Unions, Corporations, and the First Amendment: A Response to Professors Fisk and Chemerinsky

Todd E. Pettys
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INTRODUCTION

In its 2012 ruling in Knox v. SEIU Local 1000,1 the Supreme Court signaled that major changes may be coming to the body of First Amendment law governing public-sector unions’ relationships with nonmember employees who work in the bargaining units that those unions represent.2 The Court’s actual holding in Knox was not the most portentous feature of the case but was significant in its own right: when a public-sector union wishes to levy a midyear dues increase or special assessment, “the union must provide a fresh Hudson notice and may not exact any funds from nonmembers without their affirmative consent.”3 When collecting regularly

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1 132 S. Ct. 2277 (2012).

2 Federal law currently permits a union and an employer to negotiate “union-security agreements,” whereby employees who are represented by the union but do not wish to become full union members may be forced (on pain of termination) to help pay the costs that the union incurs when carrying out its duties as the employees’ exclusive bargaining representative. See Comm’n Workers of Am. v. Beck, 487 U.S. 735, 745–46 (1988) (concerning private-sector employers); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222–32 (1977) (concerning public-sector employers); see also NLRB v. Gen. Motors Corp., 373 U.S. 734, 741–43 (1963) (explaining that, while a union-security agreement may demand “membership” in the union, an employee need not actually join the union so long as he or she pays the union’s regular fees or dues).

3 Knox, 132 S. Ct. at 2296 (footnote omitted). Although the union can force nonmember employees to pay their share of the union’s collective-bargaining and contract-administration expenses, the union cannot force nonmember employees to pay for political and ideological activities that are “not germane to [the union’s] duties as collective-bargaining representative.” Abood, 431 U.S. at 235–36 (footnote omitted).
scheduled annual fees, unions have long been allowed to presume that a nonmember employee is willing to help pay for the union’s political activities unless the employee tells the union otherwise and thereby opts out of helping to cover that nonchargeable portion of the union’s costs. The Court’s insistence upon an opt-in arrangement for midyear dues increases and special assessments thus came as something of a surprise.

What especially arrests one’s attention, however, is the skepticism the Court expressed in dicta about longstanding features of union-employee relations. Joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, Justice Alito recalled the Court’s prior observation that allowing a governmental employer and public-sector union to force nonmember employees to pay the union even for the costs of collective bargaining “imposes a ‘significant impingement on [those employees’] First Amendment rights.’” Pushing that line of thinking in a direction the Court had not previously taken, Justice Alito stated that the rationale traditionally invoked to justify that impingement—preventing free-riding by employees who benefit from collective bargaining but would prefer not to have to pay for it—is

Expenditures falling into the category of collective-bargaining and contract-administration expenses are called “chargeable,” while those falling into the category of political and ideological activities are called “nonchargeable.” See generally Ellis v. Bhd. of Railway, Airline & S.S. Clerks, 466 U.S. 435, 448–55 (1984) (providing guidance on how to distinguish between chargeable and nonchargeable expenses). To facilitate both the union’s effort to collect funds for chargeable activities and nonmember employees’ right to refuse to pay for nonchargeable activities, unions are obliged to provide nonmember employees with an annual “Hudson notice,” alerting those employees to their pro rata share of the union’s chargeable and nonchargeable costs for the coming year and giving those employees an opportunity to opt out of helping to pay for the latter. See Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 305–08 (1986). In Knox, the Service Employees International Union (SEIU) had levied a special midyear assessment to help cover the costs of newly planned political activities in California without giving nonmember employees a fresh Hudson notice or opportunity to opt out. See 132 S. Ct. at 2285–86. The Court found not only that the SEIU was constitutionally obliged to provide nonmember employees with a fresh Hudson notice or opportunity to opt out, but also that the familiar opt-out arrangement was insufficient to protect the nonmembers’ First Amendment rights. See id. at 2291–93. The Court held that the union could collect the special assessment from nonmember employees only if they affirmatively opted in. See id. at 2296. Justices Sotomayor and Ginsburg concurred in the judgment, agreeing that a fresh Hudson notice was required but objecting to the majority’s insistence upon an opt-in arrangement. Id. at 2296–99 (Sotomayor, J., concurring in the judgment). Justices Breyer and Kagan dissented, objecting to the majority’s requirement of an opt-in arrangement and arguing that, on the particular facts of this case, a fresh Hudson notice was unwarranted. See id. at 2302–07 (Breyer, J., dissenting).

4 See Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 774 (1961) (“[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.”).

5 See Knox, 132 S. Ct. at 2289 (quoting Ellis, 466 U.S. at 455). The Court explained that this impingement results from the fact that “a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences.” Id. (citing Transcript of Oral Argument at 48–49, Ellis v. Bhd. of Railway, Airline & S.S. Clerks, 466 U.S. 435 (1984) (No. 82-1150)).
“something of an anomaly.” Moreover, the Court said, even if public-sector unions may charge nonmember employees for the costs of collective bargaining, there are reasons to doubt whether the Court should continue to permit those unions to use opt-out arrangements when levying the political portions of their annual fees. The majority declared that allowing unions to rebuttably presume that nonmember employees are willing to help foot the bill for the union’s nonchargeable political expenditures has been “a remarkable boon for unions” and “came about more as a historical accident than through the careful application of First Amendment principles.” In summary, Justice Alito wrote: “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.”

In Political Speech and Association Rights After Knox v. SEIU Local 1000, appearing in the Cornell Law Review, Professors Catherine Fisk and Erwin Chemerinsky propose a very different trajectory for the future of union-employee relations. For unions as well as corporations and other associations, they contend that “so long as it is the entity expressing its views, with dissidents completely free to say whatever they want however they want, the use of entity money that originates with stakeholders should not be regarded as compelled speech within the meaning of the First Amendment.” In Fisk and Chemerinsky’s view, employees in unionized workplaces thus should have no right to opt out of helping to pay for unions’ political activities, and the Court should discard the distinction between unions’ chargeable and nonchargeable expenses as irrelevant.

It is not until the closing pages of their article that Fisk and Chemerinsky systematically lay out an affirmative case for their proposal. They devote more attention to the task of creating space for their proposal by charging that, in Knox and other cases, the Court has failed to develop a coherent, legally defensible First Amendment vision of its own. It is on this charge—a charge that, if true, has repercussions far beyond its bearing on any single proposed

6 Id. at 2289–90.
7 See id. at 2290–91.
8 Id. at 2290.
9 Id. at 2291.
10 Catherine L. Fisk & Erwin Chemerinsky, Political Speech and Association Rights After Knox v. SEIU Local 1000, 98 CORNELL L. REV. 1023 (2013).
11 Id. at 1087 (footnote omitted). Alternatively, Fisk and Chemerinsky argue that if such use of entity money is regarded as compelled speech, the Court should deem it justified by a sufficiently important governmental interest. See id. at 1089–91.
12 See id. at 1086–87.
13 See id. at 1085–91.
reform—that I want to focus in this brief response.

Fisk and Chemerinsky contend that there are at least two categories of inconsistencies in the Court’s cases concerning the speech rights of entities and their members. First, taking the Court’s 2010 decision in *Citizens United v. FEC* as a central reference point, they argue that neither law nor logic can justify the Court’s willingness to provide robust protection to nonmember employees who do not wish to help cover a union’s political expenditures while giving no protection to shareholders who object to the same kinds of expenditures by their corporations. Fisk and Chemerinsky insist that, under the First Amendment, “unions and corporations should be treated the same in terms of their speech rights and the speech rights of their dissenting members and shareholders respectively.”

Second, they argue that “*Knox* is inconsistent with major, prior free speech decisions” and that some of those prior decisions are inconsistent with one another. They conclude that all of these inconsistencies “are unjustifiable and a new regime is essential so that all entities are treated alike.”

I respond in two parts. In Part I, I challenge the premise of the shareholder-employee equivalency that undergirds key portions of Fisk and Chemerinsky’s analysis. I do not purport to prove here that employees and shareholders do indeed have different entitlements under the First Amendment; for purposes of the following brief reflections, I am agnostic on that question. Rather, I wish to show that there are critical weaknesses in the equivalency they draw between employees and shareholders, and that Justices acting in

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15 See Fisk & Chemerinsky, *supra* note 10, at 1026 (stating that dissimilar treatment under the First Amendment “cannot be justified by law or logic”); see also id. at 1026–27 (stating that *Citizens United* “cannot be squared” with *Knox*); id. at 1061–62 (stating that the contrast between the two cases is “sharp and deeply disturbing”).
16 Id. at 1078. Fisk and Chemerinsky acknowledge that state action sufficient to bring the First Amendment into play is clearest when dealing with governmental employers and public-sector unions, but they argue that governmental action also is pervasive in cases involving shareholders’ objections to corporations’ political speech and private-sector employees’ objections to unions’ political speech. *See id.* at 1084–85. They contend that the Court’s differing treatment of employees and shareholders thus cannot be justified on the grounds that the First Amendment is in play in one setting but not the other. *See id.* In the private-sector-employee and shareholder settings, it is not clear that the governmental presence is sufficient to bring the First Amendment into play. *See, e.g., 2 THE DEVELOPING LABOR LAW 2303–05* (John E. Higgins, Jr. et al. eds., 6th ed. 2012) (citing cases finding an absence of state action in union disputes involving private-sector employees). The First Amendment discussion in which I am here engaged may thus be directly relevant only for public-sector employees like the complainants in *Knox* itself. For purposes of this response, however, I join Fisk and Chemerinsky in discussing the rights of all employees and shareholders without drawing distinctions between them based upon the applicability or inapplicability of the First Amendment.
18 Id. at 1029.
good faith thus could reasonably resist any conclusion for which that equivalency is essential. In Part II, I contest the claim that Knox contributes to incoherence in the Court’s First Amendment jurisprudence. Specifically, I challenge Fisk and Chemerinsky’s argument that Knox is difficult to reconcile with the Court’s leading precedents on the speech rights of government employees, and I raise doubts about their reading of the Court’s compelled-speech cases involving complaints that one’s resources are being used to help facilitate others’ speech.

I

THE EQUIVALENCY PREMISE

I begin by briefly elaborating on the equivalency that Fisk and Chemerinsky draw between dissenting shareholders and dissenting employees. I then identify two sets of problems that afflict this equivalency premise.

A. The Proposed Equivalency Between Shareholders and Employees

Fisk and Chemerinsky criticize the Court for refusing to embrace a proposed analytic equivalency between shareholders and employees. That refusal traces its roots back at least as far as the Court’s 1978 ruling in First National Bank of Boston v. Bellotti.19 Striking down a state limitation on the political speech of corporations, the Bellotti Court rejected the state’s argument that the limitation was needed to protect the rights of shareholders who found the speech objectionable.20 In reaching that conclusion, the Court dismissed the suggestion that dissenting shareholders need protections comparable to those that the Constitution affords to public-sector employees who object to paying for unions’ political speech. The Court reasoned that, unlike dissenting employees who are compelled by contract to enter into a financial relationship with the union that serves as their exclusive bargaining representative, shareholders are not compelled to contribute anything to a given corporation, and indeed may “withdraw [their] investment at any time and for any reason.”21 It is far easier for unhappy shareholders to sell their shares, the Court appeared to say, than it is for unhappy employees to walk away from their jobs. Moreover, the Court said, shareholders can ordinarily protect themselves through “the procedures of corporate democracy” and, in extreme cases, can bring

20 See id. at 794–95.
21 Id. at 794 n.34.
derivative actions against corporate leaders. More than twenty years later, the Court in Citizens United reiterated its view that shareholders can look after their own speech interests and that the government thus does not have a compelling interest in protecting them.

Agreeing with Benjamin Sachs’s analysis of the issue in the Columbia Law Review shortly before the Knox ruling came down, Fisk and Chemerinsky contend that unhappy shareholders and unhappy employees suffer comparable degrees of coercion. They point out that, while an investor holding shares in an individual company is indeed typically free to sell those shares at any time, the investor does not enjoy as much freedom as the Court suggests. For example, it may be difficult to find investment-worthy companies that avoid political spending or that consistently take views compatible with those of the investor, pension-plan participants cannot choose the corporations in which they invest, and investors’ financial disincentives to avoid the stock market altogether are great. As for employees who do not wish to be entangled with a union, these scholars point out that those individuals can opt to work in one of the twenty-three “right to work” states that prohibit forcing nonmember employees to pay fees of any kind to unions, or they can seek employment with one of the large number of employers in which unions have not gained a foothold. But in either case, they must thereby forego the financial benefits that typically come from collective bargaining and must forego job opportunities with employers and industries where union representation is prevalent. Finding that shareholders and employees are both free and constrained to comparable degrees, Fisk and Chemerinsky reject Bellotti’s quick determination that there are constitutionally significant differences between shareholders and employees.

Rather than join the debate about whether it is just as easy for most employees to leave their jobs as it is for most investors to abandon their corporate investments (although I continue to doubt that it is), I want to focus here on two fundamental sets of concerns

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22 Id. at 794–95.
26 See Sachs, supra note 24, at 839–40, 866–68.
27 See id. at 829, 834–37.
28 See Fisk & Chemerinsky, supra note 10, at 1061 (“The amount of compulsion inflicted by organizational speech may vary slightly among types of speech and organization, but the differences are slight.”); Sachs, supra note 24, at 843–44 (arguing that the conclusion “that the union and corporate contexts can be distinguished on compulsion grounds . . . is not an obvious one”).
that Fisk and Chemerinsky appear to ignore: financial realities and risks of attribution.

B. Financial Realities

Like that of other scholars who have taken the same position, the analysis that Fisk and Chemerinsky put forward proceeds largely on the assumption that when corporations and unions produce political speech, they do so with funds provided by shareholders and employees, respectively. It is in the form of this forced financial support that corporations and unions purportedly coerce their shareholders and employees. In the case of employees, this assumption is plainly correct: absent an opportunity for employees to opt out of helping to pay for the union’s political activities, money is deducted from the employees’ paychecks (or the employees write personal checks), and those funds go directly to the union for the purpose of (among other things) helping to cover the union’s political expenditures. To verify that they have helped pay for a union’s political ad campaign, employees need only look at their pay stubs or checkbooks.

The situation is quite different for the typical shareholder. Of course, there is some literal truth to the claim that a corporation’s managers pay for the corporation’s political speech using the shareholders’ money: the shareholders own the corporation, including the assets used to pay for the company’s speech. If the corporation pays for political speech one day and then entirely folds and cashes out the next, there will be fewer dollars remaining to distribute to the shareholders than there would have been if the corporation had not paid for the prior day’s political expression—and so, in that circumstance, shareholders will feel the financial bite of the political expenditure. But folding and cashing out is not the path shareholders ordinarily expect their corporation to take, nor is it the path actually taken by most corporations whose shares are publicly traded. Apart from the initial public offering at the time of a corporation’s birth and the possible payment of periodic dividends, shareholders’ primary financial transactions concerning the corporation all occur among the shareholders themselves. Shareholders typically purchase their shares from prior investors, and the profits they hope to make will (or will not) be realized when they sell those shares to the next investors. Once a corporation has moved past its initial public offering, the corporation typically obtains the money it uses to engage in political speech not from shareholders, but rather from revenues the corporation generates through sales to its

Whether a corporation’s political speech actually costs a shareholder anything thus typically depends entirely on the next investor’s assessment of whether the corporation’s political expenditures have diminished the company’s value. The shareholder’s experience is thus markedly different from that of the dissenting employee, where the union’s choice to produce political speech directly diminishes the employee’s assets. If the corporation’s next investor concludes that the company’s speech has increased the company’s value, or has not affected the company’s value one way or the other, then the shareholder will suffer no adverse financial impact whatsoever when the shareholder sells his or her shares; the amount of money the shareholder receives in exchange for those shares will be at least as much as it would have been if the company had stayed out of the political arena altogether. Nor is it fanciful to expect that, in a great many cases, a corporation’s political spending will have no identifiable impact on its market value—the spending itself can be difficult for investors to track,30 and business judgments about what does and does not serve the interests of a company may vary widely.31

Unlike dissenting employees who immediately feel the financial bite of a union’s political activities, therefore, a corporation’s political expenditures often will not take even a cent out of individual shareholders’ pockets. To say that shareholders and employees are equally compelled to foot the bill for their entities’ political speech thus does not square with the frequently prevailing financial realities.

C. Risks of Attribution

As I will argue in Part II.B, the risk that the public will perceive an association between a speaker and an objector and thus will attribute the former’s viewpoints to the latter can play a significant role in determining whether the objector is being compelled to speak or to associate with a speaker in violation of the First Amendment. For at least two reasons—the first more important than the second—this risk is typically greater for dissenting employees than for dissenting shareholders.

First, it ordinarily is much easier for the public to perceive a link between an employee and the union that he or she financially

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31 Like spending on labor, equipment, and other things, spending on political speech is a matter committed to the ordinary business judgment of corporate leaders who have broad discretion to decide how their companies’ interests can best be served. See id. at 87.
supports than between a shareholder and the corporations in which he or she invests. The fact that a person teaches in a local public school and therefore is likely affiliated with the teachers’ union, for example, is vastly easier for the public to perceive than the fact that the teacher holds shares in a particular corporation. Indeed, many shareholders themselves do not know which shares they own because they own those shares through mutual funds. Although our school teacher may have financial ties to both a union and a corporation, he or she is far likelier to be publicly associated with the union’s campaign against new teacher-competency requirements than with the corporation’s campaign against a political candidate.

The second (and more tenuous) difference relates to a curious line of argument that Fisk and Chemerinsky advance. They argue that, by providing greater First Amendment protection to dissenting employees than to dissenting shareholders, the Court has gotten it backwards because employees have far greater power than shareholders when it comes to protecting their own interests through internal governance mechanisms.32 As they importantly concede in a footnote, however, dissenting employees who have opted not to become full union members do not actually possess some of the statutory rights to which Fisk and Chemerinsky point when leveling that charge at the Court.33 Employees (like the dissenting employees in Knox) who decline to join the union and instead merely pay for their share of the union’s chargeable expenses cannot claim the protections of the “bill of rights” found in the Labor Management Reporting and Disclosure Act (LMRDA), and so they cannot claim an LMRDA entitlement to vote in union elections, run for union office, attend union meetings, and the like.34 To obtain those statutory rights, an employee would have to compromise his or her First Amendment interests still further by becoming a full-fledged union member. Nevertheless, to the extent the public perceives that all employees do indeed have significant power to influence the speech choices of the union to which they have financial ties, the public is more likely to assume there is a correspondence between the views of

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32 See Fisk & Chemerinsky, supra note 10, at 1081–84.
33 See id. at 1082 n.287 (conceding that the Labor Management Reporting and Disclosure Act—provisions of which Fisk and Chemerinsky recite in their main text—“does not confer rights on nonmembers”).
34 See 29 U.S.C. § 411(a)(1) (2006) (providing union members with such rights as the right to vote in union elections, run for union office, and attend union meetings); id. § 402(o) (defining the union “members” who receive the statute’s benefits); 3 NAT’L LAWYERS GUILD, EMPLOYEE AND UNION MEMBER GUIDE TO LABOR LAW § 12:3 (Elise Gautier & Henry Willis eds., 2012) (explaining that the LMRDA does not protect “an individual who works in an agency shop but does not belong to the union except for the payment of dues” (citations omitted)); see, e.g., Patterson v. IATSE Local 13, 754 F. Supp. 2d 1043, 1045–46 (D. Minn. 2010) (denying LMRDA protection to an employee who paid the required “representational fee” but did not actually join the union).
the union and the employee than between the views of the corporation and the typical shareholder.

For a variety of reasons, therefore, one can sensibly resist the premise that dissenting shareholders and dissenting employees are comparably situated for First Amendment purposes and, consequently, Fisk and Chemerinsky’s conclusion that the Court’s differing treatment of those two groups “cannot be justified by law or logic.”35 This does not mean that the First Amendment does indeed require differing treatment; rather, it means that those who insist on symmetrical treatment of shareholders and employees under the First Amendment have significantly more groundwork to lay.

II

KNOX’S RELATIONSHIP WITH PRECEDENT

Fisk and Chemerinsky identify three lines of First Amendment analysis that are in play in cases involving unions and dissenting employees: “the right to be free from compelled speech, the expressive rights of associations, and the speech rights of government employees.”36 In each of these three areas, they argue that Knox’s holding and dicta are difficult to reconcile with some of the Court’s leading precedents. I turn first to their claim that Knox is inconsistent with the Court’s principal cases on the speech rights of government employees. I then take up their argument that Knox cannot be reconciled with some of the Court’s leading cases on compelled speech, and I say just a bit about the right of expressive association along the way.

A. The Speech of Government Employees

Fisk and Chemerinsky argue that Knox’s strong protection of public-sector workers “cannot be reconciled with the Court’s other decisions which give little or no protection for the speech rights of government employees.”37 They point first to Garcetti v. Ceballos, in which the Court held that government employees receive no First Amendment protection whatsoever for the speech they produce “pursuant to their official duties,”38 and then to the line of cases that began with Pickering v. Board of Education, in which the Court developed a balancing-intensive analysis for speech that government employees produce when they are off the job.39

With respect to Garcetti, Fisk and Chemerinsky contend that

35 Fisk and Chemerinsky, supra note 10, at 1026 (footnote omitted).
36 Id. at 1047.
37 Id. at 1064.
there is an “obvious tension” between that case and _Knox_ because, in _Knox_, “the government employees . . . were being asked to pay the assessment precisely because they were government employees and were speaking in this capacity through their union.” 40 Yet if the dissenting employees in _Knox_ were indeed speaking through their union, their governmental employers were not paying them to do so on the employers’ behalf. As _Garcetti_ makes clear, it is only when a governmental employee is speaking pursuant to his or her job duties that the speech loses First Amendment protection, thereby freeing the employer to evaluate whether it is happy with the speech it is purchasing and to respond to the employee accordingly. 41 Except under perhaps the most unusual of circumstances, governmental employers do not pay their employees to engage in political speech through the union that serves as the employees’ collective bargaining representative. _Garcetti_ is thus easily reconciled with _Knox_’s defense of public-sector employees’ speech rights.

With respect to the protection that _Pickering_ provides to government employees speaking in their private capacities, Fisk and Chemerinsky strain too hard to find a conflict with _Knox_, and they downplay _Pickering_’s protections in the process. Consider, for example, the political controversy that gave rise to the facts in _Knox_ itself.42 Suppose that a government employee—whether a union member or not—sent a letter to the editor of a newspaper, personally imploring Californians to embrace the SEIU’s arguments and to oppose the ballot measures on which voters were being asked to pass judgment. Suppose further that the employee’s supervisor responded by firing the employee. I have little doubt that, except in atypical circumstances, the Court would find a First Amendment violation under _Pickering_. In _Knox_, of course, the dissenting employees objected to helping to pay the costs of disseminating precisely that same message. Any tension between _Pickering_ and _Knox_ is thus not as stark as Fisk and Chemerinsky suggest.

Fisk and Chemerinsky’s discussion of the speech rights of government employees yields a nice rhetorical punch when they

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41 See _Garcetti_, 547 U.S. at 421–22 (“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” (citing _Rosenberger v. Rector & Visitors of Univ. of Va._, 515 U.S. 819, 833 (1995))).

42 In the summer of 2005, then-Governor Arnold Schwarzenegger called for a special election in which Californians would consider two ballot measures. One of the measures would have required unions “to obtain employees’ affirmative consent before charging them fees to be used for political purposes,” while the other “would have limited state spending and would have given the Governor the ability under some circumstances to reduce state appropriations for public-employee compensation.” _Knox v. SEIU, Local 1000_, 132 S. Ct. 2277, 2285 (2012).
conclude that “[i]t appears that the only robust free speech rights government employees have is the right to refuse to support unions.” But unless one disregards the Court’s holding in Garcetti and takes an especially anemic view of the protections that Pickering provides, it is difficult to embrace the claim that Knox deviated from the path that those two cases charted.

B. Facilitation and the Freedom to Speak One’s Mind

Fisk and Chemerinsky also argue that Knox is inconsistent with Rumsfeld v. Forum for Academic & Institutional Rights (FAIR) (concerning law schools’ objection to hosting military recruiters who advanced an antihomosexual message) and PruneYard Shopping Center v. Robins (concerning a private shopping center’s objection to hosting pamphlet distributors and signature gatherers who advanced a political message). In both of those cases, parties objected to having their resources used to help further others’ ideological messages, but the Court found no First Amendment violation, in part because the complaining parties remained free to voice their own opinions. Fisk and Chemerinsky argue that the same could be said about the dissenting employees in Knox: those employees were being forced to contribute resources to help advance speech they found objectionable, but they were entirely free to say whatever they liked about those or other subjects. Fisk and Chemerinsky conclude that, under FAIR and PruneYard, those who have supplied money to an entity have no viable compelled-speech objection when the entity engages in political speech, so long as those who supplied the money are entirely free to speak their own minds.

FAIR and PruneYard do not establish that the freedom to speak up is sufficient to preclude a finding of compelled speech whenever an individual objects to having his or her funds used to pay for an entity’s political message. It certainly is true that, in both of those

43 Fisk & Chemerinsky, supra note 10, at 1067.
44 547 U.S. 47, 52–53 (2006) (addressing law schools’ claim that they were being compelled to speak in favor of the military’s policies regarding homosexuals when Congress threatened to withhold federal funds if they did not accommodate military recruiters on their campuses).
45 447 U.S. 74, 77–80 (1980) (addressing a private shopping center’s claim that it was being compelled to speak in favor of high school students’ ideological messages when state courts ruled that the shopping center had to allow the students to hand out political pamphlets and collect signatures for a political petition on the center’s premises).
46 See FAIR, 547 U.S. at 60–65; PruneYard, 447 U.S. at 85–87.
47 See Fisk & Chemerinsky, supra note 10, at 1048–50, 1056. Justice Frankfurter similarly took the position that it was permissible to compel dissenting employees to help pay for a union’s political speech because the employees remained free to speak their own minds. See Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 805–06 (1961) (Frankfurter, J., dissenting).
48 See Fisk & Chemerinsky, supra note 10, at 1087.
cases, the Court cited the objectors' freedom to speak their minds as a reason to reject their First Amendment complaints. But the objectors in both instances had broadly opened up their physical facilities to a large number of visitors (diverse employment recruiters in one case, diverse retail shoppers in the other), and so, as the Court pointed out, the risk that anyone would attribute particular visitors' views to the objectors themselves was very small.\(^{49}\) To the extent that there was any minor risk of erroneous attribution, the objectors could have eliminated it by exercising their freedom to speak and make it clear that they did not endorse the visitors' views.\(^{50}\) The freedom to speak one's mind thus served, at least in part, as a remedy for the small threat of erroneous attribution arising from the speakers' presence on the objectors' premises.\(^{51}\) Moreover, in hosting the visiting speakers, the law schools and shopping center did not expect to provide an additional outlay of financial support beyond what they already would spend to host other recruiters and shoppers.\(^{52}\)

The facts in the union cases are different in at least three significant ways. First, unlike the law schools and the shopping center (and, as I argued in Part I.B, unlike the typical shareholder), dissenting employees are faced with the prospect of having to surrender money to a union for the express purpose of helping the

\(^{49}\) See *FAIR*, 547 U.S. at 65 (stating that law students are fully capable of distinguishing "between speech a school sponsors and speech the school permits"); *PruneYard*, 447 U.S. at 87 (stating that, because the shopping center was open to the public, the views expressed by the pamphleteers and signature-gatherers were "not likely [to] be identified with those of the owner").

\(^{50}\) See *FAIR*, 547 U.S. at 65 (noting law schools' freedom to say they objected to the military's discriminatory policies); *PruneYard*, 447 U.S. at 87 (noting that the shopping center could post signs disavowing any support of the visitors' speech).

\(^{51}\) The Court ascribed similarly minor significance to a party's freedom to speak its mind in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). In *Glickman*, California growers of nectarines, plums, and peaches objected to a federal regulation requiring them to help pay for generic advertisements encouraging people to buy those commodities. The Court rejected the growers' First Amendment complaint. In addition to citing the growers' freedom "to communicate any message to any audience," the Court found, *inter alia*, that the growers were "part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469 (footnote omitted). The Court also found that "[w]ith trivial exceptions . . . none of the generic advertising conveys any message with which [the growers] disagree." *Id.* at 471. The Court refused to ascribe any significance at all to a party's freedom to speak its mind in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), a case in which mushroom growers objected to a federal regulation requiring them to help pay for generic mushroom advertising. *See id.* at 408. The Court struck down the requirement—notwithstanding the growers' freedom to speak their minds—because the growers disagreed with the content of the advertising and because the requirement was not part of a more comprehensive regulatory scheme. *See id.* at 410–16.

\(^{52}\) See *FAIR*, 547 U.S. at 61 n.4 (stating that the required accommodations "are not of a monetary nature" and so the Court's compelled-subsidy cases are inapposite); *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347–48 (Cal. 1979) (noting that the shopping center hosted approximately 25,000 visitors per day and that the speakers here would add only a few to that number), aff'd, 447 U.S. 74 (1980).
union produce and disseminate political speech. That consumption of the objectors’ assets—which is clear in the union cases, decidedly less so in FAIR and Pruneyard—places a sharper edge on the dissenting employees’ First Amendment complaint. Second, the risk that the speech of a politically engaged union will be attributed to the employees who help finance it seems greater than the risk that the speech of visitors will be attributed to the law school or shopping center that opens its physical facilities to a large number of diverse outsiders. Third, the freedom to speak one’s mind is a less effective remedy for dissenting employees than it was for the law schools and the shopping center. In FAIR and Pruneyard, the risk of attribution arose mainly within a confined physical space, where the law schools and shopping center could post signs or otherwise speak and thereby ensure that their physical accommodation of the speakers did not give rise to any confusion about the hosts’ own views. A union, however, does not center its political speech in a particular physical location; rather, it distributes its speech to far-flung locations through mailings, television ads, radio spots, and the like. The employee thus cannot easily speak his or her mind in all of the venues where erroneous attributions may occur.

In addition to reconciling Knox with FAIR and Pruneyard, this line of analysis also helps bring a measure of harmony that Fisk and Chemerinsky find lacking between FAIR and Pruneyard, on the one hand, and Pacific Gas & Electric Co. v. Public Utilities Commission53 (PG&E), on the other.54 In PG&E, a plurality of the Court ruled that PG&E could not be forced to include the speech of a third party in its monthly billing envelopes, even if the third party’s materials included a disclaimer stating that the speech was its own and not that of the utility company.55 At the heart of the plurality’s analysis was the conviction that many receiving PG&E’s monthly mailings would attribute the third party’s viewpoints to PG&E itself unless PG&E went to significant lengths to explain how its own views differed.56 Since the utility company had not previously opened space in its billing envelopes to members of the public, the plurality regarded the risk of erroneous attribution as especially high.57 Because that risk was so great, the plurality concluded that forcing PG&E to include the third party’s materials would compel the utility company either to

54 See Fisk & Chemerinsky, supra note 10, at 1050–52 (discussing PG&E).
55 See 475 U.S. at 15 n.11 (plurality opinion) (discounting the significance of the third party’s disclaimer).
56 See id. at 15–16 (plurality opinion) (noting that especially since the third party was given access for the purpose of creating a variety of viewpoints, PG&E would “feel compelled to respond to arguments and allegations made by [the third party] in its messages to . . . customers.”).
57 See id. at 12 n.8 (plurality opinion).
accept the resulting association in many recipients’ minds or to speak up and clarify its own viewpoints—and that compulsion could not be reconciled with PG&E’s First Amendment right not to speak.

We may thus imagine a spectrum (admittedly oversimplified) on which one can place the risk of erroneous attribution in a case in which the objector’s complaint is that his or her resources have been used to facilitate the speech of some other person or entity:58

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<th>(no risk)</th>
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Point A represents instances in which there is no risk that others will erroneously attribute the speaker’s message to the objector whose resources have helped to facilitate the message. (An example of a case falling at or near point A is Board of Regents of the University of Wisconsin System v. Southworth.59) Point B represents cases like FAIR and PruneYard, in which the risk of erroneous attribution—while extant—is small. It was small in FAIR and PruneYard because the speakers were among numerous visitors whom the objectors had invited to their physical premises for reasons having nothing to do with the visitors’ viewpoints. Point C represents cases like PG&E, in which we can say with practical certainty that erroneous attributions will occur. The risk of erroneous attribution was especially great in PG&E because the speaker would have been uniquely permitted to use the objector’s billing envelopes for the sole purpose of communicating a message.

At or near point B, the risk of erroneous attribution is so low that the objector should feel no compulsion to speak up in order to short-

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58 I am not dealing here with cases in which a person has been forced to utter government-dictated words (such as the Pledge of Allegiance in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), or has been forced to display a government-dictated message (such as the words “Live Free or Die” on a state’s license plates in Wooley v. Maynard, 430 U.S. 705 (1977)), or has been forced to incorporate another person’s speech within his or her own speech (such as ideologically expressive marchers in the privately sponsored parade in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995)).

59 529 U.S. 217 (2000). In Southworth, some University of Wisconsin students objected to paying the school’s mandatory student-activity fee, arguing that the school used some of the money to support speech that the students found objectionable. The Court found an impingement on the students’ First Amendment interests comparable to the impingement suffered by the dissenting employees in Abood but also found that the university had a powerful interest in creating an environment marked by diverse speech and ideas. See id. at 231–32. The Court concluded that the best way to protect the students’ interests was to ensure that the school distributed the funds in a viewpoint-neutral manner. See id. at 233–34. Although the Court did not do so, it could have justified its pro-university ruling (at least in part) by pointing out that, on these facts, no one reasonably could assume from the students’ payment of the fee that they shared all of the diverse viewpoints that the fee enabled speakers to express.
circuit any association others might perceive between the speaker’s viewpoints and those of the objector. But if the objector does want to speak in order to make that perceived association even less likely, the objector is free to do so. At or near point C, on the other hand, the state of affairs is very different. We can say with confidence that some observers will indeed attribute the speaker’s viewpoints to the objector. Although the PG&E plurality did not do so, we might even say that because we can be certain that others will believe that the objector shares the speaker’s views, the objector is being forced to enter into an expressive association in violation of the First Amendment. If that is so, that constitutional violation is then compounded by the violation that the PG&E plurality identified: if the objector does not wish to be associated with the speaker’s viewpoints, the objector is not merely free to speak his or her own mind—the objector must speak up, a compulsion that violates the First Amendment ban on compelled speech.

In the union cases, dissenting employees do not face a risk of erroneous attribution as great as one finds at point C, but their risk surely falls to the right of point B. And the further to the right of point B that one moves, the greater the objector’s compulsion to speak if he or she wants to ensure that others will not attribute the speaker’s views to the objector. Moreover, the way in which the dissenting employees’ risk of erroneous attribution arises—often through far-flung media campaigns—ensures that exercising their own right to speak is not nearly as effective a remedy as it was for the law schools in FAIR and the shopping center in PruneYard.

This reading of FAIR, PruneYard, and the union cases also offers an opportunity to build analytic bridges between the Court’s compelled-speech and expressive-association precedents. In Boy Scouts of America v. Dale, for example, the Court held that forcing the Boy Scouts to accept Mr. Dale (an openly gay young man) as a member would violate the Scouts’ right of expressive association because it would “significantly affect” the Scouts’ ability to communicate its anti-gay viewpoint. Though the Court did not put it this way, one might say that the Scouts’ ability to speak its own mind on homosexuality was not a sufficient remedy for the First Amendment impingement it would suffer if it were forced to retain Dale as a member. This is because the Scouts could not be present and speak each time someone inferred from Dale’s membership that the Scouts condoned homosexual behavior. After all, Dale did not confine himself to a law school or a shopping center; rather, he moved about in the world much like a politically engaged union.

Notwithstanding the financial coercion and the risks of

attributions that union-resisting employees face in unionized workplaces, there may be countervailing reasons to conclude that dissenting employees should not be permitted to opt out of helping to pay for their unions’ political speech, so long as those employees are free to voice their own views. When making an affirmative case for that conclusion at the end of their article, Fisk and Chemerinsky identify possible such reasons. One cannot persuasively say, however, that the majority in Knox deviated from FAIR and PruneYard when it declined to go down that path.

CONCLUSION

Fisk and Chemerinsky undoubtedly are correct when they argue that the Court and scholars need to pay greater attention to developing a robust account of the respective First Amendment rights of entities and their members. Moreover, they do the legal profession a great service by proposing a provocative account of their own. My concern here has been less with the merits of that proposal than with the way in which they aim to soften the reader for their call for reform. Both at the end of their introduction and then again at the close of their article, they drive home a theme that percolates throughout. Pointing particularly to Citizens United and Knox, they argue that “[t]he importance of the Court’s inconsistency cannot be overstated.”61 They contend that the five Justices who made up the majority in those two cases issued legally irreconcilable rulings—one benefiting the Republican Party and the other harming the Democratic Party62—and that those decisions and perhaps others are best explained by the personal cares and desires of the Justices themselves.63

Those are weighty allegations requiring equally weighty support. When one looks for good-faith explanations of the Court’s cases, however, one can reasonably find harmony where Fisk and Chemerinsky find dissonance and dissonance where they find harmony. With respect to shareholders and employees who are unhappy with their corporations’ and unions’ political speech, for example, the corporations’ speech often will not cost the shareholders a cent, while the unions’ speech will take money directly from the employees’ pockets.64 The employees, moreover, typically face risks of attribution that are greater than the risks of attribution confronting ordinary shareholders.65 Looking beyond Citizens United to other areas of the Court’s precedent, Knox is easily reconciled with

61 Fisk & Chemerinsky, supra note 10, at 1029.
62 See id.
63 See id. at 1091.
64 See supra Part I.B.
65 See supra Part I.C.
the Court’s cases on the speech rights of government employees.66 And there are good reasons to doubt that the Court’s cases establish that those who have given money to an entity have no viable compelled-speech objection when the entity uses those funds to produce political speech, so long as those who provided the money are free to speak their own minds.67

My aim in these few pages has not been to prove that all of these matters are now beyond debate. To the contrary, one of my aims has been to preserve a meaningful debate. After all, if one reaches too quickly for the charge of political bias or legally unprincipled decision making, one may find that the only people still listening are those who already were one’s allies and that one has lost the opportunity to change the minds that need to be changed if one’s proposals are ever to become a reality.

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66 See supra Part II.A.
67 See supra Part II.B.