

# Uniting Citizens after *Citizens United*: Cities, Neoliberalism, and Democracy

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The Supreme Court's five-to-four decision in *Citizens United v. Federal Election Commission* overturned provisions of the 2002 Bipartisan Campaign Reform Act (commonly known as McCain-Feingold) that had barred corporations from spending money on independent (i.e., not formally affiliated with a candidate) political communication.<sup>1</sup> Justice Anthony Kennedy wrote for a five-to-four majority that the Federal Election Commission (FEC) could not constitutionally allow individuals to speak through paid political advocacy while prohibiting corporations from doing so. Critics of the decision, beginning with the dissenting justices and including President Barack Obama, have accused the court of partisanship and encouraging corporations to dominate electoral politics. The phrase "post-*Citizens United*" has come to signify a new, money-driven political order in which the voices and influence of ordinary citizens are suppressed. In this article, I argue that the implications of the decision and therefore the changes needed to create a more democratic society have been widely misunderstood.

A more productive understanding of *Citizens United* must view the case in its entirety as a sociolegal event—including winning, losing, and unmade arguments and the premises underlying them. All of these elements reflect the assumptions held by the parties about power, which I define, after professor of geography Ruth Wilson Gilmore, in terms of "categories of social actors and their capacity to realize their own freedom."<sup>2</sup> Critical legal scholars have argued that the law

is perpetually subjected to normative judgments and “strategic recategorization” of legitimate actors and their capacities to act. In turn, arguments in the judicial arena have an expressive effect, reifying understandings of political capacity and citizenship, becoming “constitutive of group and individual identities and values,” and defining legitimate forms of political action.<sup>3</sup> *Citizens United* generated particularly intense reaction because the majority affirmed and extended the legal doctrine of corporate personhood into the realm of free speech, an instance of strategic categorization in terms of *who* may speak that the dissenting justices and much of the public found deeply troubling.

However, the FEC’s legal arguments, the dissenting opinion, and many of the most prominent critiques of the decision substantively agree with the majority about *how* legitimate speakers speak—by spending money to purchase media time. This article begins with a critical evaluation of arguments made on behalf of the FEC in *Citizens United* and by critics of the decision afterward, exposing the narrowness of the government’s argument and of political remedies for the problem of money in politics that that argument inspired. These liberal critiques and imagined solutions are embedded within a set of neoliberal assumptions. Neoliberalism in this context is a broad political-economic and ideological tendency that valorizes the individual right of property as the core of freedom.<sup>4</sup> In this context, a neoliberal viewpoint defines political participation as private and rejects a structural critique of wealth in politics or, indeed, any conception of public political culture distinct from private spending. Although these arguments have since constituted the nominal left pole of discussions and strategy to counter the influence of corporate spending, *Citizens United*’s critics have far more in common with their antagonists than they acknowledge and defend democracy far less than they claim.

My critique of *Citizens United* seeks to engage with deeper issues of power in contemporary political culture by considering the differences between businesses and cities as categories of corporations. *Citizens United* recategorized business corporations as First Amendment speakers and, by extension, as legitimate political subjects; more democratic and inclusive politics require a similar recategorization of cities and particularly that social movements embrace the powers that cities represent as governments and as public corporations based on association as objects of struggle. I present a brief comparative history of municipal and private corporations to demonstrate that the former have frequently served as instruments of democratic politics, supporting what Thomas Bender calls “thinking oneself into politics.”<sup>5</sup> City powers have been restrained and redefined over the course of the twentieth century precisely to curb the threats that strong cities have posed to private interests. I further argue that legal and political arguments about city power and sociospatial changes in American society have been integral to the shift toward a privatized, neoliberal conception of urban and metropolitan politics. A concluding section takes the expansion under *Citizens United* of the political capacity of business corporations as a provocation to revisit an expansive and public idea of city power, looking to debates over state-imposed municipal

receivership in Michigan and immigrant protest in Los Angeles to understand how political movements can engage with and try to reorient the local power of cities toward the needs of their inhabitants.

### **Speaking with “Other People’s Money”: Critiquing Criticism of *Citizens United***

*Citizens United* was a highly anticipated decision. After the case was first argued before the Supreme Court in March 2009, Chief Justice John Roberts ordered a second round of arguments for September that would address the constitutionality of campaign finance laws rather than the validity of their application in the case at hand.<sup>6</sup> This signal that the Court’s conservative majority saw an opportunity to establish corporate First Amendment rights sparked preemptive criticism that further swelled after the decision was announced on January 21, 2010. Here, I put aside critiques related to normative principles of jurisprudence (e.g., *stare decisis* or deference to the legislative branch) to focus on a consequentialist critique: that the Roberts Court acted to aid the Republican Party and big business. The Roberts Court is arguably the most friendly to business since the 1950s. Such friendliness was reflected in Anthony Kennedy’s suggestion that corporations “may possess valuable expertise, leaving them the best equipped” to advance public knowledge and Antonin Scalia’s (possibly gloating) call to “celebrate rather than condemn the addition of this speech to the public debate.”<sup>7</sup> Justice John Paul Stevens imputed partisan and ideological motives to the majority in his pointed dissent, charging “the only relevant thing that has changed since [prior campaign finance decisions] is the composition of this court” through Republican appointments.<sup>8</sup> The *New York Times* editorialized that the decision was “a shameful bookend to *Bush v. Gore*, and the widely read judicial analyst Jeffrey Toobin bluntly stated, “Republicans will benefit, of course.”<sup>9</sup>

These intertwined ideas—that corporations are the major source of political money and that money flows mostly to Republicans—fail on closer examination. Candidate Barack Obama, like other centrist Democrats, raised considerable funds from Wall Street and corporate executives for his 2008 campaign, though he seemed to lose that support after (very mild) criticism of financial industry practices before the 2010 midterm elections.<sup>10</sup> That cycle, which returned the House to Republican control and brought a particularly conservative class of Tea Party candidates into office, saw Republican candidates benefit from 63.9 percent of the \$85.4 million in outside money spent to either promote or oppose a candidate.<sup>11</sup> Observers were quick to ascribe the leap in spending on off-cycle elections to corporate spenders. However, it appears that much of the money in fact came from wealthy individuals with idiosyncratic motives for political activism, as with the “Kochtopus” of conservative political groups funded by David and Charles Koch at the organizational center of the Tea Party mobilization. Although court decisions following *Citizens United* have encouraged the formation of “super political action committees” (PACs) that support particular

candidates (albeit with nominal rules against coordination between the super PAC and the campaign), these new bodies have mostly served as vehicles for what Toobin has called “presidential campaigns . . . essentially underwritten by single individuals.”<sup>12</sup> Despite endemic confusion about the matter in the press, this type of spending had not been barred by the laws that *Citizens United* struck down. The Court’s subsequent ruling in *McCutcheon v. FEC* eliminated all individual limits on direct contributions to political candidates, further empowering these kinds of wealthy individuals.<sup>13</sup> Furthermore, the partisan impact of spending has been unclear. While Mitt Romney enjoyed a net edge of \$279.4 million in outside spending in 2012, Obama’s reelection campaign spent \$243 million more than Romney’s on in-house media purchases, a media advantage funded by \$715 million in contributions from individuals, 68 percent of which came from large donors.<sup>14</sup> Elections do run on sums of money that diminish the significance of the average citizen, but *Citizens United* bears an undue share of the blame for the role of money in elections, in part because Democrats, with the president leading the way, have realized the political value of attacking the decision, as when the president warned of elections “bankrolled by America’s most powerful interests” in his 2010 State of the Union address.<sup>15</sup> Obama’s remarks appropriated a mantle of populism only sporadically reflected in his policies.

The populist tone was disingenuous in a more important if less apparent institutional sense. The rehearing of *Citizens United* marked the first appearance of Elena Kagan before the Supreme Court as Obama’s solicitor general. Acting as the government’s attorney, the future appointee to the high court accepted the premise that expenditures constituted a form of political speech and rejected the notion of equalizing paid political speech through upper limits on individual expenditures. Instead, supported by a host of amicus briefs, she argued that corporate expenditures on political advertising were uniquely corrupting in ways that individual expenditures (even very large ones) were not and that the government’s legitimate interest in restricting corporate expenditures on politics stemmed from the need to protect individual shareholders from harms suffered when corporations spent to express views with which they disagreed, a “concern about corporate use of other people’s money.”<sup>16</sup>

I preface my critique of Kagan’s argument by acknowledging that she was compelled to navigate a set of campaign finance precedents and an ideologically and politically hostile Court majority, both of which constrained her options. Toobin has argued that the rehearing of *Citizens United* only after lining up four other justices in support of the eventual ruling and reports that Kagan viewed her role in the case as “a suicide mission.”<sup>17</sup> By arguing cautiously, emphasizing the narrow issues of corruption and shareholders’ interests, and avoiding any advocacy of equalizing political speech, Kagan hoped to persuade the Court to rule narrowly against the FEC and preserve the majority of campaign finance legislation.

The corpus of campaign finance jurisprudence tilts in an unequal direction. The Supreme Court had upheld the notion that spending on political advocacy

(independent of a candidate's campaign) is a form of protected speech in its key 1976 ruling in *Buckley v. Valeo*. The ruling recognized and institutionalized the reliance of modern campaigns on mass media, where spending is effectively a prerequisite for speech. *Buckley* did not prohibit all restrictions on expenditures and left room for debate about acceptable infringements on the exercise of political speech. Yet the ensuing debate on restrictions has been narrow, defined at the poles by antirestrictionists such as Martin Redish, who rejects any claim for equality of access to a marketplace of ideas and countenances no restrictions on paid speech, and neoliberal legal scholars such as Cass Sunstein, who seeks to create positive incentives for more people to make political expenditures but, crucially, also abhors regulatory restraint on individual expenditures.<sup>18</sup> Kagan essentially followed Sunstein's view, framing recent campaign finance precedents as not "suggesting anything about the equalization of a speech market."<sup>19</sup> Kagan's precedent-regarding argument inevitably and properly reflected the norms and rules of the legal system. However, as it circulated in the wider public, detached from an explicit recognition of the constraining effect of precedent, the argument began to command attention as a broader normative claim about democratic political participation and ultimately as the basis for imagining political remedies.

Kagan's efforts to articulate a legal rationale for continuing the ban on corporate expenditures was more revealing of a neoliberal view of politics expressed in the shareholder rights argument, which the chief justice dismissed as "extraordinarily paternalistic."<sup>20</sup> Roberts's concern about paternalism was more likely rhetorical than an expression of concern for democratic participation. In his ruling and in a concurrent opinion, the chief justice argued that public support for political messages from corporations was flatly irrelevant to their legality. He further asserted that shareholders rightly bore responsibility to act within corporate governance arrangements based on freely accessible and transparent disclosures about a corporation's political speech.<sup>21</sup> It is nonetheless the case that Kagan rooted the shareholder rights argument in two lines of precedent, one of which she anachronistically appropriated and another that was starkly elitist. The first was the 1907 Tillman Act, which banned corporations from contributing to federal candidates. In speeches championing the reform, President Theodore Roosevelt did refer to protecting shareholder funds from political use but did so in a context in which shareholder funds were relevant as a large pool of money with the potential to buy influence rather than as assets properly controlled by individual shareholders.<sup>22</sup> References to the Tillman Act in the *Citizens United* dissent were thus anachronistic and inflated the importance of shareholder protection. The second line of precedent affirmed requirements established by the Labor-Management Relations Act of 1947, commonly known as Taft-Hartley, that corporate bodies conduct political advocacy only with funds explicitly earmarked by donors or shareholders for that purpose.<sup>23</sup> Although the letter of the law was neutral with regard to the type of corporate body, in the context of the law's other provisions, which included banning the "closed shop," allowing states to pass "right-to-work" laws, removing legal sanction for sympathy or political strikes,

and empowering employers to distribute antiunion literature in the workplace, limiting unions' ability to amass and spend dues money on political activity was aimed at helping business owners and managers, whose incomes allowed them to spend more significant sums, to dominate political discourse.

The shareholder rights similarly imagines the 10 percent of American households that own 90 percent of all stocks and mutual funds as the group most in need of protection through campaign finance regulation.<sup>24</sup> Although it has been noted for its withering language and frequent sarcasm, John Paul Stevens's dissenting opinion was far more populist in tone than in substance. Stevens embraced the shareholder rights argument, identifying the government's most compelling interests as limiting the unique potential for corruption from corporate expenditures and protecting shareholders from situations where "their financial investments . . . undermine their political convictions."<sup>25</sup> Had the FEC prevailed, money, albeit contributed by individuals, would have talked just as loudly as ever at campaign season. Yet Stevens's dissent, by embracing shareholder rights, helped to position the principle at the center of liberal legal reform strategies in response to the decision.

Discussions at a March 27, 2010, symposium hosted by the Brennan Center for Justice at New York University's law school illustrated the extent to which this model, despite its limitations, had imposed itself on the debate.<sup>26</sup> To be sure, many of the assembled speakers, including constitutional law scholars, litigators, elected officials, and activists, did present structural critiques of the relationship between wealth and political influence. Representative Donna Edwards and law professors Richard Briffault and Daniel Tokaji faulted the FEC for failing to rigorously defend equality of political expression and argued for a more outcome-oriented principle of equality in political speech. With regard to the contested issue of corporate speech, Briffault dissented from the line of argument that the source of expenditures was consequential to the democratic process, arguing that "the difference between Michael Bloomberg and Bloomberg LLP strikes me as irrelevant."<sup>27</sup> Legal scholar Kendall Thomas most directly challenged the idea of a marketplace of ideas as a metaphor reified by law to construct "citizenship and constitutional democracy as part of the world of commodities."<sup>28</sup> These conversations reflected a fertile and broad-ranging exploration of issues of power, wealth, and democratic participation that *Citizens United* had provoked.

But, as talk shifted to political remedies, discussions of power and participation collapsed into one master strategy: legal reform to support more small contributors entering the marketplace of ideas. The Democratic National Committee helped to fetishize the small contributor, urging the court in its amicus brief to uphold this "trend in progress toward the empowerment of the individual 'small donor' who contributes to candidates and to parties."<sup>29</sup> Brennan Center Executive Director Michael Waldman spoke in opening remarks of Web-enabled "small donor public financing," legislation to "give shareholders a voice in how corporate managers . . . spend funds," and increased voter registration. Mark Alexander, the former political director of Barack Obama's 2008 campaign,

demonstrated the tension between equality and the marketplace, touting the campaign's cultivation of small donations while wondering if those might have been "drowned out" by the campaign's massive haul of donations from the wealthy.<sup>30</sup> The frame of legal reform proved restrictive because it confers the legitimacy of the rule of law to particular political characterizations of citizenship.<sup>31</sup> Reforming campaign finance in response to *Citizens United* is unlikely to disrupt fundamental political inequalities.

Positioning the particular interests of stockholders and political donors as matters of universal right is uniquely problematic, as the "donor class" is wealthier, whiter, more male, and more educated than the population at large. It is also, like the class of large stockholders, a tiny segment of the potential electorate. To illustrate, only 14 percent of respondents to the 2008 American National Election Survey made any political contribution, while less than a quarter of a percent of the potential electorate who contributed \$200 or more accounted for 76 percent of the dollar value of all personal contributions to 2002 congressional candidates.<sup>32</sup> Subsidies such as the \$50 "democracy dollar" tax credit that Oregon Democratic Congressman David Wu and law professor Gary Ackerman proposed to "reinforc[e] the marketplace of ideas with a marketplace of small donations" are unlikely to induce the nonwealthy to contribute and would offer no benefit to approximately 15 million Americans working for wages too low to incur income tax liability.<sup>33</sup> Even a significantly expanded donor class would remain a small, elite segment of the society, and encouraging more individual spending would do little to make American politics more inclusive or democratic.

### **Some Corporations Left Behind?**

Few would identify Justice Antonin Scalia as a champion of participatory democracy. Yet his concurrent opinion, which identified corporate bodies as instruments of "the right to speak in association with other individual persons," opens a path toward reconsidering the binary opposition the government and the dissenting justices embraced between individual and corporate forms of political action.<sup>34</sup> Scalia's opinion was rooted in a lengthy historical discussion of the prevalence of corporations in the early republic, which he intended as an originalist argument for deference to the power of business corporations. William Roy's history of the corporation shows that Scalia's historical interpretation was quite selective. Limited liability and other privileges of incorporation are powerful legal entitlements that are unavailable to natural persons. Until the middle of the nineteenth century, state governments were wary of unleashing those powers and most often granted corporate privileges contingent on the performance of socially needful but unprofitable work alongside business and private association. Consequently, corporations in America have included an incredible variety of private, public, and quasi-public bodies: fraternal organizations and social clubs; professional associations; churches; schools and colleges; charities and aid societies; canal, turnpike, and streetcar monopolies; businesses; and cities.<sup>35</sup>

Whereas Scalia reads backward to interpret the advancement of private interest and property as the sacrosanct principle at the heart of corporate rights, Roy encourages us to understand the corporate form as inherently social and public in its original purposes and to recognize that corporate forms have frequently empowered persons of modest means in ways that purely individual politics cannot.

Scalia also overstated the FEC's hostility to speech by associations of individuals. Indeed, Kagan stressed the FEC's abiding tolerance of not-for-profit advocacy corporations and their right to paid political speech as long as advocacy corporations could be regulated to prevent business corporations from funding them.<sup>36</sup> This distinction among kinds of associational bodies, rather than the false dichotomy Scalia posed between associational freedoms and pure individualism, is the most interesting political assumption embedded in the arguments. The government argued—and precedents in campaign finance rulings hold—that the speech of advocacy nonprofits is an extension of the speech of individual contributors who have given funds for discrete and freely chosen purposes. The legitimacy of speech funded by nonprofit donors, rather than corporate shareholders, stems from the presumption of unanimity of purpose.<sup>37</sup> Although the not-for-profit might appear as an antagonist to the business corporation—and the government and the dissenters were at pains to explain why one and not the other represented an appropriate instrument of political speech—both are fully compatible with an understanding of political participation as private and individualized. One's monetary contribution to an advocacy group represents a transaction in which the donor purchases the services of professional advocates for a discrete purpose.

There are, however, other corporations and other potential corporate political subjects—cities—that are not entirely defined by private interest. Cities in American law are corporations. This proposition is unfamiliar in popular culture, and within legal discourse, it is frequently recognized with the condition that cities constitute a class of corporation subject to significant restrictions on their activities. Indeed, cities were referenced in arguments and commentary around *Citizens United* only to support the argument that legal restrictions on municipal corporations justified restrictions on the political activities of businesses.<sup>38</sup> This argument was peripheral to the FEC's main argument for good reason. Cities are distinct among American corporations in being highly restricted. Legal historian Gerald Frug has described a city as “the only collective body in America that cannot do something simply because it decides to do it.”<sup>39</sup> The unique limits imposed on city power, limits not imposed on other corporations, stem from the dual nature of cities as *simultaneously* associations of persons and governments. This duality is difficult to reconcile with liberal political theory's binary opposition of individuals and the state. Influenced by ideological opposition to expanded government power and by the practical political interests of property owners concerned that urban residents, acting in association through local government, might appropriate that property, American courts have fatefully tended to efface the dual nature of cities by characterizing them as governments, thereby render-

ing them subordinate to state governments and to legal protections for private property.<sup>40</sup> Deference to business corporations as expressions of private liberty grew at the same time as and in inverse relation to the reclassification of cities as governments with the potential to infringe on that liberty, a reclassification that obscured the role that cities played as public associations. Indeed, this distinction between business corporations as private and cities as public and between businesses as expressions of property rights and cities as potential intruders on them has become reified in law to the point of appearing axiomatic.<sup>41</sup> Yet the distinction is historically contingent, reflecting particular articulations of legal theory, state power, and political-economic interests. City power has been constrained not by a static and historically consistent categorization of cities under the law but by antagonism from business corporations toward the public power of cities at critical political-economic moments.

The most important step in defining the status of cities through legal doctrine came from Iowa Supreme Court Justice John Dillon, who wrote an 1872 treatise on local government declaring that cities were administrative subdivisions of the states, created by state legislatures, and entitled only to actions explicitly authorized by those legislatures.<sup>42</sup> Dillon's Rule was part of an epochal transformation of political economy through the ascendancy of private corporations at the expense of public power. Dillon was a former railroad company lawyer, and his rule stacked the imprimatur of the rule of law against municipal initiatives to restrain the dominant businesses of the era. Legal principles such as Dillon's Rule worked both institutionally, by shifting conflicts from the domain of politics (where urban immigrants and workers held growing power) to the domain of the law, and rhetorically, by signaling that urban voters were not legitimate political actors, to undermine democratic action and reinforce a political economy rooted in privatism.<sup>43</sup> It was no coincidence that conflict between railroads and local governments figured prominently in the lengthy campaign to apply the Fourteenth Amendment to protect corporate property. The Supreme Court's 1866 opinion in *Santa Clara County v. Southern Pacific Railroad Co.*, in which a textual aside asserted the legal doctrine of corporate personhood, involved a dispute over a county tax assessment on railroad property at a time when the railroads had "nearly crippled many counties by refusing to pay taxes."<sup>44</sup> Dillon's Rule, alongside rulings such as *Santa Clara*, reflected a widespread common sense among Gilded Age elites that aggrandized private at the expense of public interests.

### **Home Rule and the "Right to the City"**

This consensus was disrupted by the extent of social change wrought by immigration, industrialization, and social diversification after the Civil War, when conflict rooted in the rising need for services, the resistance of propertied urban residents to taxation, and the antipathy of rural legislators to urban centers revealed the limits of Dillon's idea of city power.<sup>45</sup> A loose coalition of social scientists, local officials, workers, and citizens demanded reform, and while re-

formers were frequently identified with specific issues and particular demands, they were united in looking to enhance the power of cities as instruments for local problem solving. Progressive reformers demanded state constitutional amendments or sweeping legislation that would grant city governments' power to protect public health, operate utilities, and respond effectively to emergencies without securing explicit permission from state legislatures. Many of these reformers were proudly socialistic, and others certainly defined democracy in collective terms, demanding more power for cities because they viewed them as associations of people.<sup>46</sup> Emergent social science pushed against the private underpinnings of Dillon's Rule with theories of an interdependent society and a public interest that transcended individualism. In this vision, cities would generate public capacity to deal with common problems and, through public debate about the ends of municipal action, create a stronger democratic culture.<sup>47</sup> The most democratic strains of the home rule movement challenged Gilded Age class rule and sought to open power to people who were not shareholders in anything else but united by their habitation of a shared social space.

Only three years after the formulation of Dillon's Rule, Missouri amended its constitution to grant home rule to St. Louis in 1875, and California followed in 1879, initiating a nationwide wave of reform.<sup>48</sup> However, though home rule movements were widely successful in winning expansions of city power, those expansions generally failed to establish enduring participatory democracy in American cities over the twentieth century. The radical vision of the public city competed for influence in its time with an "old conservative" vision of municipal government as a guardian of property and order and a "managerial city" vision of local governments empowered to place elites and experts between the mob and the levers of power. Proponents of all of these visions sought to express their preferred ideas of city power, influence legal interpretation, and ultimately shape the lived social space of the nation's cities. The managerial view of home rule was ultimately the most successful one, undercutting both rural power in state legislatures and the insurgent demands of urban democracy.<sup>49</sup> This history is instructive for the present political moment because it illustrates that the legal powers of cities are not self-evident but indeed have changed to institutionalize differing visions of urban democracy through legal doctrine and state legislation.

The most radically democratic versions of home rule anticipated what the philosopher, geographer, and spatial theorist Henri Lefebvre would describe as "the right to the city": a claim to rights and power based on inhabitation and social interaction in shared urban space rather than on property or even membership in a national polity. The right to the city contains a fundamental ambiguity, reflecting and embracing the tension between the city as an association of persons and the city as a government. Indeed, both facets of the urban experience—a kind of free sociability and incorporation to distributive and political institutions—are vital to Purcell's definition of the right to the city as "enfranchise[ment] . . . with respect to all decisions that produce urban space" and to Harvey's invocation of a right both to control the surplus value created by urbanization and to "make the city

different, to shape it more in accord with our heart's desire."<sup>50</sup> The right to the city has been one historically and spatially contingent facet of urban politics in tension with two other forms of the desire and capacity to remake urban space. I use the term "the right in the city" to describe a metropolitan political economy of privatization and the rule of property, supported by attacks on public power and fear of urban diversity, concerns reflected in Dillon's time and in neoliberal urban political economy today. I use the term "rights of the city" to refer to the legally sanctioned abilities of cities to act as instruments of collective power. The history of the conflict among these ideas of the appropriate uses and scope of the corporate power of cities helps us understand the legal status of cities as an integral part of political-economic change from a previous gilded age to our own neoliberal version. As David Harvey argues, foreclosures, collapsing social services, and gentrification have revived the right to the city as a normative ideal for leftist protest movements because city dwellers are so immediately affected by these aspects of neoliberalization.<sup>51</sup> But applying the critical idea of the right to the city as a model of politics has been stymied by an internalization of the sense that the city is itself only an extension of the state and not also a powerful association with the potential to advance public freedom. This hegemonic understanding is, like urban space and institutions, a historical product. Over the course of the twentieth century, the right in the city has come to dominate the right to the city, in large part by legal suppression of and ideological attacks on the powers of cities and by cultural representations and spatial practices that define the proper and only possible function of cities as facilitators of accumulation and exchange value.

### **The Right in the City**

Changes in the social and political geography of the nation since the height of the home rule movement influenced and accompanied shifts in attitudes about city power and its uses that were expressed in parallel domains of law, government, and urban rhetoric. These shifts affected not only the powers that cities could exercise and the social ends those powers might serve but also the way that Americans understood the core purposes of cities and public life. Chief among those changes was widespread suburbanization, which provided a spatial fix for capital, publicly subsidized housing disguised as a private market, and a social setting that encouraged a transformation of social relations.<sup>52</sup> Although culturally designated as "suburbs," the more socially homogeneous municipalities that proliferated after World War II are, like their larger counterparts, almost all legally incorporated as cities. Suburban municipalities have, however, used their corporate powers for far different ends. The powers that suburban cities most often exercise—control over zoning, land use, and local taxation and budgeting—lack the grandness of Progressive Era public works or municipal utilities. But their exercise refigured home rule into what Robert Self calls the "rule of homes": a shift away from "local government's purposes as inclusion and social

provision and [toward] the city as a protector of private property rights.”<sup>53</sup> Municipal corporations that formed in this era were selectively empowered along lines defined by private interest: encouraged to act like private associations and discouraged from providing either public services or a vibrant and open public sphere. Suburbanization also established racial segregation on the metropolitan scale by articulating racial homogeneity and private property through what Carl Nightingale calls a “racist theory of property value.”<sup>54</sup> Suburbanization encouraged financial investment in and personal identification with community homogeneity and regimes of exclusion that worked through property more than regulation of personal interracial contact.

Emergent trends in social thought reinforced and justified this spatial practice by reimagining the metropolitan resident as a private individual and emphasizing the private nature of urban and particularly suburban society. Inspired by political economist Charles Tiebout’s provocative 1956 hypothesis that many small jurisdictions could compete to attract residents by offering public services to match the preferences of citizen-consumers, political scientists Vincent Ostrom and Robert Warren, among other theorist-advocates of “public choice,” sought to rationalize public administration, defining out of existence any general public interest and valorizing the proliferation of small, socially homogeneous municipalities as an efficient market for public services. In such a market, materialized in the spaces of new suburbs, public conflicts that characterized large-city politics would be displaced across municipal boundaries, and citizens could be expected to choose to live in the place that best suited their needs. Problems would be resolved by individual consumer choice among communities rather than public deliberation.<sup>55</sup> The growth of postwar suburbia created a spatial context for rearticulating the polity to the individual framing of the market.

In older, larger, and still heterogeneous cities, however, the institutional legacies of liberalism and public politics were defended by relatively powerful constituencies. The social contrast between prosperous, white, and new suburbs and urban communities has encouraged many observers to characterize the conflicts and disruptions of the 1970s and 1980s as an “urban crisis,” a politicized description that obscured a systemic metropolitan redistribution of wealth and power. As policy historian Alice O’Connor argues, urban social movements led by women, racial minorities, gays and lesbians, and other previously marginalized groups in the 1960s and 1970s provided a highly visible screen onto which neoconservative think tanks could project a traditionalist and elitist counterattack: cities were dysfunctional, their minority residents were encouraged to irresponsibility and criminality by public assistance and liberal welfare programs, and the public sector was a theft of private wealth. The discourse of crisis localized problems in central cities and justified harsh repressive measures first in defense of law and order and second in advocacy of privatization. This second phase of neoliberalization in particular was effective at enlisting and absorbing the insurgent demands of minority groups to a dominant political discourse of protecting and enhancing property value.<sup>56</sup> Thus, both the urban-authoritarian

and the suburban-individualist facets of American metropolitan development reinforced the value of the private over the public.

Legal theories that tend to absorb social scientific interpretation as justifications for law's authority have accommodated the valorization of private property rights in interpretations of home rule powers, envisioning limits on city power defined by a policy's correspondence not to a private interest but to the aggregated preferences or "collective individualism" of their residents, supporting what one critic calls a "contractarian" ideal of community exemplified by the private homeowners' association, which substitutes contractual restrictions on property for public land use control or planning.<sup>57</sup> Legal reforms that limit the power of cities to act thus also normalize a political diminution of public politics of all kinds. This sociospatial mode of political subjectivity has been brilliantly characterized by Don Mitchell as "SUV Citizenship," a militant defense of the right to assert privacy in public space and to interact with the world on one's own terms or not at all.<sup>58</sup> The consequence, as Harvey writes, has been to present the privatization of public space as inevitable, such that "even the idea that the city might function as a collective body politic . . . appears, at least on the surface, increasingly implausible."<sup>59</sup> Suburbanization not only transformed American metropolitan areas physically but also has established the spatial experiences that undergird the "other people's money" logic expressed by the FEC in *Citizens United*.

These shifts in social thinking are particularly troubling because campaign finance-oriented responses to *Citizens United*, couched in this neoliberal paradigm, may be fully complicit with or actively engaged in the stripping of the public sector of power. The public freedom that social reformers once hoped to establish has given way to what Ruth Wilson Gilmore terms "the anti-state state": actors who have taken control of state institutions in order to cripple them from within while nominally replacing the "failed" public sector with privatized, contingent, and inadequate substitutes.<sup>60</sup> Not-for-profit organizations, whose private nature secures their entitlement to speak politically, are also put forward as what Peck calls the "left hand" of neoliberalism: privatized social provision that facilitates the shifting of responsibility to the individual and away from the state and the public.<sup>61</sup> Gilmore estimates that more than 2 million of such organizations in the United States foster an ever-increasing share of social provision and discussion of political issues as the public sector and the public sphere are privatized.<sup>62</sup>

Politicians who have supported public retrenchment and privatization, perhaps best embodied by Michael Bloomberg's education reforms in New York, have won support by diligently connecting the cultural trope that the urban public sector is inefficient or ineffectual to the political work of limiting its resources. Neil Brenner and Nik Theodore's term "re-representing the city" describes an ideological strategy of denigrating the historic achievements of urban public provision as archaic or uneconomic, sustaining coordinated political campaigns against "unaffordable" or "unsustainable" pensions and wages for public workers. Such campaigns depend for success on the erasure of social value created by the

public sector and frequently mobilize racial stereotypes of public employees as lazy and public service expenditures as inevitably wasted.<sup>63</sup>

These ideological attacks are matched to political and institutional strategies that are quieter but more ruthlessly effective. One such strategy is exemplified by the American Legislative Exchange Council (ALEC). Founded in 1973 as the Conservative Caucus of State Legislators, ALEC became more influential in the new millennium as a “membership organization” of corporate representatives and more than 2,000 state legislators. The chief products of this collaboration, which evades lobbying disclosure requirements, are model bills that member legislators introduce in their respective states. One subset of model bills has reasserted the prerogative of state preemption to blunt municipal power. Among the historic state legislative practices most detested by early home rule activists, preemption works through issue-specific laws that today bar city governments from, for example, mandating a living wage, controlling rents, regulating natural gas drilling or firearms, or sponsoring programs to import medicines from Canada, “a virtual war on local municipal power around the country.”<sup>64</sup> The connection between the anti-state state and the war on cities has rarely been explicitly recognized, though Peck has identified ALEC with advancing the urban restructuring central to the process of neoliberalization.<sup>65</sup>

The war on cities as a mode of the general retrenchment of the public sector has emerged perhaps most starkly in Michigan, where the 2011 Local Government and School District Financial Accountability Act enabled the governor to appoint emergency financial managers with the authority to reorganize municipal governments, renegotiate public employee contracts, sell off assets to the private sector, and even dissolve municipal charters.<sup>66</sup> Municipal finances in many Michigan cities have been tight for years. However, the circumstances of the bill’s passage—coming after Republican Governor Rick Snyder championed a 60 percent reduction in corporate taxes and just before he signed off on cuts in state revenue sharing to local governments—suggests that the motive is not fiscal but political and predatory—restricting municipal political power to enable private interests to take over public resources. Michigan’s law was first invoked in a handful of cities, including the impoverished and majority African American city of Benton Harbor in the southwestern part of the state, where an appointed manager restricted local officials to calling meetings, approving their minutes, and adjourning them.<sup>67</sup> Emergency managers then advocated the transfer of the city’s most valuable public asset, the expansive Jean Klock Park on Lake Michigan, to private development interests. The city had long leased the property to generate revenue but never proposed a permanent sale, sparking local opposition and national outrage.<sup>68</sup> In the Detroit suburb of Pontiac, also a working-class city with a large African American population, emergency managers began in 2009 to disempower municipal government and initiate privatization measures. They reduced the city’s public payroll from more than 600 to approximately 50 and sold the city’s parking meters, fire engines, and Silverdome stadium to private interests. As the governor invoked the law against a small number of cities,

prospective emergency managers began to hold training seminars in anticipation of further appointments. Other cities began to feel the threat of a takeover. The agenda for a 2011 meeting of the Michigan Government Financial Officers' Association suggests that cities began pursuing austerity on their own, employing what some have called "economic SWAT teams" to stay ahead of the law.<sup>69</sup> This paramilitary metaphor encapsulates the punitive character of austerity reforms and the need to aggressively discipline municipalities to enforce them.

Michigan voters, including more than eight in ten in Detroit, repealed the 2010 emergency manager law by referendum in 2012 after extensive protests in Lansing, though the legislature passed another version of the law in defiance of the referendum. On March 14, 2013, Snyder named corporate bankruptcy lawyer Kevyn Orr as the emergency manager of the state's largest city. Although Detroit has long served as a symbol of urban failure, the circumstances leading to Orr's appointment indicate an acute crisis engineered by the state of Michigan and financial institutions rather than an accreted consequence of municipal profligacy. In fact, Detroit officials had imposed significant austerity measures in an effort to forestall emergency management, reducing the city's payroll from 13,400 to fewer than 10,000 workers over two years, compromising the delivery of basic services to reduce operating costs (though not enough to offset a drastic decline in revenue that began with the onset of recession in 2008).<sup>70</sup> Detroit's short-term finances were also harmed by interest rate swaps that the city negotiated with banks in 2006 to raise operating funds. The amount Detroit owed its counterparties rose as the Federal Reserve held short-term interest rates to near zero during the recession. The swaps also contained provisions allowing the banks to unilaterally terminate the deals and receive lump-sum payment of the outstanding obligation, set by the prevailing interest rates, if certain "termination events," such as a missed debt payment, the appointment of an emergency manager, or a downgrade of the city's credit rating, occurred. All three have happened, adding a \$350 million termination payment—more than the city's annual budget for fire protection—to Detroit's ledgers. These financial penalties, triggered by events sufficiently predictable to call the ethics of the swaps into question, account for 60 percent of the increase in the city's legacy expenses (present service on long-term obligations).<sup>71</sup>

While Detroit's government bears some responsibility for entering into the swaps, the state legislature helped create the fiscal distress that triggered the termination events. In 2011, Lansing reduced state revenue sharing to Detroit for fiscal year 2012 by \$67 million, fully a third of the city's revenue losses between 2011 and 2013.<sup>72</sup> The state commission tasked by the legislature to review Detroit's fiscal status to determine if an emergency manager could be appointed, however, did not mention swaps-related payments or state aid rollbacks as significant structural factors in the city's current general fund deficit of \$326 million. Rather, the commission identified long-term pension obligations and the city's charter, including requirements for comprehensive review of any privatization initiative, as "significant[ly] hampering the ability of city officials to provide

municipal services in a more efficient and cost effective manner.<sup>73</sup> Even before the appointment of a manager, an agenda for emergency management had been defined according to the area chamber of commerce's endorsement of privatization as "a positive message to business that Detroit is fixing its problems."<sup>74</sup> Orr thus assumed a mandate not only to address the city's short-term cash flow problems but also to restructure its long-term obligations to its pension system and to privatize major municipal and regional utilities. Orr demonstrated how far he would go to accomplish this agenda on July 18, 2013, when he petitioned to initiate the largest municipal bankruptcy in US history. On December 3, a federal judge ruled in Orr's favor that the city's pension obligations could be subject to renegotiation in bankruptcy despite state constitutional prohibitions on altering pensions. Tellingly, Orr's plan for restructuring through bankruptcy does not include the rate swap termination fees.<sup>75</sup> The decision has emboldened other municipalities, whether facing bankruptcy or simply governed by opportunistic neoliberals, to propose aggressive pension cutbacks.<sup>76</sup> Conservative legislators, lobbyists, and pundits have supported this agenda by demonizing public employees and dismissing the rights of communities to self-government in the name of fiscal austerity. The rhetorical strategy is backed by an institutional one: ensuring that cities such as Detroit are stripped of the power to participate in the debate or to act in meaningful ways as instruments of the will of their citizens.

### **The Rights of the City: City Power and Public Power**

This need is particularly problematic because so many cities today have elected neoliberal regimes, such as those of the outgoing Michael Bloomberg, Corey Booker in Newark, or Rahm Emanuel in Chicago, for which privatism and stakeholder citizenship are core governing ideas. Dislodging this model of citizenship at multiple scales thus requires dislodging it at the municipal level through sustained public action that challenges neoliberal policies and illustrates a more public political role for cities. Movement from protest to political change means that cities become not only budget balancers, boosters, or developers but also places from which people can again "think their way into" political life. Many of the strains of protest identified with Occupy embrace antihierarchical and anarchist principles that condemn municipal governments as extensions of the state. But a more productive urban political movement might emerge if social movements would consider the kinds of political questions raised by *Citizens United* and seek to mobilize cities as corporate political actors. I am not principally or exclusively concerned here with the specific First Amendment right of cities to "speak" in the manner that *Citizens United* declares business corporations enjoy, though there is a body of case law that suggests that cities might have such speech rights, and discursive actions by cities are potentially meaningful in a host of political conflicts.<sup>77</sup> I am more concerned with reimagining cities as instruments of public politics, expressing and amplifying the will of their inhabitants.

In his 2009 American Studies Association presidential address, Kevin Gaines urged scholars to examine “the crucial relationship between citizens and the state” to generate normative and critical analyses of a moment in which “government, public institutions, and the market are failing to meet such basic human needs as education, housing, employment, health care, and food security.”<sup>78</sup> These failures are not accidental but, as Gilmore argues, are integral to the process of neoliberalization and intended outcomes of policy decisions targeting those “who are vulnerable by definition of not having . . . political clout, expressed through votes, contributions, ownership of the means of production, control of vital territory, or organization.”<sup>79</sup> Occupy protests notably seized the city as a stage for protest, and Detroiters have opposed the taking of municipal autonomy, but there have been few scholarly reflections on the potential for cities to serve as instruments of politics that social movements might use to amplify voices and encourage organization to create new forms and terrains for political clout rather than competing with the 1 percent on the terrain of monetary contributions.

Realizing the right to the city in any meaningful capacity requires aggressively asserting the rights *of* the city as an instrument of public freedom. We can glimpse how the actions of cities as corporate instruments might articulate with other social justice politics in recent events in Los Angeles. In 2009, the city council passed a resolution protesting Arizona’s severe anti-immigrant legislation. By a thirteen-to-one vote, the council banned future contracts by the council with Arizona businesses and stopped official travel there by city officials.<sup>80</sup> Although the council justified its actions by reference to the responsibility to manage public funds, the resolution was much more important as a discursive act and a significant normative statement about the role of immigrants in American society. The council did not reach this position in isolation. On March 25, 2006, approximately half a million people, mostly Latino and including citizens and noncitizens—US born and immigrants documented and otherwise—filled the streets of downtown Los Angeles to protest a draconian immigration bill under consideration by the US House of Representatives.<sup>81</sup> More than 40,000 students walked out of area schools.

The size of the demonstration caught much of Anglo Los Angeles by surprise. It also surprised Antonio Villaraigosa, newly elected as the city’s first mayor of Mexican heritage since the 1870s. Although Villaraigosa’s fear of being too closely identified with ethnic interests made him reluctant to embrace the protests, his response to equally large marches on May 1 showed that he could no longer credibly hold office without taking a stand on immigrant rights.<sup>82</sup> Turnout for annual May Day marches declined from 2007 to 2009, but between 40,000 and 60,000 people participated in 2010. Anger at the Arizona law was widely cited as a motivating factor, and Villaraigosa recognized that anger, declaring Los Angeles a “bilingual” city and the Arizona law “unpatriotic” and “unconstitutional.”<sup>83</sup>

Less than two weeks later, the city council approved the boycott. The impact was largely symbolic; the council could exercise no power over law enforcement in Arizona and did not pressure the quasi-public authority operating the city’s

airport to cancel contracts for \$22 million of annual business with airlines based in Arizona. Critics of the council therefore questioned its substantive commitment to justice. In terms of using the power of the public purse, the council was clearly grandstanding, with little directly at stake. Yet the council's actions exemplified speech powers exercised by the city as a corporate body, declaring an official civic identity of multiculturalism on behalf of its immigrant constituents. Council member Ed Reyes, a sponsor of the resolution, argued that "Los Angeles is the second-largest city in this country, an immigrant city, an international city. It needs to have its voice heard."<sup>84</sup> This slippage between descriptions of the Latino and immigrant constituencies of Los Angeles and the corporate form of the city itself is a reminder of the potential for cities to serve as an inclusionary public platform for the interests of people who lack money and even the basic legal qualification of citizenship.

Critics might argue that the chain of events connecting the immigrant marches to the Los Angeles boycott was, like the Occupy protests, a fleeting moment of departure from neoliberal business as usual, making no lasting institutional change. But while neoliberalization is an institutional process, it is also a cultural one, connecting ideas about the best use of urban space and the political means of transforming that space. As Harvey has observed, the political-economic transformation of New York in the 1980s and 1990s worked by reimagining the city as a space of personal consumption and lifestyle tourism, enabled by financial capital and protected by aggressive policing.<sup>85</sup> On the contrary, then, even fleeting moments of protest such as the Los Angeles boycott reflect an embrace of urban public association and remind us of the potential of urban association.<sup>86</sup> Cities as associations are capable of institutionalizing oppositional politics, particularly if groups that constitute minorities in a national or state context exercise substantial power in local governments. This "dissent by decision" allows the inhabitants of a city to exercise democratic power by articulating narratives of municipal identity in opposition to regional, state, or national political narratives. Since demonstrations and activity by citizens, noncitizens, and others with or without the franchise can impact positions taken, decisions made, and pronouncements expressed by cities, municipal power can help establish more inclusive forms of political community at the local level.<sup>87</sup> Even those excluded from national citizenship may nonetheless be bound to a public identity, most dramatically in the case of "sanctuary cities" that refuse to cooperate with aspects of federal immigration enforcement.<sup>88</sup>

Although many cities have accommodated the logic of the market and the interests of financial institutions, suppressing and discouraging public freedom, actions such as these demonstrate a contrary potential for cities to take stands in response to public protest, linking the associational politics of urban life to the institutional powers of urban governments. More recently, some cities have moved closer to direct confrontation with the financial sector. Many have proposed the use of eminent domain powers to seize not real property in land but the financial property of mortgage contracts from banks. This maneuver would effectively

write down the principal owed on private mortgages, relieving public foreclosure crises and the personal financial distress of residents.<sup>89</sup> And Los Angeles has sued several major mortgage lenders, charging discriminatory and predatory practices in home loans that have thrown minority communities into crisis.<sup>90</sup> These efforts are embryonic and only hint at the possibility that reinvigorated cities might be not only *places where* but also *tools with which* we might recover public freedom.

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