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## Issue Brief

# **Unequal Treatment? The Speech and Association Rights of Employees: Implications of *Knox* and *Harris***

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# Unequal Treatment? The Speech and Association Rights of Employees: Implications of *Knox* and *Harris*

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## I. Introduction

In 2012, the Supreme Court held in *Knox v. SEIU, Local 1000* that a union representing government employees may assess money from the employees whom it represents to support political activity only if those employees first opt in to supporting political expenditures.<sup>1</sup> In reaching this holding, the Court reasoned that public sector employees have a First Amendment right to refuse to contribute money to support the political speech of their union and that protection of that First Amendment right requires states to allow such assessments only if the employees first opt to make a financial contribution. *Knox* is the latest in a long series of Supreme Court cases delineating when a union selected as the exclusive bargaining representative by the majority of employees in a workplace violates the First Amendment rights of dissenting employees by acting on behalf of the majority. The Court's next case in this line, *Harris v. Quinn*, which was argued in January and will be decided later this year, presents the question whether home care workers who are state employees have a First Amendment right to refuse to pay the union anything for the services the union is statutorily obligated to provide them.<sup>2</sup> The petitioners in *Harris* invite the Court to overrule decades of precedent and hold that the First Amendment prohibits a union representing government employees from collecting dues or fees from dissenting employees. In colloquial terms, the petitioners in *Harris* seek to have the Supreme Court declare that, as a matter of the First Amendment, all government employment must be on a "right-to-work" basis.<sup>3</sup>

The petitioners' argument in *Harris* went beyond simply the payment of the employees' fair share of the cost of contract negotiation and administration. They argued that bargaining on behalf of employees is petitioning the government and "political in nature" even when it addresses wages, and it violates the First Amendment to require dissenting employees to support the union's bargaining.<sup>4</sup> As the Justices recognized at oral argument, the logical extension of the petitioners' argument is that the First Amendment invalidates any statute allowing employees to bargain collectively on the basis of exclusive representation.<sup>5</sup> While the petitioners noted that the *Harris* case itself did not require the Court to consider whether empowering a union to be the exclusive representative of employees for purposes of negotiating wages and working conditions necessarily involves compelled speech with respect to those employees who disagree with the majority representative's positions, their brief invited the Court to find collective bargaining on the basis of exclusive representation to be unconstitutional. This Issue Brief will analyze *Harris*,

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<sup>1</sup> 132 S. Ct. 2277 (2012).

<sup>2</sup> 656 F.3d 692 (7th Cir. 2011), *cert. granted*, 134 S. Ct. 48 (2013).

<sup>3</sup> Transcript of Oral Argument at 21, *Harris v. Quinn*, \_\_ S. Ct. \_\_ (2014) (No. 11-681).

<sup>4</sup> *Id.* at 5, 17.

<sup>5</sup> *Id.* at 19–20.

*Knox*, and other leading Court cases to assess union representation and the First Amendment, contradictions in applied standards of associational speech, and the future of public sector collective bargaining.

## II. Union Representation and the First Amendment

In both private sector and governmental employment, when a majority of employees choose union representation and the union is recognized by the employer or certified by the labor relations agency, the union has the power and responsibility to negotiate with the employer over terms of employment and to enforce the collective bargaining agreement on behalf of every employee in the unit, not just union members and not just those who voted for the union. Union-represented employees need not join the union; even in states that do not bar union security devices (that is, in non-right-to-work states) employers and unions cannot constitutionally enforce an agreement requiring employees to join the union. The most that a union can require is that union-represented employees pay an “agency fee” or “fair share fee” for the union’s services in negotiating and administering the contract.<sup>6</sup> Thus, whether or not employees are union members, if they are represented by a union, not only do they receive the wage and benefits gains associated with union representation (typically about seventeen percent more than earned by comparable nonunion workers), they also have the right to free assistance from the union in enforcing their contractual and, in some cases, statutory rights against the employer.<sup>7</sup>

The Supreme Court long ago rejected the argument that the First Amendment prohibits unions and employers from requiring all represented employees to pay fees to support the union’s contract negotiation and administration functions.<sup>8</sup> In a case arising under the Railway Labor Act, the Court reasoned that nonunion members “share in the benefits derived from collective agreements negotiated by the railway labor unions but bear no share of the cost of obtaining such benefits.”<sup>9</sup> The Court also found that labor statutes allow employers and unions to enter into contracts requiring employees “to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.”<sup>10</sup> The Court held, however, that Congress did not intend to allow such contracts to require employees to subsidize the union’s political speech.<sup>11</sup> In *Abood v. Detroit Board of Education*, the Court held that nonunion government employees can be required to pay fair share fees to support collective bargaining because they benefit from it, but they cannot be required to support union political activities unrelated to contract negotiation and administration.<sup>12</sup>

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

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<sup>6</sup> NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

<sup>7</sup> See 14 Penn Plaza, LLC v. Pyett, 556 U.S. 247, 271 (2009) (finding a union duty to represent employees in arbitration of statutory claims when the agreement incorporates statutory rights); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (finding a union duty to represent employees in contractual grievance procedure).

<sup>8</sup> Int’l Ass’n of Machinists v. S.B. Street, 367 U.S. 740 (1961); *Ry. Emps. Dep’t v. Hanson*, 351 U.S. 225 (1956).

<sup>9</sup> *Street*, 367 U.S. at 762.

<sup>10</sup> *Id.* at 764.

<sup>11</sup> *Id.*

<sup>12</sup> 431 U.S. 209, 235–37 (1977).

[M]any of the expenditures involved in the present case are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other.<sup>13</sup>

The Court's focus on protecting the speech rights of the union, however, vanished in subsequent cases.

The notion that contractually required union membership involved compelled speech in violation of the First Amendment has long been controversial. As Justice Frankfurter noted, unionized employees remain free to speak on all issues regardless of the union's position. They "are in no way subjected to such suppression of their true beliefs or sponsorship of views they do not hold. . . . No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues."<sup>14</sup> Frankfurter also rejected the notion that union political advocacy coerced dissenting employees in a way that union bargaining or grievance processing did not.<sup>15</sup> Unions throughout American history have served their members not only at the bargaining table and in grievance arbitration, but also by advocating in the legislature for improved working conditions, and have been crucial in enacting legislation on "compulsory education, an eight-hour day, employer tort liability, and other social reforms."<sup>16</sup> Indeed, Frankfurter observed, "[t]he notion that economic and political concerns are separable is pre-Victorian. . . . It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor."<sup>17</sup>

Having created the requirement that unions may charge dissenting employees only for the costs germane to contract negotiation and enforcement, the Court created an elaborate set of rules governing the process by which dissenting employees may opt out of union "political" spending.<sup>18</sup> Unions must maintain a system for employees to challenge the union's accounting and determination of dissenters' fair share of chargeable expenses, must notify employees annually about the system, and allow employees to make annual objections. This is called a

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<sup>13</sup> *Int'l Ass'n of Machinists v. S.B. Street*, 367 U.S. 740, 773.

<sup>14</sup> *Id.* at 805–06.

<sup>15</sup> *Id.* at 814–15.

<sup>16</sup> *Id.* at 800.

<sup>17</sup> *Id.* at 814–15.

<sup>18</sup> Unions must provide an accounting of annual expenditures to enable dissenters to challenge the union's determination of which expenses are chargeable. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

*Hudson* notice.<sup>19</sup> The Court also stipulated the kinds of expenses that are and are not chargeable to objectors.<sup>20</sup> Objecting employees may be compelled to pay their fair share of “the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.”<sup>21</sup> Under this standard, unions may charge objecting employees for the costs of negotiating and administering the collective bargaining agreement as well as the costs associated with the union’s national convention, the union’s social activities, certain litigation expenses, and the portions of the unions’ publications reporting on chargeable activities.<sup>22</sup>

In addition to these rules, under section 14(b) of the National Labor Relations Act (“NLRA”), states can enact laws invalidating any contractual term requiring union-represented employees to share the cost of the union’s services in bargaining and administering a contract. Twenty-four states have enacted such laws, which are known as “right-to-work” laws,<sup>23</sup> although the name prompts strong objection from union supporters. In these states unions must represent all workers equally—with respect to both collective bargaining and administration—even those workers who exercise their state-law right to pay exactly nothing for the union’s representation. There have been numerous efforts to extend the right-to-work regime nationally by introducing legislation in Congress to ban all union security arrangements.<sup>24</sup> In right-to-work states, unions are still required by law to provide services to all of the employees that they represent, but the union cannot require all employees to pay their fair share of the costs of contract negotiation or administration.<sup>25</sup> As a result, in right-to-work states, employees who wish to form a union are effectively forced to subsidize the provision of the union benefits to coworkers who refuse to support the union.<sup>26</sup>

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<sup>19</sup> See, e.g., *Id.*; *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 878 (1998) (“With the *Hudson* notice, plus any additional information developed through reasonable discovery, an objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable.”).

<sup>20</sup> *Locke v. Karass*, 555 U.S. 207 (2009) (finding that litigation expenses are chargeable if the subject of the litigation is chargeable); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991) (holding that local bargaining representatives may charge objecting employees their pro rata share of costs associated with chargeable activities).

<sup>21</sup> *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984). Implementing that standard, the Court adopted a three-part test for determining whether the expenses are chargeable to dissenters: (1) whether they support “activities germane to collective bargaining”; (2) whether they involve “additional interference with the First Amendment interests of objecting employees” beyond that “already countenanced” by union representation; and (3) if so, whether the additional interference is “nonetheless adequately supported by a governmental interest.” *Id.* at 455–56.

<sup>22</sup> *Id.* at 448–54; see also *Lehnert*, 500 U.S. at 519 (reiterating test and elaborating on chargeability analysis).

<sup>23</sup> *Right-to-Work Resources*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/labor/right-to-work-laws-and-bills.aspx> (last visited Sept. 7, 2013). See Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 428–31 (2012) (summarizing recent legislative developments).

<sup>24</sup> See, e.g., National Right-to-Work Act, S. 504, 112th Cong. (2012). A business-funded nonprofit organization, the National Right to Work Committee and a legal defense foundation of the same name have pushed for over fifty years to enact right-to-work legislation both at the state level and nationally. See *About NRTWC*, NATIONAL RIGHT TO WORK COMMITTEE, [www.nrtwc.org/about-2/](http://www.nrtwc.org/about-2/) (last visited Jan. 26, 2013).

<sup>25</sup> *Hughes Tool Co.*, 104 N.L.R.B. 318, 327–29 (1953) (holding that union cannot charge nonmembers a fee in a right-to-work state because such employees, though not members or fee-payers, are nevertheless statutorily entitled to union representation).

<sup>26</sup> See Catherine Fisk & Benjamin Sachs, *Restoring Equity in Right to Work*, 4 U.C. IRVINE L. REV. \_\_ (forthcoming 2014), available on SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2325158](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325158).

In *Knox v. SEIU, Local 1000*, and in *Harris v. Quinn*, the Court appears to be on a path to do by judicial decision that which the National Right to Work Legal Defense Foundation has tried to accomplish through legislation for decades: to require the right-to-work regime for every public sector workplace and, perhaps, in the private sector as well. *Knox* took the first step by concluding that the First Amendment prohibited the Service Employees International Union (SEIU), which represents many public employees in California, from adopting a temporary assessment of one quarter of one percent of an employee's wage in order to fund a campaign to defeat two ballot measures without first notifying every represented employee and giving them an opportunity to opt out of the assessment. The case originated when a class of employees represented by the National Right to Work Legal Defense Foundation filed suit challenging the temporary assessment.<sup>27</sup> In a broad opinion by Justice Alito, the Court held that any special assessment or dues increase may be levied only after issuing a separate notice and *only on those employees who opt in*.<sup>28</sup> Remarkably, Justice Sotomayor's concurrence and Justice Breyer's dissent both pointed out, the question of whether the Constitution requires an opt in system was not briefed or argued in the case or discussed in the courts below.<sup>29</sup>

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

In *Harris*, the Court granted certiorari to review a decision of the Seventh Circuit holding that home care workers who are state employees do not have a First Amendment right to refuse to pay the union for the collective bargaining services the union is statutorily obligated to provide them.<sup>30</sup> In its reasoning, the Seventh Circuit found that the home care workers were state employees and, therefore, under the Supreme Court cases discussed above, there was no First Amendment infirmity with an Illinois public sector labor statute allowing the union and the state employer to enter into an agreement requiring the home care workers to pay their share of the union's bargaining and contract administration expenses. The National Right to Work Foundation, however, argued that the statute is unconstitutional because negotiating over pay for home care workers is speech on a matter of public concern and, therefore, union representation is compelled speech in violation of the First Amendment.

### III. The First Amendment Principles Relevant to Associational Speech

*Knox* and *Harris* involve three interrelated strands of First Amendment jurisprudence: the right to be free from compelled speech, the expressive rights of associations, and the speech rights of government employees.

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<sup>27</sup> Plaintiffs' Verified Class Action Complaint at 10, *Knox v. Westly*, 2008 WL 850128 (E.D. Cal. 2008) (No. 2:05-cv-02198-MCE-KJM).

<sup>28</sup> *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012).

<sup>29</sup> *Id.* at 2298 (Sotomayor, J., concurring); *id.* at 2306 (Breyer, J., dissenting).

<sup>30</sup> *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), *cert. granted*, 134 S. Ct. 48 (2013).

## A. Compelled Speech

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

The initial Supreme Court case concerning compelled speech was *West Virginia State Board of Education v. Barnette*, which declared unconstitutional a state law that required that children salute the flag.<sup>31</sup> Justice Robert Jackson, writing for the Court, famously said:

[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>32</sup>

The Court followed this principle in other cases, such as in *Wooley v. Maynard*, where it ruled that an individual could not be punished for blocking out the portion of his automobile license plate that contained the New Hampshire state motto, “Live Free or Die.”<sup>33</sup> Both *Barnette* and *Wooley* involved actual compulsion to speak or to display a message. *Knox* and *Harris*, of course, involved neither. And it is notable that the Supreme Court found in both *Barnette* and *Wooley* that the First Amendment simply required that people be able to opt out. In *Barnette*, the Supreme Court did not prevent schools from beginning each day with a flag salute; it simply said that children could opt out and not participate. In *Wooley*, the Court said that those who object to “Live Free or Die” on their license plate could opt out by putting tape over it. The Court did not require that New Hampshire have those who wanted the phrase on their license plates make a special effort to get it.

Apart from the rare law, like that in *Barnette*, that forces someone to utter words, the Court has not been consistent in deciding whether there is compelled speech when a person or entity is forced to convey a message. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, the Court rejected a claim that requiring universities to allow military recruiters equal access to campus interviewing as a condition for receipt of federal funds was impermissible compelled speech.<sup>34</sup> In *FAIR*, the Court insisted that expending money to enable a third party to convey a message is not compelled speech because one remains free to express whatever views one may have on the matter in question.<sup>35</sup>

Reconciling *Knox* and *Harris* with *FAIR* is difficult because identifying compelled speech is harder than the Supreme Court has acknowledged. For example, if officials of a state university aggressively campaign for a ballot initiative for a tax increase to prevent drastic

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<sup>31</sup> 319 U.S. 624, 642 (1943).

<sup>32</sup> *Id.* at 633, 642.

<sup>33</sup> 430 U.S. 705, 713 (1977).

<sup>34</sup> 547 U.S. 47, 62 (2006).

<sup>35</sup> *Id.* at 60.

budget cuts, they are using money paid by students in tuition and fees. Is this compelled speech for those employees or students who favor low taxes? If a large corporation lobbies for legislation on favorable tax treatment for corporations, is that compelled speech for those employees or shareholders who favor higher corporate taxes to fund better social services or deficit reduction?

The Court has also considered compelled speech under the First Amendment when the government forces people to use their property for speech by others, and the cases in this area are also difficult to reconcile. The Court has held that the First Amendment is violated if the government forces owners to make their property available for expressive purposes. For example, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court unanimously invalidated a state law that required newspapers to provide space to political candidates who had been verbally attacked in print.<sup>36</sup> Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court declared unconstitutional a utility commission regulation that required that a private utility company include in its billing envelopes materials prepared by a public interest group.<sup>37</sup>

In contrast, in other cases the Court has found no compelled speech when an entity is forced to use its property or resources to convey a message with which it disagrees. For example, in *PruneYard Shopping Center v. Robins*, shopping center owners argued that their First Amendment rights were violated by a California Supreme Court ruling that protestors had a right to use their property for speech under the state constitution.<sup>38</sup> The Court distinguished *Wooley* and explained that the shopping center is:

not limited to the personal use of appellants[,] . . . [but] is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.<sup>39</sup>

Nor has the Court been consistent in deciding whether mandatory financial contributions constitute compelled speech. In *Abood v. Detroit Board of Education*,<sup>40</sup> the Court said that the nonmembers of a union could be required by contract to pay a charge to subsidize the collective bargaining activities of the union but that it violated the First Amendment to require the nonmembers to pay for ideological causes with which they disagreed. In *Keller v. State Bar of California*,<sup>41</sup> the Court said that the state bar could use compulsory dues only if the dues were “reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’”<sup>42</sup> The Court explained that the Bar could collect dues from all members to pay for bar-related activities, but that dues “may not be

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<sup>36</sup> 418 U.S. 241, 256–58 (1974).

<sup>37</sup> 475 U.S. 1, 20–21 (1986).

<sup>38</sup> 447 U.S. 74 (1980).

<sup>39</sup> *Id.* at 87.

<sup>40</sup> 431 U.S. 209.

<sup>41</sup> 496 U.S. 1 (1990).

<sup>42</sup> *Id.* at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).



expended to endorse or advance a gun control or nuclear weapons freeze initiative[.]”<sup>43</sup>

In sharp contrast to *Abood* and *Keller*, the Court upheld mandatory student activity fees at public universities. In *Board of Regents of the University of Wisconsin System v. Southworth*, the Court unanimously upheld the permissibility of requiring college students to pay money each semester to a fund that subsidizes student activities.<sup>44</sup> Conservative University of Wisconsin law students challenged their having to pay the university’s student activities fee, part of which was given to groups with which they disagreed.<sup>45</sup> Justice Kennedy, writing for the Court, said that such a fee is constitutional so long as the university distributes the funds in a viewpoint-neutral manner.<sup>46</sup>

*Southworth* cannot be easily reconciled with *Abood* and *Keller*. In all three cases, there were compelled contributions. In all three cases, the challengers objected that their money was being spent to support political activities with which they disagreed. The difference is that in *Southworth*, the Court upheld the compelled expenditures because it accepted the importance of having student activity fees and the right of universities to convey messages with which some students disagree. In *Abood* and *Keller*, by contrast, the Court did not find a sufficiently important interest in requiring support for the political activities of a union or a state bar. In other words, the distinction is not in whether there was compelled speech but in whether it was sufficiently justified in the Court’s view.

Even where the Court has prohibited the use of mandatory financial contributions to fund political or ideological causes, the Court has been inconsistent in what it defines as political or ideological. For example, a state bar may charge dissenting members to fund a public relations campaign focusing on improving the reputation of lawyers generally, but a union may not charge dissenting employees to fund a similar campaign focusing on explaining to employees and to the general public the advantages of union representation for teachers.<sup>47</sup> Other than that some courts consider the poor reputation of lawyers to be a more pressing problem than public skepticism of teachers’ unions, there is no basis to distinguish why one is not unconstitutional compelled speech and the other one is. The Court’s inconsistency in defining when compulsory contributions can be used for more or less “political” purposes emerged as a salient issue in *Harris v. Quinn*, in which the petitioners insisted that negotiation over wages paid with Medicaid funds was speech on a matter of public concern and, more generally, that exclusive representation for purposes of negotiating wages paid with public funds is unconstitutional.<sup>48</sup>

One other area where the Court has considered mandatory assessments and again has been inconsistent is in the context of government requirements that agricultural producers

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<sup>43</sup> *Id.* at 16.

<sup>44</sup> 529 U.S. 217, 220–21 (2000).

<sup>45</sup> *Id.* at 221.

<sup>46</sup> *Id.* at 234.

<sup>47</sup> Compare *Lehnert, v. Ferris Faculty Ass’n*, 500 U.S. 507, 528 (1991) (holding that public relations efforts designed to bolster the reputation of teachers are not chargeable), with *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 719 (7th Cir. 2010) (holding that state bar’s PR campaign is chargeable even though *Lehnert* held a union PR campaign is not because building public confidence in the organized bar is “very different” from building confidence in teachers or their union).

<sup>48</sup> Brief for Petitioners at 28-29, *Harris v. Quinn*, No. 11-681.

contribute to funds for product advertising. In *Glickman v. Wileman Bros. & Elliott, Inc.*<sup>49</sup> and *United States v. United Foods, Inc.*,<sup>50</sup> the Court came to opposite conclusions about the constitutionality of such programs. In *Glickman*, the Court upheld regulations issued pursuant to the Agricultural Marketing Agreement Act of 1937 that required fruit producers to contribute funds to pay for generic advertising for fruit.<sup>51</sup> Justice Stevens, writing for the majority in a 5-4 split, said that “requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit.”<sup>52</sup> But four years later, in *United States v. United Foods, Inc.*, the Court invalidated the requirement for mandatory assessments for product advertising contained in the Mushroom Promotion, Research, and Consumer Information Act.<sup>53</sup> In a six-to-three decision, the Supreme Court declared the mandatory assessments on mushroom producers unconstitutional. Justice Kennedy, writing for the majority, began by emphasizing that the law forced the challengers to express “[t]he message . . . that mushrooms are worth consuming whether or not they are branded” instead of its preferred message that its brand was superior to the others.<sup>54</sup> Justice Kennedy wrote: “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors,” and therefore, “the compelled funding for the advertising must pass First Amendment scrutiny.”<sup>55</sup>

In sum, the Court has been markedly inconsistent on at least four distinct questions: (1) When does the ability of a speaker to express her own views prevent compelled funding of an organization’s speech from being regarded as compelled speech? (2) When are forced monetary contributions a violation of the First Amendment? (3) When does allowing opt out satisfy the First Amendment? (4) When is there a sufficiently compelling interest to justify compelled speech with no opt out? The inconsistency was highlighted in *Harris*, in which the parties and the Court recognized the difficulty of deciding that unions cannot collect fair share fees without limiting the ability of integrated state bars to require lawyers to pay bar dues.<sup>56</sup>

## B. The Rights of Associations

There is another interrelated strand of First Amendment law that underlies the Court’s decision in *Knox*: the rights of the association as opposed to those of its dissenting members. In *Knox*, the Court gave no weight whatsoever to the First Amendment rights of the entity, the union, or the union’s majority who wanted to express a political message. Rather, the focus was entirely on protecting dissenting members who did not want to support the union’s opposition to ballot initiatives which would have been quite harmful to unionized government employees.<sup>57</sup>

Yet, in other contexts, the Court has made exactly the opposite choice, favoring the free

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<sup>49</sup> 521 U.S. 457 (1997).

<sup>50</sup> 533 U.S. 405 (2001).

<sup>51</sup> *Glickman*, 521 U.S. at 463, 476–77.

<sup>52</sup> *Id.* at 472.

<sup>53</sup> 533 U.S. at 408–09.

<sup>54</sup> *Id.* at 411.

<sup>55</sup> *Id.*

<sup>56</sup> Brief for Respondents at 19, *Harris v. Quinn*, No. 11-681.

<sup>57</sup> *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

speech of the entity and its majority over that of any dissenters. The most obvious example of this was the Court's decision in *Citizens United v. Federal Election Commission*, which held that restrictions on independent expenditures by corporations violated the First Amendment.<sup>58</sup> The Court held that corporations have free speech rights and that limits on independent expenditures are unconstitutional restrictions of core political speech.<sup>59</sup> The Court was emphatic on the importance of protecting the speech rights of the corporate entity. It declared:

The censorship we now confront is vast in its reach. The Government has muffled the voices that best represent the most significant segments of the economy. And the electorate has been deprived of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.<sup>60</sup>

The Court was untroubled by the fact that spending from general corporate revenues meant that the corporation was spending the shareholders' money on political activities without their consent and even against their political views.

Earlier Supreme Court decisions that had justified restrictions on corporate political expenditures were in part based on the need to keep shareholders' money from being spent on political matters in a manner they might oppose.<sup>61</sup> Prior to *Citizens United*, corporations could spend money on political campaigns by creating political action committees that raised funds for those activities.<sup>62</sup> In this way, all of the corporate funds spent on campaigns were raised from those who wanted to support the corporation's political activities. But *Citizens United* held that this was not enough to satisfy the free speech rights of corporations; the First Amendment gave to them the right to spend unlimited amounts of money from corporate treasuries to elect or defeat candidates.<sup>63</sup>

In *Citizens United*, the Court rejected the notion that restrictions on how an organization spends general treasury money are justified by the need to protect dissenting shareholders' rights. The Court offered three reasons for rejecting the compelled speech argument. First, protecting dissenters within the entity does not justify restricting the First Amendment rights of the entity to spend money because it gives the government power to restrict the speech activities of the

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<sup>58</sup> 558 U.S. 310, 372 (2010).

<sup>59</sup> *Id.* at 365.

<sup>60</sup> *Id.* at 354 (citations and internal quotation marks omitted).

<sup>61</sup> *See, e.g.,* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658, 666 (1990), *overruled by Citizens United*, 558 U.S. 310 (justifying the restriction on corporate spending in elections); *see also* McConnell v. FEC, 540 U.S. 93, 204 (2003), *overruled by Citizens United*, 558 U.S. 310 (explaining that having corporations engage in political expenditures through political action committees "allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members") (quoting FEC v. Beaumont, 539 U.S. 146, 163 (2003)).

<sup>62</sup> *See McConnell*, 540 U.S. at 203 ("The ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy.").

<sup>63</sup> *Citizens United*, 558 U.S. at 365 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

entity.<sup>64</sup> Second, dissenters can protect their interests “through the procedures of corporate democracy.”<sup>65</sup> Third, a restriction on the entity’s political expenditures is both overinclusive and underinclusive as a method of protecting the First Amendment rights of dissenters. It was overinclusive because some dissenters might support the expenditures and underinclusive because it did not ban all speech that dissenters might oppose, just some political expenditures.<sup>66</sup> In a prior corporate campaign finance case, the Court rejected the purported state interest in protecting dissenting shareholders from subsidizing corporate political speech by pointing out that the restriction on corporate speech did not cover “business trusts, real estate investment trusts, [and] labor unions.”<sup>67</sup>

All of the same objections could be made regarding restrictions on union speech, and the same arguments could be made for allowing the union to speak over the objections of nonmembers.<sup>68</sup> First, preventing unions from spending some of their general treasury on political messages restricts the entity’s speech in the name of protecting the dissenters. Second, employees have an array of legal protections to enable them to challenge the leadership, and can decertify the union. It is entirely unclear whether dissenting employees have more or less power to challenge the actions of union leadership than do dissenting shareholders under the procedures of corporate democracy.<sup>69</sup> Third, the Court never even mentioned overinclusiveness and underinclusiveness in addressing the constitutionality of the rules protecting dissenters in *Knox*. If a restriction on corporate political speech is constitutionally infirm because it is underinclusive in not protecting other organizational dissenters, it is difficult to see why a law that targets only labor unions is not similarly underinclusive and therefore constitutionally infirm. A ban on all union political expenditures is overinclusive in disregarding whether the dissenting employee opposes all or only some of the union’s political messages, just as a ban on all corporate independent political expenditures is overinclusive. For example, some California public sector employees might have opposed one of the ballot measures that the SEIU levied the assessment to defeat (which would have given the governor the unilateral power to cut appropriations for public employee compensation) even if they supported the other (which would have required employees to opt in to union political expenditures). There is no reason why the overbreadth and the underbreadth problems are any different in *Citizens United* as opposed to *Knox*.

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<sup>64</sup> *Id.* at 361.

<sup>65</sup> *Id.* at 362 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

<sup>66</sup> *Id.*; see also *Bellotti*, 435 U.S. at 793 (holding the statute in question was underinclusive because “[c]orporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted”).

<sup>67</sup> *Bellotti*, 435 U.S. at 793.

<sup>68</sup> In *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 39–46 (2011), Professor Charlotte Garden pointed out the inconsistencies between *Citizens United* and the dues objector cases. She suggested *Citizens United* might be the basis for asserting a challenge to the labor cases to expand not just “what unions are permitted to say but also with what money they can say it.” *Id.* at 46. Our argument is consistent with hers, although we take a somewhat different approach.

<sup>69</sup> Corporate law scholars have refuted the notion that shareholders can control corporate political speech through the channels of corporate democracy for decades, certainly since Victor Brudney’s classic 1981 article, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235 (1981); see also Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84 (2010) (acknowledging corporate speech is not dependent on shareholder input and recommending lawmakers adopt rules requiring shareholder input).

The Court believes corporate political spending is not compelled speech and union political spending is. The reason for this is stated in an earlier campaign finance case, *First National Bank of Boston v. Bellotti*: workers are compelled to fund union political speech but shareholders are not because the latter can simply sell their shares in the corporation but the former would have to quit their job.<sup>70</sup> As Professor Benjamin Sachs has explained, the notion that quitting a job to avoid an objectionable contract term is coercion but selling shares in a corporation is not does not withstand careful scrutiny, particularly (but not exclusively) in those instances in which people cannot sell their shares because they are participants in a pension fund.<sup>71</sup> The amount of compulsion inflicted by organizational speech may vary among types of speech and organization, but the differences are ones of degree.

Other cases, too, have protected the free speech rights of the association with little concern about the rights of dissenting members. Consider, for example, *Boy Scouts of America v. Dale*,<sup>72</sup> which held that freedom of association protects the right of the Boy Scouts to exclude gays in violation of a state’s antidiscrimination statute.<sup>73</sup> The Court’s only effort to reconcile the compelled speech cases of union dues and the organizational free speech rights of *Dale* and *Rumsfeld v. FAIR* was in *Davenport v. Washington Education Ass’n*, which upheld a state law requiring that nonmembers opt into supporting union political activities.<sup>74</sup> In that case, Justice Scalia explained that *Dale* and *FAIR* are irrelevant because the Washington prohibition on union political speech “does not compel respondent’s acceptance of unwanted members or otherwise make union membership less attractive.”<sup>75</sup> If, however, there is a First Amendment right of an organization to express itself over the objection of dissenters, there is no reason why that right should apply only to expelling members and firing employees, and not to how the organization spends money. If the Boy Scouts’ First Amendment right to express a homophobic message trumps Dale’s statutory right to be free from discrimination, there is no reason why a teachers’ union’s right to oppose charter schools and vouchers should not trump its members’ rights to espouse them.

### C. Speech Rights of Government Employees

A third important strand of free speech law is directly relevant to the facts of *Knox* and *Harris*: the First Amendment rights of government employees. The *Knox* rule that government employees have a First Amendment right not to be charged for a special assessment that the union will use in part for political activities unless they opt into paying for this charge is difficult to reconcile with the Court’s other decisions which give little or no protection for the speech rights of government employees. For example, in *Garcetti v. Ceballos*, the Court held that there is no First Amendment protection against adverse employment action for the speech of

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<sup>70</sup> 435 U.S. at 794 n.34.

<sup>71</sup> Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 808–09, 833–44 (2012) (concluding that both avoiding investments in the stock market and working in unionized jobs in order to avoid subsidizing objectionable political speech involve coercion and impose unacceptable costs).

<sup>72</sup> 530 U.S. 640 (2000).

<sup>73</sup> *Id.* at 643–44.

<sup>74</sup> 551 U.S. 177, 191–92 (2007).

<sup>75</sup> *Id.* at 187 n.2.

government employees made on the job and within the scope of their duties.<sup>76</sup> Although the Supreme Court long had held that there was some constitutional protection for the speech of government employees,<sup>77</sup> it ruled against Ceballos by drawing a distinction between speech “as a citizen” as opposed to “as a public employee”; only the former is protected by the First Amendment. Justice Kennedy opined: “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>78</sup>

The distinction between speech as an employee and speech as a citizen is highly questionable; after all, government employees do not give up their citizenship when they enter their workplace. But if there is such a distinction, the government employees in *Knox* were being asked to pay the assessment precisely because they were government employees and were speaking in this capacity through their union. Similarly, in *Harris*, the fair share fees are being used to obtain better pay and working conditions for all unionized home care workers.

In a series of cases, beginning with *Pickering v. Board of Education*, the Court has held that the speech of government employees, when off the job, is protected only if it involves a matter of public concern and only if, on balance, the employee’s speech rights outweigh the employer’s interests in the efficient functioning of the office.<sup>79</sup> Phrased another way, the employee can prevail only if: (1) he or she convinces the court that speech was the basis for the adverse employment action; (2) the court concludes that the speech is related to matters of public concern; and (3) the court decides that, on balance, the speech interests outweigh the government’s interests in regulating the expression for the sake of the efficiency of the office. Not surprisingly, government employees do not usually succeed under this test.<sup>80</sup>

*Harris* illustrates the inconsistency in the Court’s treatment of the free speech rights of government employees. It is difficult, to say the least, to understand why nonunion government employees have a First Amendment right to refuse to pay for the cost of union political activity, even where the activity seeks legislation to improve working conditions, while those same employees have no First Amendment right to engage in partisan political activity or to blow the whistle on allegedly wrongful governmental conduct.<sup>81</sup>

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<sup>76</sup> 547 U.S. 410, 421 (2006).

<sup>77</sup> See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding that government employee’s speech is protected by the First Amendment if it involves a matter of public concern and does not unduly interfere with the functioning of the workplace).

<sup>78</sup> *Garcetti*, 547 U.S. at 421.

<sup>79</sup> 391 U.S. at 571–73 (holding that a public school teacher’s letter to a newspaper criticizing the board’s allocation of funds is protected since the subject was a matter of public attention and the letter did not impede employee’s daily duties or interfere with regular school operations); see *United States v. National Treasury Employees Union*, 513 U.S. 454, 465–66 (1995) (holding that government employees’ expressive activities addressed to public audience outside the workplace and unrelated to government employment was protected); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (holding that a public employee’s questionnaire distributed among staff members is not protected because it concerned internal office policy and was not a matter of public concern).

<sup>80</sup> See Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?* 10 CARDOZO L. REV. 729, 732–36 (1989) (noting the breadth of employers’ First Amendment rights and the narrowness of employees’ First Amendment rights).

<sup>81</sup> *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973); *Garcetti*, 547 U.S. 410 (2006).

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

Another troublesome implication of the *Knox* opinion is that some of its stray language casts doubt on the location of the line between chargeable germane expenses and nonchargeable political expenses. It is this thread of the *Knox* reasoning that the *Harris* petitioners emphasize in arguing that the payment of fair share fees to a union representing home care workers who are paid with Medicaid funds constitutes compelled political speech. The *Knox* majority noted that a public sector union “takes many positions *during collective bargaining* that have powerful political and civic consequences” and therefore that agency fees “constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights.”<sup>82</sup> Moreover, the *Knox* majority derided the notion that political activities, even in support of the union’s contract negotiation goals, could be chargeable.<sup>83</sup> Prior decisions (including *Ellis*<sup>84</sup> and *Lehnert*<sup>85</sup>), however, held that some political activity is chargeable because it is part of the union’s effort to secure its collective bargaining agreement (as, for example, where an executive or legislative body can reject or modify an agreement negotiated by a government agency). Yet in *Knox*, the majority challenged the independent auditors’ determination that fifty-six percent of the prior year’s expenditures were chargeable by rejecting how the SEIU had characterized the germaneness of some expenses, including lobbying.<sup>86</sup> Further, the majority noted:

Public-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions. As a result, a broad array of ballot questions and campaigns for public office may be said to have an effect on present and future contracts between public-sector workers and their employers.<sup>87</sup>

Having thus insisted that even ordinary public sector collective bargaining is “a form of compelled speech and association that imposes a ‘significant impingement on First Amendment rights’” and questioned whether “the Court’s former cases have given adequate recognition to the critical First Amendment rights at stake,”<sup>88</sup> the *Knox* majority disparaged the justification for unions charging nonmembers even for germane services. The majority said that “free-rider arguments, however, are generally insufficient to overcome First Amendment objections” and that recognizing the free-rider justification in the past was “an anomaly . . . we have found to be justified by the interest in furthering ‘labor peace.’”<sup>89</sup>

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<sup>82</sup> *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012) (emphasis added) (internal citations and quotation marks omitted).

<sup>83</sup> *Id.* at 2294.

<sup>84</sup> *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 447–48 (1984).

<sup>85</sup> *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 522–24 (1991).

<sup>86</sup> *Knox*, 132 S. Ct. at 2294.

<sup>87</sup> *Id.* at 2295.

<sup>88</sup> *Id.* at 2289 (quoting *Ellis*, 466 U.S. at 455).

<sup>89</sup> *Id.* at 2290 (quoting *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986)).

#### IV. The Future of Public Sector Collective Bargaining

Justice Alito's majority opinion in *Knox* does more than just threaten the political influence of unions. It contains language that, if misconstrued, could be used to attack the entire architecture of public sector collective bargaining on the basis of exclusivity and majority rule, and it is this language that the petitioners in *Harris* emphasize. In *Knox*, Justice Alito said, "by allowing unions to collect *any* fees from nonmembers and by permitting unions to use opt out rather than opt in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers."<sup>90</sup> Moreover, in a footnote, Justice Alito suggested that because "a union's money is fungible," a union's expenditure of objectors' fees "entirely for nonpolitical activities" might be problematic because "it would free up other funds to be spent for political purposes."<sup>91</sup>

On that analysis, requiring dissenters to pay *any* money to the union may result in the union using the dissenters' money to fund political activities. If the Court were to follow that path, the entire system of distinguishing chargeable and nonchargeable expenses is insufficient to protect objectors because the same dollar that a nonmember pays the union for contract administration might find its way into a political account, even if a different dollar is placed in the chargeable category. This would mean that *Abood* is no longer enough to protect the rights of employee-objectors.<sup>92</sup>

However, the notion that an organization's money is fungible cuts two ways. In *Davenport*, the union argued that the restriction on union expenditures of money in politics infringed the union's First Amendment rights under *Bellotti* and *Austin*.<sup>93</sup> Justice Scalia dismissed the contention: the restriction is not "on how the union can spend 'its' money." Rather, he said, it was a restriction on how the union could spend "*other people's* money."<sup>94</sup> The opinion insisted that the only reason the law burdened the union's use of its members' dues was because the union "chose to commingle those dues with nonmembers' agency fees."<sup>95</sup> Alito's position that any compelled contribution violates dissenters' rights because funds are commingled cannot be reconciled with Scalia's position that restrictions on unions' expenditures

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<sup>90</sup> *Id.* at 2295 (emphasis added).

<sup>91</sup> *Id.* at 2293 n.6.

<sup>92</sup> This part of the *Knox* opinion sits uneasily against the Court's earlier approach to circumstances when compelled funding of an organization is compelled speech. In *Glickman*, the Court attempted to distinguish its upholding of compelled subsidies for agricultural commodity ads with *Abood's* prohibition of subsidies for union speech. The Court said "*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 471 (1997) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)). As Robert Post pointed out, it is unclear whether the issue is compelled speech or compelled association. If the problem is compelled association rather than speech, and payment of agency fees is association, then it is unclear why distinguishing between germane and nongermane expenditures alleviates the problem of compelled association, unless one believes that placing dollars in different accounts is a form of association. Robert Post, Tabor Lecture, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 571-73 (2006).

<sup>93</sup> *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 186 (2007).

<sup>94</sup> *Id.* at 187.

<sup>95</sup> *Id.* at 187 n.2.



*do not* violate the union’s rights because the funds are commingled (oddly, Alito and Scalia joined both opinions). If all money is fungible, then the entire basis for *Abood* and *Davenport* falls apart: none of it is “other people’s money” and all of it is the union’s. In sum, if unions have the same First Amendment rights as corporations to spend on politics, then it violates the union’s rights for the government to restrict unions’ political speech, just as it violates corporations’ rights.

## V. Conclusion

A long line of Supreme Court cases stretching back to the 1930’s recognizes the many governmental interests in protecting the rights of employees to unionize and bargain collectively on the basis of exclusivity and majority rule. These include the macroeconomic benefits of allowing employees to bargain from a position of collective strength to improve wages and working conditions; the desirability of fostering workplace democracy; and the benefits to employees, employers, and the public of allowing bargaining by one union instead of many representatives claiming authority as a bargaining agent.<sup>96</sup> Employees who can elect representatives to determine the terms of employment on an equal footing with management learn habits of self-government and political efficacy.<sup>97</sup> Unions historically have been extraordinarily important political and social associations for their members. The desire of employees to join together in a common cause to govern themselves, to learn and teach the value of social solidarity, to improve their working conditions, and to express their vision for a better political economy is foundational to the freedom of association protected by the First Amendment.<sup>98</sup> The drive for equality of bargaining power, self-determination, and fairness is as important in the public sector as it is in the private sector, for in neither context is management by executive fiat consistent with democratic principles.

Public employee unionization and bargaining enhances the transparency and accountability of government. Unions have more power than individual employees or citizens to force the government to reveal its budget priorities and to force a debate about such priorities.<sup>99</sup>

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<sup>96</sup> See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33–34 (1937) (upholding the constitutionality of the National Labor Relations Act on the basis of the government’s interests in promoting economic growth by facilitating equality of bargaining power between employers and employees). See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 35–44 (1983) (discussing the purposes of the Wagner Act with reference to historical materials, including the promotion of economic stability, the enhancement of equality of bargaining power, and the nurturing of political democracy by enhancing workplace democracy).

<sup>97</sup> See Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 *HOFSTRA LAB. & EMP. L.J.* 101, 144 (2005) (surveying literature on connection between unionism and social capital and asserting that unionism promotes development of social capital); Anne Marie Lofaso, *In Defense of Public-Sector Unions*, 28 *HOFSTRA LAB. & EMP. L.J.* 301, 308–17 (2011) (surveying political science literature on participatory democracy and the connection between political democracy and social unit democracy).

<sup>98</sup> See James Gray Pope, *Labor’s Constitution of Freedom*, 106 *YALE L.J.* 941, 942–44 (1997) (describing the pervasiveness and significance of unionists’ vision of the right to organize, bargain, and strike as a form of insurgent constitutionalism that placed great significance on freedom of association). See generally Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Disclosure and the Problem of DeBartolo*, 1990 *WIS. L. REV.* 149 (1990) (arguing that the Court’s reconciliation of the First Amendment with the National Labor Relations Act is based on a reductionist view of unions as limited purpose organizations focused on economic issues and ignores unions’ significant role as associations).

<sup>99</sup> See Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to*

Of course, unions do not always use their collective power to advocate for government policies that everyone would deem wise. Left-wing critics of police and prison guards' unions criticize these unions' support for punitive incarceration policies, just as right-wing critics of teachers' unions blame them for the failures of the public schools.<sup>100</sup> Leaving aside the obvious fact that the blame for punitive criminal sentencing laws and lousy public schools should be laid at the door of many people and organizations beyond unionized guards and teachers, the problem is not the employees through their union acting as a group; the problem is that people are not always wise. Eliminating the right of employees to bargain as a group will not suddenly improve schools or reduce government budget problems. After all, some states without public sector bargaining rights have weak public schools and large deficits, and other states with public sector bargaining rights have strong schools and small deficits.<sup>101</sup>

Government employee unionization proved necessary for the same economic reasons that private sector employees joined unions: to ensure decent wages and working conditions. In times of fiscal crisis, government employers historically have cut pay dramatically and unfairly, often paying employees in IOUs. For example, in Chicago during the Great Depression, the Board of Education paid teachers and other school employees in scrip for over a year and then, when a court invalidated the scrip system, paid them nothing at all for months on end.<sup>102</sup> There is room for policy debate about how much government employees—teachers, park rangers, bus drivers, police officers, or DMV clerks—should be paid, what cause should be necessary to terminate their employment, when they should be eligible to retire, and what kind of retirement and health care benefits they should receive. But there is no reason to believe that policy debate will be better resolved by unilateral managerial dictate than by bilateral negotiation between government agencies and their employees' unions.

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*Protect Its Own Expression*, 59 DUKE L.J. 1, 30–34 (2009) (discussing from the standpoint of government transparency the undesirable consequences of cases limiting the free speech rights of government employees).

<sup>100</sup> See, e.g., Mike Dennis, *The California Prison Guards Union: Still Profiting from Incarceration-mania*, CAL. PROGRESSIVE MESSAGE (March 4, 2011), <http://caprogressivemessage.com/2011/03/04/the-california-prison-guards-union-still-profiting-from-incarceration-mania/> (criticizing the California Prison Guards Union's support for punitive incarceration policies); Richard D. Kahlenberg, *Bipartisan But Unfounded: The Assault on Teachers' Unions*, AM. EDUCATOR (Am. Federation of Teachers), Winter 2011-2012, at 14, available at <http://www.aft.org/pdfs/americaneducator/winter1112/Kahlenberg.pdf>.

<sup>101</sup> Catherine Fisk & Brian Olney, *Labor and the States' Fiscal Problems*, in WHEN STATES GO BROKE 253–55 (Peter Conti-Brown & David A. Skeel, Jr., eds., 2012).

<sup>102</sup> JOSEPH E. SLATER, PUBLIC WORKERS 102 (2004); see also Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 10–11 (2011) (recounting incidents in various periods of recession in which governments facing fiscal crises furloughed employees or paid them in IOUs).