

10-15-2013

## Disorganized Labor: Is *Knox v. SEIU* the Nail in the Coffin for Public Sector Unions?

John Stanley

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### Recommended Citation

John Stanley, *Disorganized Labor: Is Knox v. SEIU the Nail in the Coffin for Public Sector Unions?*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2013)

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# Disorganized Labor: Is *Knox v. SEIU* the Nail in the Coffin for Public Sector Unions?

By John Stanley\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	858
II. BACKGROUND .....	860
A. <i>Unions in the United States</i> .....	860
B. <i>SEIU, Political Player</i> .....	861
III. LEGAL FOUNDATION .....	862
A. <i>Aboud v. Detroit Board of Education</i> .....	863
B. <i>Chicago Teachers Union, Local No. 1 v. Hudson</i> .....	865
IV. <i>KNOX V. SERVICE EMPLOYEES INTERNATIONAL UNION,</i> <i>LOCAL 1000</i> .....	867
A. <i>The Facts</i> .....	867
B. <i>District Court</i> .....	869
C. <i>The Court of Appeals</i> .....	870
V. <i>KNOX AT THE SUPREME COURT</i> .....	871
A. <i>Alito for the Majority</i> .....	871
1. Mootness .....	871
2. Compulsory Subsidization of Speech .....	871
3. <i>Hudson</i> Notice and the First Amendment .....	872
B. <i>Justice Sotomayor’s Concurrence</i> .....	876
C. <i>Justice Breyer’s Dissent</i> .....	877
1. The Opt-Out System.....	877
2. The Special Assessment .....	878
3. The Likelihood of a First Amendment Violation.....	879
4. The Court Entering the Political Realm .....	880
VI. <i>KNOX IN CONTEXT</i> .....	881
A. <i>Does Knox Change Anything?</i> .....	881
B. <i>Why Hear the Case?</i> .....	882
C. <i>The Larger Union Struggle</i> .....	883
D. <i>The Cost of Unions</i> .....	885
VII. CONCLUSION.....	887

## I. INTRODUCTION

On June 5, 2012, voters in the state of Wisconsin and in the California cities of San Jose and San Diego dealt a severe blow to the unions representing many of their respective government employees. In the Badger State, Governor Scott Walker survived a recall vote brought on by his aggressive measures limiting Wisconsin's public unions' rights to bargain collectively over aspects of their employment contracts.<sup>1</sup> The California cities' ballot measures dramatically increased the amounts that city workers<sup>2</sup> contribute to their pension plans, among other changes.<sup>3</sup>

The elections represented not only the most recent in a long series of blows to labor unions, but perhaps portended things to come as well.<sup>4</sup> The trend seemed undeniable. Long before the 2012 special elections, it was widely acknowledged that union influence was declining.<sup>5</sup> By 2012, union membership was at a ninety-seven-

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<sup>1</sup> See Brian Montopoli, *Scott Walker Wins Wisconsin Recall Election*, CBS NEWS (June 5, 2012, 9:03 PM), [http://www.cbsnews.com/8301-503544\\_162-57447954-503544/scott-walker-wins-wisconsin-recall-election/](http://www.cbsnews.com/8301-503544_162-57447954-503544/scott-walker-wins-wisconsin-recall-election/).

<sup>2</sup> The reforms were not directed solely at local public unions, but union representatives opposed the actions and vowed to fight the reforms in court. See Catherine Saillant & Tony Perry, *2 Big Cities OK Cuts to Worker Pension Costs*, L.A. TIMES (June 7, 2012), <http://articles.latimes.com/2012/jun/07/local/la-me-pensions-20120607>.

<sup>3</sup> In San Jose, city workers may now choose between increasing the amount they pay into their pension fund to 13% from 5%–11% and accepting a plan with reduced benefits. *Id.* San Diego eliminated defined benefit pensions for new hires and adopted a 401k retirement plan. *Id.*

<sup>4</sup> David Kocieniewski, *Unions, at Center of Wisconsin Recall Vote, Suffer a New Setback in Its Outcome*, N.Y. TIMES, June 7, 2012, at A17 (noting that, among its various impacts, Walker's reelection will likely embolden politicians elsewhere to take similar actions and hurt union recruiting in the future).

<sup>5</sup> See PETER FAIRBROTHER & GERARD GRIFFIN, CHANGING PROSPECTS FOR TRADE UNIONISM: COMPARISONS BETWEEN SIX COUNTRIES 1 (Peter Fairbrother & Gerard Griffin eds., 2002) (acknowledging "massively" declining union membership in the 1980s and 1990s); MICHAEL D. YATES, WHY UNIONS MATTER 11–14 (2d ed. 2009) (cataloguing the political and economic challenges modern unions face); Jacob S. Hacker & Paul Pierson, *The Wisconsin Union Fight Isn't About Benefits. It's About Labor's Influence*, WASH. POST (Mar. 6, 2011),

year low.<sup>6</sup> Popular defeats at the ballot box could only confirm the fears of organized labor and its supporters that the influence of unions, both public and private, waned.<sup>7</sup>

Adding insult (and more injury) to injury, a mere three weeks after their high profile electoral losses, public unions were delivered another jolt by the Supreme Court in the form of *Knox v. Service Employees International Union, Local 1000*.<sup>8</sup> The *Knox* decision effectively limits government unions' ability to raise money for future political expenditures by prohibiting "special assessments" on nonmembers without their consent.<sup>9</sup> This note will offer a brief history of public sector unions in America and introduce the reader to the Service Employees International Union (SEIU) and its role as a political player. It will then lay the legal foundation on which *Knox* rests and examine the *Knox* decision itself. This note concludes that *Knox* is a significant event in the long-term decline of organized public sector labor, which is bound to dwindle along with unionized labor generally.

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<http://www.washingtonpost.com/wpdyn/content/article/2011/03/04/AR2011030406264.html> (arguing that powerful forces are succeeding in their attempts to "destroy [organized labor's] remaining clout").

<sup>6</sup> Adam Davidson, *Organize This*, N.Y. TIMES SUNDAY MAG., Feb. 3, 2013, at MM14.

<sup>7</sup> The passage of the Wisconsin bill resulted in large-scale protests at the statehouse in Madison. Demonstrators famously "occupied" the capitol building before legislators passed the law, leading police to remove dozens of people and lock down the building. See Jonathon M. Seidl, *Capitol Chaos: Police Drag Protesters from Wis. Statehouse*, THE BLAZE (Mar. 10, 2011, 1:56 PM), <http://www.theblaze.com/stories/2011/03/10/capitol-chaos-police-drag-protesters-from-wis-capitol/> (discussing an embedded local news video that displays and discusses the locked down Wisconsin Statehouse). The bill was so controversial that Wisconsin's Democratic state senators fled to Illinois to deny Republicans the necessary quorum of twenty members in order to vote. See Jeff Mayers, *Democrats Flee Wisconsin to Protest Union Curbs*, REUTERS (Feb. 17, 2011), <http://www.reuters.com/article/2011/02/18/us-wisconsin-protests-idUSTRE71H01920110218>. California's November 2012 ballot propositions 30 and 32 and their significance will be considered later. See generally *Proposition 2012 Cheat Sheet: California's Nov. 6 Election*, KCET, <http://www.kcet.org/news/ballotbrief/ballot-measures/california-propositions-guide-2012-cheat-sheet.html> (last visited Sept. 28, 2013) (providing information on propositions 30 and 32).

<sup>8</sup> 132 S. Ct. 2277 (2012).

<sup>9</sup> See *infra* Part III (discussing such special assessments and their legality at the heart of *Knox*).

## II. BACKGROUND

### A. *Unions in the United States*

Workers in the United States have organized to pursue their interests in a unified manner since the early nineteenth century.<sup>10</sup> For example, American shoemakers attempted to create “closed shops”<sup>11</sup> as early as 1806.<sup>12</sup> The 1935, the National Labor Relations Act (NLRA)<sup>13</sup> officially gave workers the right to form and join unions and “obligated employers to bargain collectively with unions selected by a majority of the employees in an appropriate bargaining unit.”<sup>14</sup> The NLRA did not apply to government entities or their employees, however.<sup>15</sup> Public unions are a more recent phenomenon.<sup>16</sup>

In 1958, Wisconsin, the state now leading the effort to diminish public union influence, was the first jurisdiction to allow government workers to unionize.<sup>17</sup> President John F. Kennedy’s Executive Order 10988 granted federal employees the right to form unions in 1962.<sup>18</sup> Many states and municipalities soon followed the

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<sup>10</sup> See YATES, *supra* note 5, at 35–37.

<sup>11</sup> A closed shop arrangement exists where only union members are allowed to work at a given shop. *Id.* at 36.

<sup>12</sup> *Id.*

<sup>13</sup> 29 U.S.C. §§ 151–169 (2012) (also commonly known as the Wagner Act).

<sup>14</sup> *The 1935 Passage of the Wagner Act*, NAT’L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act> (last visited Feb. 7, 2013).

<sup>15</sup> Government entities are not considered employees under the terms of the Wagner Act. Paul Moreno, *How Public Unions Became So Powerful*, WALL ST. J. (Sept. 11, 2012, 7:55 PM), [http://online.wsj.com/article/SB10000872396390444017504577645550224040874.html?mod=wsj\\_Opinion\\_leadTop](http://online.wsj.com/article/SB10000872396390444017504577645550224040874.html?mod=wsj_Opinion_leadTop).

<sup>16</sup> Traditionally, the idea of public sector unionization was viewed with hostility. *Id.* Even presidents known for their progressive views like Woodrow Wilson and Franklin Roosevelt were strongly opposed to an organized government workforce. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Exec. Order No. 10,988, 3 C.F.R. § 521 (1959–1963). Unlike private sector (and some state and local government) unions, most federal government unions cannot collectively bargain over wages and benefits, and cannot go on strike. *Wisconsin Gov. Scott Walker Says Most Federal Employees Do Not Have Collective Bargaining for Benefits or Pay*, POLITIFACT,

federal government's lead.<sup>19</sup> While union membership overall has steadily declined since the 1950s,<sup>20</sup> public union membership has trended upward since at least the 1970s.<sup>21</sup> By 2012, the union membership rate was more than five times greater among public sector workers than among their private sector counterparts—35.9% to 6.6%, respectively.<sup>22</sup> However, since 2009, public union membership has been shrinking as well.<sup>23</sup>

### B. SEIU, Political Player

With over one million state and local government members, SEIU is the second largest public employee union in the nation.<sup>24</sup> Over 350,000 of those members are in California, where Local 1000

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<http://www.politifact.com/truth-o-meter/statements/2011/mar/02/scottwalker/wisconsin-gov-scott-walker-says-most-federal-emplo/> (last visited Oct. 12, 2013). They can, however, negotiate “working conditions,” which can include a wide range of issues from scheduling and vacation time to promotion practices. *Id.*

<sup>19</sup> Moreno, *supra* note 15.

<sup>20</sup> FAIRBROTHER & GRIFFIN, *supra* note 5, at 4.

<sup>21</sup> Review & Outlook, *The Public-Union Ascendancy*, WALL ST. J. (Feb. 3, 2010), <http://online.wsj.com/article/SB10001424052748703837004575013424060649464.html>.

<sup>22</sup> *Economic News Release: Union Members Summary*, DEP'T LAB. BUREAU LAB. STAT. (Jan. 23, 2013, 10:00 AM), <http://www.bls.gov/news.release/union2.nr0.htm>. Public sector union members also outnumbered their private counterparts 7.3 million to 7 million. Combined, union workers accounted for 11.2% of the overall workforce. *Id.*

<sup>23</sup> Access to Historical Data for Union Membership, *Table 3: Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry, Members of Unions, Government*, DEP'T LAB. BUREAU LAB. STAT., <http://www.bls.gov/webapps/legacy/cpslutab3.htm> (select “Public Sector” row, “Member of Unions - Total” column; then click “Retrieve Data”) (last visited Oct. 1, 2013).

<sup>24</sup> Including private sector members, SEIU has over two million members. *About SEIU*, SEIU.ORG, <http://www.seiu.org/our-union/> (last visited Feb. 9, 2013). American Federation of State, County and Municipal Employees (AFSCME) is the nation's largest public sector union with over 1.6 million active and retired members. *About AFSCME*, AFSCME, <http://www.afscme.org/union/about> (last visited Feb. 9, 2013).

of *Knox* is located.<sup>25</sup> SEIU also claims to be the fastest growing union in North America.<sup>26</sup>

Along with its considerable size comes considerable political power. In 2012 alone, SEIU contributed over \$20 million to candidates, political groups (for example, the Democratic National Committee), or political action committees.<sup>27</sup> According to the Center for Responsive Politics, SEIU is the fifth largest political donor in the last twenty-three years, with over \$50 million in direct political contributions.<sup>28</sup> A White House visitor log released during President Obama's first year in office revealed that former SEIU president, Andrew Stern, had visited twenty-two times, making him the most frequent White House guest.<sup>29</sup> It was an attempt to flex political muscle that led to the dispute in *Knox*.<sup>30</sup>

### III. LEGAL FOUNDATION

The *Knox* decision rests primarily on two prior cases dealing with public union fee collection and political expenditures. *Abood v.*

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<sup>25</sup> California has over 700,000 SEIU members when private sector workers are included. *SEIU in California*, SEIU.ORG, <http://www.seiucalifornia.org/about/seiu-in-california/> (last visited Feb. 10, 2013). Local 1000 spent around \$4.3 million on political causes in 2012, mostly to defeat Proposition 32. See *What SEIU Local 1000 Spent on Politics This Year*, THE SACRAMENTO BEE (Nov. 27, 2012), [http://blogs.sacbee.com/the\\_state\\_worker/2012/11/seiu-local-1000s-political-action.html](http://blogs.sacbee.com/the_state_worker/2012/11/seiu-local-1000s-political-action.html).

<sup>26</sup> *About SEIU*, *supra* note 24.

<sup>27</sup> *Summary of SEIU Contributions, Lobbying, and Spending Data*, CENTER FOR RESPONSIVE POL., <http://www.opensecrets.org/orgs/summary.php?id=D000000077> (last visited Mar. 17, 2013).

<sup>28</sup> *Top All-Time Donors, 1989–2012*, CENTER FOR RESPONSIVE POL., <http://www.opensecrets.org/orgs/list.php> (last visited Oct. 1, 2013). AFSCME came in second overall with over \$68 million in political contributions. *Id.* These numbers do not include the tens of millions of dollars spent to directly influence elections, i.e., not donated to candidates or other political organizations. *About Rankings*, CENTER FOR RESPONSIVE POLITICS, [http://www.opensecrets.org/orgs/include/rankings\\_pop.php](http://www.opensecrets.org/orgs/include/rankings_pop.php) (last visited Mar. 17, 2013).

<sup>29</sup> Susan Davis, *SEIU's Stern Tops White House Visitor List*, WALL ST. J. BLOGS (Oct. 30, 2009, 6:31 PM), <http://blogs.wsj.com/washwire/2009/10/30/seius-stern-tops-white-house-visitor-list/>.

<sup>30</sup> *Id.*

*Detroit Board of Education*<sup>31</sup> acknowledged the First Amendment issues inherent in public union political contributions, but maintained that agency shop arrangements<sup>32</sup> were permissible under the Constitution.<sup>33</sup> *Chicago Teachers Union, Local No. 1 v. Hudson*<sup>34</sup> clarified the requirements that must be followed by unions in order to collect regular fees from nonmembers without violating their rights.<sup>35</sup>

A. *Abood v. Detroit Board of Education*

Nonunion teachers challenged a Michigan law<sup>36</sup> specifically allowing for agency shops whereby nonmembers would pay the equivalent of union dues despite their desire to refrain from membership.<sup>37</sup> The Court took the case to determine whether such an arrangement “violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees.”<sup>38</sup>

*Abood* itself rests upon the reasoning in two prior labor decisions: *Railway Employes’ [sic] Department v. Hanson*,<sup>39</sup> and *Machinists v. Street*.<sup>40</sup> Together, the cases stand for the proposition that employees may be compelled to contribute to expenses incurred by the union representing a shop in the bargaining process, but that use of the contributions is restricted by the First Amendment.<sup>41</sup>

The Court began by declining to take a different course in *Abood* than it had in *Hanson* or *Street* merely because the employer

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<sup>31</sup> 431 U.S. 209 (1977).

<sup>32</sup> *Id.* at 211. An agency shop is one that employs both union and nonunion workers, but a union bargains on behalf of all employees. *Id.* Nonmembers pay chargeable expenses to help defray the costs of collective bargaining. *Id.*

<sup>33</sup> *Id.* The nature of the First Amendment issues are discussed *infra* in Part III.A.

<sup>34</sup> 475 U.S. 292 (1986).

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

<sup>36</sup> MICH. COMP. LAWS § 423.210(1)(c) (1970).

<sup>37</sup> *Abood*, 431 U.S. at 211.

<sup>38</sup> *Id.* Under the agreement, new teachers would have sixty days in which to pay the required amount to the union or be subject to discharge. *Id.* at 212.

<sup>39</sup> 351 U.S. 225 (1956).

<sup>40</sup> 367 U.S. 740 (1961).

<sup>41</sup> *Abood*, 431 U.S. at 217–20.

was the state itself.<sup>42</sup> Notably, the union shop at issue in *Hanson* was considered “to result from governmental action.”<sup>43</sup> The constitutional constraints on a government employee union were to be analyzed in the same fashion as in the prior cases dealing with private sector unions.<sup>44</sup>

The Court was similarly unmoved by the plaintiff’s contention that “collective bargaining in the public sector is inherently ‘political’ and thus requires a different result under the First and Fourteenth Amendments.”<sup>45</sup> After noting that it is indeed political, rather than financial, pressure that primarily functions to check government employers in the collective bargaining process, the Court determined that such a distinction did not alter the calculus determining the legality of the fee arrangement as a whole.<sup>46</sup> Writing for the majority, Justice Stewart bluntly stated, “The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.”<sup>47</sup>

That said, there are constitutional limitations on how a union may spend fee money collected from nonmembers.<sup>48</sup> The First Amendment prohibits government unions from compelling nonmembers from whom they receive fees to subsidize non-bargaining expenditures with which they disagree as a condition of

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<sup>42</sup> *Id.* at 224. Discussing the congressional intent behind the federal labor laws, the Court pointed out, “The desirability of labor peace is no less important in the public sector, nor is the risk of ‘free riders’ any smaller.” *Id.*

<sup>43</sup> *Id.* at 226.

<sup>44</sup> *See id.* at 229–30 (“Public employees are not basically different from private employees . . . . The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer.”). In other words, the fact that the employer is a state actor is not germane to the analysis of the rights of the employee or the union, both of whom remain private actors.

<sup>45</sup> *Id.* at 227.

<sup>46</sup> *Id.* at 229. The Court pointed out that the free speech concerns of both private and public employees are essentially the same, so their interests ought to be given the same weight regardless of the status of their employers. *Id.*

<sup>47</sup> *Id.* at 232. Justice Powell, whose concurrence was joined by Justice Blackmun and Chief Justice Burger, would have made a greater distinction between public and private employers than did the majority. *See id.* at 245–60 (Powell, J., dissenting).

<sup>48</sup> *See, e.g., id.* at 235–36.

employment.<sup>49</sup> Money spent in furtherance of political or ideological causes must be derived from contributions by employees who “do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”<sup>50</sup> *Abood* thus established the broad outlines of the later agency shop cases: agency shops are permissible, but unions cannot spend a nonmember’s fees on political or ideological goals without his consent. *Hudson* would clarify the methods for assuring that unions did not violate their nonmembers’ rights.

B. Chicago Teachers Union, Local No. 1 v. Hudson

After the Illinois legislature authorized public unions within the state to implement the agency shop arrangement held to be constitutional in *Abood*, the Chicago Board of Education and the Chicago Teachers Union quickly began requiring nonmember teachers to contribute fees via paycheck deductions.<sup>51</sup> In an attempt to satisfy the constitutional requirement 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,”<sup>52</sup> the teachers’ union created a procedure for dealing with objections by nonmembers.<sup>53</sup>

Initially, the union made a determination of what percentage of its expenses was accrued on account of causes “germane to its duties as collective-bargaining agent.”<sup>54</sup> The union calculated that 95% of its total costs was the legitimate, “proportionate share” chargeable to nonmembers.<sup>55</sup> No objections could be made prior to

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<sup>49</sup> *Id.* at 234. Forced contributions are every bit as much a constitutional violation as preventing a voluntary contribution. *Id.* at 235. In addition to contributing to collective bargaining, nonmembers must also help defray costs related to contract administration and grievance adjustment. *Id.* at 225–26.

<sup>50</sup> *Id.* at 236.

<sup>51</sup> *Chic. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 294 (1986).

<sup>52</sup> *Id.* at 302 (quoting *Abood*, 431 U.S. at 237).

<sup>53</sup> *Id.* at 296.

<sup>54</sup> *Id.* at 294 (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 447 (1984)).

<sup>55</sup> *Id.* at 295–96. This estimate was made based on financial records from the previous year. The actual amount of political or ideological expenditures was

the collection of the fee.<sup>56</sup> If a teacher objected after the fee was assessed, the procedure provided that the teacher alert the president of the union in writing within thirty days.<sup>57</sup> Then, the union's executive committee would consider the objection. If the committee's decision were appealed, an executive board would reconsider.<sup>58</sup> As a last resort, the union would pay for arbitration of the dispute.<sup>59</sup> If the objector won at any level, he or she was entitled to a refund and a reduction of future paycheck deductions.<sup>60</sup> *Hudson* dealt with whether such a procedure could survive First Amendment scrutiny.<sup>61</sup> The Court found that it did not.<sup>62</sup>

The first problem the Court saw with the union's plan was that its only remedy was a rebate.<sup>63</sup> A return of funds after an erroneous deduction did not avoid the risk that nonmembers' fees would be used, even temporarily, for unconstitutional purposes.<sup>64</sup> Next, the Court discussed the inadequacy of the information given to nonmembers regarding the calculation of their proportionate share.<sup>65</sup> Lastly, the Court specified a requirement that employee objections be

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4.6%, but the union rounded to 5% to provide the nonmembers a "cushion." *Id.* at 295.

<sup>56</sup> *Id.* at 296.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

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

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

<sup>61</sup> *Id.* at 304. The teachers' union in *Hudson* also argued that such a procedure was not in violation of the Constitution because it placed the plaintiff's money in escrow pending the outcome of the case, and therefore, their fees could not have been used against their wishes. *Id.* at 299. However, for purposes of precedential value, the procedure itself is much more significant to *Knox*, and this note therefore focuses on the procedure. *See infra* Part IV.

<sup>62</sup> *Hudson*, 475 U.S. at 301, 310.

<sup>63</sup> *Id.* at 305.

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

<sup>65</sup> *Id.* at 306. While the burden of objecting is on the worker, an employee must be given notice of how his share of expenses was calculated if he is to make an informed objection. *See id.* at 306–07. This would come to be colloquially known as "*Hudson* notice." *See, e.g., Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2285 (2012). Significantly, the Court made clear that the method used to determine the fees in this case, namely estimates based on financial statements from the previous year, was acceptable given the difficulties of making precise predictions regarding costs. *Hudson*, 475 U.S. at 307 n.18.

heard in an “expeditious, fair, and objective manner.”<sup>66</sup> While an objection is pending, the amount in controversy should be held in escrow.<sup>67</sup> In sum, a constitutional nonmember union fee must be assessed only after adequate explanation of its grounds is subject to prompt challenge before a neutral authority, and should be placed in escrow pending the outcome of the hearing.<sup>68</sup>

Thus, in light of *Abood* and *Hudson*, a basic framework emerges. Government employees and employers may create agency shops represented by unions in collective bargaining.<sup>69</sup> The union representing the shop may require nonunion employees to pay a fee for chargeable expenses (i.e., those related to the duties of the union as collective bargainer).<sup>70</sup> However, the union may not spend the money assessed to a nonmember for political or ideological purposes absent the worker’s consent.<sup>71</sup> Finally, upon a worker’s reasonable objection, the objector’s fees must be placed in escrow and the worker’s claim must be promptly heard by an impartial decision maker.<sup>72</sup> This is the lens through which the Supreme Court would view the dispute in *Knox v. Service Employees International Union, Local 1000*.

#### IV. *KNOX V. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000*

##### A. *The Facts*

Like Michigan and Illinois, California allows public employees to form agency shops.<sup>73</sup> The practice of one such shop,

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<sup>66</sup> *Hudson*, 475 U.S. at 307. The Court noted that the system at issue was controlled, at all times, entirely by the union. *Id.* The Court strongly implied that decisions regarding validity of nonmember payments should be determined by someone outside of the union. *See id.* at 307–09.

<sup>67</sup> *Id.* at 310.

<sup>68</sup> *Id.*

<sup>69</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977).

<sup>70</sup> *Id.* at 217–20.

<sup>71</sup> *Hudson*, 475 U.S. at 305.

<sup>72</sup> *Id.* at 310.

<sup>73</sup> CAL. GOV’T CODE § 3502.5(a) (West 2010).

SEIU Local 1000 (the Local),<sup>74</sup> was to charge all represented employees, whether union members or not, the full amount of union dues.<sup>75</sup> If and when nonmembers objected to the assessment upon receiving *Hudson* notice, the union would only deduct the amount it calculated as chargeable expenses.<sup>76</sup> The Local's *Hudson* notice also contained a clause stating that the fee was "subject to increase at any time without further notice."<sup>77</sup>

In June of 2005, then-California Governor Arnold Schwarzenegger called for a special election in November to vote on various government budget-cutting measures.<sup>78</sup> Public employee unions actively opposed the measures.<sup>79</sup> In order to fund its campaign against the ballot proposals, the Local instituted a "special assessment" in the amount of an additional 25% of regular fees on all employees the Local represented—after the thirty-day period for objecting to the *Hudson* notice had ended.<sup>80</sup>

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<sup>74</sup> SEIU Local 1000 is California's largest state (government) employee union. *About Local 1000*, SEIU LOCAL 1000, <http://seiu1000.org/your-union/about.php> (last visited Oct. 3, 2013). It represents 95,000 workers in nine "bargaining units" based on occupation categories. *Id.*

<sup>75</sup> *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2285 (2012).

<sup>76</sup> *Id.* For 2005, the year at issue, chargeable expenses were calculated at 56.35% of full union dues. *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See id.* Proposition 76, geared at controlling state spending, would have limited outlays from the state's general and special funds to the level of the prior year plus an amount determined by average past increases. *Proposition 76: Key Issues and Fiscal Effects*, CALIFORNIA LEGISLATIVE ANALYST'S OFFICE (Sept. 30, 2005), [http://www.lao.ca.gov/2005/prop\\_76/prop\\_76\\_093005.htm](http://www.lao.ca.gov/2005/prop_76/prop_76_093005.htm). The cap would have likely affected discretionary, but not entitlement spending. *See id.*

<sup>79</sup> *See id.* SEIU was primarily concerned about Propositions 75 and 76 which respectively would have required unions to obtain employees affirmative consent in writing before charging them fees to fund political operations and given the governor power to reduce state spending on public employees. *Id.* Public employee unions contributed nearly \$10 million to oppose Governor Schwarzenegger's proposals. *Id.* (citing Carla Marinucci & John Wildermuth, *Schwarzenegger Adds Prop. 75 to His Agenda*, S.F. CHRON., Sept. 18, 2005, at A-17, available at <http://www.sfgate.com/politics/article/Schwarzenegger-adds-Prop-75-to-his-agenda-2568986.php>).

<sup>80</sup> *Knox*, 132 S. Ct. at 2285. The total fee for most members after the additional 25% would be 1.25% of their monthly salary. *Id.* at 2286.

The notice of the fee increase specifically stated that the funds were an “Emergency Temporary Assessment to Build a Political Fight-Back Fund” (the Fight-Back Fund).<sup>81</sup> The Local went on to make clear that “[t]he Fund [would] not be used for regular costs of the union—such as office rent, staff salaries, or routine equipment replacement, etc.”<sup>82</sup> The money would instead be spent on television, radio, direct mail advertising, voter registration and education, and a get-out-the-vote campaign.<sup>83</sup> Employees were not given an opportunity to opt-out of the special assessment.<sup>84</sup> A class action was filed on behalf of 28,000 nonunion employees upon whom the special assessment was imposed.<sup>85</sup>

### B. District Court

The district court granted summary judgment to the plaintiff nonmembers as to the question of whether the Local’s special assessment violated the nonmembers’ First Amendment rights.<sup>86</sup> The court found that the plaintiffs did not receive adequate notice of the fee increase, and failure to object to the original *Hudson* notice did not constitute consent to the special assessment.<sup>87</sup> The appropriate remedy, according to the district court, was new notice giving nonmembers forty-five days in which to opt-out of paying into the Fight-Back Fund.<sup>88</sup> Those who objected were to be issued a “refund of the nonchargeable portion of the [special assessment], with interest.”<sup>89</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (quoting the Local’s fee increase proposal) (internal quotation marks omitted).

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

<sup>84</sup> *Id.* Employees who originally objected upon receipt of the annual *Hudson* notice were only assessed 56.35% of the special assessment. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See *Knox v. Westly*, No. 2:05-cv-02198-MCE-KJM, 2008 WL 850128, at \*12 (E.D. Cal. Mar. 28, 2008), *rev’d sub nom.* *Knox v. Cal. State Emps. Ass’n, Local 1000*, 628 F.3d 1115 (9th Cir. 2010), *vacated sub nom.* *Knox v. Cal. State Emps. Ass’n, Local 1000*, 692 F.3d 924 (9th Cir. 2012).

<sup>87</sup> *Id.* at \*10–11.

<sup>88</sup> See *id.* at \*12.

<sup>89</sup> *Id.* at \*10. The court was unimpressed by the defendant union’s argument that *Hudson* dealt with regular annual fees and not a special assessment.

### C. *The Court of Appeals*

A divided three-judge panel reversed the ruling of the district court.<sup>90</sup> According to the Ninth Circuit panel, *Hudson* established a balancing test for determining the adequacy of union notice.<sup>91</sup> In addition to “balancing of the ‘right’ of the union to collect an agency fee against the First Amendment rights of nonmembers”,<sup>92</sup> the Ninth Circuit also inquired into whether the system of notice and subsequent remedial procedures took proper account of “the union, the [public employer] and nonmember employees.”<sup>93</sup> Under this analysis, the court concluded that the Local did not violate *Hudson*.<sup>94</sup>

The majority took issue with the district court’s failure to account for the difficulty of predicting future expenses under the normal method of chargeable expense calculations.<sup>95</sup> After all, any mistakes in the chargeability determination will necessarily average out the year after they are made when the current year’s accounting is factored in.<sup>96</sup> The panel maintained that the district court’s remedy of renewed notice when an out-of-the-ordinary fee increase was to be imposed would be unworkable for a union.<sup>97</sup>

In a lengthy dissent, Judge Wallace claimed that the majority misconstrued the *Hudson* test as well as the nature of the union’s claim to nonmembers’ money.<sup>98</sup> His assertions would soon be echoed by the Supreme Court, which took the case to decide

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*See id.* at \*11. According to the court, such a literal reading of *Hudson* amounted to using a loophole to subvert the Constitution’s First Amendment protections. *See id.* (“[N]o self-asserted loophole will allow Defendants to avoid the Constitution.”).

<sup>90</sup> *See Knox v. Cal. State Emps. Ass’n, Local 1000*, 628 F.3d 1115, 1117 (9th Cir. 2010), *rev’d sub nom. Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277 (2012).

<sup>91</sup> *Id.* at 1117, 1119–20.

<sup>92</sup> *Knox*, 132 S. Ct. at 2291.

<sup>93</sup> *Knox*, 628 F.3d at 1120 (alteration in original) (quoting *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1376 n.7 (9th Cir. 1993)) (internal quotation marks omitted).

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

<sup>95</sup> *See id.* at 1121.

<sup>96</sup> *See id.*

<sup>97</sup> *Id.* at 1122.

<sup>98</sup> *Id.* at 1127–28 (Wallace, J., dissenting).

“whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union’s political and ideological activities.”<sup>99</sup>

## V. *KNOX* AT THE SUPREME COURT

### A. *Alito for the Majority*

#### 1. Mootness

The Local may have signaled that it anticipated a reversal of the Ninth Circuit by its conduct before the *Knox* case was argued in front of the Supreme Court in January of 2012. After the Court granted certiorari, the union offered refunds to the class members and then moved to dismiss the case as moot.<sup>100</sup> Writing for the majority, Justice Alito explained that a case will generally not be dismissed on ground of mootness when doing so would allow one of the parties to immediately resume the disputed conduct without being sanctioned.<sup>101</sup> Furthermore, a live controversy existed as to the adequacy of the notice of the proposed refunds.<sup>102</sup> Thus, the Court proceeded to the merits.<sup>103</sup>

#### 2. Compulsory Subsidization of Speech

Justice Alito began by reaffirming the concept that free speech includes being able to choose “what not to say.”<sup>104</sup> Likewise, freedom of association “presupposes a freedom not to associate.”<sup>105</sup> Justice Alito then drew a connection between compelled speech and association and compelled funding of speech.<sup>106</sup> Drawing on *United*

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<sup>99</sup> See *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2284 (2012).

<sup>100</sup> *Id.* at 2287.

<sup>101</sup> See *id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2288.

<sup>104</sup> *Id.* (alteration in original) (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988)) (internal quotation marks omitted).

<sup>105</sup> *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted).

<sup>106</sup> *Id.*

*States v. United Foods, Inc.*,<sup>107</sup> he laid out the two-part test for upholding the compulsory subsidization of private speech.<sup>108</sup> “First, there must be a comprehensive regulatory scheme involving a ‘mandated association’ among those who are required to pay the subsidy.”<sup>109</sup> Next, “compulsory fees can be levied only insofar as they are a ‘necessary incident’ of the ‘larger regulatory purpose which justified the required association.’”<sup>110</sup> According to Justice Alito, the union-nonmember relationship is not one in which forced subsidization of speech can constitutionally take place.<sup>111</sup> Therefore, nonmembers are entitled to full First Amendment protection.<sup>112</sup>

### 3. *Hudson* Notice and the First Amendment

Justice Alito proceeded to state that, “unions have no constitutional entitlement to the fees of nonmember-employees.”<sup>113</sup> In fact, he asserted that the whole notion of an opt-out system—as opposed to a system whereby nonmember employees would have to affirmatively consent to a paycheck deduction for union expenses—which has become the norm, came about only because of a “historical accident.”<sup>114</sup> Justice Alito made clear the majority’s concern that opt-out fee arrangements for nonmembers push the acceptable limits of the First Amendment.<sup>115</sup> Given the tenuous grip on legality of regular union fee collection, the special assessment at issue certainly could not stand.<sup>116</sup>

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<sup>107</sup> 533 U.S. 405 (2001).

<sup>108</sup> *Knox*, 132 S. Ct. at 2289.

<sup>109</sup> *Id.* (quoting *United States v. United Foods*, 533 U.S. 405, 414 (2001)).

<sup>110</sup> *Id.* (quoting *United Foods*, 533 U.S. at 414).

<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *Id.* at 2291 (quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 185 (2007) (internal quotation marks omitted)).

<sup>114</sup> *Id.* at 2290. Justice Alito detailed union fee cases from *International Ass’n of Machinists v. Street*, 367 U.S. 740 (1961), to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and submitted that acceptance of opt-out systems would not have arisen but for unique factual circumstances in the precedential cases. *See Knox*, 132 S. Ct. at 2290.

<sup>115</sup> *See id.* at 2291.

<sup>116</sup> *See id.*

In light of the fact that some plaintiffs did not object to the original *Hudson* notice, the majority “[saw] no justification for the union’s failure to provide a fresh *Hudson* notice.”<sup>117</sup> The Court reasoned that informed consent to union fees could only be given if employees had fair notice of how their contributions would be used.<sup>118</sup> Under normal circumstances, yearly *Hudson* notice is sufficient because nonmembers will have a “fair opportunity” to consider the use of their fee.<sup>119</sup> However, when there is a special assessment, the rationale for allowing the yearly opt-out disappears.<sup>120</sup> The Court noted that this case provided a particularly illustrative example of the potential consequences of ineffective *Hudson* notice because of the nature of the contested ballot propositions.<sup>121</sup> The union was actively opposing Proposition 75, which, if passed, would have instituted an opt-in system for nonmembers who wished to contribute to the Local’s political goals.<sup>122</sup> In effect, the Local was forcing nonmembers to contribute to a campaign against their own financial interests.<sup>123</sup>

The Local argued for the adequacy under the First Amendment of its existing opt-out framework.<sup>124</sup> Its main contention was that nonmembers who would have objected to the special assessment would be compensated by opting out upon receipt of the next *Hudson* notice the following year.<sup>125</sup> This is because the union, upon accounting for the political use of the special assessment, would lower the percentage of normal members’ dues that were attributable

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (quoting *Hudson*, 475 U.S. at 303) (internal quotation marks omitted). Additionally, the logic behind annual *Hudson* notice is based on the assumption that the proportion of chargeable to nonchargeable expenses will be relatively constant. *Id.* at 2293.

<sup>120</sup> *See id.* at 2292.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* The Court pointed out that it would have been easy for the Local to put its notice of the impending fee increase in the form of a *Hudson* notice and allow nonmembers to object. *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> *Id.*

to chargeable expenses.<sup>126</sup> That is to say, nonmembers would eventually break even.

The Court disagreed that the potential for breaking even in terms of chargeable expenses provided sufficient First Amendment protection to nonmembers.<sup>127</sup> It reasoned that such a system would be tantamount to a compulsory loan by nonmembers, the proceeds of which could be used to fund projects they found repugnant.<sup>128</sup> Justice Alito repeated the Court's concern with even the existing opt-out framework and explained that any further First Amendment impingement was simply unacceptable.<sup>129</sup>

Not only was the Local's notice ineffective as it concerned the plaintiff nonmembers who had not opted out after receiving the regular annual *Hudson* notice, but the union also violated the First Amendment rights of the nonmembers who had opted out in the first instance.<sup>130</sup> The Local charged objectors the same percentage of the special assessment as it charged of the annual assessment: 56.35%.<sup>131</sup> Given that the union acknowledged that the new fees were going specifically to support a political effort, however, there was no reason to suppose the chargeable portion, if any, of the special assessment would be anywhere near that number.<sup>132</sup>

The Local suggested that the nonmembers who objected at the outset, and thus had paid only 56.35% of the special assessment, actually came out ahead in terms of the total fees assessed to them.<sup>133</sup> As it turned out, the union claimed, the actual amount of chargeable expenses for 2005 was at least 66.26%.<sup>134</sup> Therefore, those members who paid 56.35% of both the original and special assessment paid less than they could legally have been required to pay.

Justice Alito offered two reasons why this reasoning did not persuade the Court.<sup>135</sup> First, the majority objected to the expansive

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<sup>126</sup> *See id.*

<sup>127</sup> *Id.* at 2292–93.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 2293, 2295.

<sup>130</sup> *See id.* at 2293.

<sup>131</sup> *Id.*

<sup>132</sup> *See id.*

<sup>133</sup> *Id.* at 2294.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2294–95.

view the Local took of what constituted chargeable expenses.<sup>136</sup> For example, the union assumed that expenditures towards “lobbying . . . the electorate” and defeating Proposition 76 were properly counted as chargeable expenses and thus deductible from nonmembers’ pay.<sup>137</sup> The Court countered that such a broad definition of what could be considered a chargeable expense would essentially “eviscerate the limitation on the use of compulsory fees to support unions’ controversial political activities.”<sup>138</sup>

Second, the Court explained that, unless the amount of chargeable expenses could be accurately predicted (which the Local contended was impossible), then the union had an obligation to err on the side of not charging nonmembers up front.<sup>139</sup> The rationale for this rule is that if the nonmember is overcharged, there is a risk that the nonmember’s First Amendment rights will be violated by using that money to subsidize speech with which he or she disagrees.<sup>140</sup> On the other hand, if the nonmember is undercharged, there is no risk of any party’s rights being infringed.<sup>141</sup> The risk associated with under or overpayment should fall on the union—who will make up the difference upon the next assessment—not the nonmember.<sup>142</sup>

The majority ended by requiring unions both to “provide a fresh *Hudson* notice” and to receive the affirmative consent of nonmembers before imposing a special assessment.<sup>143</sup> This result was compelled by the already substantial impingement on First Amendment rights by virtue of current opt-out systems.<sup>144</sup> Any further offense to nonmembers’ free speech rights would be

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<sup>136</sup> *Id.* at 2294.

<sup>137</sup> *See id.* (quoting Brief for Respondent at 51, *Knox v. Service Employees Intern Union, Local 1000*, 132 S. Ct. 2277 (2012) (No. 10–1121), 2011 WL 5908951, at \*51) (internal quotation marks omitted). The Local argued that the opposition to Proposition 76 should count as chargeable because, if it passed, the measure would have undermined the union’s effectiveness as a collective bargainer. *Id.*

<sup>138</sup> *Id.* at 2295.

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 2296.

<sup>144</sup> *See id.* at 2295.

intolerable.<sup>145</sup> Thus, the general rule that individuals should not be required to subsidize private speech must prevail.<sup>146</sup>

*B. Justice Sotomayor's Concurrence*<sup>147</sup>

Justices Sotomayor and Ginsburg joined the Court's judgment because they agreed that the Local did not comply with *Hudson* since no new notice was issued before the additional fee was assessed.<sup>148</sup> However, Justice Sotomayor explained that, in her opinion, the holding should have ended there.<sup>149</sup> She pointed out that neither party specifically asked the Court to rule on whether an opt-in provision was necessary.<sup>150</sup> She also referred to the Court's own rules for the proposition that the Court should only consider questions "set out in the petition."<sup>151</sup> Furthermore, no prior Supreme Court case had ever brought up the possibility that the common opt-out method of fee assessment was inadequate.<sup>152</sup> Since neither party thought such a holding was necessary to resolve the case, the Court should not have gone out of its way to decide the issue.<sup>153</sup>

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<sup>145</sup> *See id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 2296–99 (Sotomayor, J., concurring). Justice Ginsburg joined Justice Sotomayor's concurrence. *See id.* at 2296.

<sup>148</sup> *Id.* at 2296–97.

<sup>149</sup> *See id.* at 2296, 2297.

<sup>150</sup> *See id.*

<sup>151</sup> *Id.* at 2297 (quoting SUP. CT. R. 14.1(a) (2013)) (internal quotation marks omitted).

<sup>152</sup> *Id.* (Sotomayor, J., concurring). The majority countered that no case had yet dealt with the issue of a special, as opposed to annual, assessment, and that this distinction is what led to the need for the opt-in provision. *See id.* at 2296 n.9.

<sup>153</sup> *See id.* at 2297–98. Justice Sotomayor turned Justice Alito's words against him by quoting his opinion in *NASA v. Nelson*: "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Id.* at 2298 (quoting *NASA v. Nelson*, 131 S. Ct. 746, 757 n.10 (2011) (internal quotation marks omitted)).

The majority contended that deciding the case on the assumption that an opt-out regime was constitutionally permissible would be akin to presuming any other unconstitutional proposition to be valid unless it was set out in the petition. *Id.* at 2296 n.9. Justice Sotomayor responded that, if the constitutional issue was not properly framed, then the Court should not have granted certiorari, or, alternatively, asked for supplemental briefing. *Id.* at 2298 n.2.

Justice Sotomayor went on to assert that the majority's position was unclear in addition to being unwarranted.<sup>154</sup> She posited a series of questions to which she found the Court's new rule lacking an answer.<sup>155</sup> She pondered, "What procedures govern this new world of fee collection?"<sup>156</sup>

But perhaps Justice Sotomayor and Justice Ginsburg's greatest concern was that the language used by the majority strongly suggested that the line of union fee cases from *Street* to *Hudson* "may not long endure."<sup>157</sup> The concurrence accused the Court of bringing up First Amendment issues not considered by the parties, "cast[ing] serious doubt on longstanding precedent"—a rare move absent prompting from concerned parties.<sup>158</sup>

### C. Justice Breyer's Dissent<sup>159</sup>

#### 1. The Opt-Out System

Justice Breyer's dissent focused on the statement in *Hudson* that "the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year."<sup>160</sup> According to the dissent, that was exactly what the Local did in this case.<sup>161</sup> Justice Breyer pointed to the fact that, since *Hudson* was decided, employers and unions have relied on the idea that fees collected by unions could be based on an accounting of chargeable expenses made in the prior year.<sup>162</sup> As he viewed the issue, the existing opt-out framework was sufficient to protect nonmember workers while compensating the union for its expenses incurred as collective bargainer.<sup>163</sup>

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<sup>154</sup> *See id.* at 2298.

<sup>155</sup> *Id.* at 2298–99.

<sup>156</sup> *Id.* at 2299.

<sup>157</sup> *See id.*

<sup>158</sup> *See id.*

<sup>159</sup> *See id.* at 2299–2307 (Breyer, J., dissenting). Justice Kagan joined Justice Breyer's dissent. *See id.* at 2299.

<sup>160</sup> *Id.* at 2299 (quoting *Chic. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 307 n.18 (1977)) (internal quotation marks omitted).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 2299–2300.

<sup>163</sup> *See id.* at 2300.

Justice Breyer meticulously explained how the yearly accounting involved in the opt-out method operated to provide fair results to nonmembers over the long term.<sup>164</sup> By capping a year's fees at the amount of the prior year's actual chargeable expenses, "what the objecting nonmembers lose on the swings they will gain on the roundabouts."<sup>165</sup> For Justice Breyer, this system, while imperfect, is workable and comports with the First Amendment—which is to say that it complies with the requirements of *Abood* and *Hudson*.<sup>166</sup>

## 2. The Special Assessment

Justice Breyer analyzed the constitutionality of the special assessment separately as to the nonmembers who objected to the initial 2005 *Hudson* notice and as to the nonmembers who did not initially object.<sup>167</sup> He concluded that the special assessment did not violate the First Amendment rights of the initial objectors because, as described above, they ended up paying less in retrospect than the union was actually entitled to charge them.<sup>168</sup> Justice Breyer also claimed that, even if it had not been the case that these nonmembers underpaid for the year in question, he would still find no constitutional violation in determining their chargeable percentage based on the prior year's financial statements.<sup>169</sup> This is due to the fact that, notwithstanding the Local's admission that none of the special assessment would be chargeable in this particular instance, projecting the amount of special assessments that will end up being chargeable will almost always be a very difficult task.<sup>170</sup> The logic and long-run fairness of the current system of using the prior year as the determinant of the current year's fees becomes manifest given

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<sup>164</sup> *Id.* at 2301.

<sup>165</sup> *Id.*

<sup>166</sup> *See id.* at 2300–03. Justice Breyer acknowledged that the possibility that an objecting nonmember's fee contribution will help pay for a non-chargeable political expenditure is always present. *Id.* at 2301. "Nonetheless this kind of system enjoys an offsetting administrative virtue," in that it is based on audited accounts and not predictions. *Id.*

<sup>167</sup> *Id.* at 2302.

<sup>168</sup> *Id.*

<sup>169</sup> *See id.* at 2302–03.

<sup>170</sup> *See id.*

such a complicated endeavor.<sup>171</sup> The fact that, in this case, the Local claimed that most if not all of the special assessment would go toward a political campaign was unfortunate because it is not likely to be representative of the vast majority of cases where special assessments are levied.<sup>172</sup> In the event that expenditures are misclassified or improperly imposed, nonmembers have at their disposal procedures for challenging the chargeability of expenses.<sup>173</sup> Justice Breyer contended that this is sufficient to vindicate objecting nonmembers' First Amendment rights.<sup>174</sup>

According to Justice Breyer, nonmembers who failed to initially object upon receipt of the annual *Hudson* notice have a stronger case than their counterparts to object to the imposition of the special assessment.<sup>175</sup> Justice Breyer claimed that this is because these nonmembers will be forced to pay the entire special assessment, not just some percentage of it.<sup>176</sup> Nonetheless, he argued, the same administrative difficulties that apply to determining chargeable expenses prior to a post-expenditure accounting make a compelling case that even initial non-objectors should not be allowed to later object to a special assessment.<sup>177</sup>

### 3. The Likelihood of a First Amendment Violation

Justice Breyer was convinced that, in most cases, actual deprivation of First Amendment rights is unlikely to occur.<sup>178</sup> He

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<sup>171</sup> *See id.* at 2303.

<sup>172</sup> *See id.* Justice Breyer echoed Justice Sotomayor's concern that a nonmember may be able to object to any special assessment, even one strictly for additional chargeable expenses. *Id.* He argued that nothing in the majority opinion would prevent such an outcome. *Id.*

<sup>173</sup> *See id.* at 2304. If an objecting nonmember is not satisfied with the union's determinations, the union will pay for arbitration before the American Arbitration Association. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* Presumably, this would increase the likelihood that nonmembers who did not initially object would end up paying for more than their share of a given year's chargeable expenses. This, in turn, would increase the possibility that they would subsidize some union projects with which they disagree.

<sup>177</sup> *Id.* at 2304–05. For example, should an initial non-objector (or an initial objector, for that matter) be allowed to object to a special assessment brought on by unexpected, but perfectly legitimate chargeable expenses? *See id.* at 2305.

explained his reasoning as follows. A regular (usually annual) opportunity to object to paying the equivalent of full dues provides the nonmember with adequate protection against the unconstitutional use of his funds for political purposes.<sup>179</sup> Employees are well aware that unions spend money in furtherance of political positions.<sup>180</sup> Nonmembers who generally oppose the union's politics will usually object at each given opportunity.<sup>181</sup> Of those who would only choose to object to special assessments, there are likely many who would do so not for ideological reasons, but merely because they wish to save money.<sup>182</sup> Objection on financial, rather than free speech grounds, is not subject to constitutional protection.<sup>183</sup> Even if an objection would have been based on First Amendment concerns, the would-be objector can always make an objection the next year, at which point his or her lessened fees will be based on the spending in the prior year that was actually objected to.<sup>184</sup>

#### 4. The Court Entering the Political Realm

Finally, Justice Breyer criticized the Court for wading into a hotly contested political issue, especially given that its holding was not specifically requested or argued by either party.<sup>185</sup> He expressed his concern that the majority's holding could be construed as pertaining to all nonmember union fees, not just special assessments.<sup>186</sup> Justice Breyer concluded by agreeing with Justice Sotomayor's concurrence insofar as it relates to the inappropriateness of taking on a constitutional issue without the "benefit of argument."<sup>187</sup> He made his concern known that "the opinion will play a central role in an ongoing, intense political debate."<sup>188</sup>

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<sup>178</sup> *See id.* at 2305–06.

<sup>179</sup> *Id.* at 2305.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See id.*

<sup>184</sup> *See id.* at 2306.

<sup>185</sup> *See id.* at 2306–07.

<sup>186</sup> *Id.* at 2306.

<sup>187</sup> *Id.* at 2306–07.

<sup>188</sup> *Id.* at 2306.

VI. *KNOX* IN CONTEXTA. *Does Knox Change Anything?*

The majority's holding in *Knox* may seem unremarkable when one considers the legal ground on which it sits, i.e., *Abood* and *Hudson*.<sup>189</sup> Given the pains the Court had taken to protect the First Amendment rights of nonmembers in the past when annual fees were being assessed, it should not be surprising that a special assessment for admittedly political purposes was subject to extreme skepticism.<sup>190</sup> The majority was clearly more inclined to err on the side of overprotecting objecting nonmembers than ensuring that unions got every penny of contributions to which they were entitled.<sup>191</sup>

Indeed, one gets the sense reading the opinion that the holding in *Knox* is a foregone conclusion.<sup>192</sup> As suggested above, even SEIU seemed to understand the futility of its position, as indicated by its suggested refund to the plaintiff class.<sup>193</sup> The Court went so far as to admonish the Ninth Circuit by repeating, verbatim, a footnote from *Hudson* explaining that the goal of any fee collection system should be the minimization of the likelihood of First Amendment violations, as opposed to a balancing of employer, employee, and union interests.<sup>194</sup> But if the answer appears clear given the precedent (Justice Breyer's dissent notwithstanding), why hear the case at all?

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<sup>189</sup> See *supra* Part III.

<sup>190</sup> Justice Breyer thought the fact the union informed employees that it intended to use the special assessment "camouflaged" the real problems, which dealt with administrative feasibility. *Knox*, 132 S. Ct. at 2303 (Breyer, J., dissenting).

<sup>191</sup> See, e.g., *id.* at 2295 (majority opinion) ("Which side should bear [the risk of underpayment or overpayment]? The answer is obvious: the side whose constitutional rights are not at stake.").

<sup>192</sup> Even the question the Court chose to consider seems to suggest the outcome: "In this case, we decide whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities." *Id.* at 2284.

<sup>193</sup> See *id.* at 2287.

<sup>194</sup> *Id.* at 2291 n.3 (quoting *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 n.11 (1986)).

### B. *Why Hear the Case?*

Two answers to this question are discernable from the opinion. First, and most obviously, the Court chose to reverse what it considered an erroneous decision by the Ninth Circuit.<sup>195</sup> Allowing a misreading of *Hudson* to persist as the law in a prominent circuit would place the First Amendment rights of nonmembers at a heightened risk—something this Court was unwilling to do.<sup>196</sup>

A more conspiratorial possibility is one that is hinted at in both Justice Sotomayor’s concurrence and Justice Breyer’s dissent: the Court is seeking to open the door to the possibility of requiring opt-in provisions for all collections of nonmember fees, not just for special assessments.<sup>197</sup> The majority spoke more than once to what it saw as the dangerous proximity between opt-out systems and First Amendment violations.<sup>198</sup> The Court’s language leaves no doubt as to the majority’s dislike of the current state of law regarding union collection of nonmember fees. It is possible that the Court is paving the way for future challenges to the constitutionality of the traditional opt-out system for all nonmember contributions.

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<sup>195</sup> *Id.* at 2296.

<sup>196</sup> *See id.* at 2295–96 (“First Amendment values [would be] at serious risk if the government [could] compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that [the government] favors.”) (alteration in original) (citation omitted).

<sup>197</sup> *See id.* at 2299 (Sotomayor, J., concurring) (“[W]hile the majority’s novel rule is, on its face, limited to special assessments and dues increases, the majority strongly hints that this line may not long endure.”); *id.* at 2306 (Breyer, J., dissenting) (“The decision is particularly unfortunate given the fact that each reason the Court offers in support of its ‘opt-in’ conclusion seems in logic to apply, not just to special assessments, but to ordinary yearly fee charges as well.”).

<sup>198</sup> *See id.* at 2291 (majority opinion) (“By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.”); *id.* at 2293 (“Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all.”); *id.* at 2295 (“As we have noted, by allowing unions to collect any fees from nonmembers and by permitting unions to use opt-out . . . schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers.”).

### C. *The Larger Union Struggle*

The question remains as to where *Knox* fits into the larger picture of the changing role of unions—especially public employee unions.<sup>199</sup> Coming as it did on the heels of the union defeats in Wisconsin and California,<sup>200</sup> it is easy to view *Knox* as a sign of the times, another step toward eventual irrelevance for organized labor. This interpretation may indeed be accurate, and would certainly please a number of the labor movement's critics.<sup>201</sup>

But organized labor has its share of modern supporters, too.<sup>202</sup> They argue, among other things that, “the decline of unionism is part

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<sup>199</sup> Although the reasoning appears to apply to all unions and the nonmembers they represent, the *Knox* decision, by the terms of the question presented, applies only to public employee unions. See *id.* at 2284. The majority refers several times to public employee unions, but the Court's analysis of *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), early in the opinion suggests that the reasoning might apply to the forced subsidization of any speech. *Id.* at 2289. Unlike the *Abood* decision, the Court in *Knox* does not attempt to reconcile any discrepancies that may exist in analyzing public versus private union fee collection from nonmembers. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229-30 (1977). See generally *Knox*, 132 S. Ct. 2277.

<sup>200</sup> See *supra* Part I.

<sup>201</sup> Labor has long had its share of critics. See, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 6 (1984) (“[Union] wage increases have harmful economic effects, reducing the national output and distorting the distributions of income.”); N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 629 (Jack W. Calhoun et al. eds., 4th ed. 2007) (“When a union raises wages above the equilibrium level, it raises the quantity of labor supplied and reduces the quantity of labor demanded, resulting in unemployment.”); Milton Friedman, *Milton Friedman on Labor Unions – Free to Choose*, YOUTUBE (Feb. 22, 2011), <http://www.youtube.com/watch?v=Tefm8wxCQdg> (arguing that unions can only increase wages for members by foreclosing opportunities to nonmembers, whereas increased wages due to market competition among employers comes at no one's expense).

<sup>202</sup> See, e.g., FREEMAN & MEDOFF, *supra* note 201, at 8 (“Collective rather than individual bargaining with an employer is necessary for effective voice at the workplace . . . .”); YATES, *supra* note 5, at 41 (“While the effect of unionization (with all other variables held constant) varies from group to group, it is always significantly positive. . . . That unions improve the wages and benefits of workers is something all workers should know . . . .”); Michael Moore, *Michael Moore: Autoworkers Union Built U.S. Middle Class*, YOUTUBE (Dec. 4, 2008), <http://www.youtube.com/watch?v=kE6e5HWH8II>; Robert Reich, *The Non Zero-Sum Society*, THE HUFFINGTON POST (Jan. 29, 2013, 7:40 AM), <http://www.huffingtonpost.com/robert-reich/union-membership>

of a cycle that will inevitably swing back to favour [sic] unionization.”<sup>203</sup> The November 2012 regular election in California would seem to support their theory—California ballot Propositions 30 and 32, both steadfastly supported by union leadership, were settled in favor of organized labor.<sup>204</sup> It would appear that, statewide, California sentiment generally is more in favor of, and more willing to finance, union labor than the municipalities of San Diego and San Jose.<sup>205</sup>

Proposition 30 increased some state taxes and prevented others from being cut.<sup>206</sup> According to California Governor Jerry Brown, failure to pass the measure would have resulted in spending cuts that would have damaged public schools and diminished public safety.<sup>207</sup> Proposition 32 would have prevented unions from deducting money from members’ paychecks to be used for political purposes (essentially creating an opt-in system for all political contributions to unions from members and nonmembers alike) as well as banned contributions to political candidates by unions and corporations.<sup>208</sup> Whether the November 2012 California election was

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rate\_b\_2572819.html (arguing that employees of large companies such as Wal-Mart and McDonald’s should be unionized and that American law should be more favorable to organized labor).

<sup>203</sup> FAIRBROTHER & GRIFFIN, *supra* note 5, at 11.

<sup>204</sup> See *Voters Protect Schools, Pass Prop. 30, Defeat 32*, SEIU LOCAL 521 (Nov. 7, 2012), <http://www.seiu521.org/2012/thank-you/> (thanking California voters for their willingness “to invest in our public schools” and defeating “a deceptive ballot measure aimed at silencing workers and their unions”).

<sup>205</sup> See Saillant & Perry, *supra* note 2 and accompanying text.

<sup>206</sup> See Official Voter Information Guide, Text of Proposed Laws for *Proposition 30: “The Schools and Local Public Safety Protection Act of 2012”*, CAL. SEC’Y OF ST., 80–84, available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf> (last visited Mar. 17, 2013).

<sup>207</sup> Inojlt, *Vote Yes on Proposition 30: Jerry Brown’s Budget Plan*, DAILY KOS (Oct. 9, 2012, 11:12 PM), <http://www.dailykos.com/story/2012/10/10/1142494/-Vote-Yes-on-Proposition-30-Jerry-Brown-s-Budget-Plan>.

<sup>208</sup> CAL. SEC’Y OF ST., PROPOSITION 32, SECTION 2: “THE STOP SPECIAL INTEREST MONEY NOW ACT”, in OFFICIAL VOTER INFORMATION GUIDE: TEXT OF PROPOSED LAWS 80, 93–94 (2012), available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf> (last visited Mar. 17, 2013).

an outlier in an otherwise anti-union trend or the beginning of a reversal of organized labor's fortunes remains to be seen.

The long-term trends described in Part II do not bode well for unions generally, and as noted, even public sector unions have been on the decline since 2009.<sup>209</sup> Overall, it is fair to say that the twentieth century saw a rise and fall of organized labor in America.<sup>210</sup> It may also prove true that, California's November 2012 election notwithstanding, recent political events will serve to embolden anti-union politicians and activists and lead them to push for more cost-cutting measures that limit union rights.<sup>211</sup>

#### D. *The Cost of Unions*

The dramatic increase in federal debt has been well publicized.<sup>212</sup> Less well known is the dramatic increase in state debt in recent years.<sup>213</sup> One method of getting state government budgets under control is to lower the costs of public payrolls.<sup>214</sup> In the past year alone there have been budget-based legislative disputes between state governments and public employee unions in Michigan, Wisconsin, California, Ohio, Illinois, Indiana, New Jersey, and Connecticut, to name a few.<sup>215</sup> Budget constraints may prove the

<sup>209</sup> See *supra* Part II.A and accompanying notes.

<sup>210</sup> See, e.g., FAIRBROTHER & GRIFFIN, *supra* note 5, at 200–03.

<sup>211</sup> See, e.g., Kocieniewski, *supra* note 4; see also *Times Topics-Organized Labor*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/o/organized\\_labor/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/o/organized_labor/index.html) (last visited Oct. 7, 2013).

<sup>212</sup> See, e.g., Mary Kate Cary, *No, Paul Krugman, Let's Not 'Kick that Can'*, US NEWS (Feb. 8, 2013), <http://www.usnews.com/opinion/blogs/mary-kate-cary/2013/02/08/paul-krugman-is-wrong-about-our-national-debt>.

<sup>213</sup> Total state debt as a percentage of the U.S. Gross Domestic Product has grown from 3.5% in 1960 to 7.5% in 2009. *US State Government Debt Since 1900*, U.S. GOV'T DEBT, [http://www.usgovernmentdebt.us/state\\_debt](http://www.usgovernmentdebt.us/state_debt) (last visited Oct. 7, 2013).

<sup>214</sup> California alone spent nearly \$25 billion on state employees in 2012. *Schedule 4, Position and Salary Cost Estimates*, CAL. ST. BUDGET, available at [http://www.ebudget.ca.gov/2013-14/pdf/BudgetSummary/BS\\_SCH4.pdf](http://www.ebudget.ca.gov/2013-14/pdf/BudgetSummary/BS_SCH4.pdf) (last visited Nov. 4, 2013).

<sup>215</sup> See *Times Topics-Organized Labor*, *supra* note 211.

deciding factor when it comes to determining the continued viability of public sector unions.<sup>216</sup>

State employee pension obligations also weigh heavily in state government decision-making—“on average, a tax increase of \$1,385 per U.S. household per year would be required, starting immediately and growing with the size of the public sector” to keep up with state and local public employee pension costs.<sup>217</sup> Meanwhile, citizens seem to be migrating from states with the highest public employee expenses to states with the lowest.<sup>218</sup> *Knox* may provide an arrow in the quiver of states seeking to cut costs by reducing expenditures on government employees.

Unions, and SEIU in particular, are putting on a brave face in spite of the anti-union trends.<sup>219</sup> SEIU continues to push its agenda at all levels of government.<sup>220</sup> If union labor is to remain relevant,

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<sup>216</sup> The state budget problem is exacerbated by the fact that heavily unionized states tend to be considered less business friendly, and thus less able to generate the business activity necessary to generate tax revenue. See Michael Marlow, *The Huge Cost of Public Unions*, N.Y. DAILY NEWS (Aug. 24, 2012), <http://www.nydailynews.com/opinion/huge-cost-public-unions-article-1.1143138>.

<sup>217</sup> Robert Novy-Marx & Josh Rauh, *The Looming Shortfall in Public Pension Costs*, WASH. POST (Oct. 19, 2012), [http://articles.washingtonpost.com/2012-10-19/opinions/35498703\\_1\\_pension-systems-defined-benefit-pensions-pension-benefits](http://articles.washingtonpost.com/2012-10-19/opinions/35498703_1_pension-systems-defined-benefit-pensions-pension-benefits).

<sup>218</sup> For example, nearly 60,000 people moved from California to Texas in 2011. Olga Spilewsky & Conan Nolan, *California's Population is Moving Out, Census Report Shows*, NBC S. CAL. (Dec. 11, 2012), <http://www.nbclosangeles.com/news/local/Californias-Population-Moving-Out-182914961.html>. California ranks in the top five states for public employee costs whereas Texas is in the bottom ten. *Issue Brief: State and Local Government Spending on Public Employee Retirement Systems*, NASRA (May 9, 2013), <http://www.nasra.org/files/Issue%20Briefs/NASRACostsBrief.pdf>.

<sup>219</sup> See YATES, *supra* note 5, at 209 (“Perhaps the time will finally be right for workers everywhere to say enough is enough.”); *Member Leadership and Action*, SEIU.ORG, <http://www.seiu.org/a/member-leadership-and-action.php> (last visited Oct. 12, 2013) (“Whether it's lobbying local and national public officials, reaching out workers who don't have a union, or standing strong with your fellow SEIU members to make improvements at work, our member activists are leading the way.”).

<sup>220</sup> For example, SEIU is involved in lobbying for comprehensive immigration reform, preservation of Medicare and Medicaid, and spending on federal jobs initiatives, among other priorities. See generally SEIU.ORG, <http://www.seiu.org> (last visited Feb. 10, 2013).

influencing politics may be its best hope.<sup>221</sup> The November 2012 California election is a clear example of a union political victory.<sup>222</sup>

## VII. CONCLUSION

By the time *Knox* was decided in June of 2012, unions had long been on the decline. Private sector unions had been particularly hard-hit since reaching their membership peak in the 1950s.<sup>223</sup> While public sector union membership has steadily gained as a percentage of total union members, government unions have shrunk over the past few years.<sup>224</sup> *Knox* dealt with an issue near and dear to the hearts of both public and private sector unions: their ability to compel contributions from nonmembers whom they represent in collective bargaining.<sup>225</sup>

While, on its face, *Knox* deals only with public unions, its logic seems to apply to labor unions generally.<sup>226</sup> Standing on the opinions in *Abood* and *Hudson*, the Court held that a public sector union could not collect funds from nonmembers via a special assessment in order to fund political or ideological activities.<sup>227</sup> A nonmember's First Amendment right not to subsidize speech with which he or she disagrees strongly outweighed the desire on the part of a union to exact contributions from those who choose not to join the union's ranks.<sup>228</sup>

While the Court did not find the commonly used technique for calculating chargeable expenses—basing the current year's

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<sup>221</sup> See FAIRBROTHER & GRIFFIN, *supra* note 5, at 220 (“Politics has remained the most stable dimension of union strategy. Unions continue to endorse and offer financial and other in-kind forms of support to pro-union candidates, most of whom are Democrats, while working to defeat anti-union candidates most of whom are Republicans.”).

<sup>222</sup> See SEIU Local 521, *supra* note 204.

<sup>223</sup> FAIRBROTHER & GRIFFIN, *supra* note 5, at 4.

<sup>224</sup> See DEP'T LAB. BUREAU LAB. STAT, *supra* note 23.

<sup>225</sup> See *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012).

<sup>226</sup> Cf. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (stating that the existence of state action was not determinative in deciding whether agency shop arrangements violated workers' First Amendment rights).

<sup>227</sup> *Knox*, 132 S. Ct. at 2296.

<sup>228</sup> *Id.* at 2294.

assessment on the prior year's financial records—unconstitutional, the majority's language strongly suggested that such a system came dangerously close to running afoul of the First Amendment.<sup>229</sup> Surely, the Court reasoned, no expansion of a union's ability to compel fees from nonmembers could be constitutionally allowed.<sup>230</sup>

Henceforth, any special assessment to raise funds to be used for a union's political or ideological campaigns (and possibly any special assessment at all) requires issuing a fresh *Hudson* notice.<sup>231</sup> Nonmembers must affirmatively opt in before any additional money can be deducted from their paychecks on behalf of the union.<sup>232</sup>

While this result was probably inevitable given the case law, it is difficult to view the holding as anything other than another blow to the plight of unions, particularly government employee unions. After the failed June 2012 recall election of Governor Scott Walker in Wisconsin and the passage of union-opposed ballot measures in the California cities of San Jose and San Diego, the *Knox* decision seemed to confirm that organized labor was caught in a downward spiral.

Given the current political, legal, and economic climate, union labor seems destined for irrelevance. Recent election results to the contrary in the November 2012 California general election are likely to be a mere Pyrrhic victory for the union cause. Government budget constraints and the high costs of unionized public workers and their pensions will ultimately be the undoing of public sector unions. Organized government labor will eventually go the way of its private counterpart and become a negligible force in American politics and economics.

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<sup>229</sup> *Id.* at 2291.

<sup>230</sup> *See id.* at 2293.

<sup>231</sup> *Id.* at 2296.

<sup>232</sup> *Id.*