

Inside Philanthropy

What Philanthropic Dollars Can Buy in America's Court System

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Rich people can do all sorts of cool things—like buy basketball teams or Hawaiian islands or fabled journals of political opinion.

They can even use their money to get a hearing before the U.S. Supreme Court.

Okay, I know, it's not that simple. But the way that philanthropic dollars have lately been used to drive high-powered litigation is striking.

Seven months ago, a decade of advocacy and litigation—backed by a handful of highly strategic funders—paid off in a huge way when the U.S. Supreme Court ruled in favor of marriage equality.

And around the same time, another lawsuit backed by savvy funders—one challenging the constitutionality of Obamacare—was rejected by SCOTUS. That case, *King v. Burwell*, was the second challenge to the healthcare law to reach the high court. An earlier suit, which the court ruled on in 2012, had succeeded in knocking down the requirement in the ACA that states expand their Medicaid programs—leaving millions of low-income people without coverage that had been guaranteed by Congress. People are literally dying as a result of that litigation victory, which was choreographed by a handful of conservative nonprofit outfits, including the Pacific Legal Foundation, the Center for Individual Rights (CIR), and the Cato Institute—a network backed, in turn, by funders like the Bradley Foundation and the Koch brothers.

Now, another case has come before SCOTUS that is also backed by Bradley and like-minded funders. *Friedrichs v. California Teachers Association* is challenging the right of public-sector unions to collect "fair-share" fees from non-members. In many state, workers that opt out of public sector unions still have to pay dues. Barring that practice would deal a major blow to such unions, which has long been a goal of conservative philanthropies as part of a broader strategy to "defund" the left. The strategic thinking, here, is simple enough: Since public sector unions provide major firepower for progressive causes and Democratic candidates, reducing their financial resources will weaken the left across a range of issue areas.

Friedrichs v. California Teachers Association was brought by CIR, which is heavily backed by Bradley—we've called the Bradley Foundation the "real mastermind of the conservative world." Bradley, which is headed by Michael Grebe, a close confidante of Governor Scott Walker, has also backed the 11 organizations that submitted amicus briefs for the plaintiffs in the case.

The lead plaintiff, Rebecca Friedrichs explained the rationale for the suit this way to reporters: "Increasingly, I saw that many of the things the union bargained for actually made my job as a teacher harder. Because of tenure laws, it is almost impossible to fire incompetent, and sometimes even abusive, teachers. And because of seniority-based layoff policies—last-in, first-out—which the union has negotiated, newer teachers are the first to go, regardless of how good they are."

If that rap against teachers unions sounds familiar to you, it's because these were the exact arguments made by another lawsuit, *Vergara v. California*, which challenged teacher job protection and triumphed in a Los Angeles state superior court in 2014. (It's now under appeal.)

As we've reported, *Vergara* was orchestrated by a Silicon Valley entrepreneur, Dave Welch, who founded and financed Students Matter, the group that put the lawsuit together. That Welch, a single savvy philanthropist, could engineer a court victory that struck down decades of legislatively approved law is a striking example of how "charitable" giving can be a powerful tool of policy combat.

Of course, there's no big surprise in that statement. Private philanthropy has been backing litigation to change public laws for at least 60 years. In the 1950s, funders supported the long and expensive litigation battle that culminated in the landmark *Brown v. Board of Education* case that struck down school segregation. The Field Foundation, established by a department store heir, backed the NAACP Legal Defense Fund which spearheaded the case, as did Ford. Starting in the 1960s and 1970s, liberal foundations and philanthropists scaled up an entire infrastructure of legal groups that used litigation to advance policy goals related to racial equity, women's rights, and consumer and environmental protections.

It is tempting to cast activist litigation, backed by private philanthropy, as an end run around the democratic process. Conservatives have made that argument for decades—and have continued making it even as they've mastered the litigation game themselves, bankrolled by their own phalanx of shadowy private donors. Most recently, they decried judicial activism in regard to the LGBT court victories.

Progressives make the same argument, despite all the gains they've scored in the courts with help from wealthy donors and foundations. For example, as the unions saw it, *Vergara* was just the latest example of how rich private individuals were hijacking public education. "It's discouraging when people who are incredibly wealthy, who can hire America's top corporate law firms, can attempt to drive an education agenda devoid of support from parents and community," said Joshua Pechthalt, president of the California Federation of Teachers, after the *Vergara* ruling.

Pechthalt would seem to have a point in suggesting that this isn't how democracy is supposed to work. On the other hand, the way that teacher contract law has been enacted in Sacramento isn't how democracy is supposed to work, either. The California Teachers Association has been the single biggest campaign contributor in the state over the past two decades, making over \$200 million in donations since 1998 to hundreds of candidates and dozens of ballot initiatives. It's also been one of the top spenders on lobbying in Sacramento, right up there with the oil industry. For years, the CTA has lavished money and attention on the elected representatives who make

the laws that govern their employment. Does this track with civic textbooks any better than *Vergara* does?

Regardless, an a la carte view of litigation, philanthropy and democracy is not sustainable. You can't cheer when the funders on your side score with this strategy—and jeer the other side as anti-democratic when it succeeds the same way. Either you're for a vision of philanthropic freedom that allows wealthy donors and foundations to buy more power in our political system, or you're against it—and favor new steps to balance such freedom with another value we cherish as Americans, which is civic equality.