & FINKIN, *supra* note___ at 175. *See also* NOWAK & ROTUNDA, *supra* note__ at 1334 (citing Associated Press v. NLRB 301 U.S. 103, 132 (1937).
[345] Newspaper Guild of Greater Phila. V. NLRB, 636 F. 2d 550, 558 (D.C. Cir. 1990).
[346] *Chamber of Commerce v. Brown*, 554 U.S. at 68.
[347] *See id.*at 76 (stating that state regulation in a zone that Congress wished to keep free from regulation is preempted).
[348] James Sherk, *Unions Declining Appeal Shows Need for Alternatives*, WebMemo, No. 3471, at page 1 (January 27, 2012), The HERITAGE FOUNDATION, http://report.heritage.org/wm3471 (showing that union density fell to a new post-World War II low in 2011).
[349] *Chamber of Commerce v. Brown*, 554 U.S. at 67-76.

the status of employer-speech rights before the Wagner Act was amended to add section 8(c), which provides express protection for employer speech. As confirmed by the Court's subsequent holding in *Thomas v. Collins*, *Virginia Electric* stands for the proposition that employer efforts to persuade workers to refrain from joining a union are within the First Amendment's guarantee.[350] The facts of this case are straightforward. As part of its campaign against the labor union, which sought to represent its workers, Virginia Electric & Power Company "gave impetus to, and assured the creation of, an 'inside' organization and coerced its employees in the exercise of their rights guaranteed by § 7 of the Act."[351] Although the NLRB found that company speeches arranged on company property and time, as well as a bulletin posted on company property, constituted conduct that interfered, restrained, and coerced employees in violation of the NLRA,[352] the company responded to the NLRB's remedial Order by successfully arguing that the Board's approach was repugnant to the First Amendment.[353] Consequently, the Supreme Court remanded the case for a redetermination.[354] This case shows that even rampant hostility by an employer who encouraged its employees to form an "independent" union to bargain on their behalf cannot bar First Amendment protection for employer speech when such speech is considered in isolation.[355] To be sure, *Virginia Electric* simply affirms the idea that employers have a First Amendment right "to engage in non-coercive speech about unionization"[356] but does not tells us that Ampersand, as a media firm, has a constitutional right to insist on editorial control as a defense to the imposition of penalties arising from an organizing campaign, nor does the opinion specify the scope of an employer's First Amendment rights within the meaning of the NLRA. Moreover, I have discovered no evidence to suggest that the outcome of *Virginia Electric* turned on the business form of the employer at issue. Risking repetition, what *Bellotti*, *Citizens United*, *Virginia Electric*, and other authorities make clear is that, first, an employer's identity, standing alone as an artificial legal construct, fails to constitute a cognizable barrier to First Amendment protection and that, second, the First Amendment constitutes an important barrier

[350] *Thomas* v. Collins, 323 U.S. 516, 537-38 (1945 (citing Labor Bd. V. Va. Elec. & Power Co., 314 U.S. 469 (1941).
[351] *Va. Elec. & Power*, 314 U.S. at 474.
[352] *Id.* at 471-77
[353] *Id.* at 447.
[354] *Id.* at 479.
[355] *Id.* at 470-74 & 477.
[356] *See Chamber of Commerce v. Brown*, 554 U.S. at 67.

to NLRB-ordered relief. The weight of these authorities fashion a platform from which one can argue that the constitutional rights enjoyed by a business organization cannot be diminished simply because a labor union seeks to organize the company or otherwise achieve some form of workplace democracy by shrinking the firm's editorial discretion.[357]

In the *Ampersand* case, a media firm's attempt to maintain editorial control arose in a context that differs from a typical case involving an employer's attempt to deploy anti-union language and grammar as a weapon against unionization, a possibility directly broached by the *Virginia Electric* Court. Instead, Ampersand, as the publisher and speaker operating in the absence of any privilege beyond that of other speakers,[358] asserts its power to discharge and otherwise constrain reporters who seek to organize for purposes of maintaining journalistic integrity and autonomy as professionals on grounds that the publisher is entitled by the Constitution to decide questions of content, a distinction that perhaps makes little difference to the workers, who were disciplined, but makes all the difference in the world to employers.

Before commenting on the legitimacy of Ampersand's free speech/free press[359] defense, it is worth recalling that the issuance of the NLRB's Order did not take place in isolation from the larger debate generated by both the gloom associated with labor decline and the response to this epiphenomenon by labor advocates. If labor unions occupy an increasingly obsolete private-sector role in the United States, one potential remedy beyond addressing employee antipathy toward unionization presents itself: a determined effort by union advocates and their allies to first blame employers and then engage in efforts to diminish the power and authority of managers of business entities through the application of government power. With this potential maneuver in view, it is possible to perceive that *Ampersand* is simply a metaphor for a meta-debate that reacts to the NLRA's failure to deliver on its promise of freedom for the common man as guaranteed by Senator Wagner.

---

[357] *See also, Nelson* v. *McClatchy*, 936 P. 2d at 1133 (favoring a media firm's First Amendment right to maintain its editorial integrity rather than the employee-plaintiff's employment claims).
[358] *Citizens United*, 130 S. Ct. at 905 (quoting *Austin*, 494 U. S. at 692 (Scalia, J., dissenting).
[359] Volokh, *supra* note___ at 517 (pointing out that the *Citizens United* majority, consistent with framing of the Constitution, rejected the notion that the "institutional press" had any constitutional privilege that other speakers did not enjoy).

It bears repeating that the NLRB was not impressed by Ampersand's claims that (1) the union organizing campaign in its entirety was not protected by the NLRA because the employees' primary demand was to protect their integrity as professional journalists and (2) any government intervention on the employees' behalf would impermissibly interfere with its First Amendment right to control the content of its newspaper. Instead, consistent with the pregnant promise of industrial democracy,[360] the Board saw merit in the employees' organizing objective: participatory editorial management designed to protect reporters' integrity and autonomy as a goal that could be severed from employees' capacity to apply to bargaining pressure during negotiations for a collective-bargaining contract.[361] Offering a highly cumbersome process, the NLRB held that if it declined to uphold reporters' organizing rights, it would constructively grant the employer a special privilege to invade the rights and liberties of workers, whereas enforcement of its Order would not require the employer to actually grant the reporters' bargaining objective or to otherwise do anything that interferes with its authority to terminate or discipline any worker who refuses to carry out its instructions concerning the paper's content.[362]

The NLRB's reasoning is deeply unsatisfying because, assuming the success of the reporters' organizing efforts, the employer would be thrust into a bargaining process that places its First Amendment rights at risk, meanings that Ampersand's rights to free speech and press could be the subject of future elucidation by the Board and the courts. This appears likely for obvious reasons within the context of bargaining. For instance, the Ninth Circuit found specific risks to the publisher's First Amendment rights from *both* the reinstatement of workers discharged during the organizing campaign and from bargaining table negotiations, a plausible conclusion that the Board dismissed.[363] The NLRB maintains this position since it claims that merely ordering the reinstatement of reporters who were discharged after they sought to protect their journalistic integrity in no way compromises Ampersand's First Amendment right to determine the newspaper's content.[364] Stated another way, the Board is saying that reporters can organize for purposes of achieving that which neither the NLRA nor the Constitution

[360] *See supra* Part III. A. & B.
[361] *Ampersand Publishing and Graphic Comm.,* 357 NLRB at 9.
[362] *Ampersand Publishing,* 357 NLRB No. 51 at 6.
[363] *Ampersand Pub. and Graphic Comm.,* 357 NLRB No. 51 at 7 (distinguishing *Ampersand* from *Overstreet v. Carpenters* and *Tornillo*).
[364] *Id*. at 7-8.

require (i.e., reporters' journalistic integrity) and that Ampersand can be required to employ such individuals so long as they insist on their own editorial freedom in their organizing campaign but decline to enforce this demand with economic weaponry during bargaining. That said, future Board elucidation could presumably result in employer penalties for unfair labor practices if, perchance, the NLRB's conception of the employer's free speech rights tied to editorial control diverges from Ampersand's attempted enforcement of its right to control the content of its newspaper. The potential imposition of penalties by the NLRB recaptures the dilemma that the Miami Herald newspaper was exposed to in *Tornillo*. As a consequence, the Supreme Court voided the Florida right-of-reply statute since it penalized the newspaper's First Amendment expression. Correspondingly, the NLRB's approach exposes Ampersand to similar suppression in the *Ampersand* case. Even if the Board's interpretation of the NLRA regulatory scheme is not a prior restraint on speech in the strict sense of the term, Ampersand would be subject to a cumbersome process that, at the end of day, is backed by penalties.

Given the Board's conclusions, the question becomes does the NLRB's approach threaten Ampersand's First Amendment right to control the content of its paper in any specific way. It is possible that the Board's preferred approach fails to account for the fact that "First Amendment freedoms need breathing space to survive" rather than an intricate case-by-case determination of whether government restrictions or threatened restrictions on speech violates the Constitution.[365] This observation is fortified by noting that "First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech."[366] Breathing space is compromised by the Board's labyrinthian effort to distinguish threats to Ampersand's editorial freedom arising from organizing and bargaining. Elaborate complications arise from the NLRA's apparent reliance on the courts as its enforcement mechanism. This process gives rise to increasingly technical arguments that are often regurgitated in the form of additional legislation, litigation, or NLRB analysis.[367] As *Citizens United* warned, an interpretation of the First Amendment that requires convoluted case-by-case determinations in order to ascertain whether corporate speech ought to be allowed raises the prospect that freedom of speech rights will be

[365] *Citizens United*, 130 S. Ct. at 892.
[366] *WRTL*, 551 U.S., at 469.
[367] Harry G. Hutchison, *Toward a Robust Conception of "Independent Judgment": Back to the Future*?, 36 U.S. F. L. REV. 335, 339-340 (2002)[hereinafter, Hutchison, *Toward a Robust Conception of Independent Judgment*] (citing Justice Frankfurter).

chilled.[368] The domain of labor law can be characterized as nothing less than intricate case-by-case determinations, a paradigm that apparently gave rise to Justice Frankfurter's concern regarding the hyper-technical "process of litigating elucidation."[369]

The *Ampersand* Board's approach raises the question of whether the government has the right and the authority to place reporters' expression rights in a preferred position by taking the right to speak away from an employer. This move would deprive Ampersand of the right to use speech as it sees fit to establish the worth, standing, and respect of its voice within the Santa Barbara community. Favoring one set of speakers over another deprives the public of the right and privilege to determine for itself what speech and which speakers are worthy of consideration, despite the justifiable view that the First Amendment protects speech, speaker, and the ideas that flow from each.[370]

2. Participatory management, reporters' autonomy, and state action

Despite the doubtful provenance of the NLRB's approach, it may be possible to side with the Board's proffered bargain in *Ampersand*—shrinking employers' speech in exchange for workers' autonomy—grounded by the deduction that Board members are simply hierarchs unbounded by cognitive bias and imbued with exceptional insight into the well-being of others and, more particularly, a defensible conception of the public interest. Since First Amendment freedoms are not absolute, and since the NLRA was purportedly enacted to achieve "workplace democracy," as Member Becker contends, some form of balancing could be deployed in order to decide the contest between the employer's First Amendment freedoms and the reporters' pursuit of participation in the production of Ampersand's newspaper as a bargaining objective. "Section 7 . . . requires that employees' concerted efforts must be engaged in for purposes of "mutual aid and protection."[371] The reporters of News-Press sought to organize in order to (1) "restore journalism ethics to the Santa Barbara News-Press, including the maintenance of a clear separation between the opinion/business side of the paper and the news-gathering side"; (2) invite back the six newsroom editors who recently resigned; (3) negotiate a contract with the

[368] *Citizens United,* 130 S. Ct. at 892.
[369] Hutchison, *Toward a Robust Conception of Independent Judgment, supra* note___ at 339-340 (citing Justice Frankfurter).
[370] *Citizens United,* 130 S. Ct. at 899.
[371] GORMAN & FINKIN, *supra* note__ at 398.

newsroom employees to govern hours, wages, benefits and working conditions; and (4) recognize the union as the workers exclusive bargaining representative.[372] Consequently, it is impossible to deny that Ampersand's reporters engaged in concerted action within the meaning of the NLRA. A more difficult issue surfaces from the pursuit of adducible evidence showing that the reporters' activity had mutual aid and protection as its central purpose since the Supreme Court has held that this idea "requires a nexus between the activity and the employees' 'interests as employees.'"[373] Consistent with this idea, the D.C. Circuit held that the NLRA "did not protect the bulk of the employees' activity [in *Ampersand*] and [that] the Board's misconception of the line between protected and unprotected activity tainted its analysis."[374]

Additional support for the D. C. Circuit's judgment may be adduced. In *Eastex*, an important case regarding the reach of the "mutual aid and protection clause," a union circulated literature that opposed the inclusion of a right-to-work provision in the state's constitution, supported efforts to raise the federal minimum wage, opposed the incorporation of the state's right-to-work law into a revised state constitution, and urged general support for the labor union.[375] Upon consideration of the case, the Supreme Court acknowledged that, at some point, the relationship between the subject of the action and the employees' workplace interest may become too attenuated[376] but nonetheless held that union communications regarding its opposition to state right-to-work law and support for a federal minimum wage increase were protected.[377] Furthermore, the Court held that an employer's reliance on its property rights to preclude the distribution of the challenged communication was invalid[378] and conceded Congress' intent to broaden the mutual aid and protection clause beyond concerted activity associated with grievance settlement, collective bargaining, and self- organization.[379] *Eastex* extends the reach of the "mutual aid and protection" clause to employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through

[372] *Ampersand Publishing v. NLRB*, 702 3d at 54.
[373] GORMAN & FINKIN, *supra* note___ at 404.
[374] *Ampersand Publishing v. NLRB*, 702 3d at 53.
[375] *Eastex* 437 U.S. at 559.
[376] *Id*. at 567-68.
[377] *Id*. at 570.
[378] *Id*. at 572-576.
[379] THE DEVELOPING LABOR LAW 208 (5th ed. 2007, John E. Higgins, Jr. ed.).

channels outside of the immediate employee-employer relationship."[380] On this view, "protection is afforded employees when they seek to improve working conditions through 'resort to administrative and judicial forums' and through 'appeals to legislators to protect their interests as employees.'"[381] Here it possible to read the *Eastex* Court as implicitly emphasizing the requirement that employee activity is defensibly within the "mutual aid and protection" clause when it extends outside of the boundaries of the employment relationship, but such activity must legitimately be related to employment.[382]

In *Ampersand*, the courts and the NLRB were required to confront the possibility that the reporters' organizing purpose—designed to adversely affect the newspaper's editorial discretion—could not be easily placed within a category defended by the mutual aid and protection analysis supplied by the Supreme Court in *Eastex*. If Ampersand retains discretion to determine the content of its paper, then the NLRA must yield because "what is published and not published" remains outside of legitimate employee concern for the purposes of Section 7 protection, leaving little room for the NLRB to delineate. This is true because *Ampersand*, unlike *Eastex*, does not involve an attempt by workers to exercise their speech rights in the distribution of a labor union communication. Instead, the reporters in *Ampersand* wish to exercise editorial control of the content of the paper in order to vindicate their journalistic integrity. Indeed, much of the *Ampersand* Board's inventive analysis implicitly acknowledges this problematic effort since the NLRB concedes that the reporters may lack the authority to actually bargain for the editorial content rights that sparked their organizing effort. A careful reading of *Eastex* correlates with the D. C. Circuit's emphasis on Ampersand's right to control the content of its newspaper, a right that trumps the workers' pursuit of their own editorial objectives. This is true even though an employer could, pursuant to its discretion, choose to share its authority with reporters.

One could argue, of course, that newsroom employees were simply acting in concert for the purposes of protecting the quality of the relevant product from abusive editorial policies, consistent with the Wagner Act's purported purpose: the advancement of democratic

[380] Eastex, 437 U. S. at 564.
[381] THE DEV'L LAB. L., *supra* note___ at 208.
[382] *Eastex*, 437 U.S. at 567-68.

governance.[383] In line with the "needs" of industrial democracy and as a central part of the nation's commitment to democratize the employment relationship[384] through participation, one could boldly proclaim that the reporters' efforts to constrain offensive editorial policies exists outside of, but relative to, the domain secured by the First Amendment.[385] Such linguistic legerdemain is questionable for two reasons. First, editorial policies necessarily influence the content of a newspaper and, accordingly, what readers read, which is one reason why the Supreme Court in *Tornillo* found that Florida's right-of-reply statute impermissibly encroached on the Miami Herald's First Amendment rights. Uniform with *Citizens United* and *Bellotti*, if a business organization is properly seen as a unitary speaker when the right of the institution to speak is placed in doubt[386] by virtue of public welfare statutes such as the NLRA, then conceiving of Ampersand's newspaper as a highly individualistic speaker may be made difficult when and if editorial policies are democratized and become fragmented. Because concerted conduct designed to affect the ultimate direction and managerial policies of the business are control issues that likely lie beyond the scope of Section 7 as a general rule,[387] it is unlikely that a publisher's editorial policies and choices "constitute a 'term or condition' of employment in which employees have a legitimate § 7 interest."[388] Although the employee interest that the NLRB Order seeks to protect —how the product itself is produced—is surely desirable, desirability alone cannot convert this interest into a working condition within the meaning of the NLRA.[389]

It is undeniable that the Santa Barbara News-Press' employees who are members of the labor union may have a clear interest in ensuring that the paper reflects the lives, hopes, and vision of the entire community. However this interest is insufficient as a term and condition of work to obtain NLRA protection.[390] This determination may be doubly true when and if the statement of such poignant hopes is backed by public disparagement of the employer[391] since

[383] Becker, *supra* note__ at 496.
[384] *Id*. at 502-523 (discussing industrial democracy).
[385] *Ampersand* 702 F. 3d. at 56.
[386] Mallory, *supra* note___ at 5 (discussing *Bellotti).*
[387] *Ampersand,* 702 F.3d, at 57.
[388] *Id.*
[389] *Id.* (citing Riverbay Corp., 341 NLRB 255, 257 (2004) and Lutheran Soc. Serv., 250 NLRB 35, 42 (1980)).
[390] *Id*. (quoting comments from Melinda Burns).
[391] *Id*.

unprotected concerted activities include conduct that is indefensibly injurious to employer interests.[392] Following the *Jefferson Standard*[393] case, "[t]he concept of 'disloyalty' has been used to deny the protection of Section 7 to certain concerted activities deemed to do unjustifiable harm to the vital interests of the employer."[394] It is therefore quite proper to accept the D.C. Circuit Court's judgment that Ampersand can discipline its employees who protest on grounds of journalistic integrity, particularly when the reporters' conduct threatens or requires a publisher to cease its editorial control.[395] This judgment signifies that the reporters' conduct threatened Ampersand's vital interests in producing a newspaper consistent with its own editorial choices. It bears repeating that workers can engage in a wide array of activities and that the *Eastex* Court gave the NLRB the discretion to protect concerted activity that exhibits a less-than-immediate relationship to the employees' interests; however, the Court also stated that "at some point the relationship becomes so attenuated that the activity" falls outside of Section 7.[396] Editorial control, viewed fairly, appears to be outside of reporters' statutorily-protected reach. The D. C. Court determined that the First Amendment precludes government coercion in such cases despite the desirability of the goal of the protest—the attainment of a responsible press. Here it is not difficult to agree with the court's observation that although "[a] responsible press is an undoubtedly desirable goal . . . press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[397] Linked inextricably to the goal of press responsibility, the workers' concerted activity cannot be saved from employer discipline simply because the employees' campaign was also linked to the desire to achieve a contract that would cover newsroom employees' hours, wages, benefits, and working conditions.[398]

Putting aside First Amendment concerns and the corresponding deduction that a newspaper has absolute discretion to determine the contents of its paper,[399] it is possible for the moment to find support for the D.C. Circuit's decision to disallow enforcement of the NLRB's remedial order after pondering the problems inherent in a public welfare approach to the issues

---

[392] THE DEV'L LAB. L., *supra* note___ at 197 (citing NLRB v. Local union No. 1229, Int'l Bhd of Elec. Workers (Jefferson Standard), 346 U.S. 464 1953).
[393] *Jefferson Standard,* 346 U.S. at 472.
[394] THE DEV'L LAB. L., *supra* note___ at 244.
[395] *Ampersand,* 702 F.3d, at 57.
[396] *Eastex*, 437 U.S. at 567-68.
[397] *Ampersand,* 702 F.3d, at 57 (citing *Miami Herald v. Tornillo,* 418 U.S. at 256).
[398] *Id* at 58.
[399] *Id*. at 56 (citing *Passaic*, 736 F.2d at 1557).

that arose in *Ampersand*. Consider the possibility that Ampersand could choose to share its editorial authority with reporters, as well as the rich possibilities associated with government intervention on behalf of such employee participatory efforts. As we have seen, this outcome appears to be consistent with the instantiation of "workplace democracy," Member Becker's professed hopes, and, quite possibly, Justice Stevens' contention that the "Framers . . . took it as a given that corporations could be comprehensively regulated in the service of the public welfare."[400] However desirable the acceptance of public welfare regulation may be, there are potential problems with this template that require clarification.

Consider Professor Bainbridge's constructive analysis. Offering insights on the value of "workplace democracy" in the form of participatory management, he notes that, "[i]f measured solely by the volume of popular and academic attention devoted to it, participatory management—the philosophy of involving employees in corporate decision making—arguably is the most important industrial relations phenomenon of the last three decades."[401] Urging a cautious approach to this phenomenon,[402] drawing on contractarian insights that define the firm as a nexus of contracts, developing a model of corporate decision making, examining the agency costs literature for a description of how agents behave and what the necessary adaptive responses are to constrain agents from shirking,[403] and, finally, admitting that neither the exclusion of employee participation nor the evisceration of traditional hierarchical management is necessarily superior,[404] Bainbridge argues that the law should adopt an enabling approach to participatory management but reject opposing extremes of either prohibition or mandate.[405] He doubts the wisdom of government intervention in the marketplace to ensure employee participation in setting the firm's strategy or direction,[406] even though he admits that small firm decision making may at times resemble Kenneth Arrow's consensus model.[407] In reaching these conclusions, Bainbridge observes that some form of centralized decision making surfaces as "the

[400] *Citizens United*, 130 S. Ct. at 949-950 (Stevens, J. concurring in part and dissenting in part).
[401] Bainbridge, *Participatory Management, supra* note___ at 658.
[402] *Id*. at 664-65.
[403] *Id*. at 660.
[404] *Id*. at 704.
[405] *Id*. at 659.
[406] *Id*. at 718.
[407] *Id*. at 665 (providing the example of partnerships, which are, of course, managed by the partners of the firm rather than by its employees).

defining characteristic of the . . . firm."[408] At the same time, "[a]ll organizations must have some mechanism for aggregating the preferences of the organization's constituencies and converting them into collective decisions."[409] In solving this problem, two basic mechanisms surface for the purpose of carrying out the task of collective decisionmaking: consensus and authority.[410] Bainbridge also notes that every organization, in choosing between consensus and authority-based decision structures, must have a mechanism for aggregating preferences that define the firm.[411] This paradigm implicates newspapers and their editorial policies, just as it implicates widget manufacturers and their output.

If this analysis is instructive, then any firm—Ampersand in particular—*could* choose to grant reporters' demand for greater participation in the production and content of its paper *unless* market failure prevents it from adopting some form of employee involvement when and if it is appropriate.[412] This analysis raises the question of whether government intervention in the employment marketplace is justified on efficiency/public welfare grounds in the absence of the employer's decision to facilitate greater employee involvement *sua sponte*. Bainbridge suggests a negative response to this question[413] for a couple of reasons. Greater employee involvement is consistent with a consensus-based decision structure—one that is justified when each member of the organization has identical information and interests, resulting in preferences that are easily aggregated and permitting relatively easy collective decision making.[414] Authority-based structure, however, is justified when group members have different interests and differing amounts of information.[415] It is manifest that the interests of the Graphic Communications Conference labor union members collide with the interests of management, making the aggregation of disparate preferences problematic.[416] Even if one is committed to the promise of participatory democracy in principle, it is difficult in practice to justify NLRB intervention so that participatory democracy can materialize in the form of reporters' organizing rights when such rights could be transmuted into employee speech rights, thereby diminishing the

[408] *Id*. at 663.
[409] *Id*. at 664.
[410] *Id*. at 664.
[411] *Id*. at 664-65.
[412] *Id*.at 730.
[413] *Id*.
[414] *Id*. at 664-665.
[415] *Id*.
[416] *Id*.

publisher's authority-based role as the editorial gate-keeper of the newspaper. Bainbridge's analysis shows that there is no economic justification for government intervention in the choice taken by the entity when confronted with demands for increased employee participation.[417] It follows that firms such as Ampersand, within appropriate constitutional and statutory boundaries, ought to be free to decide such questions.

On the other hand, if the NLRB intervenes in order to facilitate some form of balancing (i.e., between the interests of employers and employees) by mandating a pathway that allows reporters to attain their laudable objective in journalistic autonomy without their employer's uncoerced consent, then the ominous specter of state action arises, reopening the door to potential government censorship that collides with a reasoned conception of Ampersand's First Amendment rights. If business firms such as Ampersand are and ought to be entitled to constitutional rights, including speech rights,[418] in order to protect the rights of individuals who form them,[419] to preserve democracy, and to check government power,[420] as Shapiro and McCarthy argue, then this collision ought to be avoided. Inarguably, the power associated with the free flow of ideas to hold the government accountable for the arbitrary collection of data from our phones and email is necessary to prevent the state from "punishing dissenters through arbitrary arrest, search and imprisonment."[421] This rationale of constraining government power applies correspondingly to corporate and LLC rights.[422] A "world without corporate [and LLC] speech rights necessarily implies a world where government is empowered to shut down speech because it does not like the criticism of its policies"[423] or because it wishes to advance some purported public policy objective (e.g., labor organizing) that provides economic rents to individuals and groups that the current or future government favors. This, of course, would be a "profoundly undemocratic development."[424] If one accepts the argument that corporations, for whatever reason, should not enjoy constitutional rights, then it follows that the government

[417] *Id*. at 730.
[418] Shapiro & McCarthy, *supra* note___at 705.
[419] *Id*. at 702.
[420] *Id*. at 710-711.
[421] *Id*. at 711.
[422] *Id*.
[423] *Id*.
[424] *Id*.

would be free to censor all firms and most employers.[425] Furthermore, since "nearly every newspaper, broadcaster, and political journal in the United States is a corporation"[426] or an LLC, this suppressive paradigm could include most of the free press. Thus appreciated, broad First Amendment protection for the editorial judgment of Ampersand and every other media firm for the purpose of maintaining the organization's editorial autonomy is necessary to avoid industrial and economic autocracy managed by bureaucrats in the Nation's capital, despite the possibility that such an approach provokes a harsh rebuke from commentators such as Justice Stevens, who scolded the *Citizens United* majority for having a myopic focus that gives too much weight to free-floating "First Amendment principles."[427]

At its core, the *Ampersand* dispute represents the highly contingent collision of reporters' journalistic ethics and autonomy and publishers' editorial and journalistic integrity. This delineation of two conflicting models of autonomy remains viable despite the Board's accurate observation that, aside from the issues surrounding ethics, "the employees were seeking recognition of the union 'as their representative for purposes of bargaining over wages, hours, and other terms and condition of employment generally."[428] Separating reporters' concern for journalistic ethics and autonomy from an employer's editorial authority, which is tied to values advanced and made manifest by a free press, remains problematic no matter how expertly the NLRB analyzes such issues. This type of dispute is endemic to our postmodern society, which struggles to achieve the good without necessarily committing to the true,[429] a society rightly understood as one in which individuals are repelled by the notion of making contact with something larger and more enduring than oneself.[430]

Evoking the dispute that gave rise to *Nelson v. McClatchy*, the *Ampersand* case typifies the nation's ongoing struggle between constitutional principles and employee rights in a society where all values and goods can be ostensibly located within one's own person.[431] In *McClatchy*, the Washington State Supreme Court examined the collision between a state law prohibiting

[425] *Id*. at 713.
[426] *Id*.
[427] *Citizens United*, 130 at 963 (Stevens, concurring in part and dissenting in part).
[428] *Ampersand*, 702 F.3d, at 55 (quoting the Board).
[429] Hutchison, *A Clearing in the Forest, supra* note___ at 1309.
[430] RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 29 (1989).
[431] RON HIGHFIELD, GOD, FREEDOM & HUMAN DIGNITY: EMBRACING A GOD-CENTERED IDENTITY IN A ME-CENTERED CULTURE 211 (2013).

employment discrimination based on an employee's refusal to remain politically abstinent and the rights of an employer claiming that the free press clause of the First Amendment shields newspaper publishers from statutory interference with its editorial control[432] to oversee its reporters' conduct and ethical judgment.[433] Although American journalists toil under the constitutional banner of freedom of the press, at most newspapers, they must surrender their individual rights to freedom of expression as a condition of employment.[434] Favoring the ethic of objectivity, which dictates that reporters present news in a neutral and balanced fashion free from the influence of their personal opinions, many newspapers require that staff members abstain from participation in political or community affairs in order to preserve the appearance of neutrality.[435] Congruent with this observation, the *Nelson v. McClatchy* court emphasized the value of objectivity and the possibility that a reporter's personal political agenda may skew news content.[436] Finding a difference between the journalistic integrity of a newspaper's editors and publishers in contradistinction to the journalistic integrity of reporters,[437] the state supreme court found that the First Amendment and the Washington Constitution protect a publisher's editorial discretion,[438] enabling the firm to control its newspaper's content in order to maintain its credibility in the eyes of readers as an unbiased publication.[439] Whether the *McClatchy* decision falls neatly within the taxonomy deftly provided by Professor Volokh, which includes the "all-speakers-are-treated equal" category, the "mass-communications-is-more-protected" category, or the "institutional press-as-an-industry-that deserves-more-protection" category,[440] the court correctly anticipated conclusions reached by the D. C. Circuit in *Ampersand* within the boundaries illuminated by *Eastex*. Consistent with Shapiro and McCarthy's analysis, and adverting to the claim that free speech is a fundamental right on its own as well as a keystone right enabling us to preserve all other rights,[441] the Washington court found that the

---

[432] *Nelson v. McClatchy* 936 P.2d at 1124 (holding that the employment statute at issue cannot be constitutionally applied to a newspaper).
[433] *Id*. at 1124-25.
[434] Jason P. Isralowitz, Comment, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values,* 141 UNIV. OF PENN. L. REV., 221, 221-222 ((1992).
[435] *Id*. at 222.
[436] *Nelson v. McClatchy* 936 P.2d at 1124-25.
[437] *Id*. at 1131.
[438] *Id*. at 1129.
[439] *Id*.
[440] Volokh, *supra* note____ at 533 (discussing *Nelson v. McClatchy*).
[441] *Nelson v. McClatchy* 936 P.2d at 1129 (quoting Laurence Tribe).

Constitution precludes enforcement of the anti-discrimination clause of the pertinent state statute.[442] From a perspective attentive to *Ampersand*, the *McClatchy* case provides yet another analogy that vindicates the deduction that publishers, as part of the First Amendment's guarantee of freedom of speech and a free press[443] and, evidently disregarding the business form deployed by the publishing entity, have and ought to have constitutional leeway in deciding the content of their publications against the application of government speech restrictions, in the absence of proof that such restrictions further a compelling interest and are narrowly tailored to achieve that interest.[444]

C. The Speech Rights of Employers in a World that is Falling Apart

By displacing employer speech rights, the *Ampersand* Board advances participatory management in the form of reporters' rights to organize for objectives that may be unobtainable through constitutionally-limited government intervention. Contrary to this questionable approach, this Article argues that employers, organized as artificial entities by common women and men who individually and collectively possess speech rights, ought to exercise wide-ranging editorial freedom. Corresponding with this argument, Ampersand has the right to speak to the residents of Santa Barbara unimpeded by reporters' collective bargaining efforts aided by government power calibrated to constrain its newspaper's First Amendment rights. This conclusion remains tenable despite the contention that the exercise of speech by for-profit firms fails to advance human freedom since such firms are monomaniacs that enable management to speak on behalf of profit maximization and not as a representative of voters.[445] Still, since modern democracies increasingly favor authoritarianism,[446] it is likely that the speech rights of disfavored groups and individuals will continue to remain at risk. This threat is fueled by Progressive elites who yearn for regulated predictability in the nation's affairs[447] and the accompanying shrinkage of the role and importance of individual actors, perhaps premised on

---

[442] *Id*. at 1133.
[443] Volokh, *supra* note____ at 533 (showing that the *Nelson v. McClatchy* case mentions "free press" rights and often refers to "free speech" rights and "First Amendment" rights
[444] *WRTL* 551 U. S. at 464.
[445] Greenfield, Greenwood & Jaffe *supra* note___ at 883 (quoting Greenfield).
[446] Richard Pildes, *The Inherent Authoritarianism in Democratic Regimes*, in OUT AND INTO AUTHORITARIANISM, 125-151 (Andras Sajo ed. 2002).
[447] Richard A, Epstein, *Lest We Forget:* Buchanan v. Warley *and Constitutional Jurisprudence of the "Progressive Era,"* 51 VAND. L. REV. 787, 795 (1998).

the thesis that no individual strategy could achieve socially-optimal results.[448] This threat is especially apparent for individuals and independent business entities that are disconnected from the centers of political influence provided by Big Business, Big Labor, and Big Lobbyists, which typify the corruption of capitalism procured by special interest group politics.[449]

Within the United States, any discussion of such threats must take place against a background of cultural division reflecting a clash of orthodoxies, which signifies that "there is an interminable and unsettleable character of much of what passes for [Americans'] contemporary moral and philosophical debates."[450] Fracture reflects the incoherence, if not the fall, of the liberal, progressive, and largely hierarchical ideologies tied to the Enlightenment era and primes the way for the "'return of social and human problems that Progress was supposed to have relegated to History's dustbin . . .'"[451] If this is true, then Ampersand, media firms, and indeed all forms of business organizations will remain under the threat of judicial or bureaucratic rebuke despite the existence of the text of the First Amendment and the principles that undergird the Supreme Court's decision in *Citizens United*, rules that are reinforced by the notion that the Court should always look through the name of a business association "to see and protect those whom the name represents."[452] When labor advocates and members of the NLRB insist on substituting their own statist preferences for the text of the Constitution, then human liberty and the freedom of expression rights of both individuals and business organizations remain in doubt. This observation gives substance to the claim that "Nietzsche was mostly right: that while the will to power has always been present, American democracy increasingly operates within a political culture—that is a framework of meaning—that sanctions a will to domination."[453] The NLRB's treatment of the *Ampersand* case shows that the condemnation of employer freedom of speech, whether grounded in the employer's identity as an artificial organization or not, surfaces

---

[448] Samuel Issacharoff and Catherine Sharkey, *Backdoor Federalization,* 53 UCLA L. REV. 1353, 1369(2006) (explaining the nation's embrace of federal government power grounded in the notion that in complex societies there is a need for a national coordinator).
[449] *See e.g.*, DAVID A. STOCKMAN, THE GREAT DEFORMATION: THE CORRUPTION OF CAPITALISM IN AMERICA, xi (2013 (discussing the powerful lobbies and special interest groups that harm the country).
[450] ALASDAIR MACINTYRE, AFTER VIRTUE 226 (1984).
[451] Paul Seaton, *Translator's Preface* to CHANTAL DELSOL, UNJUST JUSTICE: AGAINST THE TYRANNY OF INTERNATIONAL LAW, at vii (Paul Seaton., 2008).
[452] Avi-Yonah, *supra* note___ at 1013(quoting Cnty. of Santa Clara v. S. Pac. R.R. Co., 18 F. 385, 402-03 (D. Cal. 1883).
Professor Horwitz).
[453] HUNTER, TO CHANGE THE WORLD, *supra* note___ at 109.

as nomothetic knowledge bereft of infrangible principles, an approach that consciously or accidentally misreads the evidence regarding the actual causes of labor union decline. This move appears to be sheltered from critical review by a postmodern conception of constitutional rights that fails to acknowledge that employers regulated by the NLRA and operating as artificial entities retain First Amendment rights that cannot be separated from the individuals who form them as a vehicle to exercise their right to free speech.[454]

VI. CONCLUSION

In a postmodern world illustrating the paradox of liberalism, a world where people are waiting but do not know what they are waiting for, speech rights for employers as artificial entities will likely remain contingent and under threat regardless of the fact that *Bellotti*, *Citizens United*, and *Virginia Electric* proclaim that a speaker's identity, standing alone, fails to present a plausible barrier to First Amendment protection. Despite the proclamations of the Supreme Court and the text of the Constitution, threats arise in particular from groups and individuals such as Member Becker and his ideological allies, who believe that speech restrictions are necessary to stem the labor movement's secular decline as prologue to realizing the hollow promise of the NLRA. Whether "workplace democracy" is necessary or required, any successful effort to achieve this objective through government intrusion, such as the one supplied by the NLRB in *Ampersand*, ensures that Senator Wagner's orchidaceous promise to bring freedom to the common man may trump the quest for human liberty and provide an opening for the return of political despotism. The First Amendment, rightly understood, is and ought to be a barrier to such an outcome.

[454] Somin, *Corporate Rights and Property Rights are Human Rights, supra note____*.