

2013

Public Employees at the School of Hard Knox: How the Supreme Court Is Turning Public Sector Unions into a History Lesson

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**PUBLIC EMPLOYEES AT THE SCHOOL OF HARD KNOX:
HOW THE SUPREME COURT IS TURNING PUBLIC-
SECTOR UNIONS INTO A HISTORY LESSON**

Deborah Prokopf[†]

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I. INTRODUCTION

In February 2011, newly elected Governor of Wisconsin, Scott Walker, introduced his Budget Repair Plan, a draconian set of measures designed to strip most public-sector workers in the state of the power to bargain collectively over the terms and conditions of their employment.¹ That act touched off weeks of unrest at the state capitol, culminating in a 100,000 person protest.² Democratic legislators fled the state, hoping to prevent the quorum needed in the legislature to pass the bill.³ The measure eventually passed, but much of it remains tied up in litigation.⁴ Meanwhile, angry voters recalled the governor—only the third time in U.S. history the voters of a state have recalled a governor⁵—but Walker, backed by wealthy interests inside and outside Wisconsin,⁶ survived the recall vote.

1. Bill Glauber, Dave Umhoefer & Lee Bergquist, *Budget Confrontation Rocked the State—and Beyond*, MILWAUKEE J. SENTINEL, June 4, 2011, <http://www.jsonline.com/news/statepolitics/123172373.html>.

2. James B. Kelleher, *Up to 100,000 Protest Wisconsin Law Curbing Unions*, REUTERS, Mar. 12, 2011, available at <http://www.reuters.com/article/2011/03/13/usa-wisconsin-idUSN1227540420110313>.

3. Glauber et al., *supra* note 1.

4. Steven Greenhouse, *County Judge Strikes Down Some Restrictions on Public Unions in Wisconsin Law*, N.Y. TIMES, Sept. 14, 2012, <http://www.nytimes.com/2012/09/15/us/judge-strikes-parts-of-wisconsin-union-law.html>.

5. *Recall of State Officials*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/recall-of-state-officials.aspx> (last visited Jan. 18, 2013). In 1921, Lynn Frazier of North Dakota was the first governor to be recalled; a dispute over state-owned industries led to his downfall. *North Dakota Gubernatorial Recall Election*, WIKIPEDIA, http://en.wikipedia.org/wiki/North_Dakota_gubernatorial_recall_election (last updated June 21, 2012, 6:59 PM). In 2003, California voters recalled Governor Gray Davis amid that state's energy and budget crises. *California Gubernatorial Recall Election*, WIKIPEDIA, http://en.wikipedia.org/wiki/California_gubernatorial_recall_election (last updated Nov. 25, 2012, 10:17 PM).

6. David Horsey, *Billionaires Buy Wisconsin Recall Election for Scott Walker*, L.A. TIMES, June 7, 2012, <http://www.latimes.com/news/politics/topoftheticket/la-na-tt-billionaires-buy-wisconsin-20120606,0,7775507.story>. Two-thirds of the \$31 million Walker raised to beat back the recall effort came from out-of-state donors; Walker outspent his challenger by 7-to-1. *Id.*

The pitched battle over public-sector union rights in Wisconsin was but one lightning strike in a storm that has been brewing across the United States. Since the 1990s, and intensifying sharply in the last five years, public employees and their unions have endured a pummeling from state legislatures, governors, pundits—and even the U.S. Supreme Court. While lawmakers around the country are rescinding collective bargaining rights for many public workers, the Court has issued a series of opinions that make it increasingly difficult for public-sector workers and their unions to engage in political activity—and to stand up to those attacks on their very existence. Most recently, in *Knox v. Service Employees International Union Local 1000*,⁷ the Court seized upon an opportunity presented by a narrow administrative question to impose new and unprecedented limitations upon the political speech of public-sector workers' unions.

This note begins with a brief history of unionism in the public sector in the United States, including the competing ideologies undergirding the debate over public-sector union rights. It describes the recent backlash against public-sector workers and their unions, providing the context within which the Supreme Court's recent decisions are situated. Then, it traces the development of the Court's public-sector labor jurisprudence through five key cases dealing with public-sector unions' political activity, ending with the 2012 case *Knox v. Service Employees International Union Local 1000*. *Knox*, I argue, portends a grim future for public-sector unionism in the United States.

II. HISTORY OF PUBLIC-SECTOR UNIONISM IN THE UNITED STATES

A. *Origins and Growth of Public-Sector Unions*

While organized craft unions in the private sector date back to the mid-nineteenth century,⁸ major federal legislation granting workers the right to organize and bargain collectively left out public employees.⁹ As a result, public-sector unionism was “virtually

7. 132 S. Ct. 2277 (2012).

8. See generally RICHARD O. BOYER & HERBERT M. MORAIS, *LABOR'S UNTOLD STORY* (1955); PRISCILLA MUROLO & A.B. CHITTY, *FROM THE FOLKS WHO BROUGHT YOU THE WEEKEND* (2001).

9. The 1935 National Labor Relations Act (also known as the Wagner Act), which granted private-sector workers the right to form unions and bargain collectively with their employers, explicitly excluded public employers from its

nonexistent”¹⁰ in the United States until the 1960s.¹¹ In 1962, however, President Kennedy signed Executive Order 10988, which established union recognition procedures and granted limited collective bargaining rights for federal employees in the executive branch.¹² Executive Order 10988 was hailed “as the Magna Carta for federal-employee unionism.”¹³ States followed the federal government’s lead; the order accelerated the passage of state legislation granting public employers at the state and local levels the authority to bargain with associations of public employees.¹⁴ By 1980, forty-two states had authorized collective bargaining for at least some categories of public employees.¹⁵

Unionization among public employees grew exponentially in the 1960s and 1970s. Between 1956 and 1978 membership in public-sector unions increased 500 percent.¹⁶ By 1978, almost 40 percent of all public employees were represented by unions.¹⁷ The

coverage. See 29 U.S.C. § 152(2) (2006) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof”); see also Donald S. Wasserman, *Collective Bargaining Rights in the Public Sector: Promises and Reality*, in JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 57 (Richard N. Block et al. eds., 2006).

10. Wasserman, *supra* note 9, at 57.

11. Small groups of public workers had organized as early as the 1800s when craftsmen employed in Navy shipyards joined unions. E. EDWARD HERMAN & ALFRED KUHN, *COLLECTIVE BARGAINING AND LABOR RELATIONS* 85 (1981). In the early 1900s, workers from the Government Printing Office and Postal Service unionized, though these unions “functioned primarily as fraternal, social, craft, or benevolent organizations.” *Id.* at 85–86.

12. Wasserman, *supra* note 9, at 58.

13. HERMAN & KUHN, *supra* note 11, at 86.

14. *Id.* at 87. Many states patterned their collective bargaining statutes closely after the federal law governing private-sector labor relations. The state laws “mimicked the federal National Labor Relations Act so well that many have called them ‘mini-Wagner Acts.’” Richard B. Freeman, *What Can We Learn From the NLRA to Create Labor Law for the Twenty-First Century?*, 26 A.B.A. J. LAB. & EMP. L. 327, 333 (2011).

15. HERMAN & KUHN, *supra* note 11, at 87 (“Thus, by 1980, 38 states and the District of Columbia had collective bargaining statutes covering all or some categories of public employees. In addition, in Arkansas and Virginia, attorney general opinions authorize collective bargaining; in Illinois, state employees may bargain under a 1973 executive order issued by the governor; in New Mexico, the state personnel board has issued regulations authorizing collective bargaining.”).

16. HAROLD W. DAVEY, MARIO F. BOGNANNO & DAVID L. ESTENSON, *CONTEMPORARY COLLECTIVE BARGAINING* 371 (1982).

17. *Id.* at 373. There are a number of reasons for this explosion in public-sector unionism. First, “[p]ublic sector employment more than doubled between 1956 and 1978.” *Id.* Other reasons include:

explosive growth of unionization in the public sector, however, parallels a concurrent decline in private-sector unionization rates. While the percentage of wage and salary workers in unions peaked at 34.8% in 1954,¹⁸ overall union membership is now holding steady at about 11.3%,¹⁹ with the public-sector union membership rate (35.9%) more than five times higher than that of private-sector workers (6.6%).²⁰

B. *Competing Ideologies*

The dramatic increase in public-sector unionization corresponded with growing acceptance of the legitimacy of public-sector unions, followed by intense backlash since the 1990s,²¹ demonstrated most vividly by the recent turmoil in Wisconsin.²² This shift in acceptance of public-sector unionism reflects the evolution of competing paradigms of public-sector labor relations. The “traditional” ideological model of public-sector labor relations,

(1) removal of restrictive legislation by means of executive orders and legislation at the federal level and collective bargaining statutes enacted by 38 states; (2) awareness of a disadvantageous economic shift between private and public employees; (3) acceptance of the institution of trade unionism by public sector employees much as it has been accepted by their private sector counterparts for several decades; (4) effectiveness of confrontation tactics, with many of labor relations’ direct pressure tactics modeled on those utilized by the civil rights movement in the early to mid-sixties; (5) breakdown in and loss of respect for many forms of authority; [and] (6) indifference of public agency officials to job-related complaints or grievances which, in turn, led to employee frustration and increasing receptiveness to union organizing attempts.

HERMAN & KUHN, *supra* note 11, at 87, 89.

18. GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 12 (2004), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace. Note also that virtually all of those union members in 1954 would have worked in the private sector, because very few public-sector workers had the right to organize at that time.

19. News Release, Bureau of Labor Statistics, Union Members—2012 (Jan. 23, 2013), <http://www.bls.gov/news.release/pdf/union2.pdf>.

20. *Id.*

21. *See generally* Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, 1985 U. ILL. L. REV. 245; Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 ABA J. LAB. & EMP. L. 149, 150–51 (2012).

22. After Governor Scott Walker proposed legislation in early 2011 that would have stripped most state workers of their collective bargaining rights, tens of thousands of people protested in the Wisconsin capitol for weeks. *See generally* Todd A. DeMitchell & Martha Parker-Magagna, “A ‘Law’ Too Far?” *The Wisconsin Budget Repair Act: Point*, 275 EDUC. L. REP. 1 (2012).

which prevailed until the 1960s, is hostile to collective action by public workers.²³ This model viewed unionism as “a threat to the state’s sovereignty and to the government’s responsibility to reflect popular will.”²⁴ Under this model, a public-sector employer that bargains with a union “gives up some of its power to decide public matters, and to this extent, illegally delegates its power.”²⁵

In contrast, a “new”²⁶ model of public-sector labor relations developed in the 1960s that mirrored the industrial pluralism framework dominant in the private sector at that time.²⁷ This

23. Fox, *supra* note 21, at 259.

24. *Id.* See generally Joseph E. Slater, *The Court Does Not Know “What a Labor Union Is”: How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981 (2000).

25. Fox, *supra* note 21, at 259; see also Malin, *supra* note 21, at 153. Malin points out other common criticisms of public-sector collective bargaining, which include (1) that bargaining distorts democracy by giving unions access to decisionmakers that no other group enjoys; (2) that bargaining is not conducted at arm’s length because the government officials want the union’s support in the next election; and (3) that such bargaining leads to “bloated salaries and benefits, excessive staffing levels, inefficient work rules, job security for poor performers, the absence of merit in employment decisions, and the stifling of innovation in the delivery of public services.” *Id.*

26. Note that Fox described this “new” ideology in 1985, shortly after the 1981 nationwide strike of air traffic controllers, which effectively ended when President Reagan fired them all. Fox, *supra* note 21, at 261. Reagan’s sacking of the air traffic controllers is widely recognized as a turning point in both public- and private-sector labor relations in the United States. See Joseph A. McCartin, *Unexpected Convergence: Values, Assumptions, and the Right to Strike in Public and Private Sectors, 1945–2005*, 57 BUFF. L. REV. 727, 728 (2009) (“Once Reagan permanently replaced the striking members of the Professional Air Traffic Controllers Organization (PATCO) and showed that the public would support such an action, a number of prominent private sector employers followed suit. In the 1980s, Phelps-Dodge, Greyhound, International Paper, Hormel, and others imitated Reagan’s example. The results were disastrous for labor.”). While Fox’s characterization of this model of labor relations as “new” was apt in 1985, before the effects of Reagan’s actions were fully felt, it is no longer new, and it appears to be in decline.

27. See Fox, *supra* note 21, at 255. Following the Great Depression, the labor unrest that accompanied it, and the subsequent enactment of the Wagner Act, which recognized private-sector workers’ rights to form unions and bargain with their employers, a new labor relations regime developed. “Industrial pluralism,” as it was called,

reject[ed] the widespread hostility towards labor unionism that was evident throughout judicial opinions from the early nineteenth century until the 1930s. Instead of viewing unions as coercive restraints of trade or as illegal criminal conspiracies, the industrial pluralists accept[ed], indeed favor[ed], the growth of labor unions as a healthy sign of capitalist economic development.

Id. Although the industrial pluralism framework enjoyed several decades as the

model “acknowledge[d] that labor’s interests are legitimate, and recognize[d] and protect[ed] workers’ rights to organize.”²⁸ It regarded collective bargaining as “a therapeutic way for labor and management to resolve differences as equals.”²⁹ Statutory schemes that were enacted under this paradigm required public employers to negotiate with their employees over the terms and conditions of their employment.

Professor Clyde Summers,³⁰ in a series of articles, articulated the practical and theoretical underpinnings of this “new” paradigm.³¹ Throughout these articles, Professor Summers emphasizes two key points. First, there are fundamental differences between collective bargaining in the private sector and collective bargaining in the public sector. Most importantly, bargaining in the private sector is essentially an economic, market-driven exercise, while bargaining in the public sector is a legislative act.³² A negotiated contract in the public sector “is an instrument of government and a product of government decision making” with direct implications for the level of taxes the public will pay, while private-sector bargaining solely concerns the interests of the two parties across the table, with “little or no concern for the interest or welfare of the public.”³³

Second, a built-in bias in our political system requires collective bargaining for public workers.³⁴ The political nature of governmental decision making around terms and conditions of public employment is not a reason to deny employees the right to

dominant ideological model of private-sector labor relations, it has waned in recent decades. *Id.* at 256.

28. *Id.* at 262.

29. *Id.*

30. Professor Summers, according to one writer, was to union democracy law what Louis Brandeis was to the field of privacy law. Michael J. Goldberg, *Present at the Creation: Clyde W. Summers and the Field of Union Democracy Law*, 14 EMP. RTS. & EMP. POL’Y J. 121, 121 (2010).

31. See Clyde W. Summers, *Bargaining in the Government’s Business: Principles and Politics*, 18 U. TOL. L. REV. 265 (1987) [hereinafter Summers, *Bargaining in the Government’s Business*]; Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974) [hereinafter Summers, *A Political Perspective*]; Clyde W. Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441 (2003) [hereinafter Summers, *A Different Animal*]; Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669 (1975) [hereinafter Summers, *Problems of Governmental Decisionmaking*].

32. Summers, *Bargaining in the Government’s Business*, *supra* note 31, at 266.

33. Summers, *A Different Animal*, *supra* note 31, at 442.

34. Summers, *Bargaining in the Government’s Business*, *supra* note 31, at 268.

bargain collectively. On the contrary, because government employees are massively outnumbered by voters, who continually demand more public services at a lower cost, public employees need to speak with one voice through a union in order to offset this political disadvantage.³⁵

C. Backlash

Summers's views and the "new" model of public-sector labor relations enjoyed predominance through the 1980s. Since the 1990s, however, a fierce backlash against public-sector unions has been brewing in state legislatures and the courts.³⁶ Over the past five years in particular, public workers have endured a vicious and unprecedented attack³⁷ not only on their wages and benefits, but also on their right to bargain over the terms and conditions of their employment.³⁸ The economic downturn that began in 2007 provided a convenient opportunity for right-wing politicians to pin governments' fiscal woes on so-called "pampered public sector employees with high wages and benefits and high job security."³⁹

While the connection between collective bargaining rights and massive budget deficits is, at best, misguided and, at worst, sheer pretext for union busting,⁴⁰ states from New Jersey to Idaho have nevertheless recently enacted laws restricting collective bargaining rights for public employees.⁴¹ Common themes among these laws

35. *Id.*; see also Summers, *A Political Perspective*, *supra* note 31, at 1161 ("[T]he fact that the economic interests of the voting public, both as taxpayers and as users of public services, run directly counter to the economic interests of public employees in wages and working conditions suggests that public employees may need special procedures to insure that their interests receive adequate consideration in the political process.").

36. Malin, *supra* note 21, at 150–51. Despite a brief period of expansion of public-employee-union rights in the early 2000s, the overall trend since the 1990s has been a marked contraction of those rights. *Id.* at 151–52.

37. Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 IND. L.J. 189, 189 (2012).

38. 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, 411 (2012).

39. *Id.*

40. See Slater, *supra* note 37, at 202 ("[N]o significant correlation between public-sector bargaining rights and state deficit levels has been shown. . . . [S]tates that allow public-sector collective bargaining on average have a 14% deficit relative to their budgets, while states that bar collective bargaining have 16.5% deficits.").

41. See generally Malin, *supra* note 21. Malin's analysis focuses on legislative changes in twelve states. The National Conference of State Legislatures, which tracks bills related to collective bargaining, found that there were 820 bills

are: (1) limiting the scope of bargaining, most frequently taking the topic of health insurance off the table;⁴² (2) changing impasse resolution procedures to give public employers greater control over the terms of employment;⁴³ (3) giving governments the right to renegotiate or rescind collective-bargaining agreements in times of financial distress;⁴⁴ and (4) repealing the right to bargain altogether.⁴⁵ Taken together, these changes may represent “the largest grab for economic and political power by the American upper class since the destruction of the labor guilds in the 1890s and the rise of the ‘Gilded Age’ in the late nineteenth and early twentieth century.”⁴⁶

III. THE SUPREME COURT’S EVOLVING VIEW ON PUBLIC-EMPLOYEE UNIONS

A. *Speech: The Key Issue*

A key battleground in the fight over public-sector union rights, and the focus of this note, is the right of unions to collect and spend money for political purposes, particularly when

introduced in all fifty states and Puerto Rico in 2011 seeking to restrict or eliminate collective bargaining rights of public workers. David Schaper, *Collective Bargaining Curbs Spread Across the U.S.*, NAT’L PUB. RADIO (May 24, 2011, 3:27 PM), <http://www.npr.org/2011/05/24/136610879/collective-bargaining-curbs-spread-across-the-u-s>; see also R. Theodore Clark, Jr., *Public Sector Collective Bargaining at the Crossroads*, 44 URB. LAW 185, 188 (2012) (“[I]n light of recent developments that do not augur well for public sector collective bargaining, future labor scholars may well look back on the last 50 years as ‘The Golden Age of Public Sector Collective Bargaining.’ . . . While legislative enactments and the results of collective bargaining have unquestionably favored public sector labor unions in the past half century, there are significant signs that the tide is beginning to turn.”). For a database of all public-employee-related bills introduced in 2011 and 2012, see *Collective Bargaining Legislation Database*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/labor/collective-bargaining-legislation-database.aspx>.

42. Malin, *supra* note 21, at 157 (“By far, the most numerous changes made in the upheaval of 2011 concerned the scope of bargaining.”).

43. *Id.* at 160. Idaho, Illinois, Indiana, Michigan, Nebraska, Nevada, New Jersey, and Wisconsin amended impasse-resolution procedures. *Id.* at 160–63.

44. *Id.* at 163. Nevada and Michigan enacted “financial distress” provisions. *Id.* at 163–64.

45. *Id.* at 154. Oklahoma and Tennessee repealed statutes that granted public employees the right to bargain with their employers. Wisconsin effectively ended collective bargaining for all public workers except law enforcement, firefighters, and transit workers (if the denial of collective bargaining to transit workers would result in the loss of federal transit money). *Id.* at 156.

46. Dau-Schmidt & Lin, *supra* note 38, at 408.

nonmembers⁴⁷ object to such payments. This question raises First Amendment issues because payment of union dues is, in many states, a condition of government employment. Mandatory dues that are used for political speech represent a form of compelled speech and present troubling First Amendment issues, with which the Supreme Court has been wrestling for decades.⁴⁸

The Court's jurisprudence in this area reflects the changing public sentiment regarding public-sector unions. Its cases, starting with *Abood v. Detroit Board of Education*⁴⁹ in 1977 (in which the Court approved of public-sector unionism generally and of agency-shop agreements specifically) and ending most recently with *Knox v. Service Employees International Union Local 1000*⁵⁰ (in which the Court repudiated key precedent on its way toward forcing "right-to-work" arrangements on all public employees), mirror the predominant thinking of their times. While *Abood* is representative of the "new" model of public-sector labor relations prevalent at its time, *Knox* plainly reflects the anti-union backlash of recent years. An examination of the key public-sector union dues cases leading up to *Knox* shows this disturbing evolution in the Court's jurisprudence.

B. *International Association of Machinists v. Street: The Foundational Case from the Private Sector*

While not related to public-sector workers, the case *International Association of Machinists v. Street*⁵¹ forms the basis for much of the Court's jurisprudence on public-sector-union matters.

47. A "nonmember" is a person who is covered by a union contract but is not a full member of the union. The nonmember receives all the benefits of the collective-bargaining agreement and union representation but may not participate in the internal decision-making process of the union, such as electing officers and ratifying contracts. In so-called "right-to-work" states, nonmembers may not be compelled to contribute anything toward the cost of representation and collective bargaining. In other states, the nonmember pays an "agency fee" or "fair share fee" to cover the union's costs related to bargaining and representation. See *infra* note 109.

48. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233–34 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. . . . Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." (citations omitted)).

49. 431 U.S. 209 (1977).

50. 132 S. Ct. 2277 (2012).

51. 367 U.S. 740 (1961).

In *Street*, a group of railroad workers objected to their union's collection and expenditure of dues money for political purposes. Without reaching the objecting members' constitutional arguments, the Supreme Court nevertheless held that Congress, through the Railway Labor Act, had not given unions the right to collect money for political uses over the objection of members who disagreed with the unions' views.⁵²

Although the objecting members were entitled to some remedy for the union's improper collection of their dues for political expenditures, the Supreme Court declined to fashion a specific remedy for those workers. In instructions for the lower court on remand, however, the Court established guidelines for the remedy that should be applied. Noting that the majority of members also had an interest in speaking on political matters without being silenced by the minority of dissenters, the Court urged lower courts to "select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other."⁵³ Any such remedy, however, "would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object."⁵⁴ The Court emphasized that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."⁵⁵ By placing the burden of objection upon the dissenting employee, the rights of both that employee and the majority who wish to engage in political speech are protected to the greatest degree possible.⁵⁶

This holding, that dissent is not to be presumed, surfaced in the Court's subsequent decisions on public-sector unions' speech rights, beginning with *Aboud* in 1977 and ending with *Knox* in 2012. While the early cases affirm *Street*'s holding, *Knox* leaves an open question as to whether *Street* is still good law.

C. *Aboud v. Detroit Board of Education: Birth of the Agency Shop for Public-Sector Unions*

The first Supreme Court case to deal with public-sector unions' ability to collect dues for political expenditures was the

52. *Id.* at 750.

53. *Id.* at 773.

54. *Id.* at 774.

55. *Id.*

56. *See id.* at 773–74.

1977 case *Abood v. Detroit Board of Education*,⁵⁷ in which the Court unanimously approved of agency-shop⁵⁸ arrangements for public-employee unions.⁵⁹ After the State of Michigan enacted legislation authorizing local units of government to bargain with unions representing their employees, a group of teachers filed suit to challenge the law.⁶⁰

The teachers argued, first, that public employment carries certain constitutional guarantees not present in private-sector employment, and second, that collective bargaining in the public sector is inherently political, and for that reason it would violate public employees' rights under the First and Fourteenth Amendments to require them to financially support a union for any purpose.⁶¹

The Supreme Court rejected both arguments. First, the Court borrowed the "familiar doctrine[]"⁶² from federal labor law, that labor peace is best achieved through the principle of exclusive representation.⁶³ Exclusive representation, the Court noted, carries many benefits.

The 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

57. 431 U.S. 209 (1977).

58. See generally Robert C. Cloud, Commentary, *Davenport v. Washington Education Ass'n: Agency Shop & First Amendment Revisited*, 224 EDUC. L. REP. 617, 619–20 (2007) ("[An agency shop is] one in which a union acts as an agent for all employees, regardless of their union membership. In an agency shop, employees are not required to join the union, but nonmembers do benefit from the union's collective bargaining efforts as much as those who are members. Consequently, agency shop agreements entitle unions to levy service or 'agency' fees on nonmembers. The primary purpose of such agreements is to prevent nonmembers from freeloading on the union's collective bargaining efforts without sharing the costs incurred in the process." (citations omitted)).

59. The Court in *Abood* relied heavily upon *Street*, 367 U.S. 740. See *supra* Part III.B.

60. *Abood*, 431 U.S. at 211–14.

61. *Id.* at 226–27.

62. *Id.* at 220.

63. *Id.* at 220–21. In the private sector, Congress established the principle of exclusive representation in the National Labor Relations Act. See 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 purposes, 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 . . .").

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.⁶⁴

Although Congress left the regulation of state and local government labor relations to the states, the Court reasoned that, compared to the private sector, “[t]he desirability of labor peace is no less important in the public sector.”⁶⁵ Exclusive representation does not violate the First Amendment rights of public employees because they remain free to engage in the political process on their own terms as well.⁶⁶ “[T]he principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions concerning labor relations.”⁶⁷ Therefore, states may adopt the principle of exclusive union representation to achieve the important governmental interest of labor peace, and public

64. *Abood*, 431 U.S. at 220–21; *see also* *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 63 (1975) (“National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee’s power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. ‘Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents’”) (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)); Summers, *Bargaining in the Government’s Business*, *supra* note 31, at 269 (“The principle of exclusive representation is considered fundamental in our labor law. It approaches being the First Commandment with the deification of the majority union But it is not written on stone from Sinai; it has more practical origins. The historical purpose of exclusive representation was to prevent an employer from playing one union against another to divide and conquer, and its practical purpose was to establish a single contract with standardized terms.”).

65. *Abood*, 431 U.S. at 224.

66. *Id.* at 230 (“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. With some exceptions not pertinent here, public employees are free to participate in the full range of political activities open to other citizens.” (citation omitted)).

67. *Id.* at 230 (citing *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 174 (1976)).

employees may be compelled to help pay for the cost of that representation.⁶⁸

Requiring public employees to financially support a union's political and ideological activities, however, is a different story. The Court stated:

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.⁶⁹

To require employees, as a condition of public employment, to support particular political causes and candidates would impermissibly infringe upon their rights under the First and Fourteenth Amendments, for “[i]f 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.”⁷⁰ Therefore, a union may “constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative” so long as those expenditures are not financed by employees who object to advancing those ideas.⁷¹ In other words, the Court divides union expenditures into two categories: chargeable (those expenses incurred in the course of the union's duties to act as the exclusive collective bargaining agent for all employees) and nonchargeable (those expenses not “germane” to collective bargaining but spent “for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes”).⁷² Unions may require nonmembers to contribute toward the chargeable expenses, but not toward the nonchargeable ones.⁷³

As for how to draw the line between chargeable and

68. *Id.* at 225–26.

69. *Id.* at 233–34 (citations omitted).

70. *Id.* at 235 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

71. *Id.* at 235–36.

72. *Id.* at 235.

73. *See id.*

nonchargeable expenses, the Court found the record in *Abood* too thin to justify rulemaking on that issue, and it left that question for another day.⁷⁴

D. Chicago Teachers Union Local No. 1 v. Hudson: *Procedural Safeguards for First Amendment Rights*

The Court tackled the division of chargeable and nonchargeable expenses in 1986 with the case *Chicago Teachers Union Local No. 1 v. Hudson*.⁷⁵ In that case, the Illinois General Assembly in 1981 amended the school code to permit agency shop agreements in union contracts.⁷⁶ The following year, the Chicago Teachers Union and Chicago Board of Education entered into an agreement that permitted the union to collect “proportionate share payments” from nonmembers,⁷⁷ which amounted to ninety-five percent of regular union dues.⁷⁸ The union identified its expenditures unrelated to collective bargaining based on its financial records for the previous fiscal year.⁷⁹ The union also established a procedure by which nonmembers could lodge objections to its calculations.⁸⁰

Four nonmembers objected to the proportionate share deduction, bypassing the union’s internal objection process and challenging the new procedure in court.⁸¹ They raised three objections to the union’s procedure: first, “it violated their First Amendment rights to freedom of expression and association; [second,] it violated their . . . due process rights [under the Fourteenth Amendment]; and [third,] it permitted the use of their proportionate share[] for impermissible purposes.”⁸² On appeal, however, the nonmembers focused their attack on the procedures used to calculate the amount of the proportionate share fee.⁸³

74. *See id.*

75. 475 U.S. 292 (1986).

76. *Id.* at 294–95. Prior to the amendment, union member teachers bore all the expenses of collective bargaining and contract administration, while nonmember teachers received the benefits of that representation without contributing to the cost. *Id.* at 294.

77. *Id.* at 295.

78. *Id.*

79. *Id.*

80. *Id.* at 296.

81. *Id.* at 297.

82. *Id.* at 297–98.

83. *Id.* at 299.

In its decision in *Hudson*, the Supreme Court recalled its statement in *Abood* that “the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union’s ability to require every employee to contribute to the cost of collective-bargaining activities.”⁸⁴ “Procedural safeguards are necessary to achieve this objective for two reasons.”⁸⁵ First, while the governmental interest in labor peace justifies the limited intrusion on First Amendment rights that comes with the agency shop, “the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.”⁸⁶ Second, the nonmember who objects to the political expenditures “must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.”⁸⁷ Therefore, the Court held,

[T]he constitutional requirements for the Union’s collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.⁸⁸

So, while *Abood* approved of the agency shop in public employment and distinguished between chargeable and nonchargeable expenses, *Hudson* established procedural safeguards for nonmember employees who object to supporting the union’s political and ideological program.

E. Davenport v. Washington Education Association: Cracks in the Foundation

For twenty years, *Hudson* provided a workable framework under which unions could collect and spend funds for political activity from willing members while affording objecting nonmembers an opportunity to opt out of those expenditures. In the 2007 case *Davenport v. Washington Education Association*,⁸⁹

84. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977).

85. *Hudson*, 475 U.S. at 303.

86. *Id.*

87. *Id.*

88. *Id.* at 310.

89. 551 U.S. 177 (2007).

however, the Court started to chip at the foundation it had laid with *Abood* and *Hudson*, a foundation that, consistent with the requirements of *Street*, delicately balanced the right of the union to collect money for political speech with the First Amendment rights of dissenting nonmembers.

In *Davenport*, voters in the State of Washington had approved a comprehensive campaign finance reform law, which included a provision prohibiting unions from using nonmembers' dues and fees for political expenditures unless the nonmember affirmatively approved of that contribution.⁹⁰ Several nonmembers and the State of Washington separately brought suit against the union, claiming that the union was using nonmembers' agency fees for political purposes without their affirmative consent, in violation of the law.⁹¹

The Washington Supreme Court held that the law was unconstitutional because it was not narrowly tailored to minimize the impact on union members' right to expressive activity while protecting the rights of dissenting nonmembers.⁹² The U.S. Supreme Court reversed, holding that "given the unique context of public-sector agency-shop arrangements, the content-based nature of [the law] does not violate the First Amendment" for three reasons.⁹³

First, the Court explained that the Washington Supreme Court had interpreted the Court's past cases on agency fees too broadly.⁹⁴ Those cases do not call for a balancing of the rights of dissenting members against the rights of members, the Court explained, "for the simple reason that unions have no constitutional entitlement to

90. WASH. REV. CODE § 42.17.760 (2006) ("A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.") (recodified at WASH. REV. CODE § 42.17A.500 (2012)).

91. *Davenport*, 551 U.S. at 183.

92. *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 130 P.3d 352, 362–63 (Wash. 2006) ("We conclude that the union's expressive activity is significantly burdened by [the] opt-in requirement. We also conclude that any compelling state interest in protecting dissenters' rights, could be met by less restrictive means other than the . . . opt-in procedure. The union's *Hudson* procedures amount to a constitutionally permissible alternative that adequately protects both the union and dissenters. Because [the law] is not narrowly tailored, we hold that the statute is unconstitutional.")

93. *Davenport*, 551 U.S. at 190.

94. *Id.* at 185.

the fees of nonmember-employees.”⁹⁵ The procedure for protecting nonmembers’ rights as set out in *Hudson* is a floor, not a ceiling. If a state wishes to require more than *Hudson* requires, it is free to do so without triggering First Amendment scrutiny.⁹⁶

Second, even though the opt-in law was ostensibly part of a package of campaign finance laws, the Court’s campaign finance decisions were not on point.⁹⁷ The union argued that the law was unconstitutional because it imposed restrictions on how a union may raise and spend funds that are lawfully within its possession. The Court disagreed, noting:

For purposes of the First Amendment, it is entirely immaterial that [Washington’s law] restricts a union’s use of funds only after those funds are already within the union’s lawful possession What matters is that public-sector agency fees are in the union’s possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees. . . . As applied to public-sector unions, [the law] is not fairly described as a restriction on how the union can spend “its” money; it is a condition placed upon the union’s extraordinary *state* entitlement to acquire and spend *other people’s* money.⁹⁸

Finally, the Court rejected the union’s argument that the law represented an impermissible content-based restriction on speech, since it required affirmative consent for expenditures for political speech but not for other kinds of speech. Conceding that content-based restrictions on speech are presumptively invalid,⁹⁹ the Court nonetheless noted that the risk that government will use content-based restrictions to interfere with the marketplace of ideas is not present here.¹⁰⁰ The Washington law was a “reasonable, viewpoint-neutral limitation on the State’s general authorization allowing public-sector unions to acquire and spend the money of

95. *Id.*

96. *Id.*; *cf.* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977) (“[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union’s ability to require every employee to contribute to the cost of collective-bargaining activities.”).

97. *Davenport*, 551 U.S. at 187.

98. *Id.*

99. *Id.* at 188 (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992)).

100. *Id.*

government employees.”¹⁰¹ The law leaves unions free to participate in the marketplace of ideas with funds that were not raised from dissenting nonmembers.¹⁰²

What is remarkable about *Davenport* is not that the Supreme Court upheld a state’s regulation of its public-sector unions, but the way in which the Court began to describe public-sector labor relations. Whereas *Abood* extolled the virtues of exclusive representation,¹⁰³ the Court in *Davenport* came out swinging against public-sector unions. After a brief description of the procedural history, the Court declared that “[r]egardless of one’s views as to the desirability of the agency-shop agreements, it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees.”¹⁰⁴ This statement demonstrates a significant shift in the Court’s view of public-sector unions.¹⁰⁵ While unions were once useful organizations that fostered the important goal of labor peace and helped public employees speak with one voice at the bargaining table,¹⁰⁶ they were now, in the Court’s view, simply private entities that possess the “extraordinary” power to “tax” public employees.¹⁰⁷

F. *Ysursa v. Pocatello Education Association: A Sharp Right Turn*

Two years after *Davenport*, the Court upheld another state law regulating public-sector agency fees in *Ysursa v. Pocatello Education Association*.¹⁰⁸ In that case, the State of Idaho, which is a “right-to-work”¹⁰⁹ state, enacted a law eliminating “checkoff”¹¹⁰ for voluntary

101. *Id.* at 189.

102. *Id.* at 190.

103. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220, 224 (1977).

104. *Davenport*, 551 U.S. at 184 (citations omitted).

105. Note that the makeup of the Court changed almost entirely between *Hudson* and *Davenport*. Justice Stevens is the only justice to hear both cases. Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O’Connor were replaced by Chief Justice Roberts, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, and Alito. The *Davenport* court contained all the current members of the right-wing bloc on the Court.

106. *See Abood*, 431 U.S. at 228 (“Through exercise of their political influence as part of the electorate, the [public] employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table.”).

107. *Davenport*, 551 U.S. at 184.

108. 555 U.S. 353 (2009).

109. “Right-to-work” is a term for state laws that forbid union security agreements, or agreements which require membership in a union as a condition of employment. The Taft-Hartley Act permits states to enact such laws for private-

contributions to fund unions' political activities.¹¹¹ The law, which provided criminal sanctions for violations, applied to private employers as well as to the state and political subdivisions of the state.¹¹²

Unions representing both private-sector and public-sector employees challenged the law, claiming that it violated the First and Fourteenth Amendments.¹¹³ The unions argued that the ban on checkoffs for political activities was an impermissible content-based restriction on speech because the law banned checkoffs for expenses to support political speech but not for any other category of speech.¹¹⁴

The Court of Appeals for the Ninth Circuit held the law unconstitutional as it applied to the State as an employer.¹¹⁵ Applying strict scrutiny, the appellate court held that the law was an impermissible regulation of content-based speech for which the State asserted no compelling justification.¹¹⁶

sector workers. *See* 29 U.S.C. § 164(b) (2006). Some states similarly forbid union security agreements for public-sector workers. In "right-to-work" states, union members bear all the costs of collective bargaining and contract administration, even though all workers who are covered by the contract benefit from the collective bargaining agreement. Those who receive the benefits of union representation without paying for it are known as "free riders." *See* DAVEY ET AL., *supra* note 16, at 399.

110. "Checkoff" is an agreement by which an employer deducts union dues and fees from employees' wages and remits those amounts to the union. HERMAN & KUHN, *supra* note 11, at 106. Unions highly value checkoff agreements, as they save the union a great deal of time, effort, and money in its dues-collection duties. *See id.*

111. *Ysursa*, 555 U.S. at 355–56.

112. *Id.* at 356. Violations of the law are punishable by a fine of up to \$1000, ninety days of imprisonment, or both. *Id.*

113. *Id.*

114. *Id.* at 358.

115. *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053 (9th Cir. 2007). The district court held the law unconstitutional as applied to private employers and political subdivisions of the state. *Id.* at 1056. The State did not appeal the ruling as to private employers. *Id.*

116. *Id.* at 1056. Before applying strict scrutiny analysis, the court of appeals examined whether forum analysis would be appropriate in this case. *Id.* at 1059–68. Under a forum analysis, the State may draw content-based distinctions for speech that occurs on government property that is a nonpublic forum. *Id.* at 1059–60. The appellants argued that forum analysis was appropriate because payroll deduction programs of local governments are nonpublic fora of the state. *Id.* at 1060. The court rejected that argument, however, because the State "failed to establish that local governments' payroll deduction programs involve Idaho's discretion and control over the management of its own internal affairs, such that the programs should be considered a nonpublic forum of the State." *Id.* at 1067

The Supreme Court disagreed and reversed, holding that the State need not “affirmatively assist political speech by allowing public employers to administer payroll deductions for political activities.”¹¹⁷ Idaho’s law did not abridge the unions’ freedom of speech, according to the Court; it simply declined to use the state-sponsored mechanism of the payroll deduction to promote the unions’ speech.¹¹⁸

Because the State had not infringed the unions’ First Amendment rights, the Court applied rational basis review to the law.¹¹⁹ Relying on *Davenport*, in which the Court approved of content-based distinctions for union speech, it found that “the State’s interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics”¹²⁰ was sufficient to justify the regulation, and that the ban on checkoff deductions “plainly serves the State’s interest in separating public employment from political activities.”¹²¹ Further, the State may regulate the payroll activities of local government units because those units are “subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.”¹²² The State’s interest in separating governmental functions from partisan politics “extends to all public employers at whatever level of government.”¹²³

The majority opinion in *Ysursa* drew several pointed dissenting opinions. Justice Breyer took issue with the majority’s position that the statute did not interfere with the union’s rights under the First Amendment.¹²⁴ Because a deduction system already existed, and the union was not seeking to create a new system to aid in the promotion of speech, the debate over whether the State’s action was “abridging” speech or simply “declining to promote” speech was “more metaphysical than practical.”¹²⁵ Nevertheless, Justice Breyer would have found that there was a First Amendment right at stake, and that the State’s ban on checkoff for political speech

(citation omitted). Therefore, the law was unconstitutional as to the political subdivisions of the state. *Id.* at 1068.

117. *Ysursa*, 555 U.S. at 364.

118. *Id.* at 355.

119. *Id.* at 359.

120. *Id.*

121. *Id.* at 361.

122. *Id.* at 362 (citing *Reynolds v. Sims*, 377 U.S. 533, 575 (1964)).

123. *Id.* at 363.

124. *Id.* at 365–66 (Breyer, J., dissenting).

125. *Id.* at 366.

“affects speech, albeit indirectly, by restricting a channel through which speech-supporting finance might flow.”¹²⁶

Justice Breyer agreed with the majority that strict scrutiny was not the proper way to analyze this restriction on speech.¹²⁷ Instead of using rational basis review, he would ask a question the Court has asked in other speech cases, namely “whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve.”¹²⁸ In line with those cases, he would find Idaho’s statute constitutional if he were convinced that the statute applied evenhandedly among similar kinds of contributions.¹²⁹ But, because the law was so clearly targeted against labor unions, it is not clear that it is evenhanded: “A restriction that applies to the political activities of unions alone would seem unlikely to further the government’s justifying objective, namely providing the appearance of political neutrality.”¹³⁰ As such, the speech-related harm is disproportionate to the government’s interest in maintaining the appearance of neutrality.¹³¹

Justice Stevens, also dissenting, was more direct: “Because it is clear to me that the restriction [on checkoff deductions] was intended to make it more difficult for unions to finance political speech, I would hold it unconstitutional in all its applications.”¹³² Justice Stevens identified two key features of the statute that belied its purported viewpoint neutrality. First, the statutory context—the statute pertained solely to labor unions—suggests that the legislature intended specifically to hinder only unions’ ability to raise funds for political speech.¹³³ Second, the law was both substantially overinclusive and underinclusive with respect to the State’s claimed interest in disavowing entanglement with politics;¹³⁴ it was overinclusive because it initially applied to private employers as well as public employers,¹³⁵ and it was underinclusive because it failed to restrict payroll deductions for charitable purposes.¹³⁶

126. *Id.* at 367.

127. *Id.* at 366–67.

128. *Id.*

129. *Id.* at 368.

130. *Id.* at 369.

131. *Id.* at 369–70.

132. *Id.* at 370 (Stevens, J., dissenting).

133. *Id.* at 371.

134. *Id.* at 371–72.

135. *Id.* at 372.

136. *Id.* at 371–72.

Justice Souter similarly was troubled by the fact that “[u]nion speech, and nothing else, seems to have been on the legislative mind”¹³⁷ when the State enacted the checkoff restriction. A reader of the statute, he argued, “may fairly suspect that Idaho’s legislative object was not efficient, clean government, but that unions’ political viewpoints were its target, selected out of all the politics the State might filter from its public workplaces.”¹³⁸ Still, because the unions did not directly raise the issue of viewpoint discrimination, the Court could not have fully explored that issue.¹³⁹ A court decision that ignores that “elephant in the room” is one with limited authority.¹⁴⁰ For that reason, Justice Souter argued, this case was a poor “vehicle to refine First Amendment doctrine.”¹⁴¹ He would not have granted certiorari in this case.¹⁴²

While the Court demonstrated in *Davenport* that it would uphold content-based state regulations of public-sector union speech, it showed in *Ysursa* just how far it was willing to go in order to do so. Idaho’s law did not just ban the use of payroll deduction for checkoff for voluntary political contributions; it criminalized it. It did not just apply to the state, but to all the political subdivisions of the state. And the Supreme Court upheld that unduly harsh and expansive law.

G. *Knox v. Service Employees International Union Local 1000: The Beginning of the End for Public-Sector Unions?*

1. *Background and Procedure*

On June 13, 2005, then-Governor Arnold Schwarzenegger called for a special election to be held in November in which voters would consider, among other things, two proposed ballot measures that alarmed the union representing 95,000 public workers in California,¹⁴³ Service Employees International Union (“SEIU”) Local 1000. Proposition 75 “would have required unions to obtain employees’ affirmative consent before charging them fees to be

137. *Id.* at 377 (Souter, J., dissenting).

138. *Id.*

139. *Id.* at 377–78.

140. *Id.*

141. *Id.* at 378.

142. *Id.*

143. *About Local 1000*, SEIU LOCAL 1000, <http://seiu1000.org/your-union/about.php> (last visited Jan. 26, 2013).

used for political purposes.”¹⁴⁴ Proposition 76 “would have limited state spending and would have given the Governor the ability under some circumstances to reduce state appropriations for public-employee compensation,”¹⁴⁵ in effect giving the governor the power to unilaterally abrogate duly-negotiated and ratified contracts with the state’s public-employee unions.

SEIU Local 1000 had already sent out its annual *Hudson* notice¹⁴⁶ in early June 2005, before the Governor announced his plans.¹⁴⁷ After the period for making *Hudson* objections expired, the union’s democratically-elected council¹⁴⁸ instituted an “Emergency Temporary Assessment to Build a Political Fight-Back Fund,”¹⁴⁹ which raised membership dues by one-quarter of one percent (0.25%), from 1.0% of gross wages to 1.25%.¹⁵⁰ This dues increase was intended to raise money to defeat Propositions 75 and 76 and to assist in the union’s political efforts in the 2006 general election.¹⁵¹

After receiving the notice of the dues increase, one of the plaintiffs complained to the union that he had not been afforded an opportunity to object to the special assessment.¹⁵² With the help

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

145. *Id.*

146. A *Hudson* notice is part of the procedural due process requirement under *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986). This notice, which a public-sector union sends out to nonmembers, usually on an annual or semi-annual basis, explains its calculation of chargeable and nonchargeable expenses for the coming year and offers nonmembers an opportunity to challenge that calculation and/or opt out of (object to) paying the nonchargeable expenses. *Id.* at 310. An “objecting nonmember” is one who opts out of paying the nonchargeable expenses and pays only for the expenses germane to collective bargaining under *Hudson*. *See id.* at 292.

147. *Knox*, 132 S. Ct. at 2285. The *Hudson* notice explained that 56.35% of its total expenditures in the coming year would be devoted to chargeable collective bargaining activities and would constitute the fair share percentage of dues and fees that would be charged to nonmembers in the coming year. *Id.*

148. Brief for Respondent, *Knox*, 132 S. Ct. 2277 (No. 10-1121), 2011 WL 5908951.

149. *Knox*, 132 S. Ct. at 2285.

150. Brief for Respondent, *supra* note 148, at *3. The union’s *Hudson* notice included a statement that the agency fee was subject to increase at any time without further notice. *Knox*, 132 S. Ct. at 2285.

151. *Knox*, 132 S. Ct. at 2285–86. According to the union’s proposal, the Fight-Back Fund would be used “for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California.” *Id.* at 2286 (internal quotation marks omitted).

152. *Id.* at 2286.

of the National Right to Work Legal Defense Foundation,¹⁵³ the plaintiff filed a class-action suit on behalf of 28,000 nonmember employees who contributed to the Fight-Back Fund, some who had objected after the regular *Hudson* notice was sent, and some who had never previously objected.¹⁵⁴

The district court granted summary judgment to the class of nonmembers,¹⁵⁵ but the Ninth Circuit Court of Appeals reversed.¹⁵⁶ Applying *Hudson*'s balancing test—"devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities"¹⁵⁷—that court held that no second *Hudson* notice was necessary after the mid-year increase was instituted.¹⁵⁸

First, according to the court of appeals, the chargeable and nonchargeable dues calculations set out in *Hudson* notices, as a matter of "practical necessity,"¹⁵⁹ lag one year behind actual expenditures. Because *Hudson* requires that the union's financial statements be audited before being presented to members and nonmembers, the union's expenditures must have been made before the chargeable portion can be calculated. "The audit requirement renders impossible any method of determining the chargeability of the upcoming fee year's expenditures other than basing it on the prior year's actual expenditures, because one cannot audit anticipated future expenditures."¹⁶⁰ The "inevitable effect"¹⁶¹ of such a requirement is that nonmembers' fair-share fees will fluctuate from year to year based on the prior year's expenditures, but "these over- and undercharges even out over time."¹⁶²

153. *Id.* at 2284; *see also* Press Release, Nat'l Right to Work Legal Def. Found., Inc., Federal Judge Blocks Unlawful Union Dues Seizures from State Government Employees (Nov. 3, 2005), *available at* <http://www.nrtw.org/en/press/2005/11/federal-judge-blocks-unlawful-union-dues-seizures-state-government-employees>.

154. *Knox*, 132 S. Ct. at 2286; Brief for Petitioners, *Knox*, 132 S. Ct. 2277 (No. 10-1121), 2011 WL 4100440 at *5.

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

156. *See Knox v. Cal. State Emps. Ass'n Local 1000*, 628 F.3d 1115 (9th Cir. 2010).

157. *Id.* at 1119–20 (quoting *Chi. Teachers Union Local No. 1 v. Hudson*, 475 U.S. 302 (1986)).

158. *Id.* at 1123.

159. *Id.* at 1121.

160. *Id.*

161. *Id.*

162. *Id.*

Second, and related to the first point, unions' chargeable and nonchargeable expenses vary from year to year. A union might negotiate a significant new contract in one year (the costs of which would be attributable to collective bargaining expenses) and engage in election year politics the next (which would generate a great deal of nonchargeable expenses). Thus, "*Hudson's* prior year method assumes and accepts that a union has no 'typical spending regime,' and that even though spending might vary dramatically, a single annual notice based upon the prior year's audited finances is constitutionally sufficient."¹⁶³ The union's June 2005 *Hudson* notice, then, was sufficient for the current year because the temporary emergency dues increase would be accounted for in the next year's *Hudson* notice.

Furthermore, the Ninth Circuit rejected the district court's conclusion that it is incumbent upon the union to devise a system that imposes the least possible burden on objecting nonmembers.¹⁶⁴ The union's obligation, the court stated, is "to establish a system that merely 'reasonably accommodates the legitimate interests of the union, the [public employer] and nonmember employees.'"¹⁶⁵

2. *The Supreme Court Decision*

The Supreme Court granted certiorari, reversed, and remanded, holding that "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."¹⁶⁶ In reaching that holding, the Court examined issues of compelled speech and whether the process for objecting properly protects nonmembers' First

163. *Id.* at 1122.

164. *Id.* at 1122–23.

165. *Id.* at 1123 (quoting *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1376 n.7 (9th Cir. 1993)); *see also* *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987) ("When the union's plan satisfies the standards established by *Hudson*, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support.").

166. *Knox v. Serv. Emps. Int'l Union Local 1000*, 132 S. Ct. 2277, 2296 (2012). Justice Alito, writing for the majority, was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justices Ginsburg and Sotomayor concurred in the judgment. Justices Breyer and Kagan together dissented.

Amendment rights.¹⁶⁷

First, the Court explored the inherent tension between obligatory payment of union dues and the First Amendment. Beginning from the proposition that “[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves,”¹⁶⁸ the Court noted that union dues constitute a form of compelled speech, since payment of dues—or at least payment of agency fees—is a condition of employment for most public-sector workers.¹⁶⁹ As such, union dues represent a “significant impingement on First Amendment rights”¹⁷⁰ because “a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences,”¹⁷¹ positions with which nonmembers may disagree. The Court observed that “[o]ur 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.”¹⁷²

The Court then turned to the method by which objecting nonmembers must make their objections known. By “historical accident,”¹⁷³ according to the Court, an “opt-out” system developed, which requires nonmembers to declare affirmatively that they object to paying dues and fees to support the union’s political objectives; if they do not opt out, they are presumed to wish to support the political program.¹⁷⁴ That approach, the Court said, “represents a remarkable boon for unions,”¹⁷⁵ because it puts the burden of asserting First Amendment rights on the objecting nonmember. “[W]hat is the justification for putting the burden on the nonmember to opt out of making such a payment [to fund a union’s political or ideological activities]?” the Court asked.¹⁷⁶ “Shouldn’t the default rule comport with the probable preferences

167. *Id.* at 2293–96.

168. *Id.* at 2288 (citing *R.A.V. v. City of St. Paul*, Minn., 505 U.S. 377, 382 (1992)).

169. *Id.* at 2289.

170. *Id.* (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455 (1984)).

171. *Id.*

172. *Id.*

173. *Id.* at 2290.

174. *Id.*; see *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 744 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238–42 (1977).

175. *Knox*, 132 S. Ct. at 2290.

176. *Id.*

of most nonmembers?”¹⁷⁷ Finding no justification, the Court, for the first time, imposed an “opt-in” requirement for nonchargeable expenses, making a dues objection the default position unless the nonmember affirmatively opts in to paying such dues.

Then, the Court explained why a fresh *Hudson* notice for mid-year dues increases is necessary in order to protect the First Amendment rights of objecting nonmembers. In short, “*Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be ‘carefully tailored to minimize the infringement’ of free speech rights.”¹⁷⁸ Informed choice is the key to the *Hudson* notice system, the Court explained.¹⁷⁹ An annual notice is only sufficient if it provides the nonmember with all the information she needs in order to make a decision about whether to object for the year. If the union makes a mid-year change in the amount of dues that it will require nonmembers to pay, the nonmembers could not have given informed consent to the new payment.¹⁸⁰ Therefore, the union’s procedure for collecting fees from nonmembers was not carefully tailored to minimize impingement on nonmembers’ First Amendment rights.¹⁸¹ The Court concluded:

To respect the limits of the First Amendment, the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out. Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all. Even if this burden can be justified during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out

177. *Id.*

178. *Id.* at 2291 (quoting *Chi. Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986)).

179. *Id.* at 2291–92.

180. *Id.*

181. The Court rejected the union’s argument that an increase in dues for political purposes in the current year would be offset by a decrease in chargeable expenses in the following year. The later decrease “would not fully recompense nonmembers who did not opt out after receiving the regular notice but would have opted out if they had been permitted to do so when the special assessment was announced.” *Id.* at 2292. Even a full refund “would not undo the violation of First Amendment rights,” because “the First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full.” *Id.* at 2292–93. A refund provided after the money had been spent for political purposes would be “cold comfort.” *Id.* at 2293.

requirement to collect special fees whenever the union desires.¹⁸²

As a practical matter, the Court also took issue with the union's methods of defining and accounting for its expenditures. While the union's statements of expenses that accompany *Hudson* notices are audited, the auditor does not express a legal opinion as to which expenses are chargeable and which are not; the auditor's function is limited to "ensur[ing] that the expenditures which the union claims it made for certain expenses were actually made for those expenses."¹⁸³ The union's view of the scope of its chargeable expenses, according to the Court, "is so expansive that it is hard to place much reliance on its statistics."¹⁸⁴ If the Court were to accept the union's definition of chargeability, "it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities."¹⁸⁵

3. *Concurring and Dissenting Opinions*

Justices Ginsburg and Sotomayor, concurring in the judgment, agreed that a second *Hudson* notice and opportunity to opt out are necessary when a public-sector union imposes a special assessment to fund its political activity. However, Sotomayor took the majority to task on its decision to institute an opt-in system for political expenditures. The majority, according to Sotomayor, "proceeds, quite unnecessarily, to reach significant constitutional issues not contained in the questions presented, briefed, or argued,"¹⁸⁶ which

182. *Id.*

183. *Id.* at 2294 (alteration in original) (quoting *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987)).

184. *Id.*

185. *Id.* at 2295.

186. *Id.* at 2297 (Sotomayor, J., concurring). The petitioners presented the following questions:

1. . . . May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political purposes—a statewide ballot initiative campaign—without first providing a *Hudson* notice that includes information about that assessment and provides an *opportunity to opt out* of supporting those political exactions?

2. . . . May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a union's opposition to public ballot initiatives?

Brief for Petitioners, *supra* note 154, at i (emphasis added). The respondent presented the following questions:

1. If a public employee union has already issued an annual *Hudson* notice

violates the Court's own rules.¹⁸⁷ The question of whether an opt-in system for nonchargeable expenses is constitutionally necessary was not one that either party raised in its briefs or arguments.¹⁸⁸ With respect to such a constitutionally significant question,

[t]he imperative of judicial restraint is at its zenith here . . . for “[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”¹⁸⁹

Furthermore, the Court's holding—that “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”¹⁹⁰—raised more questions than it answered,¹⁹¹ and introduced a great deal of

establishing an objector fee based upon its auditor-verified expenditures in the preceding year, must the union, when instituting a temporary increase in membership dues that will not change the objector fee rate, issue a supplemental notice that predicts how the funds generated by the increase will be used, establishes a new objector fee rate solely for the increase based upon those predictions, and provides nonmembers with a separate *opportunity to object* to paying the predicted nonchargeable portion of the increase?

2. (a) Can nonmembers of a public employee union pursue in this Court a chargeability challenge to the union's spending to oppose a ballot initiative, where they disavowed and never litigated such a claim below, where the decision below did not decide such a claim, and where there is no evidence that objectors' fees were spent to support the union's opposition to the initiative?

(b) If so, is a public employee union's opposition to a ballot initiative that would give a state's governor the power to abrogate the union's collective bargaining agreements sufficiently related to “contract . . . implementation[.]” . . . that the costs of that opposition are chargeable to all nonmembers?

Brief for Respondent, *supra* note 148, at i–ii (first omission in original) (emphasis added) (citations omitted).

187. See SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).

188. See Brief for Petitioners, *supra* note 154; Brief for Respondent, *supra* note 148.

189. *Knox*, 132 S. Ct. at 2298 (alterations in original) (quoting *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997)).

190. *Id.* at 2296 (majority opinion).

191. *Id.* at 2298–99 (Sotomayor, J., concurring). Justice Sotomayor asked, Must a union undertaking a special assessment or dues increase obtain affirmative consent to collect ‘any funds’ or solely to collect funds for nonchargeable expenses? May a nonmember opt not to contribute to a special assessment, even if the assessment is levied to fund uncontestably

uncertainty in an area of law that had been settled for some time.

Justice Sotomayor also criticized the majority for backing away from longstanding precedent that placed the burden of objecting on the dissenting nonmember.¹⁹² “To cast serious doubt on longstanding precedent is a step we historically take only with the greatest caution and reticence.”¹⁹³ The majority’s decision to step away from a long-settled issue, without affording the parties the opportunity to brief and argue the issue was “both unfair and unwise.”¹⁹⁴ “Not content with our task, prescribed by Article III, of answering constitutional questions,” Sotomayor concluded, “the majority today decides to ask them as well.”¹⁹⁵

Justices Breyer and Kagan dissented, criticizing the majority’s departure from *Hudson’s* framework for “developing administratively workable systems that (1) allow unions to pay the costs of fulfilling their representational obligations to both members and nonmembers alike, while (2) simultaneously protecting the nonmembers’ constitutional right not to support ideological causes not germane to [the union’s] duties as collective-bargaining agent.”¹⁹⁶

Focusing on the practical ramifications of the majority’s approach, the dissent disapproved of the Court’s willingness to depart from *Hudson’s* framework, upon which unions and employers have relied for twenty-five years.¹⁹⁷ The dissent conceded that the *Hudson* approach—which bases one year’s chargeable expenses on the previous year’s expenditures and can vary significantly from year to year—is imperfect.¹⁹⁸ Still, such an approach “enjoys an offsetting administrative virtue.”¹⁹⁹ Because the present year’s dues are based upon the prior year’s audited

chargeable activities? Does the majority’s new rule allow for any distinction between nonmembers who had earlier objected to the payment of nonchargeable expenses and those who had not? What procedures govern this new world of fee collection?

Id.

192. *Id.* at 2299. Justice Sotomayor specifically criticized the majority for casting aside the Court’s “explicit holding” in *International Association of Machinists v. Street*, 367 U.S. 740 (1961) as “nothing but an ‘offhand remark.’” *Knox*, 132 S. Ct. at 2299.

193. *Knox*, 132 S. Ct. at 2299.

194. *Id.*

195. *Id.*

196. *Id.* at 2300 (Breyer, J., dissenting) (internal quotations omitted).

197. *Id.*

198. *Id.* at 2301.

199. *Id.*

expenses, nonmembers receive a level of certainty that they would not have if the union were required to make predictions about the coming year's expenses instead.²⁰⁰ And while nonmembers will pay more in some years and less in others, "what [they] lose on the swings they will gain on the roundabouts."²⁰¹

As to the requirement that the union give a fresh *Hudson* notice when it increases dues mid-year, the dissent conceded that the opportunity to opt out is a greater concern for nonmembers who did not opt out after the first *Hudson* notice because they will not have an opportunity to withhold any amount of the increase.²⁰² Nevertheless, the dissent maintained, requiring the union to issue a new notice is administratively unworkable and not required by the Constitution.²⁰³ *Hudson's* annual notice approach is imperfect, "[b]ut for constitutional purposes the critical fact is that annual objection is at least one reasonably practical way to permit the principled objector to avoid paying for politics with which he disagrees."²⁰⁴

The dissent also rejected the majority's position that an opt-in system is necessary to protect objecting nonmembers' First Amendment rights.²⁰⁵ The dissent agreed with Justice Sotomayor that the majority improperly decided a question that had not been presented to the Court,²⁰⁶ but the dissent further explained that an opt-in system primarily protects those "who do not feel strongly enough about the union's politics to indicate a choice either way."²⁰⁷ These nonmembers may not care enough to opt in, but also would not have opted out. Thus, the opt-in system has the potential to significantly reduce the union's ability to raise funds for political activity while primarily protecting the First Amendment rights of nonmembers who don't care enough to assert them.²⁰⁸ As the Court held in *Davenport*, states may choose to

200. *Id.*

201. *Id.*

202. *Id.* at 2304.

203. "[I]nsofar as a new objection permits the new objector to withhold only the portion of the fee that will pay for nonchargeable expenses . . . unions, arbitrators, and courts will have to determine, on the basis of a prediction, *how much* of the special assessment the new objector can withhold." *Id.* at 2305.

204. *Id.*

205. *Id.* at 2306.

206. *Id.*

207. *Id.* at 2307.

208. *Id.*

impose an opt-in requirement on their public-sector unions,²⁰⁹ but the Supreme Court has never mandated it. “There is no good reason for the Court suddenly to enter the debate” over opt-in requirements, Justice Breyer wrote, “much less now to decide that the Constitution resolves it.”²¹⁰

4. Analysis

The Supreme Court’s decision in *Knox* is a breathtaking display of judicial activism by the far-right wing of the Court,²¹¹ which calls into question the future of public-sector unionism in the United States. Four features of this decision in particular should give advocates for workplace fairness great cause for concern.

First, the Court abandoned fifty years of precedent²¹² to unilaterally impose an opt-in system for mid-year changes to political dues and fees, even though neither party asked the Court to reach that question, and neither party had an opportunity to brief and argue the issue. The Court dismissed as dicta the “explicit holding”²¹³ from *Street*, that “dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.”²¹⁴ Since *Street*, the Court had continued to apply this requirement throughout its subsequent cases,²¹⁵ a principle commonly known as *stare decisis*, but which the majority, in this case, called “a historical accident.”²¹⁶

By moving away from long-settled principles of labor law, the Court injected a great deal of uncertainty into the law that will likely invite future litigation.²¹⁷ The effect of the Court’s holding

209. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177 (2007).

210. *Knox*, 132 S. Ct. at 2307.

211. A *New York Times* editorial called the decision “one of the most brazen of the Roberts [C]ourt.” Editorial, *The Anti-Union Roberts Court*, N.Y. TIMES, June 23, 2012, <http://www.nytimes.com/2012/06/23/opinion/the-anti-union-roberts-court.html>.

212. *See Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961).

213. *Knox*, 132 S. Ct. at 2299 (Sotomayor, J., concurring).

214. *Street*, 367 U.S. at 774.

215. *See Chi. Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

216. *Knox*, 132 S. Ct. at 2290 (majority opinion).

217. William Gould, Chairman of the National Labor Relations Board from 1994 to 1998, said, “The Court’s opinion makes clear its displeasure with [sixty] years of precedent on the dues issue, which have placed the burden on employees who object [to political spending] to opt out This decision is an invitation to

("[W]hen 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"²¹⁸) is to raise more questions than it settles. Does the opt-in procedure apply to every dues increase, or only to mid-year increases? If a nonmember objects for the first time following a mid-year increase, how will the chargeable portion be calculated? Will the union have to estimate its coming year's expenses? How will such estimates and expenses be audited? Must the union issue a refund, or may it collect on an underpayment, if its projections later proved to be inaccurate? Because the Court reached questions in its holding that the parties did not brief or argue, the parties lost an opportunity to weigh in on how the Court should answer these practical administrative questions.

The Court's holding in *Knox* also calls into question the viability of *Street*'s holding, which requires a showing of affirmative dissent from nonmembers. It is not clear whether the Court intended to overrule *Street*, but the Court's holding in *Knox* leaves the door wide open to impose *Knox*'s holding on private-sector unions as well. To make dissent the default position would seem to upset the balance the Court struck in *Street* between the right of dissenting nonmembers to avoid supporting union speech and the right of the majority of the members to speak collectively on matters of political importance. *Knox*'s holding tips the balance in favor of dissenters.

Second, the Court circumvented the democratic process to impose court-made law in an area that has traditionally been left to the states. Congress left the regulation of labor relations with state employees to the states.²¹⁹ States have been free to experiment with various labor relations systems and laws, and the Court has protected such experimentation. In *Davenport*, for example, the Court held that a state may pass a law requiring that nonmembers

litigate this issue." Cole Stangler, *Supreme Court Union Ruling, Knox v. SEIU, Could Cut Back Labor's Political Speech*, THE HUFFINGTON POST, (June 25, 2012 7:32 PM), http://www.huffingtonpost.com/2012/06/25/supreme-court-unions-knox-v-seiu_n_1625659.html.

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

219. See 29 U.S.C. § 152(2) (2006); see also *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 186 (2007) ("[O]ur repeated affirmation that courts have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement.").

be required to opt in to, rather than permitted to opt out of, dues levied for political purposes.²²⁰ Now, however, the Court, on its own initiative, converted that permissive regulation to a mandatory one for all states. This is especially troubling in light of the fact that Proposition 75, which would have required unions to obtain members' affirmative consent before charging them dues and fees to be used for political purposes, was defeated by California voters.²²¹ Thus, the Supreme Court imposed a regime that voters rejected.

Furthermore, California law also permits some political expenditures to be counted as chargeable expenses.²²² In that state, chargeable expenses may include "the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer."²²³ California's law appears to recognize that, in order to be effective at the bargaining table, unions of public-sector workers must also engage in political activity to persuade lawmakers to support the union's negotiating positions. Without engaging in some political activity, unions of public workers cannot effectively represent the members' best interests at the bargaining table.²²⁴ Not only does the Court's holding in *Knox* call into question the viability of California's law without affording the state an opportunity to defend it, it also ignores the benefit of some political activity to both members and nonmembers in the collective bargaining process. This is particularly troubling because unions have a duty to represent the

220. *Davenport*, 551 U.S. at 178.

221. See *Proposition 75*, LEAGUE OF WOMEN VOTERS OF CAL. EDUC. FUND (Jan. 28, 2006, 2:49 PM), <http://www.smartvoter.org/2005/11/08/ca/state/prop/75/>.

222. CAL. GOV'T CODE § 3515.8 (West 2010).

223. *Id.*

224. See Rafael Gely, Ramona L. Paetzold & Leonard Bierman, *Educating the United States Supreme Court at Summers' School: A Lesson on the "Special Character of the Animal,"* 14 EMP. RTS. & EMP. POL'Y J. 93, 117 (2010) ("[U]nion representation in the public sector is based on the understanding that the collective bargaining process represents only one component of the relationship between the public employee and the public employer. . . . In the public sector . . . collective bargaining duties related to conditions of employment cannot readily be seen as distinct from a union's political activities. . . . [P]ublic policies that make it harder for public sector unions to engage in political activities also, in turn, make it harder for them to fulfill the full panoply of their bargaining responsibilities.").

interests of members and nonmembers alike. Limiting the unions' ability to engage with the decision makers on the other side of the bargaining table hamstrings the unions in the fulfillment of that duty.

Third, the Court hinted unsubtly that a judicially-created nationwide "right-to-work" scheme—at least for public-sector unions, if not all unions—may be on its agenda.²²⁵ The Court noted that union dues constitute a "significant impingement"²²⁶ on First Amendment rights, and that while "[o]ur cases to date have tolerated this 'impingement' . . . we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake"²²⁷—foreboding dicta that suggests that the Court is inviting further challenges to laws that allow unions to collect agency fees from nonmembers. Indeed, the *Knox* decision "all but begs right-wing advocacy groups and public employers to use [the Court's] emerging First-Amendment jurisprudence to take down public-employee unions and in essence find a Southern-style 'right-to-work' law in the Constitution."²²⁸

The Court has even conveniently foreshadowed the logical path it could take in order to arrive at its answer to the "right-to-work" question. First, it blurs the critical distinction between dues used for politics and dues used for collective bargaining, a distinction the Court itself drew in *Abood*.²²⁹ Dues collected for *any purpose*, according to the Court in *Knox*, constitute a form of compelled speech and represent "a significant impingement on First Amendment rights."²³⁰ Because a public-sector union bargains collectively with politically accountable officials, that bargaining itself has "powerful political and civic consequences."²³¹ In essence, the Court equated public-sector collective bargaining with political activity simply because the employer is a governmental entity. Then, from this position, it is a very short leap to requiring that all

225. The National Labor Relations Act permits states to enact "right-to-work" laws covering the private-sector workforce. See 29 U.S.C. § 164(b) (2006). Because states regulate their own public-sector labor relations, each state chooses whether its public-employment system will be a "right-to-work" system or an agency-shop system.

226. *Knox v. Serv. Emp. Int'l Union Local 1000*, 132 S. Ct. 2277, 2289 (2012).

227. *Id.*

228. Garrett Epps, *The Court's Scott Walker Moment*, AM. PROSPECT (June 21, 2012), <http://prospect.org/article/court%E2%80%99s-scott-walker-moment>.

229. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229–31 (1977).

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

231. *Id.*

public-sector employment be “right-to-work.”²³² After all, if all public-sector collective bargaining is political, and unions may not compel nonmembers to pay dues for political purposes, then unions may not compel nonmembers to pay any dues at all. This is the essence of the “right-to-work” model: nonmembers cannot be compelled to pay any dues, even to support the union’s collective bargaining efforts, which benefit all the employees covered by the contract.

Finally, the Court cited in passing,²³³ but largely ignored, the most troublesome precedent with which it should have grappled: *Citizens United*.²³⁴ In fact, the disconnect between *Citizens United* and *Knox* and its predecessors may be the most disturbing feature of this case. While the key holding in *Citizens United*—that the First Amendment does not permit political speech restrictions based on the speaker’s identity²³⁵—purports to place unions and corporations on equal footing insofar as political spending is concerned, *Knox* undermines that supposed equality in three key ways.

First, while *Citizens United* rejected onerous administrative requirements for corporate speakers, *Knox* further entrenches such requirements for unions. The Court in *Citizens United* found that forcing corporations to conduct their political speech through

232. Acknowledging the inherently political nature of public-sector collective bargaining does not compel the conclusion that unionization is inappropriate in the public sector, which seems to be the direction in which the Court is headed. Indeed, Professor Summers reaches the opposite conclusion when examining the special character of public-sector collective bargaining, which he calls a “properly and inevitably political” act. Summers, *Bargaining in the Government’s Business*, *supra* note 31, at 266. Robust unions are necessary to protect the interests of public workers, he argues; “one of the principal justifications for public-employee bargaining is that most public employees need this special process to give them an ability to counteract the overriding political strength of other voters who constantly press for lower taxes and increased services.” Summers, *Problems of Governmental Decisionmaking*, *supra* note 31, at 675. “Right-to-work” schemes weaken unions and make it more difficult for them to bargain effectively on behalf of their members. See generally Michael M. Oswald, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691 (2007).

233. “Public-sector unions have the right under the First Amendment to express their views on political and social issues without government interference.” *Knox*, 132 S. Ct. at 2295 (citing *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010)). This is the only reference to *Citizens United* in the Court’s opinion.

234. *Citizens United*, 130 S. Ct. 876.

235. *Id.* at 903.

political action committees (“PACs”), with all the attendant reporting and recordkeeping requirements, represented a “burdensome alternative[]” to direct speech and was impermissible under the First Amendment.²³⁶ Analogously, then, “it should be true that unions, as associations, have significant First Amendment interests themselves, and that imposing excessive procedural or compliance burdens on union speech can amount to a First Amendment violation.”²³⁷ For unions, however, the recordkeeping and reporting requirements under *Hudson* and other statutory provisions are even more burdensome than those demanded of PACs.²³⁸ *Knox* not only left those administrative burdens in place for unions, it increased them by requiring unions to identify which nonmembers wish to opt in to support a union’s political program.²³⁹ The Court in *Knox* did not acknowledge this lopsided scheme, much less attempt to justify it.²⁴⁰

Second, as the Court noted in *Citizens United*, “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”²⁴¹ Making it easier for corporations to spend money on political speech, while making it harder for unions to do the same, will create the predictable result of over-representing corporate interests in the public discourse.²⁴²

236. *Id.* at 897.

237. Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 41 (2011).

238. *See id.*, at 14 (“[U]nions’ uses of dues and fees for political purposes are encumbered even beyond [campaign finance law’s] independent expenditure provision. For example, unions are not permitted to use for political purposes dues and fees submitted by members who object to such use, and they must publicly disclose many of their expenditures and receipts pursuant to the Labor Management Reporting and Disclosure Act. This means that even if unions are excused from the segregation and reporting requirements that election law imposes, they must nonetheless carefully track their spending and ensure that only authorized funds go toward political activities.”) (citations omitted)). These opt-out requirements apply to both private-sector and public-sector workers. *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), created opt-out requirements for private-sector unions substantially similar to *Hudson*’s requirements for public-sector workers.

239. *Knox v. Serv. Emps. Int’l Union Local 1000*, 132 S. Ct. 2277, 2293 (2012).

240. *See* Garden, *supra* note 237, at 43–44 (“At minimum, before imposing requirements designed to protect objectors in public . . . employment, courts should ensure that the requirements are narrowly tailored and that they will be, on balance, sufficiently effective to justify the burden on unions’ political speech.”).

241. *Citizens United*, 130 S. Ct. at 899.

242. Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 861–62 (2012).

By erecting greater roadblocks to unions' political speech, *Knox* increases the opportunities for corporate voices to drown out workers' voices in the marketplace of ideas. This content-based disparity makes this distinction constitutionally suspect.²⁴³

Third, while *Knox* mandated an opt-in scheme for objecting nonmembers in public-sector unions, corporate shareholders who object to their companies' political spending under *Citizens United* are not afforded a similar right to opt out of those expenditures.²⁴⁴ Thus, corporations may spend freely the proportionate shares of the residual claimants' interests in the corporation without their consent,²⁴⁵ but public-sector unions must now ask permission of every member before collecting dues money for political speech.²⁴⁶ The problem with this asymmetry between shareholder rights and objecting nonmember rights is that it "provide[s] corporations a legally constructed advantage over unions when it comes to political spending,"²⁴⁷ which is inconsistent with federal campaign finance law's insistence that unions and corporations be put "on exactly the same basis, insofar as their financial activities are concerned."²⁴⁸ The Court's admonition in *Knox* that "[t]he general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail"²⁴⁹ seems only to apply to dissenting nonmembers and not to dissenting shareholders.

In sum, *Knox* is in many ways incompatible with *Citizens United*, a disconnect that the Court functionally ignored.²⁵⁰ Although the *Knox* Court cited *Citizens United* for the proposition that "[p]ublic-sector unions have the right under the First Amendment to express their views on political and social issues without government interference," this obscures the complicated and thorny First Amendment issues that both cases raise.²⁵¹

243. *Id.* at 862.

244. For a thorough examination of the problems with the asymmetry between shareholders' rights and objecting nonmembers' rights, see *id.*

245. *Id.* at 825.

246. *Knox v. Serv. Emps. Int'l Union Local 1000*, 132 S. Ct. 2277, 2293 (2012).

247. Sachs, *supra* note 242, at 803.

248. *Id.* (quoting *United States v. UAW-CIO*, 352 U.S. 567, 579 (1957)).

249. *Knox*, 132 S. Ct. at 2295.

250. See generally Jeremy G. Mallory, *Still Other People's Money: Reconciling Citizens United with Abood and Beck*, 47 CAL. W. L. REV. 1, 32 (2010) (arguing that "no principled distinction exists that would prevent the cross-application" of the union dues precedents in the corporate speech context).

251. *Knox*, 132 S. Ct. at 2295 (citing *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010)).

IV. CONCLUSION

Although the Supreme Court's decision in *Knox* seems to signal open season on workers and their unions, workers and voters are fighting back. Indeed, popular support for pro-union laws remains strong, and where anti-union measures have been put directly to voters, those measures have frequently been rejected. In California, for instance, where the *Knox* case originated, voters recently defeated Proposition 32, a measure that, like the Idaho law at issue in *Ysursa*, would have barred both public- and private-sector unions from collecting dues for political purposes through employee payroll deductions.²⁵²

Voters in Ohio also soundly defeated SB 5, a Wisconsin-style measure pushed by Governor John Kasich that would have curtailed public employees' collective-bargaining rights, eliminated the right to strike, and scrapped binding arbitration of labor-management disputes.²⁵³ By a margin of 61–39%, voters in that state turned back the anti-union overreaching by Governor Kasich,²⁵⁴ because of his support of SB 5, the Governor's approval ratings sank to 38% in the months leading up to the election.²⁵⁵

Even in Michigan, where the Republican-dominated lame-duck legislature and Republican governor hastily pushed through a “right-to-work” law before the end of the 2012 term, only 41 percent of Michiganders support right-to-work legislation.²⁵⁶ With the election of several more Democrats to the state legislature,

252. *Proposition 32*, LEAGUE OF WOMEN VOTERS OF CAL. EDUC. FUND (Dec. 17, 2012, 1:48 PM), <http://www.smartvoter.org/2012/11/06/ca/state/prop/32/>; see also *Proposition 32: Prohibits Political Contributions by Payroll Deduction*, CAL. LEGIS. ANALYST'S OFF. (July 18, 2012), http://lao.ca.gov/ballot/2012/32_11_2012.pdf. The proposition would also have banned payroll deductions for political expenditures by corporations, but according to the Legislative Analyst's Office, “[o]ther than unions, relatively few organizations currently use payroll deductions to finance political spending in California.” *Id.* at 3. That provision, then, would have been essentially meaningless.

253. Amanda Terkel & John Celock, *Ohio Issue 2: Controversial Anti-Union Law Defeated by Voters*, HUFFINGTON POST, (Nov. 9, 2011, 12:38 PM), http://www.huffingtonpost.com/2011/11/08/ohio-issue-2_n_1083100.html.

254. *Id.*

255. Joe Vardon, *Kasich Can Count Big Wins, SB 5 Loss in First Year*, COLUMBUS DISPATCH, Dec. 18, 2011, <http://www.dispatch.com/content/stories/local/2011/12/18/kasich-can-count-big-wins-sb-5-loss-in-first-year.html>.

256. Tom Jensen, *Snyder's Popularity Plummets*, PUB. POL'Y POLLING (Dec. 18, 2012), <http://www.publicpolicypolling.com/main/2012/12/snyders-popularity-plummets.html>.

right-to-work legislation would have failed in the next session.²⁵⁷ And with such low support among the public, it likely would have been defeated if put to a popular vote. Perhaps for that reason, supporters of the legislation tied the right-to-work language to an appropriations bill, eliminating the possibility that it could be overturned by referendum.²⁵⁸ Workers in the cradle of the American labor movement, however, are not rolling over. One lawsuit has already been filed to challenge the law, and labor is mulling its other options, including political as well as legal strategies.²⁵⁹

As workers beat back anti-union initiatives from right-wing lawmakers at the state level, there is also hope at the federal level. In the next four years, President Obama may have the opportunity to replace more than one member of the Supreme Court;²⁶⁰ a moderate majority could help to stem the tide of anti-union decisions coming out of the Court. For public-sector workers in particular, the stakes have never been higher.

257. Josh Hicks, *Did Michigan Lawmakers Ram Through 'Right to Work' Laws?*, WASH. POST, Dec. 20, 2012, http://www.washingtonpost.com/blogs/fact-checker/post/did-michigan-lawmakers-ram-through-right-to-work-laws/2012/12/19/a87d8e60-47c9-11e2-b6f0-e851e741d196_blog.html.

258. Chad Livengood & Karen Bouffard, *Snyder Makes Michigan 24th Right-to-Work State*, DETROIT NEWS, Dec. 11, 2012, <http://www.detroitnews.com/article/20121211/POLITICS02/212110393>.

259. Amanda Terkel, *Right to Work in Michigan: Labor's Options for Repeal*, HUFFINGTON POST, (Dec. 11, 2012, 4:13 PM), http://www.huffingtonpost.com/2012/12/11/right-to-work-michigan_n_2277178.html; see also Jim Lynch, *Lawsuits Expected over Right to Work*, DETROIT NEWS, Dec. 20, 2012, <http://www.detroitnews.com/article/20121220/POLITICS02/212200365>.

260. Sheryl Gay Stolberg, *Future of an Aging Court Raises Stakes of Presidential Vote*, N.Y. TIMES, June 27, 2012, <http://www.nytimes.com/2012/06/28/us/presidential-election-could-reshape-an-aging-supreme-court.html>. There are now four justices—Justices Scalia, Kennedy, Ginsberg, and Breyer—over the age of 74. *Id.* The average retirement age for Supreme Court justices is 78.7. *Id.*