POLITICAL SPEECH AND ASSOCIATION RIGHTS AFTER *KNOX V. SEIU, LOCAL 1000*

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In Citizens United v. Federal Election Commission, Boy Scouts of America v. Dale, *and other recent cases, the Supreme Court has given organizations a newly robust First Amendment right to use the entity's money in ways that stakeholders within the organization may find anathema and to discriminate against employees and members in order to advance the expressive interest of the entity. Yet, in 2012, the Court held in* Knox v. Service Employees International Union, Local 1000 *that a labor union violates the First Amendment rights of dissenters if it levies a special assessment for political speech without first having dissenters opt in. The Court's jurisprudence on associational speech lacks any theory of when and why an organization's speech violates the rights of dissenters. Nor does it consider what kinds of internal organizational governance mechanisms are necessary to ensure a fair allocation of speech protections between those who wish the organization to promote one message and those who wish it to promote another. Moreover, the majority in* Knox *casts First Amendment doubt on the validity of the entire concept of collective bargaining by a union elected by a majority to represent all employees in a bargaining unit of government employees. As ballot measures in various states have been enacted or are pending that limit the rights of unions to raise and spend money on politics in the name of protecting dissident employees, a principled approach to the free speech rights of unions, corporations, and other associations is ever more needed.*

In this Article, we offer an approach to reconciling the First Amendment expressive interests of organizations with the expressive interests of dissenting stakeholders within them. We suggest an approach to resolving the inconsistency between Citizens United, *the union-dues cases, and the Court's other compelled speech and associational speech jurisprudence. Contrary to the prevailing wisdom, we suggest not that shareholders be given the opt-out (or opt-in) rights of dissenting union employees but instead that unions be given the same broad speech rights as corporations to finance political activity with dues and fees paid by all employees.*

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INTRODUCTION

A striking number of recent, important constitutional cases depend on analysis of the speech rights of entities—like corporations, unions, and associations—and how they relate to the speech rights of their members, especially their dissenting members. When the Supreme Court held in *Citizens United v. FEC* that corporations have a First Amendment right to make unlimited, independent campaign expenditures, it dismissed in a few sentences the idea that the corporate leadership's use of corporate resources on politics might infringe the

rights of dissenting shareholders.[1] When the Court gave the Boy Scouts a First Amendment right to discriminate against gays, it gave the group's leadership power to advance their views at the expense of those within the Boy Scouts who would prefer that the organization promote tolerance, self-reliance, and wilderness conservation.[2] Most recently, some courts have suggested or held that closely held, for-profit corporations have a First Amendment right to refuse to offer employee health insurance policies that cover contraception regardless of whether the benefits package is paid for in part by employees; these cases seek to give management the right to express their views about contraception at the expense of women employees' rights to comprehensive health care coverage.[3]

Collectively, these recent cases have given organizations a newly robust First Amendment right to use the entity's resources and money in ways that stakeholders within the organization may find anathema and to discriminate against employees and members in order to advance the expressive interests of the entity. In fact, in all of these cases—and many others like them—the courts' focus has been almost entirely on the free speech rights of the entity, and the courts have given little, if any, weight to protecting members of the entity who help pay for the entity's speech but disagree with its content.

There is one type of organization, however, where the Court has held that the leadership's speech on behalf of the organization violates the First Amendment rights of dissenters: labor organizations. The law has long been that both public sector and private sector unions violate the First Amendment rights or the statutory rights of dissenting employees when they spend money from the organization's general treasury to advance a political message without giving the em-

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1 130 S. Ct. 876, 886, 911 (2010).

2 Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

3 *See, e.g.*, Grote v. Sebelius, 708 F.3d 850 (7th Cir. 2013) (granting injunction pending appeal in favor of privately held corporation manufacturing vehicle parts against federal law requiring contraception coverage in employer-provided group health insurance plan); Wheaton College v. Sebelius, 703 F.3d 551 (D.C. Cir. 2012) (determining challenge to contraceptive mandate not ripe for judicial review based on government's assertion that it would not enforce the mandate against religiously affiliated entities such as the college appellant); Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (holding that for-profit S-corporation engaged in heating and air conditioning equipment business has First Amendment right to refuse to comply with provision of Affordable Care Act requiring coverage of contraceptive care in employer-sponsored health insurance plan; facts do not indicate what portion of benefits package, if any, is paid for by employees). *But see, e.g.*, O'Brien v. U.S. Dept of Health & Human Servs., 894 F. Supp. 2d 1149, (E.D. Mo. 2012) (rejecting First Amendment challenge to contraceptive mandate brought by privately held limited liability company engaged in mining, processing, and distributing).

ployees the chance to opt out of having their dues or fees support political activity.[4]

In June 2012, in *Knox v. Service Employees International Union, Local 1000*, the Court dramatically expanded the rights of dissenting employees by holding that a union may make a special assessment to support political activities only if employees first *opt in*, and suggesting that it is poised to require opt in for other union expenditures.[5] Anti-union employees in unionized workplaces thus enjoy a right to refuse to subsidize organizational political activity that no shareholder or corporate employee enjoys and that no nonprofit association member enjoys. Thus, as Professor Benjamin Sachs has pointed out, while under *Citizens United* corporations and unions are equally free "to *spend* general treasury money on electoral politics," the Court has imposed "a restriction on unions' ability to *fund* these general treasuries that corporations do not face."[6]

The dissimilar treatment of unions as compared to almost all other organizations for purposes of the compelled speech restriction on associational free speech rights cannot be justified by law or logic.[7] Moreover, as the Supreme Court has expanded the expressive rights of organizations while ignoring the rights of dissenters in cases like *Citizens United* and *Boy Scouts of America v. Dale*, and has simultaneously narrowed the expressive rights of labor unions by expanding the rights of dissenters in *Knox*, the dissonance between its two bodies of law has grown sharper. The jurisprudence lacks any theory of when and why an organization's speech violates the rights of dissenters. Nor does it consider what kinds of internal organizational governance mechanisms are necessary to ensure a fair allocation of speech protections between those who wish the organization to promote one message and those who wish it to promote another. Ironically, although

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4 Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 895 & n.294 (2012).

5 132 S. Ct. 2277, 2295–96 (2012).

6 Sachs, *supra* note 4, at 803.

7 We thus agree with Professor Sachs's analysis. *See id.* Our analysis differs from his in three major respects. First, we address the Court's recent decision in *Knox* requiring opt in rather than opt out; Professor Sachs's article was published before *Knox* was decided. Second, our focus is broader: we argue not just for parity between stockholders and unionized employees but for a paring back of the dissenting rights of union employees, expansion of the rights of dissenting stockholders, and reconciling those two areas with the law governing the expressive interests of associations more generally. Third, we argue that opt out rights for employees should be abolished rather than, as Professor Sachs argues, extended to shareholders.

Other scholars have also criticized the inconsistency between the Court's treatment of union political speech in *Knox* and corporate political speech in *Citizens United*. *See, e.g.*, Ciara Torres-Spelliscy, *Taking Opt-In Rights Seriously: What* Knox v. SEIU *Could Mean for Post-*Citizens United *Shareholder Rights*, 74 MONT. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225851; Charlotte Garden, *Citizens, United and* Citizens United: *The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011).

the law gives greater protection to employees to control the leadership and decision making of their union than it gives to shareholders or nonprofit association members, the Court's First Amendment jurisprudence gives dissident shareholders fewer protections than dissident employees. As litigation,[8] legislation, and ballot measures in various states seek to impose new limits on the rights of unions to raise and spend money on politics in the name of protecting dissident employees,[9] a principled approach to the free speech rights of unions is ever more needed.

In this Article, we show that the Court's recent expansion of the rights of corporations to speak over the objections of dissenting members cannot be squared with *Knox*'s expansion of the right of dissenters to restrict union speech. We explain why the conventional distinction between unions and all other organizations—a voluntariness notion that no one is forced to be a Boy Scout or own shares of a corporation but people are forced to work in unionized workplaces—is false. We also respond to the *Knox* dicta on the constitutionality of majority unions' political speech by showing that requiring payment of fees to support union activity in a regime of exclusive representation and majority rule does not infringe the rights of dissenting employees. We offer an approach to reconciling the First Amendment expressive interests of organizations with the expressive interests of dissenting stakeholders within them. While we are not the only scholars to observe the inconsistency between *Citizens United* and the union-

8 *See, e.g.*, Harris v. Quinn, 656 F.3d 692, 699 (7th Cir. 2011) (holding that provision of Illinois Public Labor Relations Act requiring home health aides paid by the state to pay agency fees for union representation does not facially violate the First Amendment), *petition for cert. filed* (U.S. Nov. 29, 2011) (No. 11-681). The petition for the writ of certiorari asks the Court to rule that compulsory payment of agency fees to a union representing government workers violates the First Amendment because it is "[c]ompelled [a]ssociation to [p]etition [the] [g]overnment" that is "[a]ntithetical to the [p]rinciples of [d]emocratic [p]luralism [p]rotected by the First Amendment." Petition for Writ of Certiorari at 25–29, *Harris*, 656 F.3d 692 (No. 11-6811) 2011 WL 6019918, at *25–29. *Harris* is, perhaps, distinguishable from prior cases in that the workers in *Harris* are arguably contractors rather than employees. *See Harris*, 656 F.3d at 697–98.

9 For example, although rejected by voters, Proposition 32 on the November 2012 California ballot would have required employees to opt in to union political spending and prohibited unions from spending any money raised through payroll contribution. *See* Jon Healey, *Proposition 32 Cost the GOP Far More than Mere Money*, L.A. TIMES (Nov. 9, 2012, 6:00 AM), http://www.latimes.com/news/opinion/opinion-la/la-ol-self-defeating-anti-union-millionaires-20121108,0,7931625.story. Between 1992 and 2012, at least twelve efforts were made in five states to qualify ballot measures to limit a union's use of payroll deductions for political purposes. The measures qualified for the ballot eight times in three states, three additional efforts failed to qualify, and one measure was removed from the ballot by the courts. *Id.* Between 2009 and 2013, legislatures in sixteen states considered at least forty measures specifically targeting the use of payroll deductions for political purposes. *Id.* at 7. A comprehensive analysis of state payroll deduction measures is forthcoming: Brian Olney, *Paycheck Deception: When Government "Subsidies" Silence Political Speech*, 4 UC IRVINE L. REV. (forthcoming 2013).

dues cases, our broad frame includes the Court's general compelled speech and associational speech jurisprudence, and we may be unique in suggesting not that shareholders be given the opt-out (or opt-in) rights of dissenting union employees but instead that unions be given the same broad speech rights as corporations with no obligation to allow opting out (or opting in).

Part I describes the First Amendment jurisprudence on the rights of employees represented by unions with respect to union political activities. We explain how *Knox* dramatically changed the law and expanded the rights of dissenters at the expense of the rights of union members and the union itself.

Part II examines the underlying First Amendment principles and precedents. *Knox* and the cases that preceded it are based on concern for protecting dissident government employees from compelled speech. There are three separate strands of free speech doctrines that underlie *Knox*: the need to prevent compelled speech, the speech rights of associations, and the speech rights of government employees. On close examination, the precedents in each of these areas do not support the Court's holdings in *Knox*.

In Part III, we examine the implications of *Knox* for the speech rights of unions and for the future of public sector collective bargaining. The expansive dicta in the Court's opinion has potentially enormous implications for the rights of public employees to bargain collectively and to participate in politics through their unions. We argue that courts continuing down the path opened in *Knox* would be undesirable for society and for the First Amendment.

In Part IV, we suggest how courts should approach the difficult question of reconciling the speech rights of entities with the rights of dissenting individuals. We offer three conclusions. First, there is the need for a new, clearer analytical framework that separates distinct questions. Second, either the Court must accord corporate shareholders the rights of dissent that the Court has given employees in unionized workplaces or it must expand the free speech rights of unions to be in parity with the rights of corporations and other associations. Finally, we suggest that the idea that an organization's political spending constitutes compelled speech of dissidents is logically unsatisfying, and we therefore propose a new approach. Our approach reconciles the rights of an organization to speak with the right of stakeholders to be free from compelled speech or other harms to their interests caused by the organization's speech. We argue that both corporations and unions should be able to spend money in elec-

tion campaigns without legal protection for dissenting shareholders or members.[10]

The importance of the Court's inconsistency cannot be overstated. Together, *Citizens United* and *Knox*, decided just two years apart, have significantly increased the political influence of corporations and have significantly decreased the political influence of unions. These cases thus have enhanced the clout of organizations that are thought to support the Republican Party while decreasing that of those that tend to support Democrats.[11] A close examination reveals that the Court's inconsistencies in this area of law are unjustifiable and a new regime is essential so that all entities are treated alike.

I
The First Amendment Rights of Labor Unions and Dissenting Employees

Knox is the most recent decision in a line of cases that is well over a half century old. Understanding it and its significance requires putting it in this larger context.

A. The Origins and Development of the Law of Union Security and Union Dues

Under federal and state labor law, a union selected by the majority of employees in a bargaining unit is the exclusive representative of the employees in the bargaining unit.[12] Exclusivity of the union chosen by the majority is a rule favored by employers that would otherwise be confronted with demands from multiple different employee groups and by employees who know there is strength only in numbers.[13] As the Supreme Court said,

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[10] Whether their expenditures or contributions should be limited for reasons of protecting the political process—a notion that *Citizens United* largely rejected—is a separate issue that we do not address. *See* Citizens United v. FEC, 130 S. Ct. 876, 909 (2010).

[11] One analysis of data released by the Federal Election Commission in January 2013 shows that in the election cycle preceding the November 2012 cycle, Business (concededly an amorphous category) made 59% of its total contributions to Republicans and 41% to Democrats, while Labor made only 9% to Republicans and 91% to Democrats. *2012 Overview: Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties Super PACs and Outside Spending Groups*, OpenSecrets.org, www.opensecrets.org/overview/blio.php (last visited Jan. 24, 2013).

[12] A bargaining unit is a group of employees of a single employer sharing a community of interest regarding working conditions. 29 U.S.C. § 159(a) (2006) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such proposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."); *see* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975).

[13] *See Emporium Capwell*, 420 U.S. at 62, 67.

> [t]he designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.[14]

Representation by a single union also enables the administration of multi-employer health, retirement, and other benefit plans that are essential to the social insurance system in industries like construction, entertainment, and service in which employees work relatively short periods for multiple employers.[15]

The represented employees need not join the union, but they are still bound by its negotiating decisions, and they still have a claim on its services. That the union is the exclusive representative means that the union alone has the power and responsibility to negotiate with the employer over terms of employment and to enforce the collective bargaining agreement on behalf of every employee in the unit, not just union members and not just those who voted for the union.[16] Thus, whether or not employees are union members, if they are represented by a union, not only do they receive the wage and benefits gains associated with union representation (typically about seventeen percent more than earned by comparable nonunion workers[17]), they also have the right to free legal assistance from the union in enforcing their contractual and, in some cases, statutory rights against the employer.[18]

Not every employee will be a supporter of every choice the union makes. If a union negotiates health benefits at the expense of a wage increase, or agrees to wage concessions in exchange for a promise to avoid layoffs, or negotiates for promotions based on seniority rather

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14 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220–21 (1977).

15 *See What Is a Multiemployer Plan?*, INT'L FOUND. EMP. BENEFIT PLANS, http://www.ifebp.org/News/FeaturedTopics/Multiemployer/#3 (last visited Jan. 24, 2013).

16 Under the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), a union even has the responsibility in some circumstances to represent employees who wish to bring statutory employment discrimination claims against the employer in a grievance and arbitration proceeding. The union is not obligated to bring every statutory claim, but it must act non-arbitrarily in deciding which statutory claims to bring, just as it must act non-arbitrarily in deciding which contractual grievances to prosecute. *See id.* at 271.

17 *See* Sachs, *supra* note 4, at 811 & n.47 (collecting sources on the wage premium in unionized workplaces).

18 *See 14 Penn Plaza*, 556 U.S. at 271 (finding a union duty to represent employees in arbitration of statutory claims when the agreement incorporates statutory rights); Vaca v. Sipes, 386 U.S. 171, 174 (1967) (finding a union duty to represent employees in contractual grievance procedure).

than supervisory assessments of merit, some employees will be disappointed. Unions must make trade-offs, and some employees may become disaffected.[19] The law tempers the power conferred by exclusivity by requiring that the union negotiating and enforcing the collective bargaining agreement must treat all represented workers fairly and avoid arbitrary treatment or invidious discrimination.[20]

In the long battle to improve working conditions through organizing, workers struggled to develop robust and financially secure organizations capable of dealing with the large, professionally managed, and well-financed corporations who were their adversaries and negotiating partners.[21] Union activists determined that automatic dues payment and union security were necessary to prevent some employees from free riding on the wage gains and contractual protections secured by the union and to enable workers to be represented and have their hard-won collective contracts administered by a competent staff.[22] Unions, like the legal and medical professions today, also thought that a monopoly on the practice of a certain trade or profession would protect the consumers of the product or service from poor quality work.[23] For all of these reasons, some labor organizations (sometimes with and sometimes without the support of employers) insisted on employment rules making it necessary to be a member of the union, craft, or guild in order to work in a particular job.[24] These "closed shop" agreements were originally embraced by Congress in the Wagner Act.[25] Contractual requirements that employees belong

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19 *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) ("The complete satisfaction of all who are represented is hardly to be expected.").

20 *See* Steele v. Louisville & Nashville R.R., 323 U.S. 192, 207 (1944); Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 193–98 (1980); Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 127–28 (1992).

21 There are many books detailing the many legal and practical challenges workers faced in developing strong unions. For some of the classics covering the period from the mid-nineteenth century to the mid-twentieth, see DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 1–8 (1987); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 11–16 (1985). *See generally* IRVING BERNSTEIN, THE LEAN YEARS (1960) (discussing labor movement struggles pre- and post-Great Depression).

22 *See* Malin, *supra* note 20, at 146–47.

23 *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438–40 (1963) (considering state's argument that creating a monopoly in the provision of legal services protects consumers).

24 *See* Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51, 57–61 (1990).

25 Section 8(3) as originally written prohibited "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization," but contained a proviso "[t]hat nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . ." National Labor Relations Act, ch. 372, § 8(3), 49 Stat. 449, 452 (1935). In the railroad industry, where closed shops were uncommon, the Railway Labor Act of 1926 did not address the

to a union and pay dues to fund the services provided by the union were common practice in many industries and raised no constitutional questions because they were private employment agreements.[26]

The Taft-Hartley Act of 1947 added a series of provisions creating legal rights for employees and employers to resist unionization, including a prohibition on the closed shop, but it preserved the ability of unions and firms to agree to require employees to join the union thirty days after becoming employed (the "union shop").[27] In a union shop, an employee can be fired for a loss of union membership only when it results from a failure to pay union dues, but not from a failure to abide by a union's bylaws or other rules.[28] The Taft-Hartley amendments were a product of congressional concern about the power of unions to interrupt the operation of basic industries in the postwar period and to coerce union members and other employees.[29] But Congress also understood the union concern that without some rule requiring employees to pay dues to the union, nonunion employees will get a "free ride" by sharing the benefits of what unions are able to accomplish though collective bargaining without paying for them.[30]

The Taft-Hartley Act also added section 14(b), which allows states the power to restrict or prohibit union security agreements altogether as an exception to the general rule of preemption under the National Labor Relations Act (NRLA).[31] Although states differ in the extent to which they utilize section 14(b) to restrict security agreements, every state with a right-to-work law prohibits unions and employers from conditioning employment on any type of union membership. In so doing, state right-to-work laws—either explicitly or as interpreted judicially—bar most union security agreements, including agency fee ar-

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permissibility of closed shops where they existed. Union density was quite high on the railroads, and union security agreements were rare because railroad hiring practices and the difficulty of starting new nonunion railroad lines meant that employees had no reason to fear the threat of low-wage, nonunion competition. *See* KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 869 (2009); Victoria L. Bor & Harold Datz, *Union Security*, *in* LABOR UNION LAW AND REGULATION 424–26 (William W. Osborne ed., 2003).

26 *See* Dau-Schmidt, *supra* note 24, at 130–31.

27 The Taft-Hartley Act added to section 7 "the right of employees 'to refrain from [concerted activities] except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment' as authorized in section 8(a)(3)." DAU-SCHMIDT ET AL., *supra* note 25 at 866–72 (quoting Taft-Hartley Act, ch. 120, 61 Stat. 136, 140 (1947) (codified as amended at 29 U.S.C. § 157 (2006)).

28 *See* NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963).

29 On the history of section 14(b), see Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 128–34 (2005).

30 *See id.*

31 Taft-Hartley Act, ch. 120, § 14(b), 61 Stat. 136, 151 (1947) (codified as amended at 29 U.S.C. § 164(b) (2006)).

rangements.[32] In right-to-work states, unions are still obligated by law to provide services to all of the employees that they represent, but the union cannot require employees to pay their fair share of the costs of contract negotiation or administration.[33] In right-to-work states, employees who wish to form a union are effectively forced to subsidize the provision of the union benefits to coworkers who refuse to support the union. This also means that right-to-work laws effectively tax the First Amendment activities of unions and their members by reducing the amount of money unions have to spend on First Amendment activity.[34] Unions in some right-to-work states have experimented with fee for service agreements. Although the union cannot charge fair share fees in advance, some statutes and cases allow them to charge for some services provided to individuals, such as filing grievances and taking cases to arbitration.[35] Even in states that do not bar union se-

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32 As of 2012, twenty-three states have exercised this power. *See* Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 428–31 (2012) (summarizing recent legislative developments). There have been numerous efforts to extend the right-to-work regime nationally by introducing legislation in Congress to ban all union security arrangements. *See, e.g.*, National Right-to-Work Act, S. 504, 112th Cong. (2012). A business-funded nonprofit organization, the National Right-to-Work Committee, and a legal defense foundation of the same name have pushed for over fifty years to enact right-to-work legislation both at the state level and nationally. *See About NRTWC*, NATIONAL RIGHT TO WORK COMMITTEE, www.nrtwc.org/about-2/ (last visited Jan. 26, 2013). Those allied with the labor movement vigorously oppose the right-to-work regime, arguing that workers in right-to-work states tend to earn less than workers in other states. *See* Michael M. Oswalt, Note, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691, 701 & nn.58–59 (2007) (reporting data showing lower union density in states with right-to-work laws and also reporting a study showing an increase in shareholder wealth after the passage of right-to-work laws, an effect that was attributed to labor's weakened bargaining position); *see also* Steven E. Abraham & Paula B. Voos, *Right-to-Work Laws: New Evidence from the Stock Market*, 67 S. ECON. J. 345, 358–59 (2000) (economic analysis showing firm owners anticipating adoption of right-to-work law in Louisiana would increase their share of firm profits); William J. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445, 463–64 (1998) (reviewing literature on right-to-work laws and concluding that these laws impact unionization, free riding, union success in NLRB elections, and state industrial development).

33 Hughes Tool Co., 104 N.L.R.B. 318, 327–29 (1953) (holding that union cannot charge nonmembers a fee in a right-to-work state because such employees, though not members or fee-payers, are nevertheless statutorily entitled to union representation); Bor & Datz, *supra* note 25, at 518, 527.

34 This point has been made recently by Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMP. LAB. L. & POL'Y J. 277 (2013).

35 *See, e.g.*, Cone v. SEIU Local 1107, 998 P.2d 1178, 1183 (Nev. 2000) (holding that union fee schedule for all nonmembers for grievance arbitration does not violate Nevada right-to-work law and dismissing Board's contrary precedent because it inequitably "requir[es] union members to shoulder the burden of costs associated with nonunion members' individual grievance representation"); United Ass'n of Journeymen Local Union No. 81, 237 N.L.R.B. 207, 209–11 (1978) (holding that union may charge a fee to nonmembers for use of union hiring hall). *But see* State, Cnty. & Mun. Emp. Local 2384 v. City of Phx.,

curity devices (that is, in non-right-to-work states), employers and unions cannot constitutionally enforce an agreement requiring employees to join the union; the most that a union can require is that union-represented employees pay an "agency fee" for the union's services in negotiating and administering the contract.[36]

The agency fee system was proposed to and rejected by the Supreme Court in 1956 in *Railway Employees Department v. Hanson.*[37] In *Hanson,* the National Right to Work Foundation argued that the Railway Labor Act (RLA) was unconstitutional because it preempted a Nebraska right-to-work law and therefore compelled employees to support unions.[38] The RLA, unlike the NLRA, preempts state right-to-work laws.[39] RLA preemption was crucial to establish state action because otherwise the contract requiring employees to pay dues to the union and the union's subsequent expenditure of dues might have been considered to be simply a private agreement between a private employer (the railroad) and nonprofit organization, the railway employees' union. The First Amendment, then, would have no relevance.

The Supreme Court made two significant holdings in *Hanson.* First, the Court agreed with the plaintiffs that the RLA's preemption of state right-to-work laws was sufficient state action to subject the union security agreement between the private union and the private railroad to constitutional scrutiny.[40] Second, the Court held that the compelled subsidization of the employees' exclusive bargaining representative did not violate the employees' First Amendment rights. Because there was no evidence in the case as to how the union spent dues, the Court reserved the issue of whether the expenditure of dues over the objection of some employees might in some cases "impair freedom of expression."[41]

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142 P.3d 234, 235 (Ariz. 2006) (finding that fair share fees violate Arizona right-to-work law); United Ass'n of Journeymen Local Union No. 141 v. NLRB, 675 F.2d 1257, 1261–62 (D.C. Cir. 1982) (holding that fair share fees violate right-to-work laws of Arkansas, Florida, Louisiana and Mississippi); Fla. Educ. Ass'n v. Pub. Emp. Relations Comm'n, 346 So. 2d 551, 552–53 (Fla. Dist. Ct. App. 1977) (holding that fair share fee violates Florida right-to-work law); *cf.* NLRB v. North Dakota, 504 F. Supp. 2d 750, 752 (D.N.D. 2007) (holding state law requiring union to charge nonmembers for services is preempted by NLRA). Under section 19 of the NLRA, enacted in 1974 and amended in 1980, an employee who holds a conscientious objection to unions does not have to pay fees to a union but must pay the same amount to another charity. *See* Bor & Datz, *supra* note 25, at 528–30.

[36] *See* NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963).

[37] 351 U.S. 225 (1956).

[38] *Id.* at 228.

[39] *Id.* at 231.

[40] *Id.* at 232 ("If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded."). The question of whether federal preemption of a state law governing a private contract constitutes state action is discussed *infra* note 60 and accompanying text.

[41] *Hanson,* 351 U.S. at 238.

The Court reached the issue it reserved in *Hanson* in *International Ass'n of Machinists v. Street.*[42] The Court emphasized the importance of unions' role in "securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies . . . ."[43] The Court noted that nonunion members "share in the benefits derived from collective agreements negotiated by the railway labor unions but bear no share of the cost of obtaining such benefits"[44] and found that the RLA "contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes."[45] But, to avoid the constitutional issue raised by the National Right to Work Foundation, the Court held that Congress did not intend to force employees to subsidize the union's political speech.[46]

The Court cautioned, however, that limits on the right of unions to charge nonmember employees for political expenditures must not be allowed to restrict the ability of the union to convey its own political message:

> [M]any of the expenditures involved in the present case are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other.[47]

As explained below, this focus on protecting the speech rights of the union vanished in subsequent cases.

The next major challenge to union security came in *Abood v. Detroit Board of Education*, in which Michigan courts had held that the state's public sector labor statute permitted an agency shop and allowed unions to spend agency shop fees on political activities.[48] The

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[42] 367 U.S. 740 (1961).

[43] *Id.* at 760 (quoting Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 752–53 (Frankfurter, J., dissenting)).

[44] *Id.* at 762 (internal citations omitted).

[45] *Id.* at 764.

[46] *Id.*

[47] *Id.* at 773.

[48] 431 U.S. 209, 215–16 (1977).

Court therefore could not avoid the constitutional question through statutory interpretation. The Court held that nonunion members can be required to pay agency fees to support collective bargaining because they benefit from it, but they cannot be required to support union political activities unrelated to contract negotiation and administration.[49]

The notion embraced in *Street* and *Abood* that contractually required union membership involved compelled speech in violation of the First Amendment produced sharp dissent from some Justices. In *Street*, Justice Frankfurter, joined by Justice Harlan, thought that the majority's constitutional avoidance analysis was wrongheaded. First, there was no basis in fact for thinking that Congress had intended the RLA to allow employees to opt out of union spending.[50] Second, the dissent saw no coerced speech in union activism. The employees remained free to speak on all issues regardless of the union's position.

> Plaintiffs here are in no way subjected to such suppression of their true beliefs or sponsorship of views they do not hold. Nor are they forced to join a sham organization which does not participate in collective bargaining functions, but only serves as a conduit of funds for ideological propaganda. . . . No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues.[51]

Justice Frankfurter also rejected the notion that union political advocacy coerced dissenting employees in a way that union bargaining or grievance processing did not.[52] The line between political expression and contract negotiation, the dissenters insisted, was fictitious. The dissent rejected the notion that a union serves its members only at the bargaining table and in grievance arbitration, and not by advocating in the legislature for improved working conditions.[53] Unions throughout American history pursued the interests of workers

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49 *Id.* at 235–37. As Professor Martin Malin pointed out, the Court in *Abood* introduced confusion into the law governing union dues by suggesting that compelled funding of union political activity not only raised free speech issues but also issues of freedom of association by funding speech with which employees disagreed as well as enforcing ideological conformity. *See* Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 858 (1989). The conflation of free speech and free association continued in *Knox*. *See* discussion *infra* Part I.B.

50 *Street*, 367 U.S. at 801 (Frankfurter, J., dissenting) ("[T]here is a total absence in the text, the context, the history and the purpose of the legislation under review of any indication that Congress, in authorizing union-shop agreements, attributed to unions and restricted them to an artificial, non-prevalent scope of activities in the expenditure of their funds. An inference that Congress legislated regarding expenditure control in contradiction to prevailing practices ought to be better founded than on complete silence.").

51 *Id.* at 805–06.

52 *Id.* at 814–15.

53 *See id.*

through political channels as well as through bargaining, including "compulsory education, an eight-hour day, employer tort liability, and other social reforms."[54] Indeed, Justice Frankfurter observed, "[t]he notion that economic and political concerns are separable is pre-Victorian. . . . It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor."[55]

In 1988, the Court extended the architecture of dissenters' rights to private sector unions and union security arrangements in *Communications Workers v. Beck*.[56] Skipping over the constitutional avoidance rationale, the Court based its decision on statutory interpretation. When Congress enacted the Taft-Hartley Act in 1947, the Court reasoned, it intended to create the same union shop regime that the Court invented as a matter of constitutional avoidance fourteen years later in *Street*.[57]

Apart from the anachronism of assuming Congress intended something that the Court only dreamed up years later, the problem with the Court's analysis in *Beck*, as noted by Justice Blackmun in a dissent joined by Justices O'Connor and Scalia, was that neither the plain language of section 8(a)(3) of the NLRA nor its legislative history supported it. The statute expressly allows agreements that require employees to become union members as a condition of employment in a workplace where they receive the benefits of union representation, and nothing in section 8(a)(3) gives "any employee, union member or not, the right to pay less than the full amount of regular dues and initiation fees charged to all other bargaining-unit employees."[58] Moreover, as the dissent pointed out, nothing in the statute "limits, or even addresses, the purposes to which a union may devote the moneys collected pursuant to [a union security] agreement."[59]

In sum, as we will discuss more fully below, the right of dissident employees to refuse to support union political activities began as a matter of constitutional avoidance in *Street*, although the argument for state action is specious. In no other situation has federal statutory preemption of state regulation of private sector employment relation-

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[54] *Id.* at 800.

[55] *Id.* at 814–15.

[56] 487 U.S. 735 (1988).

[57] *Id.* at 745–47.

[58] *Id.* at 767 (Blackmun, J., concurring in part and dissenting in part).

[59] *Id.* at 769. A critique of the Court's statutory interpretation in *Beck* has been persuasively made by Professor Kenneth Dau-Schmidt, *supra* note 24, at 54–55. Professor Martin Malin has noted that the Court's determination that the union security clause at issue in *Beck* violated the duty of fair representation was inconsistent with its entire body of cases on the duty of fair representation. Malin, *supra* note 20, at 152.

ships created the state action necessary to give employees First Amendment protections from employer discipline.[60] Nevertheless, the Court extended the right to public sector employees in *Abood*, where there is clearly government action but, as we explain below, generally employees do not have First Amendment rights to make or refrain from political speech. By the time the Court finally granted all private sector employees a right to opt out of union political expenditures in *Beck*,[61] it lacked a plausible argument for doing so as a matter of statutory language or legislative history—as even Justice Scalia agreed in dissent[62]— but clearly believed as a matter of policy that employees should have the right to resist subsidizing union political activities.[63]

The Court created an elaborate set of rules governing the opt-out process. Unions must maintain a system for employees to challenge the union's accounting and determination of dissenters' fair share of chargeable expenses and must notify employees annually about the system and allow employees to make annual objections.[64] This is called a *Hudson* notice.[65] The Court also stipulated the kinds of expenses that are and are not chargeable to objectors.[66] Objecting em-

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60 If federal preemption of state laws regulating employment contracts renders enforcement of the affected provisions of the employment agreement state action, then the Court's entire jurisprudence under the Federal Arbitration Act preempting state regulation of arbitration agreements in employment contracts also renders such agreements state action. *Cf.* AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1751–53 (2011) (holding that Federal Arbitration Act preempted a California state rule governing unconscionability of class arbitration waivers in consumer contracts); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (construing section 1 of the Federal Arbitration Act as exempting contracts of employment of transportation workers but no other employment contracts from Federal Arbitration Act's coverage). An employee fired for refusing to sign an agreement waiving her right to bring a sexual harassment and retaliation suit in court would, on that analysis, have a possible First Amendment, Fourteenth Amendment, and perhaps even Seventh Amendment claim against the private sector employer.

61 *See Beck*, 487 U.S. at 741–42.

62 *Id.* at 768 (Blackmun, J., joined by O'Connor, J., and Scalia, J., concurring in part and dissenting in part).

63 Professor Sachs has also noted the confusion in the Supreme Court's cases about whether the opt out-rule is based on constitutional requirement, constitutional avoidance, or statutory interpretation. Sachs, *supra* note 4, at 817.

64 Unions must provide an accounting of annual expenditures to enable dissenters to challenge the union's determination of which expenses are chargeable. Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986). The system governing private sector workers is described in *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 232–33 (1995).

65 *See, e.g.*, Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 878 (1998) ("With the *Hudson* notice, plus any additional information developed through reasonable discovery, an objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable.").

66 Locke v. Karass, 129 S. Ct. 798, 802 (2009) (finding that litigation expenses are chargeable if the subject of the litigation is chargeable); *Miller*, 535 U.S. at 877–79 (holding that agency-fee objectors who have not agreed to a union's arbitration process may not be required to exhaust arbitral remedy before challenging the union's calculation in federal court); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 524 (1991) (holding that local bar-

ployees may be compelled to pay their fair share of "the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."[67] Under this standard, unions may charge objecting employees for the costs of negotiating and administering the collective bargaining agreement as well as the costs associated with the union's national convention, the union's social activities, certain litigation expenses, and the portions of the unions' publications reporting on chargeable activities.[68]

In the 1980s and 1990s, in legislation and ballot initiatives, union opponents began to assert that allowing employees to opt out of challenged expenditures was insufficient protection for dissenters. They insisted that only a system requiring employees to opt in would protect dissenters against compelled speech.[69] Some of these measures were framed as or included in campaign finance reform measures. One such initiative, Initiative 134, was adopted in 1992 in Washington.[70] It limited campaign expenditures and prohibited a labor organization from using fees collected from nonmembers "to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."[71] The law did not require corporations to secure shareholder consent to make such expenditures.[72]

A conservative legal organization brought a series of suits against the Washington Education Association (WEA) challenging its political expenditures and fundraising under Initiative 134.[73] In one such suit,

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gaining representative may charge objecting employees their pro rata share of costs associated with chargeable activities).

67 Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447–48 (1984). Implementing that standard, the Court adopted a three-part test for determining whether the expenses are chargeable to dissenters: (1) whether they support "activities germane to collective bargaining"; (2) whether they involve "additional interference with the First Amendment interests of objecting employees" beyond that "already countenanced" by union representation; and (3) if so, whether the additional interference is "nonetheless adequately supported by a governmental interest." *Id.* at 455–56.

68 *Id.* at 448–54; *see also Lehnert*, 500 U.S. at 519 (reiterating test and elaborating on chargeability analysis).

69 *See, e.g.*, Brief for Petitioner at 38–39, Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007) (No. 05-1589) (characterizing union opt-in requirement as a minimal protection for dissenters' First Amendment rights).

70 *See id.* at 5.

71 WASH. REV. CODE § 42.17A.500 (2012).

72 Interestingly, even some who had initially supported Initiative 134 later concluded that its prohibitions on campaign expenditures had unintended consequences and failed "to limit the influence of special interests." Editorial, *Initiative 134: Is This What We Voted for?*, SEATTLE TIMES, Oct. 14, 1993, http://community.seattletimes.nwsource.com/archive/?date=19931014&slug=1725945.

73 *See* State *ex rel.* Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n, 130 P.3d 352, 355 (Wash. 2006), *vacated*, 551 U.S. 177 (2007); State *ex rel.* Evergreen Freedom

the Washington Supreme Court held that the state law unconstitutionally infringed the right of the WEA to engage in political activity.[74] In *Davenport v. Washington Education Ass'n*, the Supreme Court reversed the Washington Supreme Court and upheld the statute in a five-to-four decision with a majority opinion by Justice Scalia.[75] The Court reasoned that the statute did not restrict the union's speech but simply limited "the union's extraordinary *state* entitlement to acquire and spend *other people's* money."[76] The Court made clear that the opt-out regime it had devised in prior cases was sufficient to protect dissenters but that states could give dissenting employees more rights than the Court had.[77]

B. *Knox v. SEIU, Local 1000*

Knox goes beyond anything the Court previously held by concluding that the First Amendment requires an opt-in regime with respect to certain forms of union fees. In other words, what the Court in *Davenport* said that a state could do by law, the Court in *Knox* found to be a constitutional requirement. Moreover the Court's majority suggested in dicta that its reasoning would apply not only to the special assessment at issue in that case but might also apply to all union fundraising from represented employees, including annual dues and fees.

The *Knox* decision is the result of an effort by then California Governor Arnold Schwarzenegger to use the initiative process to significantly decrease the influence of public employee unions in that state. In June 2005, Governor Schwarzenegger called for a special election to consider various ballot measures, including one (Proposition 75) that would have required unions to use an opt-in system as in *Davenport* and another (Proposition 76) that would have given the governor the unilateral power to reduce state appropriations for public sector employee compensation.[78] In response, the Service Employees International Union (SEIU), which represents many public employee unions in California, joined a coalition of labor organizations in launching a campaign to defeat the ballot measures. To fund the

Found. v. Wash. Educ. Ass'n, 999 P.2d 602, 604–05 (Wash. 2000); State *ex rel.* Evergreen Freedom Found. v. Wash. Educ. Ass'n, 49 P.3d 894, 899–900 (Wash. Ct. App. 2002).

74 *See Wash. Educ. Ass'n*, 130 P.3d at 364–65.

75 551 U.S. 177, 191–92 (2007).

76 *Id.* at 187.

77 *Id.* at 185. The Supreme Court also held that payroll deduction—the system that unions have long insisted upon as necessary to enable them to exercise their rights to bargain and to engage in other expressive activities—is not constitutionally protected. Thus, when Idaho decided to weaken unions by prohibiting the collection of union dues and fees through payroll deduction, the Supreme Court rejected a challenge that the statute violated the union's First Amendment rights. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 364 (2009).

78 *See* Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2285 (2012).

campaign, the SEIU proposed to adopt an emergency temporary assessment of one quarter of one percent of an employee's wage.[79] For an employee earning ten dollars an hour, that would amount to two and a half cents an hour or one dollar a week. The assessment lasted for eight months before the next opt-out opportunity.[80] In other words, an employee who worked forty hours every week at ten dollars an hour and paid the entire assessment before being allowed to opt out would have paid thirty-two dollars. Because it turned out that only about thirty percent of the union's total expenditures, including the special assessment, were nonchargeable in the 2005–2006 year, the employee would be entitled to recoup about ten dollars.[81]

Although the annual period for registering objections to union spending under *Hudson*[82] had expired, the SEIU sent a letter to its members and fee payers notifying them of the temporary fee increase and explaining the need for it. The union did not provide a new *Hudson* notice informing employees of their right to opt out, nor did it provide a new opportunity to opt out.[83] However, once dissenters complained, the union allowed its fee payers (those who had filed objections pursuant to the last *Hudson* notice), per the last set of calculations done under *Hudson* to determine the chargeability of expenses in the prior year, to pay only fifty-six percent of the temporary increase.[84]

As it happened, the SEIU's nonchargeable expenditures were lower in the fiscal year that began in July 2005 than they had been in the year ending June 2005. Only thirty-one percent of its expenditures were nonchargeable, as compared to forty-four percent in the prior year.[85] Hence, the dissenters ended up being charged less, including the emergency temporary assessment, than was their fair share of the union's annual expenses. Thus, on the facts of the case, *none of the plaintiffs was actually forced to subsidize any political speech*; indeed, they paid less than their share of the contract negotiation and administration expenses. In other words, union members were forced to subsidize the nonmembers' share of the union's contract administration expenses.

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79 Knox v. Cal. State Emps. Ass'n, Local 1000, 628 F.3d 1115, 1118 (9th Cir. 2010), *rev'd*, 132 S. Ct. 2277 (2012).

80 *Id.*

81 As explained above, chargeable expenses are those deemed to be for the collective bargaining activities, which nonmembers must pay for, while nonchargeable expenses are those for political activities, which nonmembers do not need to pay for. *See supra* notes 64–68.

82 Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 310 (1986); *see supra* text accompanying notes 63–67.

83 *Knox*, 132 S. Ct. at 2286.

84 *Id.*

85 *Id.* at 2301 (Breyer, J., dissenting).

Nevertheless, a class of employees represented by the National Right to Work Legal Defense Foundation filed suit challenging the temporary assessment and, in particular, the SEIU's failure to issue a separate *Hudson* notice in July–August 2005 and to provide an additional opportunity for employees to opt out.[86] The district court, without oral argument and in an unpublished opinion, granted summary judgment for the plaintiffs, finding that the union intended to use the entire temporary assessment for nonchargeable expenses.[87] It ordered the union to issue a new *Hudson* notice and to provide those who objected with a full refund of their contributions to the temporary assessment.[88]

The Ninth Circuit reversed in a split decision, holding that it was not necessary to issue a new *Hudson* notice for a midyear special assessment.[89] The court held that the union's procedure, including its letter to all employees notifying them of the nature and purpose of the assessment and its decision to charge anyone who had previously objected according to the prior year's chargeability percentage, accommodated the First Amendment rights of union employees to engage in political fundraising and the First Amendment rights of the nonunion employees to object.[90]

The dissenting employees sought and obtained certiorari on two questions: (1) whether a *Hudson* notice is required for a "special union assessment intended solely for political and ideological expenditures", and (2) whether payment of agency fees may be compelled to fund "political expenditures for ballot measures."[91] The briefing both on the petition for certiorari and on the merits focused on whether a *Hudson* notice should be required for a midyear special assessment; whether the union's statement that the assessment would be used to defeat Propositions 75 and 76 meant that the entire assessment was not chargeable and, if not, how to determine the proportion of chargeable expenses in the assessment; and whether to treat those who had opted out in response to the June 2005 *Hudson* notice differently from those who had not.[92]

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86 Plaintiffs' Verified Class Action Complaint at 10, Knox v. Westly, No. 2:05-cv-02198-MCE-KJM, 2008 WL 850128 (E.D. Cal. Mar. 28, 2008).

87 *Knox*, 2008 WL 850128, at *7, *12.

88 *Id.* at *12.

89 Knox v. Cal. State Emps. Ass'n, Local 1000, 628 F.3d 1115, 1122–23 (9th Cir. 2010), *rev'd*, 132 S. Ct. 2277 (2012).

90 *Id.* at 1120.

91 Petition for Writ of Certiorari at i, Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277 (2012) (No. 10-1121), 2011 WL 882172, at *i.

92 *See* Petition for Writ of Certiorari, *supra* note 91, at 16–27; Petitioners' Reply Brief on the Merits at 8–11, *Knox*, 132 S. Ct. 2277 (No. 10-1121), 2011 WL 6468686, at *8–11; Brief for Petitioners at 8–11, *Knox* 132 S. Ct. 2277 (No. 10-1121), 2011 WL 4100440, at *8–11.

The Supreme Court reversed the Ninth Circuit.[93] In a five-to-two-to-two decision, the majority did not simply decide the issue presented and hold that a separate *Hudson* notice was required, along with a new opportunity to opt out. Nor did the majority hold that the chargeability of the temporary assessment could not be determined using the prior year's formula. Instead, in a broad opinion by Justice Alito, the Court held that any special assessment or dues increase may be levied only after issuing a fresh *Hudson* notice and *only on those employees who opt in.*[94] As Justice Sotomayor's concurrence and Justice Breyer's dissent both pointed out, the question of whether to switch from an opt out-system to an opt-in system was not briefed or argued in the case or discussed in the courts below.[95]

After two paragraphs of quotations and string cites of cases on the importance of the First Amendment freedoms of speech and association, and a short discussion of a case which found unconstitutional a federal statute requiring mushroom handlers to pay assessments to promote mushroom sales,[96] Justice Alito's opinion began by casting into doubt the constitutionality of mandatory payment of fees to public sector unions:

> Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a "significant impingement on First Amendment rights." Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.[97]

The opinion then noted the justification for unions charging nonmembers for services—to prevent free riding on the unions' efforts—but immediately cautioned that "[s]uch free-rider arguments, however, are generally insufficient to overcome First Amendment objections."[98] The majority asserted that the free rider justification for compelling nonmembers to pay a portion of union dues "represents

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93 *Knox*, 132 S. Ct. at 2296.

94 *Id.*

95 *Id.* at 2298 (Sotomayor, J., concurring); *id.* at 2306 (Breyer, J., dissenting).

96 *Id.* at 2288–89 (discussing United States v. United Foods, Inc., 533 U.S. 405 (2001)). In its discussion of *United Foods*, however, the majority entirely overlooked its own precedent upholding the validity of another statutory regime requiring tree fruit producers to contribute to an advertising scheme. Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997). For further discussion of these cases, see *infra* text accompanying notes 159–173.

97 *Knox*, 132 S. Ct. at 2289 (internal citations omitted) (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks,466 U.S. 435, 455 (1984)).

98 *Id.*

something of an anomaly—one that we have found to be justified by the interest in furthering 'labor peace.'"[99]

The majority began its analysis of opt-out and opt-in regimes for assessing fees by noting that the long-settled opt-out rule "represents a remarkable boon for unions," and that "[c]ourts 'do not presume acquiescence in the loss of fundamental rights.'"[100] The opinion then posed a series of rhetorical questions doubting the validity of opt out: "[W]hat is the justification for putting the burden on the nonmember to opt out of making such a payment? . . . And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues?"[101] Rather than discussing the possible answers to its questions, the opinion then asserted that "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles"[102] and criticized *Street* for failing to consider the constitutional implications of an opt-out requirement.[103] In its final sentence before turning to the facts of the case, the majority ominously asserted that the Court's prior cases authorizing the opt-out system "approach, if they do not cross, the limit of what the First Amendment can tolerate."[104]

Regarding the union's failure to provide a *Hudson* notice for the special assessment, the majority opinion posited that some employees who did not object to paying full dues in June might have chosen in August not to support the SEIU's political objectives.[105] The majority particularly criticized the union for failing to require opt in for money spent to oppose Proposition 75, which if adopted, would have required an opt-in regime. In rejecting the union's contention that the next year's *Hudson* notice would have given objecting employees the chance to recoup whatever they had contributed to the prior year's nonchargeable expenses, the majority insisted that "even a full refund would not undo the violation of First Amendment rights. . . . [F]or nonmembers who disagreed with the SEIU's electoral objectives, a refund provided after the union's objectives had already been achieved would be cold comfort."[106] In a footnote, the majority rejected the idea that a new *Hudson* notice should be required only when a special

99 *Id.* at 2290 (quoting Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 303 (1986)).

100 *Id.* (quoting College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999)).

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 2291.

105 *Id.* at 2292.

106 *Id.* at 2292–93.

assessment is imposed for political purposes: "[A] union's money is fungible, so even if the new fee were spent entirely for nonpolitical activities, it would free up other funds to be spent for political purposes."[107]

The Court also rejected the use of the prior year's determination of the proportion of chargeable expenses for a special assessment, finding it unreasonable to assume that the same proportion of a special assessment will be chargeable as were the expenses for the entire previous year.[108] The Court also found it infeasible to devise a new breakdown for chargeable and nonchargeable expenses for a special assessment because there would be no reason to trust the union's assertion about what an assessment would be used for.[109] The Court concluded:

> [B]y allowing unions to collect *any* fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers. In the new situation presented here, we see no justification for any further impingement. . . . Therefore, when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact *any* funds from nonmembers without their affirmative consent.[110]

Justice Sotomayor, joined by Justice Ginsburg, concurred in the judgment on the grounds that unions must issue a new *Hudson* notice for a special assessment that is intended for political activities, that employees should be given the opportunity to opt out, and that the union should not be able to collect nonchargeable expenses from those who previously objected.[111] Their opinion criticized the majority for deciding the opt-in issue, which had not been briefed or argued in the case. As Justice Sotomayor pointed out, the petitioners' briefs never even mentioned opt in.[112] The concurring opinion also pointed out the uncertainty surrounding the scope of the Court's holding: Is opt in required for *any* special assessment, even one to fund indisputably chargeable activities? If opt out still applies to special assessments intended to fund a mix of chargeable and nonchargeable activities, may nonmembers opt out of the entire assessment or only the nonchargeable portion? What process must unions use to determine whether nonmembers have to pay anything?[113] Justice

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107 *Id.* at 2293 n.6.
108 *Id.* at 2294.
109 *Id.* at 2294–95.
110 *Id.* at 2295–96 (emphasis added).
111 *Id.* at 2296 (Sotomayor, J., dissenting).
112 *Id.* at 2298 n.2.
113 *Id.* at 2298–99.

Sotomayor's opinion also sharply criticized the breadth of the majority's dicta casting doubt on the constitutionality of the opt-out rule for regular union dues.[114]

Justice Breyer, joined by Justice Kagan, dissented. Justice Breyer explained the difficulty of applying the *Hudson* rule to allow dissenters to opt out of a portion of dues in the context of midyear assessments. Noting that no party in the case had challenged the constitutionality of the *Hudson* system allowing opt out based on an audit of the prior year's expenses, the dissent explained that if the regular dues system is not unconstitutional, the special assessment is not either.[115] The fairest and most efficient way to administer a system that allows dissenters to avoid funding political expenses is to rely on annual audits of past years because one cannot audit future expenses and any other system is fraught with problems and is no more likely to protect dissenters than the audit system.[116] A once-a-year system for registering objections balances the rights of dissenters against the administrative burden and expense that would accompany allowing employees to object to paying full dues every quarter or every month.[117] The dissent noted that the majority did not explain why new dissenters could not be protected by being allowed simply to withhold the same forty-four percent for nonchargeable expenditures that those who had objected in June could withhold.[118] The dissent also noted that not even a "temporary constitutional harm" had been done to those who had not filed an objection in response to the June 2005 *Hudson* notice and thus had to pay the full special assessment because the union's total chargeable expenses in 2005–2006 were larger than in 2004–2005, so dissenters actually paid less than their fair share.[119]

Finally, Justice Breyer's dissent echoed Justice Sotomayor's criticism of the majority's adoption of an opt-in rule that no party had advocated, particularly since "each reason the Court offers in support of its 'opt-in' conclusion seems in logic to apply, not just to special assessments, but to ordinary yearly fee charges as well."[120] As Breyer noted, an "ongoing, intense political debate" across the country con-

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114 *Id.* at 2299 ("To cast serious doubt on longstanding precedent is a step we historically take only with the greatest caution and reticence. To do so, as the majority does . . . is both unfair and unwise.").

115 *Id.* at 2302 (Breyer, J., dissenting).

116 *Id.* at 2301–03.

117 *Id.* at 2301–02 ("This kind of basic administrative system is imperfect[, but it] . . . enjoys an offsetting administrative virtue. . . . It . . . gives workers reliable information. It gives workers advance notice of next year's payable charge. It gives nonmembers a 'reasonably prompt' opportunity to object.") (quoting Chi. Teachers Union, Local No. 1. v. Hudson, 475 U.S. 292, 310 (1986)).

118 *Id.* at 2305.

119 *Id.* at 2302.

120 *Id.* at 2306.

cerns "whether, the extent to which, and the circumstances under which a union that represents nonmembers in collective bargaining can require those nonmembers to help pay for the union's (constitutionally chargeable) collective-bargaining expenses."[121] Although, as the dissent noted, the Court held in *Davenport* that states can adopt statutes shifting from opt out to opt in, the Court had never said that the Constitution compels it. "There is no good reason for the Court suddenly to enter the debate, much less now to decide that the Constitution resolves it."[122]

At the very least then, *Knox* is significant in that it is the first time the Supreme Court has said that an opt-out system is not sufficient to protect nonunion employees from compelled speech and that an opt-in regime is constitutionally required. The broad language of the Court's majority suggests that five Justices may not be content to limit their new rule to special assessments but rather are poised to say that opt in is always constitutionally required. As explained below the most disturbing dicta in the Court's opinion calls into question the constitutionality of collective bargaining based on exclusive representation and majority rule.[123]

II
THE UNDERLYING FIRST AMENDMENT PRINCIPLES: COMPELLED SPEECH, FREEDOM OF ASSOCIATION, AND THE FREE SPEECH RIGHTS OF GOVERNMENT EMPLOYEES

Knox and the cases concerning the rights of nonunion members that preceded it involve three interrelated strands of First Amendment jurisprudence: the right to be free from compelled speech, the expressive rights of associations, and the speech rights of government employees. As explained in Part I, the Supreme Court's majority in *Knox* found that to avoid compelled speech, unions and employers cannot agree to any contract except one that allows nonunion members to opt into supporting the special assessment.[124] In doing so, the Court gave no apparent weight to the right of the association or its majority to be able to govern itself or participate effectively in the political process. The Court treated the law as to each of these strands of First Amendment jurisprudence as clear and settled, when in reality each is confused.

An examination of First Amendment principles shows that the Court's decision in *Knox* cannot be the result of following precedent.

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121 *Id.*
122 *Id.* at 2307.
123 *See infra* Part IV.
124 *See supra* notes 93–110.

Indeed, the Court's decision in *Knox* is inconsistent with major, prior free speech decisions. Moreover, this examination of the underlying free speech principles demonstrates the need for a reconceptualization as to when forced speech occurs and violates the First Amendment and as to how the speech rights of an entity are to be balanced against the interests of its dissenting members.

A. Compelled Speech

The Court has long been inconsistent in deciding what constitutes compelled speech, when forcing the use of private property for speech is compelled speech, and when mandatory financial contributions—the issue in *Knox*—are compelled speech.

1. *What Constitutes Compelled Speech?*

The initial Supreme Court case concerning compelled speech was *West Virginia State Board of Education v. Barnette*, which declared unconstitutional a state law that required that children salute the flag.[125] Justice Robert Jackson, writing for the Court, famously said:

> [T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[126]

The Court followed this principle in other cases, such as *Wooley v. Maynard*, where it ruled that an individual could not be punished for blocking out the portion of his automobile license plate that contained the New Hampshire state motto, "Live Free or Die."[127] The Court said that

> the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."[128]

Both *Barnette* and *Wooley* involved actual compulsion to speak or to display a message. *Knox*, of course, involved neither. And it is notable, in the context of *Knox*, that the Supreme Court found in both *Barnette* and *Wooley* that the First Amendment simply required that people be able to opt out. In *Barnette*, the Supreme Court did not

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125 319 U.S. 624, 642 (1943).

126 *Id.* at 633, 642.

127 430 U.S. 705, 713 (1977).

128 *Id.* at 714 (citation omitted) (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

prevent schools from beginning each day with a flag salute; it simply said that children could opt out and not participate. In *Wooley*, the Court said that those who object to "Live Free or Die" on their license plate could opt out by putting tape over it. The Court did not require that New Hampshire have those who wanted the phrase on their license plates make a special effort to get it.

Apart from the rare law, like that in *Barnette*, that forces someone to utter words, the Court has not been consistent in deciding whether there is compelled speech when a person or entity is forced to convey a message. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, the Court rejected a claim that requiring universities to allow military recruiters equal access to campus interviewing as a condition for receipt of federal funds was impermissible compelled speech.[129] Most law schools refused to allow the United States military to use campus facilities for recruiting because they refused permission to all discriminatory employers to recruit, and they believed that allowing use of the facilities would send a message to students that they endorsed the military's policy of excluding gays and lesbians.[130] When Congress enacted the Solomon Amendment, which denied federal funding to universities that excluded the military from campus facilities, several law schools asserted a First Amendment right to refuse to condone sexual orientation discrimination by employers.[131]

The United States Court of Appeals for the Third Circuit found that the Solomon Amendment impermissibly forced colleges and universities to express support for a policy of which they disapproved.[132] The Supreme Court unanimously rejected this argument and stated:

> The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.[133]

But this is far too facile a distinction, especially when compared to *Knox*. In *Knox* and the cases that preceded it, the Court believed that spending money to facilitate a third person expressing a message constituted compelled speech.[134] But in *FAIR*, the Court insisted that

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129 547 U.S. 47, 62 (2006).

130 *See id.* at 52–53.

131 *See id.*

132 *See* Forum for Academic & Institutional Rights, Inc. v. Rumsfeld, 390 F.3d 219, 236 (3d Cir. 2004), *rev'd*, 547 U.S. 47 (2006).

133 *FAIR*, 547 U.S. at 60 (alteration in original) (citation omitted).

134 *See supra* notes 42–49, 97.

expending money to enable a third party to convey a message is not compelled speech because one remains free to express whatever views one may have on the matter in question.[135] The latter, of course, was the position that Justice Frankfurter took in his dissent in *Street*: payment of union dues is not compelled speech because dissident employees retain the right to express their own views.[136]

The special assessment in *Knox*, in the words of *FAIR*, regulated conduct, not speech; it affected what nonmembers must do (pay money), not what they may or may not say. The Court in *FAIR* was unconcerned about law schools being forced to expend resources to facilitate the military's recruiting on campus even though there was no opt out, while the Court in *Knox* focused entirely on nonmembers being forced to expend resources even though there was an opt out available.

2. *When Is the Compelled Use of Private Property Impermissible?*

The Court has also considered compelled speech under the First Amendment when the government forces people to use their property for speech by others. The cases in this area are also difficult to reconcile.

In some instances, the Court has held that the First Amendment is violated if the government forces owners to make their property available for expressive purposes. For example, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court unanimously invalidated a state law that required newspapers to provide space to political candidates who had been verbally attacked in print.[137] The Court emphasized that the freedom of the press gave to the newspaper the right to decide what was included or excluded.[138]

Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court declared unconstitutional a utility commission regulation that required that a private utility company include in its

135 *See FAIR*, 547 U.S. at 60. Nor can it be asserted, under the Supreme Court's precedents at least, that maintaining or refusing to maintain a discriminatory employment or membership policy is not a form of First Amendment expression. The Court in *Boy Scouts of America v. Dale* expressly held that the Boy Scouts have a First Amendment right to express a message condemning homosexuality by discriminating against gays in employment and membership. 530 U.S. 640, 659 (2000). If the Boy Scouts have a First Amendment right to express that message by discriminating in employment, it is hard to see why law schools do not have the same First Amendment right to express the opposite message by refusing to discriminate or to allow their students to be the victims of discrimination.

136 *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 805–06 (1961) (Frankfurter, J., dissenting).

137 418 U.S. 241, 256–58 (1974).

138 *See id.* at 258. The Court, however, allowed this as to the broadcast media. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 373–75 (1969).

billing envelopes materials prepared by a public interest group.[139] Because utilities enjoy a monopoly on the provision of services, they enjoy a monopoly on the ability to send a bill each month that their customers must open and read. The utility commission sought to provide a more balanced presentation of views on energy issues; the public interest group's statements were to be a counterpoint to the statements by the utility companies.[140] The Court found that such compelled access violated the First Amendment. Justice Powell, writing for the Court, said that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."[141]

In contrast, in other cases the Court has found no compelled speech when an entity is forced to use its property or resources to convey a message with which it disagrees. In *PruneYard Shopping Center v. Robins*, shopping center owners argued that their First Amendment rights were violated by a California Supreme Court ruling that protestors had a right to use their property for speech under the state constitution.[142] The shopping center owners specifically invoked *Wooley v. Maynard* and said that forcing them to allow speech was impermissible coerced expression.[143] The Supreme Court disagreed and found no violation of the First Amendment. The Court expressly distinguished *Wooley* and explained that the shopping center is

> not limited to the personal use of appellants[,] . . . [but] is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.[144]

Moreover, the Court said that "no specific message is dictated by the State to be displayed on appellants' property. . . . [A]ppellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."[145]

It is difficult to reconcile *PruneYard* with *Pacific Gas & Electric*. The Court's asserted distinction—that the owners in *PruneYard* had not objected to the particular message being conveyed as they had in *Pacific Gas & Electric*—is questionable. The shopping center owners wanted

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139 475 U.S. 1, 20–21 (1986).

140 *See id.* at 12–13 & n.9.

141 *Id.* at 9.

142 447 U.S. 74 (1980). The Supreme Court previously had held that there is no First Amendment right of access to privately owned shopping centers for speech purposes. Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976).

143 *See Robins*, 447 U.S. at 85–87.

144 *Id.* at 87.

145 *Id.*

to exclude the speakers from using their property enough to litigate the case to the Supreme Court. If there is a right of private property owners to avoid compelled use of their property, their right to do this should not depend on the content of their views relative to the demonstrators'.

There is a real tension between *Knox* and the Court's decision in *PruneYard*. In the latter, the Court was unconcerned about property owners being forced by state law to support views they oppose, but in *Knox*, the Court's decision was based entirely on not allowing state law to be used to require nonunion members to support political activities they oppose.

3. *When Are Compelled Contributions a Violation of the First Amendment?*

As explained in Part I, *Knox* holds that it violated the First Amendment for a union to specially assess nonmembers for political activities without nonmembers having to opt into supporting them.[146] But even in the area of compelled contributions, the Court has been markedly inconsistent in deciding whether there is a First Amendment violation.

As explained in Part I, in *Abood v. Detroit Board of Education*, the Court said that the nonmembers of a union could be required by contract to pay a charge to subsidize the collective bargaining activities of the union but that it violated the First Amendment to require the nonmembers to pay for ideological causes with which they disagreed.[147] The Court said that the "heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[148]

The Court reaffirmed and applied *Abood* in *Keller v. State Bar of California*.[149] The Court said that the Bar could use compulsory dues only if the dues were "reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'"[150] The Court explained that the Bar could collect dues from all members to pay for bar-related activities. But the Court added:

> Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to

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146 *See supra* Part I.B.

147 *See supra* Part I.A.

148 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977).

149 496 U.S. 1 (1990).

150 *Id.* at 14 (quoting Lathrop v. Donohue, 367 U.S. 820, 843 (1961)).

their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.[151]

In sharp contrast to *Abood* and *Keller*, the Court upheld mandatory student activity fees at public universities. In *Board of Regents of the University of Wisconsin System v. Southworth*, the Court unanimously upheld the permissibility of requiring college students to pay money each semester to a fund that subsidizes student activities.[152] Conservative University of Wisconsin law students challenged their having to pay the university's student activities fee, part of which was given to groups with which they disagreed.[153] They argued under *Abood* and *Keller* that this was forced association that violated their First Amendment rights.[154]

The Supreme Court rejected the challenge. The Court emphasized the importance of student activity fees in universities in providing a diversity of speakers and events.[155] Justice Kennedy, writing for the Court, said that such a fee is constitutional so long as the university distributes the funds in a viewpoint-neutral manner.[156] In this case, the students had stipulated as to the viewpoint-neutral disbursement of the funds, so no First Amendment violation was found.[157]

Southworth cannot be easily reconciled with *Abood* and *Keller*. In all three cases, there were compelled contributions. In all three cases, the challengers objected that their money was being spent to support political activities with which they disagreed. The difference is that in *Southworth*, the Court upheld the compelled expenditures because it accepted the importance of having student activity fees and the right of universities to convey messages with which some students disagree. In *Abood* and *Keller*, by contrast, the Court did not find a sufficiently important interest in requiring support for the political activities of a union or a state bar. In other words, the distinction is not in whether there was compelled speech but in whether it was sufficiently justified in the Court's view. Relatedly, when applying *Keller*, courts have been inconsistent in drawing the line between nonchargeable political activities and other expenses. A state bar may charge dissenting members to fund a public relations campaign focusing on improving the reputation of lawyers generally, but a union may not charge dissenting employees to fund a similar campaign focusing on explaining to employees and to the general public the advantages of union representa-

151 *Id.* at 16.
152 529 U.S. 217, 220–21 (2000).
153 *Id.* at 221.
154 *Id.* at 227–28.
155 *Id.*
156 *Id.* at 234.
157 *Id.*

tion for teachers.[158] Other than that some courts consider the poor reputation of lawyers to be a more pressing problem than public skepticism of teachers' unions, there is no basis to distinguish why one is not unconstitutional compelled speech and the other one is.

One other area where the Court has considered mandatory assessments and again been inconsistent is in the context of government requirements that agricultural producers contribute to funds for product advertising. In two decisions, *Glickman v. Wileman Bros. & Elliott*[159] and *United States v. United Foods, Inc.*,[160] the Court came to opposite conclusions about the constitutionality of such programs. In *Glickman*, the Court upheld regulations issued pursuant to the Agricultural Marketing Agreement Act of 1937 that required fruit producers to contribute funds to pay for generic advertising for fruit.[161] Wileman Brothers & Elliott, California fruit producers, challenged the regulation as impermissible compelled speech and association.

The Supreme Court, in a five-to-four decision, rejected the challenge and upheld the federal law. Justice Stevens, writing for the majority, said that "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit."[162] Justice Stevens said that neither the challengers' desire to differentiate their own product nor their belief that the money was not being well spent provided a basis for a First Amendment violation.[163]

But four years later, in *United States v. United Foods, Inc.*, the Court came to the opposite conclusion and invalidated the requirement for mandatory assessments for product advertising contained in the Mushroom Promotion, Research, and Consumer Information Act.[164] The Act authorizes the Secretary of Agriculture to establish a Mushroom Council composed of mushroom producers and importers.[165] The council can impose mandatory assessments on handlers of fresh

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158 *Compare* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 528 (1991) (holding that public relations efforts designed to bolster the reputation of teachers are not chargeable), *with* Kingstad v. State Bar of Wis., 622 F.3d 708, 719 (7th Cir. 2010) (holding that state bar's PR campaign is chargeable even though *Lehnert* held a union PR campaign is not because building public confidence in the organized bar is "very different" from building confidence in teachers or their union).

159 521 U.S. 457 (1997).

160 533 U.S. 405 (2001).

161 521 U.S. at 463, 476–77.

162 *Id.* at 472.

163 *Id.* at 472–73.

164 533 U.S. at 408–09.

165 *Id.* at 408.

mushrooms to be used for generic advertising to promote mushroom sales.[166]

In a six-to-three decision, the Supreme Court declared the mandatory assessments on mushroom producers unconstitutional. Justice Kennedy, writing for the majority, began by emphasizing that the law forced the challengers to express "[t]he message . . . that mushrooms are worth consuming whether or not they are branded" instead of its preferred message that its brand was superior to the others.[167] Justice Kennedy said: "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side it favors," and therefore, "the compelled funding for the advertising must pass First Amendment scrutiny."[168]

The Court then proceeded to distinguish *Glickman.* For example, Justice Kennedy said that "in *Glickman,* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy," whereas "[h]ere . . . the advertising itself . . . is the principal object of the marketing scheme."[169] Justice Kennedy also said that in *Glickman,* California tree fruit producers were constrained in other aspects of their marketing, but no similar restrictions applied to mushroom producers who were not bound by the statute to "associate as a group which makes cooperative decisions."[170] Justice Kennedy said that it did not matter that the "party who protests the assessment here is required simply to support speech by others, not to utter the speech itself."[171] The Court expressly cited to *Abood* and *Keller* to support its conclusion that "the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity."[172]

It is hard to see a meaningful distinction between *Glickman* and *United Foods* other than that one involved mushrooms and the other tree fruit. Although the majority in *United Foods* insisted there was a persuasive distinction based on the presence of other regulations of tree fruit producers in *Glickman,* as Justice Breyer explained, it is hard to see why the existence of other regulations should matter in assessing the permissibility of mandatory assessments.[173] If compulsory pay-

166 *Id.*
167 *Id.* at 411.
168 *Id.*
169 *Id.* at 411–12.
170 *Id.* at 412–13.
171 *Id.* at 413.
172 *Id.*
173 *Id.* at 420–21 (Breyer, J., dissenting).

ment to subsidize advertising is compelled speech, it matters not whether the compelled speech is part of a complex regulatory regime or a simple one.

4. *So When Does Compelled Speech Violate the First Amendment?*

This review of the compelled speech cases shows that contrary to the assumption of the *Knox* majority, there is no coherent principle as to what is compelled speech or when it violates the First Amendment. In fact, the Court is markedly inconsistent on at least four distinct questions:

When does the ability of a speaker to express separate views prevent compelled funding from being regarded as compelled speech? In *FAIR*, the Court expressly found that there was not compelled speech because law schools still could say what they wanted.[174] In *PruneYard*, the Court noted that shopping centers could still express their own views.[175] But in *Knox*, it did not matter that nonunion members retained their ability to say whatever they want,[176] and the Court in *Street* ignored Justice Frankfurter's dissent asserting that payment of union dues does not compel speech because the individuals retain the right to express their own views.[177]

When are forced monetary contributions a violation of the First Amendment? In some financial support as compelled speech cases, the Court has upheld compulsory payments by pointing out that a person giving financial support to an entity that will spend it on speech with which the person disagrees is a less substantial intrusion on First Amendment rights than when the government itself forces or prohibits an individual to state a message. Thus, in upholding compulsory payment of student activity fees in *Southworth*, the Court emphasized that student fees would ultimately support a wide array of views, only some of which some students might find objectionable.[178] "It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."[179] Similarly, the Court has noted that requiring a financial contribution does not force the dissenter to state a position; it simply enables the third party to state a position. As the Court remarked in *Abood*,

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174 547 U.S. 47, 70 (2006).

175 447 U.S. 74, 87 (1980).

176 *See* 132 S. Ct. 2277, 2295–96 (2012).

177 *See* 367 U.S. 740, 806 (1961) (Frankfurter, J., dissenting).

178 529 U.S. 217, 232 (2000). Of course, the special assessment in *Knox* supported a wide array of views, not all of which were political. 132 S. Ct. at 2285. And the Court has never required union dissenters to prove that they actually disagree with all of the political views expressed by the union.

179 *Southworth*, 529 U.S. at 232.

> [a] public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint. Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing.[180]

By sharp contrast, the Court found in *Knox* that requiring individuals to pay a special assessment violated the First Amendment.[181]

When does allowing opt out satisfy the First Amendment? If associational speech constitutes compelled speech of dissenters, the question then becomes whether allowing opt out cures the problem. In cases such as *Wooley*, *Abood*, and *Keller*, the ability to opt out—by putting masking tape over the words on a license plate or declining to pay a portion of dues—is sufficient to meet the First Amendment.[182]

In the labor context, under cases like *Abood*, opt out has likewise long been deemed sufficient to meet the requirements of the First Amendment. In *Knox*, by contrast, opt out was expressly held to be insufficient to satisfy the First Amendment. Why is opt out necessary at all? Why, if it is necessary, is it sufficient? Why is opt out insufficient in other cases?

When is there a sufficiently compelling interest to justify compelled speech with no opt out? In *Southworth*, the Court found that the interest in having compulsory student activity fees meant there was no First Amendment violation, but in *Knox* the Court found that even an opt-out approach was not enough to satisfy the First Amendment.

B. The Rights of Associations

There is another interrelated strand of First Amendment law that underlies the Court's decision in *Knox*: the rights of the association as opposed to those of its dissenting members. In *Knox*, the Court gave no weight whatsoever to the First Amendment rights of the entity, the union, or the union's majority who wanted to express a political message. Rather, the focus was entirely on protecting dissenting members who did not want to support the union's opposition to ballot initiatives which would have been quite harmful to unionized government employees.[183]

Yet, in other contexts, the Court has made exactly the opposite choice, favoring the free speech of the entity and its majority over that of any dissenters. The most obvious example of this was the Court's decision in *Citizens United v. Federal Election Commission*, which held that

180 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 (1977).

181 132 S. Ct. at 2296.

182 Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990); *Abood*, 431 U.S. at 235–36; Wooley v. Maynard, 430 U.S. 705, 707–08 (1977).

183 *Knox*, 132 S. Ct. at 2289.

restrictions on independent expenditures by corporations violated the First Amendment.[184] In a five-to-four decision, with Justice Kennedy writing for the majority, the Court held that corporations have free speech rights and that the limits on independent expenditures are unconstitutional restrictions of core political speech. The Court declared: "[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[185]

Indeed, the Court was emphatic on the importance of protecting the speech rights of the corporate entity. It declared:

> The censorship we now confront is vast in its reach. The Government has muffled the voices that best represent the most significant segments of the economy. And the electorate has been deprived of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.[186]

The Court was untroubled by the fact that spending from general corporate revenues meant that the corporation was spending the shareholders' money on political activities without their consent and even against their political views. Prior Supreme Court decisions that had justified restrictions on corporate political expenditures were in part based on the need to keep shareholders' money from being spent on political matters in a manner they might oppose.[187] Prior to *Citizens United*, corporations could spend money on political campaigns by creating political action committees that raised funds for those activities.[188] In this way, all of the corporate funds spent on campaigns were raised from those who wanted to support the corporation's political activities. But *Citizens United* held that this is not enough to satisfy the free speech rights of corporations; the First

184 130 S. Ct. 876, 917 (2010).

185 *Id.* at 913.

186 *Id.* at 907 (citations omitted) (internal quotation marks omitted).

187 *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658, 666 (1990), *overruled by Citizens United*, 130 S. Ct. 876 (justifying the restriction on corporate spending in elections); *see also* McConnell v. FEC, 540 U.S. 93, 204 (2003), *overruled by Citizens United*, 130 S. Ct. 876 (explaining that having corporations engage in political expenditures through political action committees "allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members" (quoting FEC v. Beaumont, 539 U.S. 146, 163 (2003)).

188 *See McConnell*, 540 U.S. at 203 ("The ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy.").

Amendment gives to them the right to spend unlimited amounts of money from corporate treasuries to elect or defeat candidates.[189]

In *Citizens United*, the Court rejected the notion that restrictions on how an organization spends general treasury money are justified by the need to protect dissenting shareholders' rights. The Court offered three reasons for rejecting the compelled speech argument. First, protecting dissenters within the entity does not justify restricting the First Amendment rights of the entity to spend money because it gives the government power to restrict the speech activities of the entity.[190] Second, dissenters can protect their interests "through the procedures of corporate democracy."[191] Third, a restriction on the entity's political expenditures is both overinclusive and underinclusive as a method of protecting the First Amendment rights of dissenters. It was overinclusive because some dissenters might support the expenditures and underinclusive because it did not ban all speech that dissenters might oppose, just some political expenditures.[192] In a prior corporate campaign finance case, the Court rejected the purported state interest in protecting dissenting shareholders from subsidizing corporate political speech by pointing out that the restriction on corporate speech did not cover "business trusts, real estate investment trusts, [and] labor unions."[193]

All of the same objections could be made regarding restrictions on union speech, and the same arguments could be made for allowing the union to speak over the objections of nonmembers.[194] First, preventing unions from spending some of their general treasury on political messages restricts the entity's speech in the name of protecting the dissenters.

Second, in unions far more than in corporations, employees have an array of legal protections to enable them to challenge the leadership. Members have rights under statute or under most unions' constitutions and bylaws to vote on the assessment of dues, on ratification of a collective bargaining agreement, and on the leadership of the

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189 *Citizens United*, 130 S. Ct. at 913 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

190 *Id.* at 911.

191 *Id.* (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)).

192 *Id.*; *see also Bellotti*, 435 U.S. at 793 (holding the statute in question was underinclusive because "[c]orporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted").

193 *Bellotti*, 435 U.S. at 793.

194 In *Citizens, United and* Citizens United: *The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 39–46 (2011), Professor Charlotte Garden pointed out the inconsistencies between *Citizens United* and the dues objector cases. She suggested *Citizens United* might be the basis for asserting a challenge to the labor cases to expand not just "what unions are permitted to say but also with what money they can say it." *Id.* at 46. Our argument is consistent with hers, although we take a somewhat different approach.

union.[195] Shareholders have far fewer rights to protect their interests through the procedures of corporate democracy.[196]

Third, the Court never even mentioned overinclusiveness and underinclusiveness in addressing the constitutionality of the rules protecting dissenters in *Knox.* If a restriction on corporate political speech is constitutionally infirm because it is underinclusive in not protecting other organizational dissenters, it is difficult to see why a law that targets only labor unions is not similarly underinclusive and therefore constitutionally infirm. A ban on all union political expenditures is overinclusive in disregarding whether the dissenting employee opposes all or only some of the union's political messages, just as a ban on all corporate independent political expenditures is overinclusive. For example, some California public sector employees might have opposed Proposition 76 (which would have given the governor the unilateral power to cut appropriations for public employee compensation) even if they supported Proposition 75 (which would have required employees to opt in to union political expenditures). There is no reason why the overbreadth and the underbreadth problems are any different in *Citizens United* as opposed to *Knox.* And it is intellectually indefensible for the Court to use overbreadth or underbreadth as bases for rejecting limits on corporate political speech while never even mentioning those problems in upholding limits on union political speech.

The real reason why the Court thinks corporate political spending is not compelled speech and union political spending is was the one stated in an earlier campaign finance case, *First National Bank of*

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195 *See infra* Part IV.B.1 (noting that unions must allow members to vote on dues increases, vote on union contract ratification, speak at union meetings, and run for office). There are, however, some limits on employees' rights. Employees who refuse to become union members and who pay only agency fees cannot vote on union leadership. *See* Jennifer Friesen, *The Costs of "Free Speech"—Restrictions on the Use of Union Dues to Fund New Organizing,* 15 HASTINGS CONST. L.Q. 603, 638 n.117 (1988). Employees do not have statutory rights to vote on ratification of collective bargaining agreements, although most union constitutions and bylaws provide for employee votes on ratification. *See, e.g.*, Arnold v. U.S. Indus., Inc., Jane Colby Div., 111 L.R.R.M. (BNA) 2714, 2718 (W.D. Va. 1981) ("No vote of the membership is needed to validate [a modification to a collective bargaining agreement] in the absence of an express requirement in the agreement, or in the constitution or bylaws of the union."). And unions that do not represent private sector workers are not covered by the federal statute providing rights to vote on union leadership; whether state laws provide such rights to employees represented by public sector unions (such as the Fraternal Order of Police) varies from state to state.

196 Corporate law scholars have refuted the notion that shareholders can control corporate political speech through the channels of corporate democracy for decades, certainly since Victor Brudney's classic 1981 article, *Business Corporations and Stockholders' Rights Under the First Amendment,* 91 YALE L.J. 235 (1981); *see also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84 (2010) (acknowledging that corporate speech is not dependent on shareholder input and recommending lawmakers adopt rules requiring shareholder input).

Boston v. Bellotti: workers are compelled to fund union political speech but shareholders are not because the latter can simply sell their shares in the corporation but the former would have to quit their job.[197] As Professor Sachs has explained, the notion that quitting a job to avoid an objectionable contract term is coercion but selling shares in a corporation is not does not withstand careful scrutiny, particularly (but not exclusively) in those instances in which people cannot sell their shares because they are participants in a pension fund.[198]

The amount of compulsion inflicted by organizational speech may vary slightly among types of speech and organization, but the differences are slight. Investors can theoretically choose to buy shares only in companies whose political spending and advertising does not offend their views, although it may be difficult to find such a company among the Fortune 500. Pension plan participants, however, typically cannot choose the stocks held by their plans and thus cannot avoid whatever compulsion of speech is associated with owning stock. Similarly, those who buy life insurance may find it impossible to avoid their premium contributions being directed to entities whose political spending or advertising they find offensive. A secretary who wishes to avoid associating with a union can find a job with a nonunion company. A police officer may find it impossible to get an equivalent job without union representation other than by moving to a state that does not allow public sector employees to unionize. Students could choose to attend a university that does not collect student fees to support views they oppose, but that might involve foregoing the chance to attend the University of Wisconsin and choosing to attend a private, religiously affiliated university instead. A boy who wishes to go camping and hiking with his friends from school has no alternative to the Boy Scouts. Finally, to take the recently salient example of corporations or religiously affiliated entities being forced to offer health insurance plans that cover contraception or the full range of reproductive health services, there is no more coercion in the corporation having to offer the benefits package than there is in an employee having to contribute premiums to an insurer whose political spending, advertising, or benefits packages offend her views.

There is thus a sharp and deeply disturbing contrast between *Citizens United* and *Knox*. In *Citizens United*, the Court protected the free speech rights of the entity and was unconcerned about the free speech rights of the shareholders who disagreed with its political expenditures. In *Knox*, the Court paid no attention to the free speech

197 *Bellotti*, 435 U.S. at 794 n.34 (1978).

198 Sachs, *supra* note 4, at 808–09, 833–44 (concluding that both avoiding investments in the stock market and working in unionized jobs in order to avoid subsidizing objectional political speech involve coercion and impose unacceptable costs).

rights of the the union and was entirely focused on protecting the free speech rights of the nonmembers who disagreed with its political expenditures.[199]

Other cases, too, have protected the free speech rights of the association with little concern about the rights of dissenting members. Consider, for example, *Boy Scouts of America v. Dale*[200]: in *Dale*, the Court, in a five-to-four decision, held that freedom of association protects the right of the Boy Scouts to exclude gays in violation of a state's antidiscrimination statute.[201] James Dale was a lifelong scout who had reached the rank of Eagle Scout and had become an assistant scoutmaster.[202] While in college, he became involved in gay rights activities and was quoted in a newspaper article on the psychological needs of gay and lesbian teenagers and was identified in the article as the co-president of the Gay/Lesbian Alliance at Rutgers University.[203] A scout official saw this article and sent Dale a letter excluding him from further participation in the Scouts.[204]

Dale sued under the New Jersey antidiscrimination law.[205] The New Jersey Supreme Court found that the Boy Scouts were not exempt from the law as a private club and rejected the Boy Scouts' claim that freedom of association protected their right to discriminate based on sexual orientation.[206]

In the Supreme Court, the Boy Scouts claimed that they had an expressive message that was antigay and that forcing them to include homosexuals undermined this communicative goal. Chief Justice Rehnquist's majority opinion acknowledged that "[o]bviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation."[207] But Chief Justice Rehnquist was willing to find such a goal based on the Boy Scouts' interpretation of its own words, such as its command that scouts be "morally straight," and from the position it had taken during litigation.[208]

In other words, the Court in *Dale* essentially held that during litigation, a group can define its own expressive message. Chief Justice

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199 One possible distinction between these cases is based on state action: in *Knox*, the law determines what nonmembers must contribute to the union, whereas in *Citizens United*, no law required individuals to contribute to the corporation. For a detailed discussion of this distinction, see *infra* Part IV.B.2.

200 530 U.S. 640 (2000).

201 *Id.* at 643–44.

202 *Id.* at 644–45.

203 *Id.*

204 *Id.*

205 *Id.* at 645.

206 Dale v. Boy Scouts of America, 734 A.2d 1196, 1213, 1230 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

207 *Dale*, 530 U.S. at 650.

208 *Id.* at 650–55.

Rehnquist said that its failure to clearly state such a communicative goal in advance is not determinative: "The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."[209]

The Court in *Dale* focused entirely on the First Amendment rights of the association. The Court gave no weight to the rights of dissenting members, such as James Dale. In fact, the Court's holding was that state law could not protect these individuals, even when the state's objective was to prevent discrimination.[210] A local Boy Scout troop that disagreed with the national policy was powerless to allow gays to serve. Those who disagreed with the Boy Scouts could resign from the Scouts or refrain from joining, but the law could do nothing else to stop the Boy Scouts from discriminating against homosexuals. In sharp contrast, the Court in *Knox* paid no attention to the First Amendment rights of the union as an entity or its majority. The Court held that even allowing nonmembers to opt out of the political expenditures was not sufficient to meet the requirements of the First Amendment.[211]

The Court's only effort to reconcile the compelled speech cases of union dues and the organizational free speech rights of *Dale* and *Rumsfeld v. FAIR* was in *Davenport v. Washington Education Ass'n*, which upheld a state law requiring that nonmembers opt into supporting union political activities.[212] Justice Scalia explained that *Dale* and *FAIR* are irrelevant because the Washington prohibition on union political speech "does not compel respondent's acceptance of unwanted members or otherwise make union membership less attractive."[213] If, however, there is a First Amendment right of an organization to express itself over the objection of dissenters, there is no reason why that right should apply only to expelling members and firing employees, and not to how the organization spends money. If the Boy Scouts' First Amendment right to express a homophobic message trumps Dale's statutory right to be free from discrimination, there is no reason why a teachers' union's right to oppose charter schools and vouchers should not trump its members' rights to espouse them. Justice Scalia's opinion does not even try to explain why the factual difference (spending money versus discriminating in hiring and membership) generates a constitutionally significant legal difference in the balance between the rights of the leadership and the rights of

209 *Id.* at 656.
210 *Id.* at 656–61.
211 Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2291 (2012).
212 551 U.S. 177, 191–92 (2007).
213 *Id.* at 187 n.2.

the dissenters. Indeed, one would think that the harm to dissenting Scouts—being ejected from an organization to which some boys devote much of their childhood and adolescence—is far greater than the harm to employees who are compelled to pay an extra fifty or one hundred dollars to a union.[214]

The contrast between *Dale* and *Knox* also illustrates the difficulty with the notion that anti-union employees are coerced by union political speech but gay or gay-sympathetic scouts are not coerced by the Scouts. As Professor Sachs has shown, a worker who wishes to avoid a unionized workplace has many options in a private sector job market with only seven percent union density.[215] A boy who spent his childhood as a scout has no comparable alternative to the Scouts when he comes out as gay in his teens. Even if we focus on the initial decision to join rather than the more painful decision to quit, the coercion is not comparable. Just ask any parent who has tried to explain to a six-year-old son why he could not join the local Boy Scout troop that many of his school friends are joining.

C. Speech Rights of Government Employees

There is a third important strand of free speech law that underlies *Knox*: the First Amendment rights of government employees. The holding of *Knox* is that government employees have a First Amendment right not to be charged for a special assessment that the union will use in part for political activities unless they opt into paying for this charge.[216] Oddly, *Knox* even appeared to say that employees must be allowed to opt into a special assessment that will be used entirely for activities that would be chargeable to objectors if they were funded by annual dues rather than by special assessment. It is a decision entirely about protecting the speech rights of government employees. Yet this robust protection of the speech rights of government employees simply cannot be reconciled with the Court's other decisions which give little or no protection for the speech rights of government employees.

Most recently and most dramatically, in *Garcetti v. Ceballos*, the Court held that there is no First Amendment protection against ad-

214 The Court in *FAIR* similarly distinguished *Dale* on the ground that forcing the Boy Scouts to accept gays made it harder for them to express their message than forcing law schools to subject their students to discriminatory employers made it for the schools to express a message of equality. 547 U.S. 47, 69–70 (2006). Yet the Court did not explain how requiring the law school to subject its students to discrimination made it easier to convey a message of equality than prohibiting the Boy Scouts from discriminating made it for them to condemn homosexuality. In both cases, the organizations remained free to say anything they wanted.

215 *See* Sachs, *supra* note 4, at 834–35.

216 *Knox*, 132 S. Ct. at 2295–96.

verse employment action for the speech of government employees made on the job and is within the scope of their duties.[217] Ironically, *Garcetti* was a five-to-four decision with the majority rejecting free speech rights of government employees being exactly the same as the majority that had protected the speech rights of government employees in *Knox*: Justices Roberts, Scalia, Kennedy, Thomas, and Alito.[218]

Garcetti involved Richard Ceballos, a supervising district attorney in Los Angeles County who concluded that a witness in one of his cases, a deputy sheriff, was not telling the truth.[219] He wrote a memo to this effect and felt that the Constitution required him to inform the defense of the witness' false statement.[220] As a result of this speech, Ceballos alleged that his employers retaliated against him by transferring him to a less desirable position and denying him a promotion.[221]

The issue before the Supreme Court was whether Ceballos' speech was protected by the First Amendment. Although the Supreme Court had long held that there was some constitutional protection for the speech of government employees,[222] it ruled against Ceballos and nearly eliminated the First Amendment speech rights of government employees. The Court drew a distinction between speech "as a citizen" as opposed to "as a public employee"; only the former is protected by the First Amendment. Justice Kennedy stated: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[223] The Court expressed concern about the disruptive effects of allowing employees to bring First Amendment claims based on their on-the-job speech. Justice Kennedy wrote that allowing such claims "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents."[224]

There is an obvious tension between *Garcetti's* rejection of *any* speech protection for government employees and *Knox*'s emphatic

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[217] 547 U.S. 410, 421 (2006).

[218] *See Knox*, 132 S. Ct. at 2284; *Garcetti*, 547 U.S. at 412.

[219] 547 U.S. at 414.

[220] *Id.*

[221] *Id.* at 415.

[222] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (holding that government employee's speech is protected by the First Amendment if it involves a matter of public concern and does not unduly interfere with the functioning of the workplace).

[223] *Garcetti*, 547 U.S. at 421.

[224] *Id.* at 423.

protection of speech rights of government employees.[225] The distinction between speech as an employee and speech as a citizen is highly questionable; after all, government employees do not give up their citizenship when they enter their workplace. But if there is such a distinction, the government employees in *Knox* were being asked to pay the assessment precisely because they were government employees and were speaking in this capacity through their union. The Court in *Garcetti* was concerned about judicial involvement in the workplace, but in *Knox* it had no concerns about judicial involvement in the workplace and in deciding what unions can and cannot charge employees for.

Nor has the Court been protective of the speech rights of government employees when they are off the job. In a series of cases, beginning with *Pickering v. Board of Education*, the Court has held that the speech of government employees, when off the job, is protected only if it involves a matter of public concern and only if, on balance, the employee's speech rights outweigh the employer's interests in the efficient functioning of the office.[226] Phrased another way, the employee can prevail only if he or she convinces the court that speech was the basis for the adverse employment action; if the court concludes that the speech is related to matters of public concern; and if the court decides that, on balance, the speech interests outweigh the government's interests in regulating the expression for the sake of the efficiency of the office. Not surprisingly, government employees do not usually succeed under this test.[227]

Thus, the Court provides no protection for the speech of government employees on the job and relatively little for it off the job. But when it comes to the right to resist contributions to the union, the same five Justices who were in the majority in *Garcetti* granted govern-

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[225] We are not the first to observe this. *See* Malin, *supra* note 34, at 298–99. A similar point was made about decisions prior to *Knox*. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 3–4 (2009) (noting doctrinal shift in courts' treatment of public employees' First Amendment claims and proposing new constitutional frameworks with less deferential approach to assessing government's expressive claims).

[226] 391 U.S. at 571–73 (holding that a public school teacher's letter to a newspaper criticizing the board's allocation of funds is protected since the subject was a matter of public attention and the letter did not impede employee's daily duties or interfere with regular school operations); *see* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465–66 (1995) (holding that government employees' expressive activities addressed to public audience outside the workplace and unrelated to government employment was protected); Connick v. Myers, 461 U.S. 138, 146 (1983) (holding that a public employee's questionnaire distributed among staff members is not protected because it concerned internal office policy and was not a matter of public concern).

[227] *See* Richard Michael Fischl, Commentary, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 CARDOZO L. REV. 729, 732–36 (1989) (noting the breadth of employers' First Amendment rights and the narrowness of employees' First Amendment rights).

ment employees broad First Amendment rights to refuse to participate in funding an organization's speech with which they disagree. It appears that the only robust free speech rights government employees have is the right to refuse to support unions.

III
THE IMPLICATIONS OF *KNOX*

Having examined the holding and the constitutional underpinnings of *Knox*, we now describe two principal implications of *Knox*. First, it likely will significantly decrease the speech and political activities of unions. Second, the Court's language and reasoning calls into question the very existence of collective bargaining based on principles of exclusivity and majority rule. We argue that both of these implications are very undesirable for society and for constitutional law. Neither, of course, is preordained, and we urge the Court to reject both.

A. Implications of *Knox* for the Future of Union Political Activities

As both the concurring and dissenting opinions point out, the majority's opinion in *Knox* raises doubts about the constitutional validity of the opt out regime that has been a settled feature of the law of union dues under the RLA and public sector statutes since the 1960s and '70s and under the NLRA since the Court's holding in *Communications Workers v. Beck* in 1988.[228] Although the holding of *Knox* is limited to requiring opt in for special assessments, there is nothing in the majority's reasoning that is limited to this.

In supposing that most nonmembers prefer not to pay full dues, that the default rule "should comport with the probable preferences of most nonmembers," and that an opt-out rule "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree," the Court clearly suggested that opt in is constitutionally required.[229] Moreover, in characterizing the opt-out rule as "a historical accident,"[230] "dicta,"[231] and an "offhand remark,"[232] Justice Alito sought to undermine the integrity of the opt-out rule. Finally, in suggesting that the prior decisions allowing opt out "approach, if they do not cross, the limit of what the

228 Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2297-99 (2012) (Sotomayor, J., concurring); *id.* at 2306–07 (Breyer, J., dissenting).

229 *Id.* at 2290 (majority opinion).

230 *Id.*

231 *Id.*

232 *Id.*

First Amendment can tolerate,"[233] the majority invited a next case in which the Court can cite to this decision as precedent acknowledging the impropriety of an opt-out rule in all circumstances, not just for special assessments.

Requiring employees to opt into union political spending will reduce the number of employees who contribute and the total amount that employees will contribute to political expenditures as compared to an opt-out rule. It will not necessarily do so because of employees' preferences about union political activity but rather because of some mix of a collective action problem and inertia. First, the collective action problem facing employees who wish to advocate for improved working conditions through political activity is the same as the collective action problem that justifies majority unionism in contract negotiation. An opt-in rule simply makes it harder to overcome the collective action problem. As Mancur Olson pointed out a half century ago, without a union security agreement, many employees will make the individually rational decision to refrain from paying union dues because improved wages and working conditions are collective goods that cannot be extended to some in a unionized workplace without extending them to all.[234] So long as other employees fund the union, the free-riding employees will get the benefit of collective bargaining without paying the costs. The problem is that all of the individually rational decisions will add up to a collectively irrational decision.[235] The same is true, of course, when a union uses a political strategy to improve working conditions. All teachers (and students) benefit from smaller classes, but the individually rational teacher would prefer that others fund the political efforts to achieve it. However, the Court has never explained why the collective action problem that justifies employees agreeing to compel everyone who benefits from collective bargaining to share the costs should not also justify employees agreeing to compel everyone who benefits from legislation to share the costs.

The second reason why an opt-in rule will reduce union political activity is inertia. Behavioral economic studies show that setting the default in an optional savings plan, for example, dramatically affects whether people will participate.[236] If the default is that employees

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233 *Id.* at 2291.

234 *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 76–91 (1965).

235 *See id.* at 88 (noting that the "profit motive" of rational workers would lead to the death of unions because "[a] rational worker will not voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union").

236 *See, e.g.*, Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow™: Using Behavioral Economics to Increase Employee Saving*, 112 J. POL. ECON. S164, S169 (2004) (noting that

contribute to a retirement savings plan, most employees will not elect to change the default. If the default is that employees do not contribute, more employees will not, even when contributing is beneficial to the employee (as where the employer will match the employee contribution).

Inertia, however, is not the same as lack of support for a union's political activity. Under an opt-out regime, no employee is ever compelled to finance union political spending. If there were a solid empirical basis for believing that nonmembers know what the union's political positions are and disagree with a majority of them, setting the default as opt in might make sense. But there is no such basis. In a unionized workplace, a majority can choose union representation and a majority can rid themselves of a union. One might reasonably infer that the likely preference of the majority is to support at least some political activities that the union, through its duly elected leadership, deems to be in the best interest of the membership. Even considering only those employees who choose not to become union members, we still know little about which of the union's political expenditures they oppose. A teacher might refuse to join a union because he objects to the union's handling of allegations of teacher misconduct but might support the union's political efforts to reduce class sizes or resist cuts to arts education. That is the reason why the Supreme Court had, until *Knox*, consistently held that dissent from the union's political activities is not to be presumed but must be established by the employee. That some employees chose to reduce their union contributions by becoming fee payers does not indicate which of the union's political activities they oppose.

Not only is there no empirical or theoretical basis for the *Knox* majority's policy preference for opt-in rules, there is no constitutional basis for it either. As the Court insisted in *Citizens United*,[237] *Southworth*,[238] *Dale*,[239] and in a number of other cases going back to its civil rights era decisions about the free speech rights of associations,[240] organizations have First Amendment rights both because of the benefit to members of the association and because of the benefit to the public

automatic enrollment significantly increases participation in savings plans due to inertia against changing default); John Beshears et al., *The Importance of Default Options for Retirement Savings Outcomes: Evidence from the United States* (Nat'l Bureau of Econ. Research, Working Paper No. 12009, 2006), *available at* www.nber.com/papers/w12009 (presenting empirical evidence on how default selections impact retirement savings outcomes).

237 130 S. Ct. 876, 898–99, 904–08 (2010).

238 529 U.S. 217, 233 (2000).

239 530 U.S. 640, 647–48, 660 (2000).

240 *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428–31 (1963) ("[T]he litigation [the NAACP] assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.").

of having more voices heard. By imposing an opt-in rule on one category of association (labor organizations) and for one category of speech (political expenditures), the majority in *Knox* created a legal rule that discriminates both against certain speakers (unions) and on the basis of certain types of speech (political expenditures). Reducing the ability of a union to make political expenditures sacrifices the First Amendment rights of the association and its members to the rights of nonmembers.

Another troublesome implication of the *Knox* opinion is that some of its stray language casts doubt on the location of the line between chargeable germane expenses and nonchargeable political expenses. The majority noted that a public sector union "takes many positions *during collective bargaining* that have powerful political and civic consequences" and therefore that agency fees "constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights."[241] Moreover, the majority derided the notion that political activities, even in support of the union's contract negotiation goals, could be chargeable.[242] Prior decisions (including *Ellis*[243] and *Lehnert*[244]) had held that some political activity is chargeable because it is part of the union's effort to secure its collective bargaining agreement (as, for example, where an executive or legislative body can reject or modify an agreement negotiated by a government agency). Yet in *Knox*, the majority challenged the independent auditors' determination that fifty-six percent of the prior year's expenditures were chargeable by rejecting how the SEIU had characterized the germaneness of some expenses, including lobbying.[245] Further, the majority noted:

> Public-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions. As a result, a broad array of ballot questions and campaigns for public office may be said to have an effect on present and future contracts between public-sector workers and their employers.[246]

The germaneness line has been the subject of litigation and conflicting results in the lower courts.[247] Some courts have held that the

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241 Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2289 (2012) (emphasis added) (internal quotation marks omitted).

242 *Id.* at 2294.

243 Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447–48 (1984).

244 Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 522–24 (1991).

245 *Knox*, 132 S. Ct. at 2294.

246 *Id.* at 2295.

247 Indeed, the entire notion that a union's activities can and should be divided into those that are "economic" as opposed to those that are "political" is problematic, as Justice Frankfurter noted when the Court first invented the dissenters' opt-out right in *Street. See supra* text accompanying notes 52–55. Unions have always pursued improvements in the

cost of organizing new workers is chargeable if the union can show that there is a correlation between the wages and union density in the relevant labor market.[248] Others have held that the cost of organizing is chargeable only when it is directed at eliminating wage competition affecting the objector's bargaining unit.[249] Political expenses may be chargeable by public sector unions if they are aimed at securing a new collective bargaining agreement.[250] In addition, courts have treated chargeability for union expenses and chargeability of expenses of state bar associations quite differently: two circuits held that a state bar's public relations campaign was chargeable even though a plurality in *Lehnert v. Ferris Faculty Ass'n* said that a union's public relations campaign was not chargeable without explaining why building public confidence in the organized bar is different from building employee confidence in a union or its employees.[251]

Having thus insisted that even ordinary public sector collective bargaining is "a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights'" and

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lives of workers through legislative activism for minimum wage laws, maximum hours laws, prohibitions on child labor, workplace safety and health measures, and the like. Moreover, the entire notion that the "political" and the "economic" are separable in labor law or anywhere else has been debunked by legal scholars and labor leaders for decades. *See, e.g.*, Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1, 14–17 (1981) ("Where effective representation requires expenditures in order to set up a coalition of recipients of social services to press for higher appropriations, launch a nationwide campaign against a wage control program that threatens bargaining . . . I see no reason why employees who derive the benefits from these political efforts should not be required to render them support."); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 43 (1999) ("[U]nion political activity is wholly germane to a union's work in the realm of collective bargaining, and thus a reasonable means to attaining the union's proper object of advancing the economic interest of the worker.") (internal quotation marks omitted); J. Albert Woll, *Unions in Politics: A Study in Law and the Workers' Needs*, 34 S. CAL. L. REV. 130, 144 (1961) (noting that union political action "is a legitimate if not indispensable means of advancing the cause of organized labor" and is germane to economic interests because it can result in the "defeat of unfavorable legislation," or "strengthen the union's bargaining position") (internal quotation marks omitted).

248 Pirlott v. NLRB, 522 F.3d 423, 435 (D.C. Cir. 2008); *see also* United Food & Commercial Workers Union, Local 1036 v. NLRB, 284 F.3d 1099, 1113–14 (9th Cir. 2002) (en banc) (holding that a union may charge nonmembers costs of organizing employers within the same competitive market).

249 Scheffer v. Civil Ser. Emps. Ass'n, Local 828, 610 F.3d 782, 789–91 (2d Cir. 2010).

250 Seidemann v. Bowen, 584 F.3d 104, 112 (2d Cir. 2009).

251 Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 528–29 (1991) (plurality opinion); Kingstad v. State Bar of Wis., 622 F.3d 708, 719 (7th Cir. 2010) (rejecting challenge against use of bar dues to fund television advertising showing lawyers engaged in community service and finding that such ads might improve public perception of lawyers); Gardner v. State Bar of Nev., 284 F.3d 1040, 1043 (9th Cir. 2002) (stating without explanation that a PR campaign to improve the public perception of lawyers is germane to the purpose of state bar even though a similar campaign by a union to improve the public perception of teachers is not germane to the purpose of a union).

questioned whether "the Court's former cases have given adequate recognition to the critical First Amendment rights at stake,"[252] the *Knox* majority disparaged the justification for unions charging nonmembers even for germane services. The majority said that "free-rider arguments, however, are generally insufficient to overcome First Amendment objections" and that recognizing the free-rider justification in the past was "an anomaly . . . we have found to be justified by the interest in furthering 'labor peace.'"[253]

The result again is that the political speech and political activities of unions will be significantly reduced in the future. The tension within the Court's decision in *Citizens United* is manifest: within two years, the Court has greatly strengthened the speech rights of corporations and greatly weakened the speech rights of unions.

B. Implications of *Knox* for the Future of Public Sector Collective Bargaining

Justice Alito's majority opinion does more than just threaten the political influence of unions. It contains language that, if misconstrued, could be used to attack the entire architecture of public sector collective bargaining on the basis of exclusivity and majority rule. This implication is not noted by any of the opinions in *Knox*. We emphasize that nothing in *Knox* holds that majority rule unionism is unconstitutional. We explore this aspect of *Knox* for the light it sheds on the majority's implicit policy judgments about the First Amendment rights of unions as compared to other associations and individuals.

The language in *Knox* suggests that requiring nonmembers to pay *any* money to a union is unconstitutional. Justice Alito said, "by allowing unions to collect *any* fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers."[254] Moreover, in a footnote, Justice Alito suggested that because "a union's money is fungible," a union's expenditure of objectors' fees "entirely for nonpolitical activities" might be problematic because "it would free up other funds to be spent for political purposes."[255]

On that analysis, requiring dissenters to pay *any* money to the union may result in the union using the dissenters' money to fund political activities. If the Court were to follow that path, the entire

252 Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2289 (2012) (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 455 (1984)).
253 *Id.* at 2289–90 (quoting Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 303 (1986)).
254 *Id.* at 2295.
255 *Id.* at 2293 n.6.

system of distinguishing chargeable and nonchargeable expenses is insufficient to protect objectors because the same dollar that a nonmember pays the union for contract administration might find its way into a political account, even if a different dollar is placed in the chargeable category. This would mean that *Abood* is no longer enough to protect the rights of employee-objectors.[256]

However, the notion that an organization's money is fungible cuts two ways. In *Davenport*, the union argued that the restriction on union expenditures of money on politics infringed the union's First Amendment rights under *Bellotti* and *Austin*.[257] Justice Scalia dismissed the contention: the restriction is not "on how the union can spend 'its' money." Rather, he said, it was a restriction on how the union could spend "*other people's* money."[258] The opinion insisted that the only reason the law burdened the union's use of its members' dues was because the union "chose to commingle those dues with nonmembers' agency fees."[259] Justice Alito's position that any compelled contributions violates dissenters' rights because funds are commingled cannot be reconciled with Justice Scalia's position that restrictions on unions' expenditures do not violate the union's rights because the funds are commingled (oddly, Justices Alito and Scalia joined both opinions). If all money is fungible, then the entire basis for *Abood* and *Davenport* falls apart: none of it is "other people's money" and all of it is the union's. If unions have the same First Amendment rights as corporations to spend on politics, then it violates the union's rights for the government to restrict unions' political speech, just as it violates corporations' rights.

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256 This part of the *Knox* opinion sits uneasily against the Court's earlier approach to circumstances when compelled funding of an organization is compelled speech. In *Glickman*, the Court attempted to distinguish its upholding of compelled subsidies for agricultural commodity ads with *Abood*'s prohibition of subsidies for union speech. The Court said:

> *Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief."

Glickman v. Wileman Bros. & Elliot, 521 U.S. 457, 471 (1997) (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977)). As Robert Post pointed out, it is unclear whether the issue is compelled speech or compelled association. If the problem is compelled association rather than speech, and payment of agency fees is association, then it is unclear why distinguishing between germane and nongermane expenditures alleviates the problem of compelled association, unless one believes that placing dollars in different accounts is a form of association. Robert Post, Lectures, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV., 555, 571–73 (2006).

257 Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 186 (2007).

258 *Id.* at 187.

259 *Id.* at 187 n.2.

There is another reason to be concerned about the reckless dicta in *Knox*. Justice Alito's opinion said that allowing the union to bargain on behalf of nonmembers is compelled speech that is justified by a governmental interest in "labor peace," a term the opinion put in quotes as if to belittle it.[260] This misrepresents the long line of Supreme Court cases stretching back to the 1930s in which the Court recognized the many governmental interests in protecting the rights of employees to unionize and bargain collectively on the basis of exclusivity and majority rule. These include the macroeconomic benefits of allowing employees to bargain from a position of collective strength to improve wages and working conditions; the desirability of fostering workplace democracy; and the benefits to employees, employers, and the public of allowing bargaining by one union instead of many representatives claiming authority as a bargaining agent.[261] If the Court determines that labor peace is the only interest justifying public sector collective bargaining on the basis of exclusivity and majority rule, it may be poised to find the interest to no longer be compelling. Today, strikes are less likely to happen if there is no union than if there are multiple unions battling for governmental recognition, and many public sector employees are prohibited from striking, so labor peace may not be threatened by eliminating public sector bargaining. Thus, the *Knox* dicta on the governmental interests supporting collective bargaining on a majority rule exclusivity basis suggests the majority may be working toward finding it unconstitutional even if it is done on a free-rider basis.

In identifying these implications, we have assumed, but not justified, that collective bargaining is desirable and that employees have a First Amendment right to join unions and, where permitted by statute, to bargain collectively. This has been the assumption of federal law, the state law of most states, and of the Supreme Court for decades.[262] It is grounded in the constitutional right of people to join

260 132 S. Ct. at 2290.

261 *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33–34 (1937) (upholding the constitutionality of the National Labor Relations Act on the basis of the government's interests in promoting economic growth by facilitating equality of bargaining power between employers and employees). *See generally* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 35–44 (1983) (discussing the purposes of the Wagner Act with reference to historical materials, including the promotion of economic stability, the enhancement of equality of bargaining power, and the nurturing of political democracy by enhancing workplace democracy).

262 *See generally* JOSEPH E. SLATER, PUBLIC WORKERS (2004) (describing the history of the legal regulation of government employee unionization and collective bargaining); *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1676 (1984) (surveying statutory, constitutional, and case law on the rights of public employees to unionize and bargain).

organizations, including unions.[263] Although government employees have no constitutional right to bargain collectively in the absence of a statute authorizing it,[264] the Supreme Court long ago held that the government has an important interest in granting employees in both the private sector and government service the right to bargain collectively on the basis of majority rule and exclusivity.[265]

In the wake of the several attacks on public sector collective bargaining, including the *Knox* dicta suggesting that public sector bargaining is compelled speech, it is important to recall the many reasons why employees enjoy a constitutional right to join unions and statutory rights to bargain. First, collective bargaining enhances democracy. Employees who can elect representatives to determine the terms of employment on an equal footing with management learn habits of self-government and political efficacy.[266] Unions historically have been extraordinarily important political and social associations for their members. The desire of employees to join together in a common cause to govern themselves, to learn and teach the value of social solidarity, to improve their working conditions, and to express their vision for a better political economy is foundational to the freedom of association protected by the First Amendment.[267] The drive for equality of bargaining power, self-determination, and fairness is as important in the public sector as it is in the private sector, for in neither context is management by executive fiat consistent with democratic principles.

Second, public employee unionization and bargaining enhances the transparency and accountability of government. Unions have more power than individual employees or citizens to force the govern-

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263 Thomas v. Collins, 323 U.S. 516, 534 (1945) (finding a Texas law restricting union organization to be a violation of the First Amendment rights of freedom of speech and freedom of assembly).

264 Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463, 464–66 (1979).

265 *See Jones & Laughlin Steel Corp.*, 301 U.S. at 33–34.

266 *See* Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 144 (2005) (surveying literature on connection between unionism and social capital and asserting that unionism promotes development of social capital); Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 28 HOFSTRA LAB. & EMP. L.J. 301, 308–17 (2011) (surveying political science literature on participatory democracy and the connection between political democracy and social unit democracy).

267 *See* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942–44 (1997) (describing the pervasiveness and significance of unionists' vision of the right to organize, bargain, and strike as a form of insurgent constitutionalism that placed great significance on freedom of association). *See generally* Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of* DeBartolo, 1990 WIS. L. REV. 149 (1990) (arguing that the Court's reconciliation of the First Amendment with the National Labor Relations Act is based on a reductionist view of unions as limited purpose organizations focused on economic issues and ignores unions' significant role as associations).

ment to reveal its budget priorities and to force a debate about such priorities.[268] Of course, unions do not always use their collective power to advocate for government policies that everyone would deem wise. Left-wing critics of police and prison guards' unions criticize these unions' support for punitive incarceration policies, just as right-wing critics of teachers' unions blame them for the failures of the public schools.[269] Leaving aside the obvious fact that the blame for punitive criminal sentencing laws and lousy public schools should be laid at the door of many people and organizations beyond unionized guards and teachers, the problem is not the employees through their union acting as a group; the problem is that people are not always wise. Eliminating the right of employees to bargain as a group will not suddenly improve schools or reduce government budget problems. After all, some states without public sector bargaining rights have weak public schools and large deficits, and other states with public sector bargaining rights have strong schools and small deficits.[270]

Third, government employee unionization proved necessary for the same economic reasons that private sector employees joined unions: to ensure decent wages and working conditions. In times of fiscal crisis, government employers historically have cut pay dramatically and unfairly, often paying employees in IOUs. For example, in Chicago during the Great Depression, the Board of Education paid teachers and other school employees in scrip for over a year and then, when a court invalidated the scrip system, paid them nothing at all for months on end.[271] There is room for policy debate about how much government employees—teachers, park rangers, bus drivers, police officers, or DMV clerks—should be paid, what cause should be necessary to terminate their employment, when they should be eligible to retire, and what kind of retirement and health care benefits they should receive. But there is no reason to believe that the policy de-

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268 *Cf.* Norton, *supra* note 225, at 30–34 (discussing from the standpoint of government transparency the undesirable consequences of cases limiting the free speech rights of government employees).

269 *See, e.g.*, Mike Dennis, *The California Prison Guard's Union: Still Profiting from Incarceration-Mania*, CAL. PROGRESSIVE MESSAGE (March 4, 2011), http://caprogressivemessage.com/2011/03/04/the-california-prison-guards-union-still-profiting-from-incarceration-mania/ (criticizing the California Prison Guards Union's support for punitive incarceration policies); Richard D. Kahlenberg, *Bipartisan but Unfounded: The Assault on Teacher's Unions*, AM. EDUCATOR (Am. Federation of Teachers), Winter 2011–2012, at 14, *available at* http://www.aft.org/pdfs/americaneducator/winter1112/Kahlenberg.pdf.

270 Catherine Fisk & Brian Olney, *Labor and the States' Fiscal Problems*, *in* WHEN STATES GO BROKE 253–55 (Peter Conti-Brown & David A. Skeel, Jr., eds., 2012).

271 SLATER, *supra* note 262, at 102; *see also* Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contracts Clause*, 59 BUFF. L. REV. 1, 10–11 (2011) (recounting incidents in various periods of recession in which governments facing fiscal crises furloughed employees or paid them in IOUs).

bate about taxes, as opposed to public employee pay, will be better resolved by unilateral dictate than by bilateral negotiation.

Finally, contrary to the contestable claims of labor critics, public employee bargaining is not the cause of state and local government budget deficits. Study after study has shown that, on average, public sector employees are paid less than comparable private sector employees.[272] While studies have shown that there is a correlation between public sector bargaining rights and the pay and benefits of government employees,[273] other studies have shown that there is no correlation between public sector bargaining rights and state budget deficits.[274] Indeed, states with expansive public sector bargaining rights tend to have smaller budget deficits than do states with no public employee bargaining.[275] Anecdotal evidence of extraordinarily high levels of public employee compensation or pension benefits almost always concerns management-level public employees—chiefs of police or fire departments, city managers, and the like—rather than large numbers of unionized government workers.[276] Indeed, the average state and local pension benefit is $22,653 per year.[277]

It is important to remember that the most radical implications of *Knox* stem from its dicta. But its holding—that unions cannot impose a special assessment to fund political speech without first getting employees to opt in—is troubling enough. The Court has never required corporations and other organizations to play by the same rules it has imposed on unions. As we and other scholars have pointed out, the Court's dissimilar treatment of employees and shareholders is difficult to justify. Its wildly disparate approach to the entire problem of compelled speech, we have shown, ignores the alleged coercion of most organizational dissenters except anti-union workers. We now consider what rule should replace the Court's various, different ones in the area of compelled associational speech.

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272 *See* Fisk & Olney, *supra* note 270, at 264–70 (surveying literature regarding public sector employee salaries compared to private sector employee salaries).

273 *See, e.g.*, Sarah F. Anzia & Terry M. Moe, *Public Sector Unions and the Costs of Government* (Aug. 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107862.

274 *See* Fisk & Olney, *supra* note 270, at 279–92.

275 *Id.* (comparing budget deficits to extent of legal rights to bargain in fifty states and showing no correlation between deficit and bargaining rights).

276 *See id.*

277 *Transparency and Funding of State and Local Pension Plans: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 112th Cong. 40 (2011) (statement of Iris J. Lav, Senior Advisor, Center on Budget and Policy Priorities) (citing census data).

IV
Restoring the Balance and Treating All Organizational Dissenters Equally

In this Part, we make three major points. First, in subpart A, we argue that there is a need for a clearer analytical framework in balancing the speech rights of entities and those of dissenting individuals. The Court's approach in *Knox* and other cases blurs distinct questions. At the very least, we seek to more clearly identify the issues which need to be addressed. Second, in subpart B, we argue that under this analytical framework, unions and corporations should be treated the same in terms of their speech rights and the speech rights of their dissenting members and shareholders respectively. We argue here that there is no basis for the Court's protecting corporation's speech but giving no protection for dissenting shareholders in *Citizens United* while providing no protection for the speech of unions and great protection for dissenting members in *Knox*. That, of course, is an argument to treat corporations and unions the same, but it does not explain how they should be treated. We address this in subpart C and argue that allowing a corporation or a union to spend money on political activities should not be regarded as compelled speech of its members, and even if it is compelled speech, it is justified by sufficient interests to meet First Amendment scrutiny.

A. An Analytical Framework

Knox and the cases discussed throughout this Article raise three distinct questions. First, is an entity using an individual's money to support political activities with which he or she disagrees engaged in compelled speech within the meaning of the First Amendment? Second, if so, is opt out sufficient to meet the requirements of the First Amendment? Third, if there remains a First Amendment problem of compelled speech, is there a sufficiently important government justification to permit it?

These are distinct questions, and separating them offers greater clarity than the Court has provided. For example, as to the first question, the Court assumed in *Knox* that union political expenditures are compelled speech and assumed in *Citizens United* that corporate political expenditures are not, but the underlying issue—when is an entity using a person's money to support political activities with which he or she disagrees—is never considered in any depth.

Identifying compelled speech is harder than the Supreme Court has acknowledged. For example, if officials of a state university aggressively campaign for a ballot initiative for a tax increase which will prevent drastic budget cuts, they are using money paid by students in

tuition and fees.[278] Is this compelled speech for those employees or students who favor low taxes? If a large corporation lobbies for legislation on favorable tax treatment for corporations, is that compelled speech for those employees or shareholders who favor higher corporate taxes to fund better social services or deficit reduction? In fact, the complexity of the issue is reflected in the inconsistency in the Court's decisions, as discussed in Part II, as to when expenditures of money against the wishes of dissenters is compelled speech. In *Board of Regents of the University of Wisconsin System v. Southworth*, the Court unanimously upheld the permissibility of requiring college students to pay money each semester to a fund that subsidizes student activities, even though college students had to pay money for ideological activities they opposed.[279] In *Rumsfeld v. FAIR*, the Court rejected a claim that requiring universities to allow military recruiters equal access to campus interviewing as a condition for the receipt of federal funds was impermissible compelled speech, even though costs were imposed on law schools and they were forced to support implicitly an entity with which they disagreed.[280] Why is spending the money of dissenters in these cases permissible while it is unconstitutional in *Knox*?

A second question is whether opt out is sufficient if there is compelled speech. Again, the Court has been inconsistent. In *Wooley v. Maynard*—a paradigm compelled speech case—the Court found opt out sufficient; individuals could avoid the compelled speech problem by placing tape over the offending words on the license plate.[281] But in *Knox*, the Court expressly found opt out to be insufficient.[282] The Court never has offered a principle as to when opt out is sufficient.

Even if it is accepted that there is compelled speech and that dissenters need protection, there is the distinct question of what is adequate to meet the First Amendment. It is troubling in *Knox* that the Court said that opt in, rather than opt out, is constitutionally required but offered no analysis as to why opt out is not sufficient to protect dissenters and satisfy the First Amendment. This is particularly disturbing because the Court deviated from the approach that it had followed for thirty-five years since *Abood* and does so with so little explanation.

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278 We note that the University of California did not campaign, aggressively or otherwise, for a November 2012 ballot measure that prevented immediate budget cuts of hundreds of million dollars because state law prohibits university officials from engaging in such political activities in their official capacity. CAL. EDUC. CODE § 7054 (West Supp. 2013).

279 529 U.S. 217, 220–21 (2000). For further discussion, see *supra* text accompanying notes 152–157.

280 547 U.S. 47, 51, 70 (2006). For further discussion, see *supra* text accompanying notes 129–136.

281 430 U.S. 705, 713 (1977)

282 Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2290–91 (2012).

A third question is whether a law allowing compelled speech is supported by a government interest sufficient to withstand First Amendment scrutiny. Ultimately, the underlying issue is how the free speech rights of the entity should be balanced against the rights of the dissenting individuals. As explained above, in many cases—*Citizens United, Southworth, Dale*—the Court emphasized the free speech rights of the entity and its majority. In cases like *Knox*, the Court gave no weight to the free speech rights of the entity and focused entirely on the rights of the dissenters.

The inconsistency in how the Court balanced the First Amendment rights of entities with those of dissenters and in the Court's assessment of the government's interest in striking the balance more in favor of one than the other has never been acknowledged by the Court and has been largely overlooked by commentators.[283] A crucial underlying issue—and a central point of this Article—is the need to focus directly on the competing interests of the entity to speak on behalf of its majority and the rights of dissenters to be protected from having their money spent against their wishes. Either the Court is ignoring this balance entirely or it is engaging in balancing without ever acknowledging or explaining what it is doing.

Our hope is that separating these as distinct questions will lead to greater clarity in analysis, cause courts and commentators to address each of these questions in the depth they deserve, and result in less inconsistency in the case law.

B. Corporations and Unions Should Be Treated the Same

Throughout this Article, we have repeatedly contrasted the difference in the treatment of corporations and unions as exemplified by the difference in the decisions in *Citizens United* and *Knox*. In this section, we go further and explain why, at the very least, corporations and unions should be treated the same in terms of their speech rights as entities and the rights of dissenting shareholders and members. We make two points: First, in terms of democratic participation, there is much more protection for dissenters in the union context than in the corporate context, so if anything, the Court got it backwards in these cases. Second, the difference between *Citizens United* and *Knox* cannot be explained in terms of the presence or absence of state action.

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283 A few commentators have examined the problem. *See, e.g.*, Bebchuk & Jackson, *supra* note 196, at 113–15 (noting that *Citizens United* left open the possibility of more properly tailored mechanisms for protecting minority shareholders); Joseph Blocher, *Rights to and Not to*, 100 CALIF. L. REV. 761, 795–96 (2012) (noting that the Court has not "monogamously" remained committed to one speech categorization over another); Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 851 (2011) (describing rights against compelled speech).

1. *The Protections for Dissenters: Democracy in Corporations and Unions*

The constitutional jurisprudence on the expressive interests of associations generally overlooks how allowing some in the organization to use its resources to advance their views coerces others within the organization. And it entirely lacks any theory of what kinds of internal governance mechanisms within the organization would be necessary or appropriate to ensure a fair allocation of speech protections between those who wish the organization to promote one message and those who wish it to promote another. Apart from unsubstantiated and conclusory gestures to the idea that shareholders can protect themselves through the procedures of corporate democracy, the Supreme Court has mainly concluded that because corporations and associations like the Boy Scouts are private entities, their disregard of the dissenters' views involves no state action and, therefore, the rights of the dissenters are irrelevant to the First Amendment rights of the entity.[284]

Ironically, however, the Court's robust protection for the rights of union dissenters gives the one group that already enjoys substantial legal power to control the activities and expenditures of their organization far more constitutional protection than is enjoyed by any other member or constituent of a for-profit or nonprofit corporation or association. Thus, to the extent that *Knox* and its predecessors are based on a fear that unions will use their own First Amendment rights to coerce dissenting minorities within the organization, the Court has granted protection to those that already enjoy it. Meanwhile, dissenting minorities within corporations enjoy very little legal protection either to shape the agenda of their organization or to opt out of expenditures that would constitute compelled speech.

Federal law extensively regulates the internal affairs of unions. Early common law doctrines that treated the union's legal status as a contract with its members, along with the smattering of state laws regulating nonprofit associations generally, seemed to critics inadequate to the task of regulating entities that had the economic and political power and social importance that unions had in the 1950s.[285] Moreover, corruption in the large and powerful Teamsters Union invited congressional action. The Labor Management Reporting and Disclosure Act (LMRDA) of 1959, popularly known as the Landrum-Griffin Act,[286] comprehensively regulates internal union affairs by protecting

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284 Citizens United v. FEC, 130 S. Ct. 876, 911 (2010); Boy Scouts of Am. v. Dale, 530 U.S. 640, 643–44 (2000).

285 *See* Bor & Datz, *supra* note 25, at 426.

286 Labor-Management Reporting and Disclosure Act (LMRDA) of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).

the rights of union members to participate in the governance of the union and to enable the United States Department of Labor to inspect the finances of unions.[287]

Title I contains what the statute calls a "bill of rights" for union members.[288] It grants rights to equal treatment, to free speech and assembly, to run for union office, to approve dues increases through direct votes or delegate conventions, to sue the union, to due process in disciplinary proceedings, to obtain a copy of the collective bargaining agreement, to be informed by the union about rights under the LMRDA, and to freedom from retaliation by the union for attempting to exercise rights under the LMRDA.[289] Other titles of the LMRDA impose reporting requirements on unions and their officers,[290] regulate the process by which unions may replace the leadership of subordinate entities within the union, such as local affiliates,[291] and regulate the timing and conduct of elections of union leadership.[292] Unions may enforce only "reasonable qualifications uniformly imposed" on eligibility to run for office.[293] Finally, the LMRDA imposes fiduciary duties on union officials.[294] It grants general investigative

287 *See* William W. Osborne, *Union Member Rights & Obligations*, *in* LABOR UNION LAW AND REGULATION, *supra* note 25, at 7. As one scholar noted, the LMRDA attempts "to draw a fine line between the need to protect internal union democracy and the desire to avoid undue government interference in internal union affairs." MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 33 (1988). As pointed out previously, the LMRDA does not confer rights on nonmembers, nor does it regulate the rights of employees represented by unions that do not represent private sector workers. The internal governance of unions that represent only employees of state and local government may be regulated by state laws.

288 LMRDA § 101, 29 U.S.C. § 411 (2006).

289 29 U.S.C. §§ 411–415, 431, 481, 529, 530. In *Sheet Metal Workers' International Ass'n v. Lynn*, a leading case interpreting the Title I protections, the Supreme Court held that an elected union official could not be removed in retaliation for expressing views critical of a proposed dues increase. *See* 488 U.S. 347, 348–49 (1989).

290 LMRDA §§ 201–203, 29 U.S.C. §§ 431–433.

291 LMRDA §§ 301–303, 29 U.S.C. §§ 461–463.

292 29 U.S.C. § 481.

293 29 U.S.C. §481(e); *see* Local 3489, United Steelworkers of Am. v. Usery, 429 U.S. 305, 306–07 (1977) (invalidating union rule limiting eligibility for election to union office to those who had attended at least one-half of monthly union meetings because it rendered vast majority of members ineligible and was not justified by desire to ensure that those elected to office were dedicated and knowledgeable about union governance); Herman v. Springfield Mass. Area, Local 497, Am. Postal Workers Union, 201 F.3d 1, 2, 6 (1st Cir. 2000) (finding reasonable a rule requiring attendance at three monthly meetings in twelve months even though it disqualified 96% of membership); Herman v. Local 1011, United Steelworkers, 207 F.3d 924, 925, 928 (7th Cir. 2000) (finding unreasonable an eligibility rule requiring attendance at eight monthly meetings in two years when it disqualified 92% of union's 3000 members.

294 LMRDA § 501, 29 U.S.C. § 501.

power to the Secretary of Labor and prohibits retaliation against those who exercise their rights under the act.[295]

In contrast to the extensive federal regulation of union governance and dues collection under the LMRDA, the law of corporations gives shareholders relatively little power to control the decision making or disclosures of corporations and absolutely no power over its political speech. More than forty years ago, Victor Brudney raised serious questions about whether political spending by corporations might violate the First Amendment rights of shareholders and called for the creation of law regulating how corporations decide whether to engage in political speech.[296] As scholars have recently observed, his call has not been answered. In the wake of *Citizens United*, Professors Lucian Bebchuk and Robert Jackson, Jr. renewed the call for law to determine how corporations exercise their newly expanded First Amendment rights. As they observed,

> [u]nder existing corporate law rules, political speech decisions are by default governed by the same rules as ordinary business decisions. As a result, with respect to corporate political speech decisions, there is under current corporate law (i) no role for shareholders; (ii) no mandatory role for independent directors; and (iii) no mandatory disclosure to investors.[297]

Shareholders have no legal rights to disclosure of corporate political expenditures and no legal rights to vote on the amount or recipients of corporate political expenditures.[298]

If we take the Court at its word that shareholders are not coerced by corporate political speech because they have the mechanisms of corporate democracy available to protect them, it follows that the rights of dissenters should be sensitive to the degree of legal protection they have to control or influence internal organizational governance. On this analysis, dissenting union members should have fewer rights to opt out (or opt in) than do shareholders. Unlike corporations, unions are obliged by federal law and by their own constitutions and bylaws to disclose their expenditures to their members and to political bodies, to allow members to vote on dues increases, to allow members to vote on whether to ratify a union contract (including its agency fee or union security clause), and to allow members to attend

295 LMRDA §§ 601, 609, 29 U.S.C. §§ 521, 529 (2006). The LMRDA is enforced by litigation brought by private individuals as well as by investigations and litigation brought by the United States Department of Labor. 29 U.S.C. §§ 440, 464. In addition, the Department of Labor has promulgated regulations interpreting and enforcing the statute. *See, e.g.*, 29 C.F.R. pt. 401, (2012).

296 Brudney, *supra* note 196, at 235–43.

297 Bebchuk & Jackson, *supra* note 196, at 87.

298 *Id.*; *see* Brudney, *supra* note 196, at 237.

and speak at union meetings and to run for office.[299] Of course, the existence of majoritarian, democratic legal processes do not obviate the need to protect minorities in union governance any more than in political governance. Surely that unions are compelled by law to run as democracies and to respect the free speech rights of minorities, while corporations are not, is reason to suggest that employees should not have *greater* dissenters' rights than shareholders.

2. *State Action*

One argument for treating corporations and unions differently is based on state action. The argument is that the state requires nonunion members to pay agency fees and thus the First Amendment applies in the union context, whereas the state does not require anyone to be a shareholder, and the First Amendment therefore does not apply when a corporation spends shareholder money in election campaigns. On close examination, however, it is apparent that this argument overstates the role of the government with regard to unions and understates it with regard to corporations. The result is that the difference between the treatment of corporations and unions ultimately cannot justified based on the presence or absence of state action.[300]

To be clear, neither federal nor state law requires that anyone pay agency fees; no statute requires that nonmembers of a union pay funds to support the collective bargaining activity of a union. Agency fees are collected only if a majority of employees vote to unionize, and only then if the union and the employer agree to a contract requiring the payment of fees.[301] Absent this *private* action, there is no union and no fees are collected for it. Federal and state laws play an important, but a more subtle, role. Laws specify the procedures through which employees decide to unionize, and they do not prohibit the union from requesting that individuals who do not pay the agency fees be fired or the employer from firing those individuals.[302] Thus, a combination of both private action and government action is involved when a union collects agency fees.

The same is also true when a corporation spends money on political activities. The choice of a corporation to expend corporate funds in an election is a private decision made by the officers and ultimately

[299] 29 U.S.C. §§ 411–415, 431, 481, 529–530.

[300] The question of whether union security provisions involve greater state action than do corporate charters granting officers control over corporate political speech and the conclusion that the degree of state action is equivalent except in the case of government employers are extensively discussed in Sachs, *supra* note 4, at 844–51. We only briefly cover the main points here and refer readers to his longer discussion.

[301] *See* Bor & Datz, *supra* note 25, at 424–25.

[302] *See id.* at 428–32.

the directors of the corporation, but it is state law which allows this to occur without shareholder consent. State corporate law, specifically the business judgment rule, gives to corporate officers and directors broad latitude to spend corporate funds in the best interests of the corporation.[303] It is the corporate law of the states, both in statutes and in common law, that creates corporations as entities, facilitates investment in them under the terms of limited liability stipulated by state corporate law, and allows corporations to spend money without express shareholder consent. This law is unquestionably state action.[304]

Therefore, for both private sector unions and corporations, there are both private actions and government actions that are critically involved when money is spent in election campaigns. With respect to public sector unions, of course, there is state action: the government as the employer is empowered through its negotiations with the private, nonprofit organization representing its employees to agree to a contract requiring employees to pay agency fees. As noted above, the discontinuity in the Court's treatment of public sector agency fees is not on the issue of state action, but on the substance of the First Amendment. Under *Abood*, government employees have a First Amendment right to refuse to support union political speech.[305] But under cases upholding the Hatch Act and equivalent restrictions on government employee political activity and under *Garcetti*, government employees have few or no First Amendment rights to engage in any political speech except their *Abood* rights to oppose unions.[306]

C. How Should Corporations and Unions Be Treated?

Thus far in this Part, we have made two relatively modest arguments: a clearer analytical framework is needed and, under it, corporations and unions should be treated the same. But this, of course, does not address how they should be treated. Put most simply, the question is whether to extend the treatment of corporations in *Citizens United* to unions or the treatment of unions in *Abood* to corporations. In other words, should there be more protection for dissenting corporate shareholders, as *Abood*'s approach would provide, or should there

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303 *See* Bebchuk & Jackson, *supra* note 196, at 87; Sachs, *supra* note 4, at 824–25.

304 Long ago, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), the Court recognized that the common law of a state is state action. ("It matters not that . . . it is common law only. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.").

305 *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232–37 (1977).

306 *See* Garcetti v. Ceballos, 547 U.S. 410, 417–26 (2006); United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 554–56 (1973) (upholding the Hatch Act, which restricts federal employees from engaging in certain political activities).

be more protection for the expressive interests of unions, as *Citizens United* would provide?

In subpart A, we identified three key questions which should be applied in analyzing when entity expenditure of funds should be seen as violating the free speech rights of dissenters. Applying these questions here, we conclude that the *Citizens United* approach is preferable and that unions should be able to spend funds on political activities without needing to let dissenting members opt out.

To be clear, in saying this, we are not addressing a different question that is beyond the scope of this paper: Is there a compelling government interest in limiting corporate and union expenditures in political campaigns because of the potentially distorting effects of such spending? This, of course, was the key dispute between the majority and dissenters in *Citizens United*.[307] Our analysis focuses on different questions: Are restrictions on corporate and union expenditures justified to protect dissenters, and if there is a basis for First Amendment protection for dissenters, what is sufficient to accomplish it?

First, political spending by an organization should not be regarded as compelled speech by dissenters—whether they are shareholders or union members or dissidents within an organization—even if they are providing funds to support the organization and its activities. When the entity speaks, it is expressing *the entity's* views as directed by those controlling it; dissenters are not being forced to convey any message. Indeed, as Justice Frankfurter recognized long ago in his opinion in *International Ass'n of Machinists v. Street*, when the union spends money, "[n]o one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues."[308]

This is not a novel idea. In *Rumsfeld v. FAIR*, the Court said that the First Amendment rights of law schools were not infringed by forcing them to allow the military to recruit on campus, even though this involved the compelled expenditure of funds, because "[l]aw schools remain free under the statute to express whatever views they may have

[307] *Compare* 130 S. Ct. 876, 909 (2010) ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."), *with id.* at 930 (Stevens, J., dissenting) ("Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.").

[308] *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 806 (1961) (Frankfurter, J., dissenting).

on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."[309]

If a corporation or union were to require its shareholders or members to campaign or display bumper stickers or engage in partisan activities for a specific candidate, that would be compelled speech. But so long as it is the entity expressing its views, with dissidents completely free to say whatever they want however they want, the use of entity money that originates with stakeholders should not be regarded as compelled speech within the meaning of the First Amendment.[310]

Second, even if there is compelled speech, the question is what remedy is appropriate. *Citizens United* requires none (because it does not recognize the compelled speech problem) while *Abood* requires that opt out be available for political expenditures and *Knox* requires opt in for special assessments. As explained above, one approach would be to extend *Abood* and *Knox* to corporate spending. At the very least, opt out is sufficient to protect the interests of dissenters; any who do not want their money spent in a particular way have the mechanism to ensure that this does not occur.

We think, though, that the better approach would be to apply *Citizens United* to the union context and eliminate both opt-out and opt-in requirements and allow spending without any legal protection for dissenters. Both *Abood* and *Knox* require a determination of what expenditures are "germane" to the union's collective bargaining activities and which are not. As explained above, courts have struggled with this distinction and have been markedly inconsistent.[311]

This is inevitable because it involves difficult line drawing. Of course, that a line is difficult to draw does not mean one cannot be drawn. But courts should hesitate to adopt such rules. If a union is lobbying city council members to approve a new collective bargaining agreement with city workers, is that not clearly germane to the union's collective bargaining activities? Imagine that approval of the new collective bargaining agreement with city workers turns on the outcome of a city council race. If the union expends funds to elect the candidate who has pledged to approve the new collective bargaining activity, is this not clearly germane to the union's collective bargaining activities? Imagine that a presidential race will unquestionably determine the members of the National Labor Relations Board and that will directly affect the rights of employees and the power they have to

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309 547 U.S. 47, 60 (2006).

310 Consider whether, at some point, compelling people to fund the speech of an entity might violate the First Amendment because of the onerousness of the levy, but not because it constitutes speech of the person. For example, an entity's charging of 50% of an employee's paycheck to pay for billboards for political candidates might violate the First Amendment solely because of the burden of the charge.

311 *See supra* text accompanying notes 247–251.

negotiate and enforce collective bargaining agreements across the country. Is that not clearly related to the collective bargaining of the union? Yet, under current law, courts are likely to deem each scenario not germane and beyond the unions' ability to spend money without allowing nonmembers to opt out (or under *Knox*, if it is a special assessment, to opt in).[312]

The underlying assumption of *Abood* and *Beck* is that there is a distinction between what is germane to collective bargaining and what is political. The difference is a matter of degree rather than of kind. In fact, unless the union is being irresponsible and its leadership is violating its statutorily imposed fiduciary duties, everything the union spends is to further the interests of the union, its members, and the employees it represents.[313] Everything it does therefore will be "germane." The same is true of corporations. If a corporation lobbies the government for regulations that expand its markets (perhaps by permitting vending machines in public schools) or reduce its operating costs (by relaxing environmental regulation or labor protections) or create tax breaks from local governments (that will reduce revenues available to fund public schools), its political speech may be germane to its business but offensive to some of its shareholders. Corporate officers may believe that nothing is more important to the corporation's business climate than the winner of the state gubernatorial election or the federal presidential election. Drawing the line between speech that is germane and that which is not would be as difficult for corporations as for unions, but the challenge of implementing any rule with respect to corporations would be larger because there are more corporations with more shareholders than there are unions. Notifying shareholders of opt-out or opt-in rights would be a correspondingly larger task. Administering an objection system would be complex, particularly for shareholders whose stocks are managed by a pension or mutual fund. Sending out rebate checks as dividends, as some scholars have proposed, would not be a simple task.[314] Moreover, if the *Knox* distinction between ordinary dues and special assessments holds, a set of rules would be necessary to determine which corporate political expenditures are ordinary and which are special in order to determine which expenditures shareholders would opt out of and which they would opt into. In sum, although conceptually it makes sense to apply to corporations the same opt-out or opt-in rights that are applied to unions, the implementation of such a system would not be simple or cheap.

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[312] *See* Sachs, *supra* note 4, at 816–17.

[313] 29 U.S.C. § 501 (2006).

[314] *See, e.g.*, Jeremy G. Mallory, *Still Other People's Money: Reconciling* Citizens United *with* Abood *and* Beck, 47 CAL. W. L. REV. 1, 36–38 (2010).

Finally, even if corporate and union spending is seen as compelled speech for dissidents, there is a sufficiently important interest for allowing it. Free speech rights are, of course, not absolute. The Supreme Court repeatedly has said that content-based restrictions on free speech must meet strict scrutiny, while content-neutral restrictions only need to meet intermediate scrutiny.[315]

Allowing corporations, unions, and other entities to spend money over the objection of dissenters is a content-neutral rule. It allows organizations to do this whatever the topic of the expression and whatever the viewpoint of the speech. Therefore, by definition, this is a content-neutral rule.[316] As such, it only has to meet intermediate scrutiny; that is, it must be substantially related to an important government interest.

Allowing entities to engage in speech serves important interests. As the Supreme Court recognized in *First National Bank of Boston v. Bellotti*[317] and more recently in *Citizens United*, speech of corporations is protected because it adds to the marketplace of ideas and helps to inform people. That, of course, is true of the speech of unions and all organizations. As the Court explained in *Bellotti*, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[318] Similarly, in *Citizens United*, the Court stressed that the value of speech does not depend on the identity of the speaker and that restrictions on corporate speech deprive society of ideas and information. The Court said that the law limiting corporate expenditures in election campaigns

> muffle[d] the voices that best represent the most significant segments of the economy. And the electorate [has been] deprived of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.[319]

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315 *See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. . . . In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . .").

316 *See id.* at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." (citations omitted)). Here, no distinction is made based on the viewpoint expressed.

317 435 U.S. 765 (1978).

318 *Id.* at 777.

319 Citizens United v. FEC, 130 S. Ct. 876, 907 (2010) (citations omitted) (internal quotation marks omitted).

Thus, permitting entities—such as corporations and unions and other organizations—to take positions and speak on political issues facilitates what the Supreme Court has deemed to be an important, and indeed a compelling, interest: informing the electorate.

Also, allowing entities to speak serves the important interest that is also benefitted by protecting freedom of association: facilitating the speech of the majority who control the entity. The Supreme Court explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[320] Groups have resources—in human capital and money—that a single person lacks. The Court has observed that "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[321]

Allowing an entity to speak is really allowing the majority who control it to express their message much more effectively than they could as separate individuals. This, too, is a reason for allowing entities to speak, even though dissenters may disagree with their message.

In fact, in *Southworth*, the Court unanimously upheld the permissibility of requiring college students to pay money each semester to a fund that subsidizes student activities, even though the university spent funds in ways that some students objected to, because it was viewpoint neutral and because there was the important interest of facilitating speech.[322] In other words, the speech interests of the entity were deemed to outweigh the interests of the dissenting students who objected to how their money was being spent. We believe this same rationale should be followed for unions, corporations, and other entities.[323]

We are not unmindful of the fact that a dissident employee or shareholder or student or organization member may dislike how

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320 NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

321 Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984). For an excellent discussion of the rights of groups under the Constitution, see generally Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

322 529 U.S. 217, 229-30 (2000).

323 We limit our argument to an entity's actual speech and expenditures for political speech. We believe that expressive conduct, including discrimination in membership as in *Dale* or arguably expressive conduct such as that involved in offering an employee benefits plan that omits coverage of contraceptives and family planning services presents a different balance between the First Amendment rights of the entity and the equality rights of the dissenters. *See supra* note 3. We have discussed that issue elsewhere. *See* Erwin Chemerinsky & Catherine Fisk, *The Expressive Interests of Associations*, 9 WM. & MARY BILL RTS. J. 595, 596 (2001) (arguing that the framework of *Dale* "is flawed in that it fails to consider whether there is a compelling interest in infringing expressive association so as to achieve equality").

money is being spent. But for the reasons given in this subpart, we believe that the burden on the dissident is minimal and the benefits of allowing speech by the entity are great. The result we propose is not radical; it is simply applying to unions exactly what the Supreme Court approved for corporations in cases like *Citizens United.* The government interests in allowing unions to engage in political speech are at least as great as in allowing corporations to do so, and the government interests in allowing dissenting employees, or state bar members or mushroom growers, to opt out are no greater than in allowing shareholders to do so.

Conclusion

At first glance, *Knox v. Service Employees International Union, Local 1000* may seem like a relatively minor case. The Supreme Court said that nonmembers needed to opt into supporting the union's special assessment opposing ballot initiatives. In this Article, we have attempted to show that *Knox* is anything but minor. It has potentially broad implications for the political activities of unions and even for the future of exclusive representation in collective bargaining based on majority rule.

Knox also raises even more expansive questions about the speech rights of entities—including corporations, nonprofit associations, and unions—compared with the speech rights of dissenting shareholders and members. This is an issue that arises in countless important contexts but has not been dealt with by the Supreme Court in a consistent or even a coherent manner.

In this Article, we have suggested an approach to dealing with this issue and for resolving the inconsistency that is so manifestly evident in cases like *Citizens United* and *Knox.* Corporations and unions must be treated the same and both should have the ability to speak. In our view, contrary to that of most commentators, neither corporate political speech nor union political speech involves compelled speech of dissenting stakeholders, and therefore neither employees nor stockholders should be required by law to opt in or given a legal right to opt out. Thus, we argue that the reasoning of *Citizens United* compels the Court to reconsider *Street, Abood,* and the cases that depend on them, including *Knox.* Whatever position the Court takes, it should treat unions and corporations the same. First Amendment law must be more than that the five Justices in the majority—and it was the same five Justices who were the majority in both cases—want to protect corporations' speech rights more than they want to protect unions' speech rights or that they care more about protecting the speech rights of anti-union employees than they do about the rights of dissident shareholders.