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THE RISE OF THE WORKING CLASS SHAREHOLDER: AN APPLICATION, AN EXTENSION, AND A CHALLENGE

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One of the enduring debates in corporate governance scholarship and doctrine is, to borrow a phrase, for whom are corporate managers trustees.[1] Should

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[1] E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160-63 (1932) (examining tension between corporate managers' responsibilities to shareholders and their responsibilities to society). This debate remains a lively—and voluminous—one. *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 125-52 (2006) (advocating principles of corporate governance based on broader responsibilties to stakehholders); LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 9-11 (2012) (criticizing "shareholder value thinking" as myopic view of corporate managers' responsibilities); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550-52 (2003) (advocating for director primacy approach to analysis of corporate governance); Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 850-75 (2005) (arguing for shareholders' power to make "rules-of-the-game" decisions); Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1055-59 (2008) (juxtaposing shareholder primacy model of corporate governance with stakeholder model); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2000) (asserting that consensus has formed around "view that corporate law should principally strive to increase long-term shareholder value"); Michelle M. Harner, *Corporate Control and the Need for Meaningful Board Accountability*, 94 MINN. L. REV. 541, 544 (2010) (analyzing "similarities between controlling shareholders and controlling creditors" and policies to govern controlling stakeholder actions); Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2095-120 (2010) (arguing nonshareholder constituents should be treated like shareholders); Katherine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 312 (2011) (advocating policies that empower stakeholder investors); Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249, 264-98 (2010) (examining debate between stakeholder theory and shareholder primacy); Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 537-70 (2006) (analyzing criticism of shareholder primacy based on efficiency concerns); David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1377 (1993) (detailing how clash between pro-shareholder and nonshareholder viewpoints animates crisis in corporate law's normative foundations); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1018-21 (2013) (detailing emergence of radical shareholder primacy as approach to corporate governance focused on short-time horizons); Robert J. Rhee, *A Legal Theory of*

corporations be managed primarily to serve shareholder interests or to serve a more robust set of stakeholder interests? That debate has ebbed and flowed over the last century, with some commentators arguing that we are in a historical moment when it is again salient.[2] One piece of supporting evidence is Senator Elizabeth Warren's recent introduction of the Accountable Capitalism Act,[3] which requires large corporations to be chartered at the national level and mandates that forty percent of their directors be elected by employees.[4] The bill has no chance of success in the current political climate, but the fact that a prominent politician and potential presidential candidate believes that progressive corporate governance reform is something that can rally voters speaks volumes about the contemporary importance of the shareholder primacy debate.

For corporate governance scholars, this debate is the intellectual equivalent of the divide between the Red Sox and the Yankees. You find your tribe early in your sentient life, and no amount of persuasion, argument, or data will move you. The battle lines are intransigent.

Professor David Webber's new book, *The Rise of the Working-Class Shareholder*, is especially valuable given this intransigence.[5] Webber turns our attention to the vast, largely untapped power of the trillions of dollars parked in

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Shareholder Primacy, 102 MINN. L. REV. 1951, 1954 (May 2018) (providing "empirical review of judicial discussion of shareholder profit maximization in the era of the modern corporation, 1900 to 2016"); Benedict Sheehy, *Scrooge—The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate*, 14 U. MIAMI BUS. L. REV. 193, 238-40 (2005) (arguing corporations have never been solely shareholder focused).

2 *See* Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July-Aug. 2012, at 48, 57 (advocating prioritization of long-term shareholders and more productive interactions between shareholders, managers, and boards over big reforms); Joe Nocera, *Down With Shareholder Value*, N.Y. TIMES, Aug. 11, 2010, at A19 (describing new movement "aimed at overturning the hegemony of shareholder value"); Steven Denning, *The Dumbest Idea in the World: Maximizing Shareholder Value*, FORBES (Nov. 28, 2011, 1:19 PM), http://www.forbes.com/sites/stevedenning/2011/11/28/maximizing-shareholder-value-the-dumbest-idea-in-the-world/ [https://perma.cc/GG5F-WH97] (admonishing executives to focus on customers rather than shareholders); Steven Pearlstein, *How the Cult of Shareholder Value Wrecked American Business*, WASH. POST: WONKBLOG (Sept. 9, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/09/how-the-cult-of-shareholder-value-wrecked-american-business/ (cataloguing economic deletarious effects of maximizing shareholder value); Stefan Stern, *Transcend "Shareholder Value" for All Our Sakes*, FIN. TIMES (Oct. 22, 2014), http://www.ft.com/intl/cms/s/0/0a288288-583e-11e4-a31b-00144feab7de.html?siteedition=intl#axzz3Is1UZ900 (arguing focus on maximizing shareholder value creates unsustainable externalities).

3 Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

4 *See id.* §§ 4, 6 (seeking to rebalance shareholder and stakeholder interests through federal corporate law).

5 DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON, at xii (2018) (claiming pension funds are "tremendous source of power for labor").

employee pension funds.[6] Because of these assets, labor can press their interests vis-à-vis corporate governance within a shareholder primacy framework.[7] The intransigence is immaterial. One does not have to convince policy makers to expand the board or to broaden the notion of fiduciary duty to include a consideration of employee interests.[8] All that is required is for labor to assert its collective power as owner of capital. As Webber explains, the power of labor as owner of capital can operate in two ways, which might be called labor-as-shareholder and shareholder-as-labor.[9]

When labor acts as active shareholders, they push companies in various ways, most prominently with regard to time horizon. That "short-termism" is a problem, and that it is prevalent, is an area of broad agreement.[10] The turnover rate for shares of most companies in the United States is over one hundred and fifty percent per year,[11] and the daily volume in the United States of high-frequency trading, in which investors hold stocks for seconds or less, is as much as seventy percent.[12]

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[6] *See id.* (noting value of pension funds "amount to somewhere between $3 and $6 trillion").

[7] *Id.* at 17-18 (outlining potential power of shareholder framework).

[8] *See id.* at 181-211 (exploring relation of fiduciary duty conceptions to issue of capture).

[9] *Id.* at xii (claiming "power of labor's capital operates along two dimensions: advancing workers' interests as workers, and advancing workers' interest as long-term shareholders saving for retirement").

[10] *See* Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 IOWA J. CORP. L. 265, 293-323 (2012) (detailing effects of investment practices, management techniques, and firm cultures on short-termism); Kent Greenfield, *The Puzzle of Short-Termism*, 46 WAKE FOREST L. REV. 627, 628 (2011) (exploring externality of "future costs to shareholders"); Rachelle C. Sampson & Yuan Shi, Are US Firms and Markets Becoming More Short-Term Oriented? Evidence of Shifting Firm and Investor Time Horizons, 1980-2013, at 9-19 (Oct. 29, 2018) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.2837524 [https://perma.cc/J9UK-853M] (providing evidence of increasing short-termism in U.S. equity capital markets).

[11] *See Stocks Traded, Turnover Ratio of Domestic Shares (%) of United States*, WORLD BANK, http://data.worldbank.org/indicator/CM.MKT.TRNR?end=2016&locations=US&start=2000 [https://perma.cc/Y63Z-AU7P] (last visited Dec. 21, 2018) (tracing stocks traded since 2000).

[12] *See* LAWRENCE E. MITCHELL, THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY 277-78 (2007) (examing incentives for short-term stockholding); Matthew O'Brien, *Everything You Need to Know About High-Frequency Trading*, ATLANTIC (Apr. 11, 2014), https://www.theatlantic.com/business/archive/2014/04/everything-you-need-to-know-about-high-frequency-trading/360411/ [https://perma.cc/JL7D-Z7GM] (detailing how half of stock trades are high frequency); Shobhit Seth, *The World Of High Frequency Algorithmic Trading*, INVESTOPEDIA (Sept. 16, 2015), http://www.investopedia.com/articles/investing/091615/world-high-frequency-algorithmic-trading.asp [https://perma.cc/A3MY-3D68] (showing sixty to seventy percent of trades in United States attributable to high frequency trading during 2009-2010, though it has since decreased).

This pattern of short-term holding means that most shareholders will tend to ignore or disregard any change in the value of their stock occurring at a later time. They will prioritize the short term in their choice of shares to hold and in their influence on management in companies whose shares they hold.[13] Management adhering to the interests of those shareholders will prioritize short-term gains even if the result is long-term difficulties.[14]

Labor-as-shareholder helps retard that trend. Because employees invest for retirement, pension funds are the prototypical long-term investor, desiring the appreciation of their portfolio over time. Any effort by companies to prioritize short-term returns at the expense of the long-term health of the company will be opposed by employee investors. This means that active pension funds can provide a necessary corrective to the pressures from other holders of capital, which frequently pressure management to prioritize the short term.[15]

As Webber discusses, pension funds can also provide meaningful benefits when acting as shareholder-as-labor. Webber convincingly argues that the investment and voting decisions of pension fund trustees may take into account not only the impact of those decisions on the corpus of the fund but also on the lives of the workers who contribute to it.[16] Webber concedes that it is a "widely shared view" that the trustees of a fund have a duty of loyalty that runs only to the fund itself rather than the employee beneficiaries of it.[17] But he argues that such a view is "errant"[18] and that the investment power of funds can be used to preserve jobs (by opposing privatization, for example) or to create jobs (by

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[13] *See* Jillian A. Popadak, A Corporate Culture Channel: How Increased Shareholder Governance Reduces Firm Value 26-37 (Oct. 25, 2013) (unpublished manuscript), https://ssrn.com/abstract=2345384 [https://perma.cc/9YXX-VSKA] (correlating increased shareholder voice in governance with greater attention to short-term tangible results and decreases in attention to intangible sources of long-term value).

[14] *See* MITCHELL, *supra* note 12, at 1 ("A recent survey of more than four hundred chief financial officers of major American corporations revealed that almost 80 percent of them would have at least moderately mutilated their businesses in order to meet analysts' quarterly profit estimates."); Lee Drutman, *The Long Term Value Moment*, AM. PROSPECT (July 6, 2007), http://prospect.org/cs/articles?article=the_longterm_value_moment [https://perma.cc/P4YP-88SJ] (cataloging various studies pointing out pathologies of short-termism as business strategy). There are complexities to this description of the problem of short-termism that I address elsewhere but do not address here. *See* Kent Greenfield, *The Puzzle of Short-Termism*, 46 WAKE FOREST L. REV. 627, 630-34 (2011) (identifying short-termism strategies).

[15] *See* Popadak, *supra* note 13, at 10 (detailing pressures felt by executives to deliver short-term gains to shareholders); Sampson & Shi, *supra* note 10, at 8 ("External pressures may also lead firms to shorten their investment horizons . . . ."). For a longer explanation of the importance of stakeholder governance in reducing short-termism, see KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO: (AND THEY SHOULD ACT LIKE IT) 218-22 (2018).

[16] WEBBER, *supra* note 5, at 182-83 (2018) (analyzing law of fiduciary duty's ability to further labor's interests).

[17] *Id.* at 183 (outlining narrow view of fiduciary duty).

[18] *Id.*

investing in companies that offer well-paying jobs, for example).[19] As Webber argues, "a broader view of fiduciary duty empowers pension fund trustees to consider how these investments actually impact their work-contributors . . . ."[20] In Webber's view, pension funds can and should use their financial power both as investors and as activist shareholders to protect and advance the interests of workers.

Both of these strategies—labor-as-shareholder and shareholder-as-labor—offer the potential for change within corporations and corporate governance without deciding or waiting for a shift in the larger shareholder vs. stakeholder debate.[21] For those of us reaching for those more fundamental changes, Webber shows that there are lower hanging fruits available for plucking. This book is now the definitive treatment of a little-understood area of the investment world, and it makes a spirited case for the promise of using labor assets to leverage real change in the way companies are run. To use a Webber quote from a different context, "It [is] hardly the French Revolution, but it [is] a start."[22]

Two aspects of the book deserve special mention. First, Webber includes a number of vignettes focusing on specific individuals who have played important roles in various battles on behalf of labor. Heather Slavkin Corzo, an AFL-CIO official (and Boston University School of Law alumna) pushed the SEC to adopt a disclosure rule on CEO-to-worker pay ratios.[23] Erik Lie, a scholar at the University of Iowa, first exposed the ubiquitous problem of backdating options to benefit corporate executives.[24] Barry McAnarney, the Executive Director of the Massachusetts Laborers' Pension Fund, pressured the real estate company that owned Zucotti Park near Wall Street to allow the Occupy protesters to stay put for a few weeks.[25] Professor Jack Beermann courageously expressed contrary viewpoints at a conference at George Mason sponsored by the Koch brothers.[26] These stories not only make the text more accessible, they provide a valuable service by shining a light on these individuals and their work. A pat on the back can go a long way.

Second, *The Rise of the Working-Class Shareholder* also serves an important pedagogical purpose. Many law students have internalized the lessons law schools have been implicitly teaching for decades: those who want to pursue

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[19] *Id.* at 197 (claiming where difference between worker-centric approach and maximize-returns approach "really matters is in managing the threat of privatization or making investments that create worker jobs").

[20] *Id.* at 198.

[21] *Id.* at xiv (arguing markets "must be transformed from within").

[22] *Id.* at 53.

[23] *Id.* at 145-51 (narrating how Corzo was able to force SEC to adopt disclosure rule).

[24] *Id.* at 164-67 (detailing Lee's findings).

[25] *Id.* at 97 (describing how McAnarney leveraged "power as an investor in a real-estate corporation" to buy time for Occupy Wall Street).

[26] *Id.* at 233-34 (outlining Beermann's views on public pension reform).

careers in the law to achieve social progress should practice in areas like civil rights, human rights, constitutional law, and environmental justice. Business and corporate practice can be left to those who have a different set of priorities and may be on a different part of the political and ideological spectrum. But this book makes clear that a deep knowledge of how markets work can be immensely helpful when married to a commitment to using that knowledge to help real people. Webber's book is a wonderful example to students of what someone with his commitments can achieve even if they are—to quote him—"a midlevel, bag-carrying, law firm associate."[27]

Finally, three points regarding the ideas presented in *The Rise of the Working-Class Shareholder* are worth exploring. The first is an application of Webber's ideas. The second is an extension of his ideas. The third is a challenge to one of his ideas.

As for application, consider the public debate about guns. Hardly a month goes by without another grisly reminder of the prevalence of guns and the violence they engender. But guns are not only dangerous—they are lucrative. The gun industry produced over fifty billion dollars of economic impact nationwide in 2017,[28] and the industry annually produces over nine million firearms.[29] And the business is growing: In 2017, the Bureau of Alcohol, Tobacco, Firearms and Explosives reported an estimated forty-three percent increase in firearms manufacturing in the United States within the last five years.[30] The wealth created flows into the coffers of not only the manufacturers, but also retailers such as Walmart and Dick's Sporting Goods. Moreover, up until the Parkland shooting on February 14, 2018, those who love guns were considered an attractive market demographic, with some companies actively seeking to take advantage of their fandom. Examples included Amazon's video service streaming the NRA channel, airlines offering discounts to NRA members, and credit card companies offering gun-branded cards.[31]

As Webber points out, most pension funds invest in companies that benefit one way or the other from the gun trade.[32] Most ironically perhaps, teachers'

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27 *Id.* at 173.

28 Andrew Lisa, *Gun Industry Contributes $51.3B to US Economy, Research Shows*, MSN (Apr. 24, 2018), https://www.msn.com/en-us/news/other/gun-industry-contributes-dollar513b-to-us-economy-research-shows/ar-AAvuCzz (ranking states according to level of economic activity linked to gun industry).

29 Press Release, Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF Releases 2017 Report on Firearms Commerce in the U.S. (Sept. 6, 2017), https://www.atf.gov/news/pr/atf-releases-2017-report-firearms-commerce-us [https://perma.cc/3LLU-3YX7] (ranking states according to number of registered weapons).

30 *Id.* (cataloguing specific weapons for which sales increased).

31 *See* Julie Creswell & Tiffany Hsu, *Connection to N.R.A. Can Be Bad for Business*, N.Y. TIMES, Feb. 24, 2018, at A12 (detailing controversy surrounding companies' links to gun industry).

32 WEBBER, *supra* note 5, at 35-36 (observing how largest pension funds invested in gun

pensions (like most public employees' pensions) are invested in guns to the tune of billions if not trillions of dollars.[33] It is profoundly and horribly ironic that teachers at Stoneman Douglas High School in Parkland, Florida, were murdered by a man wielding an AR-15, which is produced by Outdoor Brands Corp.—a company in which the Florida teachers' pension fund invests.[34]

Webber discusses how the California State Teachers' Retirement System ("CalSTRS") divested from gun companies after the murders in an elementary school in Newtown, Connecticut in 2012.[35] Recognizing Webber's arguments that pension funds can use the power of shareholder-as-labor, this practice of divestment needs to be expanded to other teachers' funds around the country. Teachers, unfortunately, have become first responders. Imagine the potential of using public pension funds—and especially teachers' pension funds—to fight against guns by divesting from gun manufacturers, gun retailers, and others who benefit from the gun industry. Fund managers will have to make strategic choices based on their answers to age-old questions, which Webber flags, of whether divestment is done to exert leverage for change or for moral and political purity, and whether divestment is strategically more powerful than remaining an investor and exerting influence from within.[36] But I cannot imagine a better group than teachers to stand up to the gun industry, especially since so many of the powerful teachers' funds are in blue states.[37]

As an extension of Webber's book, one idea not mentioned but that fits nicely in this field is the use of the *ultra vires* doctrine.[38] That doctrine constrains

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companies).

[33] *Id.* (noting how largest pension funds connected to gun companies managed by teacher unions).

[34] Neil Weinberg & Polly Mosendz, *Teacher Retirement Funds in 12 States Hold Gun Company Stocks*, BLOOMBERG (Feb. 22, 2018), https://www.bloomberg.com/news/articles/2018-02-22/teacher-retirement-funds-in-12-states-hold-gun-company-stocks (cataloguing investments made by teacher pension funds in firearm manufacturer stocks).

[35] WEBBER, *supra* note 5, at 35-36 (observing CalSTRS divested more because of "moral outrage," not because of typical investment rationales).

[36] *Id.* at 36 (detailing unique investment challenges activist shareholders face); *cf.* Jack Ehnes, *An Engaged Conversation on Divestment*, CALSTRS: PLAN PERSPECTIVE (Aug. 21, 2013), https://www.calstrs.com/blog-entry/engaged-conversation-divestment [https://perma.cc/3REC-PXDN] (advocating engagement over divestment); Rebecca Leber, *Divestment Won't Hurt Big Oil, and That's OK*, THE NEW REPUBLIC (May 20, 2015), https://newrepublic.com/article/121848/does-divestment-work [https://perma.cc/DN2Y-RZGS] (arguing even if divestment does not financially impact company, it can be useful "for driving home the message of the broader campaign" behind divestment).

[37] *See* Weinberg & Mosendz, *supra* note 34 (detailing states in which pension funds are located).

[38] *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1281 (2001) (focusing on vitality of *ultra vires* doctrine in regards to restraining corporations to "lawful" purposes).

corporations from engaging in business activities outside of the range of activities identified in their charters.[39] After states began granting general charters over a century ago, the doctrine largely fell away.[40] But charters continue to require companies to engage in only lawful activities.[41] As I have argued for some time, lawfulness continues to be a material constraint on corporate behavior and can be enforced not only using law external to the corporation but can also be enforced by use of the *ultra vires* doctrine.[42] Shareholders can sue companies to enjoin corporate illegalities as being *ultra vires*—beyond the power of the company.[43] What's more, shareholders can sue here in the United States when illegalities occur overseas, and even when the jurisdiction where the illegalities are occurring do not enforce the laws at issue.[44] The promise of legal behavior is in the charter, and the obligation runs to the shareholders.[45]

Labor pension funds are the perfect plaintiffs for these suits. Pension funds understand that illegalities often have long-term negative financial effects on companies, even if they pay off in the short term.[46] And pension funds can see that illegalities committed by companies often operate so as to hurt non-shareholder stakeholders.[47] So pension funds can see the costs of illegalities from both the point of view of labor-as-shareholder (because they care relatively more about the long term) and shareholder-as-labor (because illegalities are likely to hurt employees or other stakeholders more than shareholders who hold a mere financial interest in the company). I have been involved in a few of these suits, the most recent being a suit brought by the Louisiana Municipal Police Employees' Retirement System against the Hershey Company for the illegal use of child labor in west Africa.[48] I think there should be more suits like that one.

39 *Id.*

40 *Id.* at 1302-13 (charting rise and fall of *ultra vires* doctrine's prominence).

41 *Id.* at 1281 ("[C]orporations are not authorized under their charters to commit crimes or otherwise act unlawfully.").

42 *Id.* at 1314-22 (detailing how *ultra vires* may enforce lawful corporate behavior).

43 *Id.* at 1352-56 (outlining strategies for injunctive relief relying on *ultra vires*).

44 *Id.* at 1372-78 (arguing *ultra vires* can bolster international law and norms).

45 *Ultra vires* suits can also be brought by the attorney general of the incorporating jurisdiction. *See id.* at 1359 ("Forty-nine states still retain a provision in their state incorporation statutes that allows the state to dissolve a corpration or enjoin it from engaging in ultra vires activities.").

46 *See id.* at 1330-42 (detailing reasons why shareholders would want corporate managers to avoid unlawful acts).

47 *Id.* at 1343 (noting how "other regarding preferences" may cause shareholders to be concerned about stakeholders' position).

48 *See* Kent Greenfield, *'Blood Chocolate,' Corporate Law and the ACS*, ACSBLOG (Mar. 24, 2014), https://www.acslaw.org/acsblog/blood-chocolate-corporate-law-and-the-acs/ [https://perma.cc/2TES-8JMZ] (tracing connections between chocolate manufacturing and child labor).

Finally, let me raise a challenge to one aspect of Webber's book. Several times Webber mentions *Citizens United v. FEC*,[49] and speaks of it in ways that appear to map with the conventional critique made among ideological progressives.[50] That critique, for the most part, is that *Citizens United* recognized the free speech rights of corporations, that corporate political spending has since exploded, that the political influence of unions has been swamped, and that our democracy has been perverted.[51]

The story about *Citizens United* is more complicated. The decision did, in a roundabout way, unleash Super PACs to spend hundreds of millions of dollars in our elections. Super PAC spending went from sixty million dollars in 2010 to over six hundred million dollars in 2012 to roughly one billion dollars in 2016.[52] But that phenomenon came about because of the portion of *Citizens United* that had nothing to do with corporations per se, and which was then built on by cases in lower courts that interpreted *Citizens United* to allow for the creation of Super PACs.[53]

But the story about corporate spending has more of a "dog [that] did nothing in the night-time" quality.[54] The amount of corporate money in play in elections since *Citizens United* is quite small in comparison both to the amount of spending from individuals and to the total cost of campaigns.[55] In the 2012

[49] 558 U.S. 310, 319 (2010).

[50] *See* WEBBER, *supra* note 5, at 47-48 (noting how corporate law scholars scoff at Court's conception of corporate governance in *Citizens United*).

[51] *See, e.g.*, GREENFIELD, *supra* note 15, at 23 (criticizing *Citizens United* for "simplistic, libertarian theory of free speech").

[52] Super PACs spent a total of $62,641,448 in the 2010 election, $609,936,792 in the 2012 election, and $1,060,490,102 in the 2016 election. *See 2016 Outside Spending, by Super PAC*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=S [https://perma.cc/23U2-2Y9X] (last visited Dec. 21, 2018) (listing Super PACs and political contribution during 2016 election cycle).

[53] *See* SpeechNow.org v. FEC, 599 F.3d 686, 692-93 (D.C. Cir. 2010) (discussing high bar government must clear to regulate campaign contributions). A plethora of academic commentary on *Citizens United* also exists. *See* Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 10-15 (2014) (criticizing Supreme Court's narrow view of corruption); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 52-63 (2012) (detailing potential post-*Citizens United* campaign finance reforms); Laurence H. Tribe, *Dividing* Citizens United*: The Case v. the Controversy*, 30 CONST. COMMENT. 463, 464-78 (2015) (dissecting *Citizens United*).

[54] SIR ARTHUR CONAN DOYLE, *The Adventure of Silver Blaze*, *in* MEMOIRS OF SHERLOCK HOLMES 28 (1963).

[55] *See* Adam Bonica, *Avenues of Influence: On the Expenditures of Corporations and Their Directors and Executives*, 18 BUS. & POL. 367, 367 (2016) ("The anticipated flood of corporate political cash [after *Citizens United*] has amounted to no more than a trickle. In the 2012 election cycle, a handful of predominantly privately owned corporations spent roughly $75 million from their treasuries on federal elections, or roughly one percent of the estimated $6 billion spent in total for the election cycle.").

presidential cycle, publicly traded corporations were responsible for far less than one percent of the total independent expenditures in the 2012 presidential cycle,[56] and the best data available on the 2016 cycle show that corporate spending was about the same.[57] The impact would be somewhat larger if spending from private corporations is added. But much of that private company spending was through shell companies as a conduit for the contributions of wealthy individuals. That use of shell corporations may be problematic for a number of reasons, but it does not mean that corporations were trying to influence the election. It meant that *individuals* were trying to influence the election.[58]

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[56] *See id.* at 371. Bonica includes in his figure of seventy-five million dollars approximately twenty million dollars from shell companies privately held by wealthy individuals and families. *Id.* That would make the amount from for-profit, publicly traded corporations less than one percent of the total.

[57] *See generally* OPENSECRETS.ORG, http://www.opensecrets.org/ [https://perma.cc/VU8D-W6JG] (last visited Dec. 21, 2018). This is the web-based database for the Center for Responsive Politics. The site does not organize the data in a way that makes it simple to search for corporate donors. Nevertheless, within the donor lists of the major Super PACs for the 2016 cycle, very few for-profit, publicly traded companies appear. No corporate donor is listed for the top pro-Clinton Super PAC—Priorities USA Action. *Priorities USA Action: Contributors, 2016 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/pacs/pacgave2.php?cmte=c00495861&cycle=2016 [https://perma.cc/J9ZY-PU7W] (last visited Dec. 21, 2018). The top pro-Trump Super PAC, Get Our Jobs Back, lists only two businesses as donors, and both are privately held. The top pro-Trump company was NY Post Publishing, which donated just over three hundred thousand dollars. *Get Our Jobs Back: Expenditures, 2016 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/pacs/expenditures.php?cycle=2016&cmte=C00616078 [https://perma.cc/JFS6-7XJK] (last visited Dec. 21, 2018). Jeb Bush's Super PAC, Right to Rise USA, had ten corporate donors, but nine of them are privately held and appear to have been conduits for individual money. *Right to Rise USA: Contributors, 2016 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/pacs/pacgave2.php?cycle=2016&cmte=C00571372 [https://perma.cc/Z7R9-HMYS] (last visited Dec. 21, 2018). The single largest public company donor was NextEra Energy, a clean energy company, which gave one million dollars. *NextEra Energy: Profile for 2016 Election Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/orgs/summary.php?id=D000000321&cycle=2016 [https://perma.cc/H4EH-KSYT] (last visited Dec. 21, 2018). The Senate Leadership Fund (a pro Republican PAC) had only three corporate donors listed for 2016, with Chevron, which gave two million dollars, being the only publicly traded company appearing on the list. *Senate Leadership Fund: Contributors, 2016 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00571703&cycle=2016 [https://perma.cc/VTF2-C785] (last visited Dec. 21, 2018). The Congressional Leadership Fund (a pro Republican PAC) had two public company donors—Chevron at $1.3 million and Devon Energy at $500,000. *Congressional Leadership Fund: Contributors, 2016 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00504530&cycle=2016 [https://perma.cc/A63B-UZK8] (last visited Dec. 21, 2018).

[58] *See* GREENFIELD, *supra* note 15, at 130-31.

The reality is that most of the money flowing into Super PACs in both the 2012 and 2016 presidential election cycles originated not from the coffers of for-profit corporations, but from wealthy individuals and labor unions.[59]

For example, in the 2012 elections, the biggest corporate spender was Chevron, which spent $2.5 million to support its preferred candidates.[60] This may sound like a large amount, but it was dwarfed by the spending of wealthy individuals. Sheldon Adelson, the casino owner, spent more than ninety million dollars in the same cycle, and the Koch brothers ran a network of groups that together spent over four hundred million dollars.[61] Chevron's involvement was also tiny by comparison to its size. In 2012, Chevron had operating revenues of $231 billion and net income of $26.2 billion.[62] Its political spending was, therefore, about 0.001% of its revenues and 0.01% of its income.[63]

In the 2016 cycle, too, publicly traded corporations were not active spenders.[64] According to data gathered by the Center for Responsive Politics, of

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[59] *Id.* at 24.

[60] Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics*, 12 CONN. PUB. INT. L.J. 361, 402 (2013) (listing contributions of publicly traded corporations to Super PACs during 2012 election cycle); Press Release, Citizens for Resp. and Ethics in Washington, Post-Election Money in Politics Analysis (Nov. 9, 2012), http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20022643/2012_Election_Analysis.pdf [https://perma.cc/J755-35VB] ("Most large, publicly-traded corporations avoided public super PAC donations, but in October Chevron gave $2.5 million to the Congressional Leadership Fund, a conservative super PAC with close ties to House Speaker John Boehner."); Dave Levinthal & Tarini Parti, *5 Money Takeaways from 2012*, POLITICO (Nov. 17, 2012), http://www.politico.com/story/2012/11/five-money-takeaways-from-2012-083655?o=0 [https://perma.cc/R8Q4-3L8X] ("When oil company Chevron donated $2.5 million to the pro-Republican Congressional Leadership Fund super PAC in October, it marked the highest-profile example of a publicly traded corporation directly injecting cash into political elections since the 2010 *Citizens United* decision.").

[61] *2012 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D [https://perma.cc/RL6J-R3S5] (last visited Dec. 21, 2018) (listing Adelson's political contributions during 2012 election cycle); *Political Nonprofits: Top Election Spenders*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2012 [https://perma.cc/Z3UK-Y9J7] (last visited Dec. 21, 2018) (compiling spending by 501(c)(4) and 501(c)(6) groups during 2012 election cycle); Andrew Prokop, *40 Charts That Explain Money in Politics*, VOX (July 30, 2014, 9:40 AM), http://www.vox.com/2014/7/30/5949581/money-in-politics-charts-explain [https://perma.cc/68C8-TMBP] ("During the 2012 elections, one dark money network was particularly elaborate and influential—the one tied to the billionaire Koch brothers, which spent at least $400 million on the effort."); *The Koch Network: A Cartological Guide*, OPENSECRETS.ORG (Jan. 7, 2014), https://www.opensecrets.org/news/2014/01/koch-network-a-cartological-guide/ [https://perma.cc/6QUN-XE6K] (diagramming network of Koch brothers' political groups).

[62] GREENFIELD, *supra* note 15, at 24-25.

[63] *Id.*

[64] According to the *New York Times*, as of February 2016, in the heat of the primary season,

the nearly three thousand instances of corporate contributions to Super PACs in 2016, only a tiny number came from publicly traded companies.[65] In fact, there were only twenty-six corporate donations of one million dollars or more in the 2016 cycle and only forty-two of more than five hundred thousand dollars.[66] Of the top fifty donations, only nine were made by publicly traded companies or their subsidiaries.[67] Chevron made four, totaling $3.3 million; Devon Energy gave two, totaling $1.25 million; a subsidiary of ConoccoPhillips gave one million dollars; NextEra energy gave one million dollars; and a subsidiary of the parent company of R. J. Reynolds Tobacco gave one million dollars.[68] The other donations to Super PACs came from privately held companies, and, as noted, many appear to be mere conduits for contributions from their dominant shareholders.[69] Totaled together, the top fifty donations from both public and private business entities amounted to just over fifty-two million dollars.[70] This is about thirty million dollars less than Sheldon Adelson and his wife gave in 2016.[71] What's more, of the large donations from public companies to Super PACs, only one—NextEra's one million dollars—was spent in support of a presidential candidate: Jeb Bush, who dropped out of the race in February 2016.[72] That is worth emphasizing. In one of the most heated elections in modern

eighty-seven donors had given at least a million dollars to a candidate or a candidate's Super PACs. Of those eighty-seven, only nine donors were for-profit corporations. Of those nine, only one was publicly traded. Of the eight private companies, most appear to be dominated by a single owner. Wilson Andrews et al., *Million-Dollar Donors in the 2016 Presidential Race*, N.Y. TIMES (last updated Feb. 9, 2016), http://www.nytimes.com/interactive/2016/us/elections/top-presidential-donors-campaign-money.html (cataloging top donors in 2016 presidential election); *see also* COMM. FOR ECON. DEV. OF THE CONF. BD., THE LANDSCAPE OF CAMPAIGN CONTRIBUTIONS 9 (2016), https://www.ced.org/pdf/Election_Spending_Report_-_Nov_2016.pdf [https://perma.cc/T23E-DNSW] ("Even after *Citizens United*, most of the money raised and spent to support candidates in federal elections comes from individual donations subject to contribution limits and disclosed to the public."); Theo Francis, *Despite Citizens United, Corporate Super PAC Contributions Trail Individuals, Study Finds*, WALL STREET J. (Nov. 2, 2016), http://www.wsj.com/articles/despite-citizens-united-corporate-super-pac-contributions-trail-individuals-study-finds-1478059201 (comparing corporate Super PAC contributions to individual campaign contributions).

[65] These figures are derived from a spreadsheet of all corporate expenditures in 2016, provided to the author by the Center for Responsive Politics. The spreadsheet is on file with author.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *See Top Individual Contributors: All Federal Contributions*, OPENSECRETS.ORG, https://www.opensecrets.org/overview/topindivs.php?cycle=2016 [https://perma.cc/9SNT-MW5P] (last visited Dec. 21, 2018) (noting Adelsons donated $82,582,800).

[72] *Right to Rise USA: Contributors, 2016 Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/pacs/pacgave2.php?cycle=2016&cmte=C00571372 [https://perma.cc/9AXR-Q3

history, only one publicly traded company contributed one million dollars or more to a Super PAC supporting a presidential candidate in 2016. And that money went to a candidate who lost early. The remaining large corporate donations went to groups supporting candidates in Congress. Not a single large corporate expenditure went to support either candidate who won the nomination of the two major parties in 2016.

Sometimes ignored in the debate over *Citizens United* is the fact that the Court did not only remove the cap from corporate spending in elections. It also removed the statutory cap on the independent expenditures of unions.[73] Unlike corporate spending, unions have indeed increased their political expenditures markedly. In the 2016 cycle, the Service Employees International Union contributed about thirty-nine million dollars directly to candidates and other groups and spent nearly twenty-five million dollars independently.[74] The National Education Association spent and contributed over thirty million dollars.[75] The Laborers Union spent nearly thirty million dollars and the AFL-CIO spent nearly twenty million dollars.[76] Based on these numbers, one can make a strong argument that the groups who have benefited most from *Citizens United* have been unions and the politicians they support.[77] *Citizens United* allowed unions another battlefield on which to fight—that of electoral politics.

Going forward, given the difficulties unions face across the board and the new challenges they face because of the Supreme Court's recent decision striking down on free speech grounds the method by which unions finance themselves,[78] we might come to realize that *Citizens United* is a lifeline to unions. Their power will not arise just because they can mobilize members to picket, protest, and vote.[79] They will be able to use their financial strengths in the electoral space to

GD] (last visited Dec. 21, 2018); *see also 2016 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&disp=D&type=O&superonly=N [https://perma.cc/XLP5-8VVA] (last visited Dec. 21, 2018) (listing "top individuals and organizations spending their money to influence your vote").

[73] *See* Citizens United v. FEC, 558 U.S. 310, 318-19 (2010) (holding provision of act banning unions from using general treasury funds to fund "electioneering communication" unconstitutional).

[74] *Service Employees International Union: Profile for 2016 Election*, OPENSECRETS.ORG, https://www.opensecrets.org/orgs/summary.php?id=d000000077&cycle=2016 [https://perma.cc/ALL6-3KLN] (last visited Dec. 21, 2018).

[75] *National Education Assn: Profile for 2016 Election Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/orgs/summary.php?id=d000000064&cycle=2016 [https://perma.cc/G79F-P6G7] (last visited Dec. 21, 2018).

[76] *AFL-CIO: Profile for 2016 Election Cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/orgs/summary.php?id=d000000088&cycle=2016 [https://perma.cc/87N8-U7DW] (last visited Dec. 21, 2018).

[77] For more on the impact of *Citizens United*, see generally GREENFIELD, *supra* note 15.

[78] Janus v. Am. Fed'n of State, Cty., & Mun. Emps. 31, 138 S. Ct. 2448, 2460 (2018) (holding agency fees violated First Amendment).

[79] WEBBER, *supra* note 5, at 15-30 (juxtaposing lackluster results from union strike with impressive results from shareholder activism).

influence elections. Along with the efforts that Webber suggests—using the financial strengths of shareholder-as-labor and labor-as-shareholder—the unions will be able to fight to protect themselves against the forces of capital with, ironically, the power of money.