

# THE PAYCHECK PROBLEM

Jennifer Mueller\*

## ABSTRACT

*The struggle to reconcile individual liberty with the need for collective enterprise, a perennial question at law, has been particularly acute of late. In cases like Citizens United v. FEC, Harris v. Quinn, and Burwell v. Hobby Lobby, the Supreme Court has re-assessed dissenters' ability to exit various joint funding schemes, raising questions about the limits of group activity and the power of the government to address systemic problems.*

*Many litigants asserting "opt-out" rights argue that a challenged law forces them to subsidize speech in violation of the First Amendment. The Court's recent responses to such claims have both departed from precedent and revealed deep inconsistencies in the doctrine. These tensions are captured in the Paycheck Problem, which contemplates a public employee who has strong feelings on a matter of public policy yet is required to financially support speech contrary to his views through his taxes, union agency fee, and pension contribution. The Article reviews the trajectory of the Supreme Court's cases in these areas and demonstrates how the Court's recent decisions sharply diverge in the opt-out rights provided in the union and corporate contexts. In addition to doctrinal tensions previously observed with regard to individuals forced to subsidize an organization's political spending (allowed in the corporate context but prohibited for unions), this Article observes that the Court's recent rulings could be read to give a dissenting corporate shareholder a First Amendment claim based on a vast array of corporate activities traditionally subject to the most deferential of judicial review. Among other things, such a conclusion would deeply destabilize public pensions.*

*This is not an argument for First Amendment anarchy, but for a new limiting principle, which the Article demonstrates through adding to the existing union and corporate law conversations an analysis of the Court's tax and government speech cases, in which the Court has reached the right result but not for the right reasons. The Article concludes by outlining three possible paths forward at a time when the Supreme Court, with a new Justice in place, finds itself at a crossroads on these questions.*

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\* Practitioner-in-Residence, American University Washington College of Law, 2012–2016; J.D. Harvard Law School. Many thanks to Justin Levitt, Amanda Frost, Amanda Leiter, Ben Leff, Nancy Abramowitz, and Robert Dinerstein. I also benefited from the research assistance of Meredith Satz and Lindsey Garber.

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## INTRODUCTION

If one is in search of a unifying theory of the First Amendment, it is best to keep moving past the Supreme Court’s compelled subsidy of speech cases. In recent years litigants have beaten a regular path to the Court asserting a constitutional right to avoid contributing funds to various collective schemes—most of which are designed to benefit the litigants themselves—because they object to an expressive component of the challenged program.<sup>1</sup> Although the Court has now had the opportunity to consider similar arguments across a range of contexts, its pronouncements in this area have not coalesced around any organizing principle to determine if and when the First Amendment requires that collective enterprises provide their participants

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<sup>1</sup> See, e.g., *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“For the third time in eight years, we consider whether a Federal program that finances generic advertising to promote an agricultural product violates the First Amendment.”); *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014) (addressing a challenge to mandatory fees for a quasi-public union); *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (per curiam) (addressing a challenge to mandatory fees for a public union), *reh’g denied*, 136 S. Ct. 2545 (2016).

exit rights. If anything, the Court's lines of analysis have become ever more difficult to reconcile.<sup>2</sup> This has implications for both constitutional theory and organizational practice.

This Article explores the Court's compelled subsidy jurisprudence through reference to a hypothetical—but hardly far-fetched—real-world scenario. Imagine a state police officer, Sam. Every month, Sam's paycheck reflects several automatic deductions, including federal tax withholdings, union dues, and a mandatory contribution to the state's pension fund. Like many state law enforcement officers, Sam works in a unionized workplace.<sup>3</sup> He was once a union supporter, but now he strongly disagrees with his union's support for body-worn cameras ("BWCs").<sup>4</sup> Sam can opt out of full union membership if he wishes to withdraw his support from the union's political activities, but he still must pay a reduced monthly amount as an agency or "fair share" fee to cover a pro rata portion of the services the union is required to provide to all employees, such as training, grievance procedures, contract administration, and collective bargaining—the very bargaining process in which the union is negotiating for widespread adoption of BWCs.<sup>5</sup> To pour salt on a wound, Sam has recently learned that his state pension fund, to which he is also required to contribute, is invested in a leading manufacturer of BWCs.<sup>6</sup> This company has lobbied for public BWC funding, run advertisements in favor of politicians who support widespread adoption of BWCs, and negotiated contracts with state and federal governments for the purchase of additional BWCs and support services. Finally, Sam is also upset that the federal government is promoting BWCs and has proposed spending millions of dollars—including his tax dollars—to increase their use.<sup>7</sup>

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<sup>2</sup> See *infra* Part II.

<sup>3</sup> News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2016 (Jan. 26, 2017) [hereinafter BLS 2015 Labor Data], <https://www.bls.gov/news.release/pdf/union2.pdf>; see also Bureau of Labor Statistics, U.S. Dep't of Labor, *Police and Detectives*, OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/ooh/protective-service/police-and-detectives.htm#tab-5> (last updated Oct. 24, 2017) ("Most police and detectives belonged to a union in 2016.")

<sup>4</sup> See, e.g., Roy Klabin, *The Case Against Police Body Cameras*, DAILY BANTER (May 13, 2015), <http://thedailybanter.com/2015/05/the-case-against-police-body-cameras/> (noting some law enforcement, civil liberty, and public administration objections to pervasive use of police body cameras); Janet Vertesi, *The Problem with Police Body Cameras*, TIME (May 4, 2015), <http://time.com/3843157/the-problem-with-police-body-cameras/> (explaining via case studies how video evidence frequently fails to provide objective clarity to the factfinder).

<sup>5</sup> See *infra* note 98.

<sup>6</sup> See Ben Geier, *Body Cam Stocks Are Soaring After Obama Urges Greater Use by Police*, FORTUNE (Dec. 2, 2014), <http://fortune.com/2014/12/02/taser-obama-congress-ferguson/> (indicating that BWC manufacturers are often both publicly traded and appealing investments); Rich Smith, *Body Cameras for Police: How They Work, Who Makes Them, and Stocks You Can Buy*, MOTLEY FOOL (Sept. 14, 2014, 12:17 PM), <https://www.fool.com/investing/general/2014/09/14/body-cameras-for-police-how-they-work-who-makes-th.aspx>.

<sup>7</sup> See *Fact Sheet: Strengthening Community Policing*, THE WHITE HOUSE: OFFICE OF THE PRESS SEC'Y (Dec.

Sam does not want his money to support any of these expressive activities. The Constitution protects Sam's right to speak his mind on BWCs.<sup>8</sup> Does it also give him the right to refuse to pay his taxes, union fees, and pension contribution because these payments constitute the compelled subsidy of speech that he opposes? Is there a principled way to reconcile the Court's rulings in this area?

This is the Paycheck Problem, and it provides a compact and timely platform from which to examine shifts that the Supreme Court has signaled in its recent First Amendment rulings and consider our own intuitions about money, speech, and the Constitution. It is compact because, although spanning three areas of law, the hypothetical removes from the First Amendment analysis considerations of state action or compulsion; both are assumed.<sup>9</sup> It is timely because in recent years the question of "opt-out rights" has assumed an ever more prominent role in public debate and in the Supreme Court's jurisprudence.<sup>10</sup> Indeed, the death of Justice Antonin Scalia left unresolved one of the very questions presented in the Paycheck Problem: whether a public employee can be required to pay an agency fee to a union that represents him but that he has declined to join.<sup>11</sup> In late September 2017, as this Article

1, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing> (including increased use of police body cameras among its recommendations).

<sup>8</sup> He may not, however, have the right to both keep his job and speak his mind. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

<sup>9</sup> I also leave to one side the opt-in/opt-out question and the question of state restrictions on union payroll deductions. See *Ysursa v. Pocatelto Educ. Ass'n*, 555 U.S. 353, 355 (2009) (upholding a state law that allowed public-sector unions to collect general union dues but not support for its political activities through payroll deductions); Brian Olney, *Paycheck Protection or Paycheck Deception? When Government "Subsidies" Silence Political Speech*, 4 U.C. IRVINE L. REV. 881, 909 (2014) (critiquing *Ysursa* as inconsistent with other First Amendment rulings).

<sup>10</sup> See Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 62, (2013) (arguing that nearly every constitutional issue can be framed as a question of unconstitutional conditions, and that "placing exit and sorting at the center of constitutional law, rather than at its periphery, opens new directions for constitutional theory in the United States"); Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 894–95 (2014) ("At the heart of the new paradigm of constitutional rights . . . is a right to 'opt out' of some central public or civic project. . . . The particular exit rights that I enumerate—that is, the rights to exit from the benefits and responsibilities of public projects, including public education, publicly funded policing, civil rights commitments, and public health projects—harm civil society in profound ways not appreciated by rights critics in the 1970s and 1980s.").

<sup>11</sup> *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (deadlocking 4-4 on a case that sought to overturn longstanding precedent upholding public union agency fees for activity related to the union's required duties); see Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 21, 2017), [https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html?\\_r=0](https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html?_r=0) (discussing Justice Neil Gorsuch's views and their relationship to the balance of power on key issues before the Court).

was going to press, the Supreme Court again granted certiorari on that issue in *Janus v. AFSCME Council 31*.<sup>12</sup>

Justice Scalia joined with those Justices on the Roberts Court who have taken an increasingly robust interpretation of the First Amendment's exhortation that the government "shall make no law . . . abridging the freedom of speech,"<sup>13</sup> and in many ways the story of the Paycheck Problem is the story of the Court's shifting First Amendment analysis.<sup>14</sup> As described below, in recent decades the Court has expanded the scope of speech covered by the First Amendment, it has elided the distinction between direct and indirect restrictions on speech, and it has increasingly focused on the burden to individual autonomy that speech restrictions impose rather than their impact on public discourse.<sup>15</sup> Each of these trends has a special resonance in the context of compelled speech (as opposed to direct speech restrictions), and each has contributed to the Court's increased skepticism towards collective funding initiatives. Taken together, these shifts have sparked concerns that the current Court is using the First Amendment as a deregulatory hatchet much the way that the *Lochner*-era Court once employed due process and freedom of contract.<sup>16</sup> The concern is particularly acute where, as with taxes, unions, or pensions, the challenged program represents a collective effort to address a diffuse but significant societal issue.

Yet this First Amendment "dismantling" has been piecemeal and inconsistent. For example, in recent years the Court has relied on the First Amendment to re-visit the question of whether employees can be required to fund public-sector unions' collective bargaining activities, challenging decades-old

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<sup>12</sup> 851 F.3d 746 (7th Cir. 2017), *cert. granted sub nom.*, *Janus v. Am. Fed'n*, 138 S. Ct. 54 (mem.); *see infra* notes 134, 360.

<sup>13</sup> U.S. CONST. amend. I.

<sup>14</sup> *See Harris v. Quinn*, 134 S. Ct. 2618 (2014) (holding, in a majority opinion which Justice Scalia joined, mandatory agency fees for a quasi-public union violated First Amendment).

<sup>15</sup> *See infra* Parts I.A–B.

<sup>16</sup> *See, e.g.*, Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343, 2345 (2014) (warning that "to apply a heightened First Amendment standard when a court is reviewing an ordinary economic regulatory program, merely because there may be some indirect effect on private speech caused by the challenged regulations, would return us to the *Lochner* era and sharply undermine congressional authority"); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207 (2015) ("In the early twentieth century, businesses articulated similar antiregulatory sentiment in other terms. This was the *Lochner* era. . . . [I]n their structure, the claims of the past resemble those of the present."); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 880 (2015) ("Virtually all commercial transactions are consummated through contracts, and all contracts exist in the medium of language. If the First Amendment were interpreted to endow commercial speakers with autonomy interests in the words of their contracts, *Lochner* would be revived."); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135 ("[A] growing number of scholars, commentators, and judges have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York's* anticonstitutional liberty of contract." (citing *Lochner v. New York*, 198 U.S. 45 (1905))).

case law allowing such assessments.<sup>17</sup> Even as it has shown solicitude for the First Amendment interests of union-shop employees, however, the Court has struck down laws protecting the constitutional interests of corporate shareholders, whose investments now may be channeled by corporations into independent political expenditures with which the shareholder may disagree.<sup>18</sup>

This Article joins with recent scholarship that examines the tension between the Court's treatment of compelled support for union political activities, on the one hand, and corporate political activities, on the other.<sup>19</sup> Unions have long been barred from using their mandatory fees for political expenditures unrelated to the union's core responsibilities. Political activities must be funded by additional voluntary contributions, payment of which makes one a full union member rather than just a "covered" or "agency shop" employee. In the 1977 case *Abood v. Detroit Board of Education*, the Court explained that this arrangement safeguards employees' core First Amendment rights.<sup>20</sup> Yet in its 2010 decision in *Citizens United v. FEC*, the Supreme Court broke with precedent to allow corporations to use unlimited general treasury funds on independent political advertisements.<sup>21</sup> Surely, commentators argued, the First Amendment rights of shareholders and pension fund members are likewise jeopardized when corporations use their investments for political purposes.<sup>22</sup> The emphasis in the scholarship to date has been on finding a pragmatic work-around to this dilemma, such as disclosure of corporate political spending or a change in union structure.<sup>23</sup> A related analysis

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17 See, e.g., *Harris*, 134 S. Ct. at 2643 (holding mandatory agency fees for a quasi-public union violated First Amendment). While the Court has restricted its analysis to public-sector unions, it would not be difficult to extend its logic to private unions.

18 See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 362 (finding that restrictions on "electioneering communications" by corporations chill speech protected by the First Amendment). But see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014) (citing the rights of individual shareholders to the free exercise of religion, as protected by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, in overturning the Affordable Care Act's contraception mandate for closely-held corporations).

19 See generally Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Eric John Finseth, *Shareholder Activism by Public Pension Funds and the Rights of Dissenting Employees Under the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 289, 344 (2011) (article published prior to changing name to Eric John Finseth Alden); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012).

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

21 *Citizens United*, 558 U.S. at 365.

22 See, e.g., Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1024–25 (2013) ("*Citizens United v. FEC* . . . dismissed in a few sentences the idea that corporate leadership's use of corporate resources on politics might infringe on the rights of dissenting shareholders."). See generally Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981) (discussing, in the first major piece of scholarship to address this issue, whether First Amendment rights are extended to stockholders during the corporate decisionmaking process); Sachs, *supra* note 19.

23 See *supra* note 18; see also Ciara Torres-Spelliscy, *Taking Opt-in Rights Seriously: What Knox v. SEIU*

proposes that employees contributing to a public pension should have the right to withhold funds for a pro rata portion of the shares voted by pension boards to advance a political or ideological purpose (for example, a resolution promoting a diverse board of directors or a shareholder proposal introducing corporate climate change objectives).<sup>24</sup>

This Article argues that there are even more significant implications of the Court's holdings that cannot be remedied by the thoughtful solutions already proposed. Since *Citizens United*, the Court has moved the even further from its traditional balancing approach, holding that compelled subsidies impose a First Amendment burden akin to compelled speech itself and articulating a broad definition of speech that one cannot be compelled to fund, sweeping into its ambit the kind of speech that corporations engage in quite regularly—for example, speech that might impact a federal or state budget.<sup>25</sup> These decisions parallel the approach the Court has taken in recent cases challenging speech restrictions (as opposed to compelled contributions), which increasingly apply a heightened or “exacting” level of scrutiny to laws affecting even routine commercial speech.<sup>26</sup> Taking the Court at its word would imply that it is not only corporations' newfound ability to engage in overtly political speech that may create a First Amendment cause of action for shareholders, but also business activities that we have traditionally viewed as existing in a corporate law sphere quite separate from constitutional law inquiries, such as contract negotiations and lobbying initiatives. At the very least, the Court's recent holdings make one struggle to identify constitutionally meaningful grounds to distinguish pension contributions from agency fees for the purposes of a compelled speech analysis. If Sam can withhold his union agency fee, why can he not also withhold his pension contribution?

The Paycheck Problem does not insist on false equivalencies, but it does surface significant similarities in an effort to bring some rigor to an area of jurisprudence long recognized as inconsistent and haphazard.<sup>27</sup> Union agency fees, pension contributions, and taxes rest in distinct legal fields, but

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*Could Mean for Post-Citizens United Shareholder Rights*, 74 MONT. L. REV. 101, 127 (2013).

<sup>24</sup> See Finseth Alden, *supra* note 19, at 344.

<sup>25</sup> See *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014) (holding that one may not be compelled to subsidize a quasi-public union's speech because, inter alia, it addresses matters of public concern, such as potential increases in state Medicaid expenditures, which could impact the state budget).

<sup>26</sup> See *infra* Part I.A.

<sup>27</sup> Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 662 (2003) (criticizing the Court's application of *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), as resulting in “a jurisprudence of deception and inconsistency—one that sporadically strikes down the occasional governmental act or pronouncement for violating the *Barnette* prohibitions while more often winking at (or explaining away or, most often, simply not noticing) massive transgressions”); see also Fisk & Chemerinsky, *supra* note 22, at 1052 (“[E]ven in the area of compelled contributions, the Court has been markedly inconsistent in deciding whether there is a First Amendment violation.”).

the parallels among them, particularly between union and pensions, are such that the Court's current First Amendment cases make it surprisingly challenging to identify a distinguishing line that reflects something other than scale or degree (or pure policy preference).<sup>28</sup> The practical difficulties of reconciling the Court's holdings thus expose a more theoretical conundrum: applying the Court's recent compelled subsidy of speech jurisprudence across the range of relevant contexts would be societally destabilizing, but treating each challenge as a discrete occasion to announce a new rule of law would be constitutionally erratic.

To resolve this paradox, this Article brings into the analysis the Court's "government speech" line of cases, which announced a blanket rule barring First Amendment challenges to any assessments that could be considered a federal tax—a theoretically unmoored move that at least one scholar deemed a judicial "ipse dixit"—and reconsiders them to identify a more principled basis for decision in the area of compelled subsidies.<sup>29</sup> The goal is not to arrive at the same outcome for each of the three areas in which Sam wants to withhold his financial support, but to locate a consistent rationale for determining when the Constitution requires cooperative endeavors to allow opt-outs.

The Article proceeds as follows. Part I provides an overview of the relevant case law that analyzes the constitutionality of compelled subsidies in each of these three areas—taxes, unions, and pensions—with particular attention to more recent cases that expand the First Amendment penumbra and emphasize the role of the First Amendment in protecting individual autonomy. Part II engages with the question at the heart of the Paycheck Problem: are compelled payments in these three areas constitutionally distinguishable? It examines grounds for treating pensions differently from unions for First Amendment purposes, considering both factors suggested by other scholars and proposing new ones. It then looks at the explanations the Court has offered in rejecting a right to opt out of taxes and questions why these justifications would not apply equally well to union agency fees and pension contributions. The Article concludes, among other things, that union agency fees and pension contributions create a similar First Amendment burden for a dissenter, yet the Court treats them quite differently. Conversely, taxes truly are different, but the Court has not articulated a theory—other than

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<sup>28</sup> Cf. Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439, 461 (2014) (“[W]hat is amusing about *Harris* is that it is the Republican-appointed Justices who are both activist and anti-state’s rights here, substituting their policy views about the importance of certain labor contract terms for those of the Illinois legislature and governor about a matter of state governance.”); Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 3 UTAH L. REV. 389, 419 (2014) (comparing, *inter alia*, union political activity cases with corporate political activity cases).

<sup>29</sup> See Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 197 (2005).



sheer size—that this is so. This is because the Court has failed to offer a consistent theory of what the First Amendment protects and why.

These discussions illustrate the need to identify a new limiting principle in First Amendment compelled subsidy of speech cases. The final Part takes up this challenge. Part III suggests three ways the Court might move forward with its First Amendment jurisprudence. It could fall back and regroup around a workable definition of protected speech, degree of burden, and levels of scrutiny (the “functional” path); it could embrace its current expansive approach as to both speech coverage and individual autonomy, which would require adding to its current analysis an acknowledgment of the potential First Amendment harm that opt-outs pose to others participating in a cooperative enterprise (the “individual” path); or it could re-focus its First Amendment jurisprudence to advance the operational purpose of the First Amendment in supporting and sustaining our constitutional democracy (the “structural” path). While any of these paths would be an improvement over the Court’s current ad hoc doctrine, the structural path is both nuanced and systematic and thus holds the most promise for rationalizing the Court’s approach to these cases.

The questions posed by the Paycheck Problem are not merely academic. The Court’s shifting rhetoric has very real implications for public law and private ordering. Approximately 150 million individual tax returns were filed in the United States in 2017.<sup>30</sup> In 2016, roughly 38% of public employees—close to 8 million individuals—were represented by unions, and nearly 35% were full union members.<sup>31</sup> Another 7.4 million workers are union members in the private sector.<sup>32</sup> State and local pension plans had more than 20 million members in 2016, and over 10 million beneficiaries.<sup>33</sup> The rhetoric around the 2016 presidential election suggested that there are many individuals, like Officer Sam, who would like to opt out of paying their taxes, union dues, or pension contributions.<sup>34</sup> The question is whether the First Amendment provides them an avenue to do so.

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<sup>30</sup> Brett Collins, *Projections of Federal Tax Return Filings: Calendar Years 2011–2018*, IRS (2012), <https://www.irs.gov/pub/irs-soi/12rswinbulreturnfilings.pdf>.

<sup>31</sup> BLS 2015 LABOR DATA, *supra* note 3.

<sup>32</sup> *See id.*

<sup>33</sup> PHILLIP M. VIDAL, U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC PENSIONS: STATE- AND LOCALLY-ADMINISTERED DEFINED BENEFIT DATA SUMMARY BRIEF: 2016 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/econ/g16-aspp-sl.pdf>. By way of comparison, fewer than 700 individuals “maxed out” in political contributions the election cycle before the Supreme Court ruled that BCRA’s aggregate contribution limit violated the First Amendment. *See* *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); Bob Biersack, *McCutcheon’s Multiplying Effect: Why an Overall Limit Matters*, OPENSECRETS.ORG (Sept. 17, 2013), <http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why/>.

<sup>34</sup> *See, e.g.*, John Cassidy, *What Do the Brexit Movement and Donald Trump Have in Common?*, NEW YORKER (June 23, 2016), <https://www.newyorker.com/news/john-cassidy/what-do-the-brexit-movement->

## I. THE CHANGING JURISPRUDENCE OF COMPELLED SUBSIDY CHALLENGES

### A. *Setting the Scene*

A few points help to frame the discussion that follows. First, this is a moment of ascendancy for First Amendment challenges to a wide array of laws. In most cases the Court continues to recite the traditional First Amendment “balancing test,” which asks whether a challenged regulation restricts “covered” speech and then, based on the nature of the speech affected, what degree of scrutiny is warranted.<sup>35</sup> Under this approach, restrictions on political speech are most closely scrutinized—there must be a close fit between a legitimate government objective and the speech burden, and the restriction must concomitantly be as limited as possible—and other categories less so.<sup>36</sup> However, the test’s continued viability as a workable standard is increasingly in doubt. In recent years the Court has expanded its First Amendment penumbra and now reviews restrictions on even commercial speech and viewpoint-neutral laws with something approaching exacting scrutiny.<sup>37</sup> As Professor Fredrick Schauer recently observed, these developments represent a sea change:

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and-donald-trump-have-in-common (comparing the movement for the United Kingdom to withdraw from the EU to the pro-Trump populist movement); Timothy Noah, *Does Labor Have a Death Wish?*, POLITICO MAG.: HIST. DEPARTMENT (Nov. 7, 2017), <https://www.politico.com/magazine/story/2017/11/07/labor-movement-trump-betrayal-215796> (noting that a majority of union members voted for Trump despite his support for anti-union “right to work” laws).

<sup>35</sup> See, e.g., R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291 (2016) (discussing how the differing types of speech have traditionally warranted differing degrees of scrutiny). *But see* United States v. Stevens, 559 U.S. 460, 470 (2010) (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”).

<sup>36</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770–71 (1976) (recognizing that some restrictions on commercial speech are subject to First Amendment review, albeit at a lower standard of scrutiny than restrictions on political speech); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985); *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

<sup>37</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557–59 (2011) (employing “heightened” First Amendment scrutiny to strike down a state law that prohibited pharmacies from selling doctor’s prescription records to data mining companies without the doctor’s permission); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224, 2228 (2015) (striking down sign ordinances that applied different size and placement criteria to different signs depending on their content and announcing sweeping rule that a “law that is content-based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech,” potentially jeopardizing many subject-specific regulations (citation omitted)); see also *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 789, 799 (2011) (applying strict scrutiny when considering a First Amendment challenge to a law criminalizing the sale or rental of violent video games to minors); *Stevens*, 559 U.S. at 468 (sustaining a First Amendment challenge to a law that criminalized the production of videos depicting animal cruelty).

In the past, many of the most important issues surrounding the First Amendment were issues about the nature and degree of its protection within its widely acknowledged coverage. But now the pressure appears to be on coverage itself, with what seems to be an accelerating attempt to widen the scope of First Amendment coverage to include actions and events traditionally thought to be far removed from any plausible conception of the purposes of a principle of free speech.<sup>38</sup>

The robust approach to the First Amendment's protections has come at a cost to government regulation. Indeed, in one recent decision Justice Kennedy made an enigmatic reference to the Court's long-repudiated *Lochner* decision that appeared to suggest that some Justices view the First Amendment as an appropriate tool to strike down economic regulations, much as Justices in an earlier era used substantive due process and freedom of contract to do the same.<sup>39</sup>

It is also helpful to recognize that the argument that the government cannot force someone to subsidize speech with which she disagrees has developed out of two lines of First Amendment jurisprudence, both of which involved categories of traditionally-protected speech. First, for more than seventy years the Court has held that the government cannot compel one to profess particular beliefs.<sup>40</sup> It articulated this conclusion in its rulings on two challenges brought by Jehovah's Witnesses more than thirty years apart to laws that went to core political speech—one requiring individuals to recite the Pledge of Allegiance and another requiring the display of the state motto on all license plates.<sup>41</sup> In the latter case, the Court wrote that “[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”<sup>42</sup>

A conceptually different problem presented itself when a law did not restrict or compel speech itself, but rather an activity with expressive content. The Court recognized that such activity—whether burning a draft card or contributing to a candidate—could raise First Amendment issues, but found

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<sup>38</sup> Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614–15 (2015) (listing dozens of recent cases in which the First Amendment has been used to challenge or to defend against a law of general application).

<sup>39</sup> *Sorrell*, 564 U.S. at 567 (“The Constitution ‘does not enact Mr. Herbert Spencer’s Social Statics.’ It does enact the First Amendment.” (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting))).

<sup>40</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding a law requiring recitation of the Pledge of Allegiance violates the First Amendment), *overruling* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>41</sup> *Id.* at 627–29; *Wooley v. Maynard*, 430 U.S. 705, 706–07, 713 (1977) (holding a law requiring New Hampshire state license plates to display the logo “Live Free or Die” violates the First Amendment).

<sup>42</sup> *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

that the restriction functioned at a level of remove that made the constitutional harm less acute.<sup>43</sup> In *Buckley v. Valeo*, for example, the Court applied a less strict standard of review to campaign contribution limits than it applied to restrictions on the amount a campaign could spend on actual speech.<sup>44</sup> It reasoned that contributions added little more than volume to the existing marketplace of ideas:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . A limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. . . . [T]he transformation of contributions into political debate involves speech by someone other than the contributor.<sup>45</sup>

Finally, it is helpful at the outset to ask what our constitutional concerns are—if any—when we consider Sam's plight in the Paycheck Problem. This in turn requires us to consider the purpose of the First Amendment and the nature of its protections. Justice Brandeis long ago wrote that the First Amendment's role is to safeguard the "functions essential to effective democracy," and nearly a century of scholarship has been dedicated to unpacking what that might mean and how it should look in application.<sup>46</sup> Courts and scholars have suggested at least three possible approaches, all of which appear at various points in Supreme Court opinions yet are not entirely complementary. The first is that we are concerned with how the compelled funding of speech affects the oft-cited "marketplace of ideas," the sausage factory

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<sup>43</sup> See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding a law banning the destruction of draft cards and explaining that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

<sup>44</sup> *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) ("The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.").

<sup>45</sup> *Id.* at 21.

<sup>46</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1981); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

of democracy in which philosophies are debated, elections are decided, and policy judgments are made.<sup>47</sup> The focus here is on preserving content, both the speaker's ability to utter it and the listener's ability to hear it, on the assumption that the best ideas will compete for a Darwinian victory in the public (and public policy) arena.<sup>48</sup> A second approach suggests that we should be concerned whenever the state's power is brought to bear to infringe an individual's autonomy, or one's freedom to believe or say what one wishes.<sup>49</sup> The focus here is on ensuring that government does not force a person to betray or offend her conscience or sense of self, on the assumption that the "constitutional guarantee of free speech ultimately serves only one true value . . . 'individual self-realization.'"<sup>50</sup> A third approach argues that statutes and regulations should be evaluated according to the First Amendment's purpose, which is to advance what Robert Post recently described as "democratic legitimation" and "public discourse."<sup>51</sup> The focus here is on process, both in supporting democratic institutions and encouraging broad and

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<sup>47</sup> See, e.g., *Bd. of Regents v. Southworth*, 529 U.S. 217, 229–30 (2000) (holding that a university may charge students a fee to provide "viewpoint neutral" funding to student groups because the "sole purpose of [the program is to] facilitat[e] the free and open exchange of ideas by, and among, its students."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (protecting speech in the form of paid advertisements because any other conclusion "might shut off an important outlet for the promulgation of information and ideas"); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that "the ultimate good desired is better reached by free trade in ideas"); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011).

<sup>48</sup> See Volokh, *supra* note 47, at 596 (arguing that the "marketplace of ideas" is self-regulating because thinking people "are constantly engaging in a process through which truth and falsehood are separated"). Scholars have long disputed the aptness of this metaphor, and recent findings in the fields of behavioral economics and social psychology have raised questions about its empirical underpinnings. See generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984); Lyrrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799 (2010); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).

<sup>49</sup> See, e.g., Redish, *supra* note 46, at 593 (arguing that the First Amendment protects an individual's right to make life-affecting decisions); see also *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 575–76 (2005) (Souter, J., dissenting) (agreeing with the majority that a subsidy for government speech deprives taxpayers of their "presumptive autonomy as speakers"); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding unconstitutional a law requiring citizens to display the state motto on their license plates); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (overturning a law requiring recitation of the Pledge of Allegiance because it violated the First Amendment).

<sup>50</sup> Redish, *supra* note 46, at 593; cf. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding unconstitutional a federal law requiring for-profit corporations, notwithstanding their owners' religious beliefs, to provide contraceptive health care to employees); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.").

<sup>51</sup> See POST, *supra* note 46, at 73; see also SUNSTEIN, *supra* note 46, at 34–51 (arguing that government regulation of the "marketplace of ideas" is necessary to ensure opportunity of free expression to all); FISS, *supra* note 46, at 1416 ("When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment.").

meaningful participation in public debate. This theory contemplates that social, economic, and cultural forces at work in modern America can create circumstances in which the quantity and quality of public debate might, in fact, “be enriched and our capacity for collective self-determination enhanced” by government regulation of speech.<sup>52</sup>

Our intuitions around these background principles may steer us in one direction when a regulation threatens to restrict or ban speech in its entirety—there, the potential threat to the marketplace of ideas may appear most pressing—and another when a regulation compels speech or, as in the Paycheck Problem, the subsidy of speech. There, the potential threat to our individual liberty and our right to be free of undue government influence may be our most available response. Certainly both of these ideas inform the cases discussed below. The question for the reader is whether these, or other, theories provide grounds for distinguishing among the payments in the Paycheck Problem.

## B. Federal Taxes

### 1. Early Cases

When it comes to his indignation at subsidizing the federal government’s speech, Sam is in good company. Refusal to pay taxes as a form a civil disobedience is embedded in the formative fabric of the United States, and conscience objections to taxes were argued to—and rejected by—courts long before the Supreme Court began to engage seriously with the First Amendment’s Free Speech Clause.<sup>53</sup> In the latter half of the twentieth century, free speech arguments joined other causes of action claimed by tax resisters in defending their non-payments. Taxpayers who objected to various government activities—for example, the Vietnam War,<sup>54</sup> the Cold War,<sup>55</sup> or federal welfare programs<sup>56</sup>—sought to withhold all or a percentage of their taxes, resulting in a “flood of ‘tax protest’ actions which threaten[ed] to drown the federal court system.”<sup>57</sup>

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<sup>52</sup> Fiss, *supra* note 46, at 1415.

<sup>53</sup> See *Barnes v. First Par. in Falmouth*, 6 Mass. (1 Tyng) 401, 407 (Mass. 1810) (upholding tax to support Protestant clergymen over objection that it interfered with “liberty of conscience”); cf. Henry David Thoreau, *Resistance to Civil Government*, in *THE WRITINGS OF HENRY D. THOREAU: REFORM PAPERS* 63, 78–84 (Wendell Glick ed., 1973). See generally *WE WON’T PAY!: A TAX RESISTANCE READER* (David M. Gross ed., 2008); Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 946–82.

<sup>54</sup> *United States v. Malinowski*, 472 F.2d 850, 852 (3d Cir. 1973).

<sup>55</sup> *Welch v. United States*, 750 F.2d 1101, 1103 (1st Cir. 1985).

<sup>56</sup> *Crowe v. Comm’r of Internal Revenue*, 396 F.2d 766, 767 (8th Cir. 1968) (per curiam).

<sup>57</sup> *Fink v. United States*, No. 84-109-D, 1984 WL 3062, at \*1 (D.N.H. July 10, 1984). For example, the various taxpayers in *Welch* withheld as a “war tax credit” 52%, representing the percentage of the U.S. budget spent on the military, 61% for “government war crimes,” and 50% in protest of

It was as a free exercise claim that tax protests reached the Supreme Court in *United States v. Lee*.<sup>58</sup> Mr. Lee was an Amish employer who objected on religious grounds to making payments into the Social Security system on behalf of his employees.<sup>59</sup> The Court accepted that payment of the tax violated Mr. Lee's religious beliefs.<sup>60</sup> (In fact, self-employed members of certain religious faiths, including the Amish, were and continue to be exempted from the requirement that they pay Social Security taxes for themselves on the condition that, among other things, they claim no benefit from the program.<sup>61</sup>) A unanimous Court found, however, that the government's legitimate interest in the Social Security program justified the blanket imposition of the tax on all employers, regardless of their religious belief.

Although concerning only a challenge to Social Security taxes and considering only a free exercise argument, the Supreme Court's opinion in *Lee* was written expansively, observing that there is "broad public interest in maintaining a sound tax system," and that the system can only be maintained through "mandatory and continuous participation."<sup>62</sup> This language was subsequently cited by lower courts in tax challenges brought under the Free Speech Clause,<sup>63</sup> and indeed in his opinion in *Lee*, Chief Justice Burger acknowledged the war tax cases occupying the lower courts, writing that the Court's holding would equally apply to challenges to general federal income taxes.<sup>64</sup>

*Lee* is discussed further below.<sup>65</sup> For now, it is worth noting that while courts have rejected tax protest arguments since the nation's founding, until recently they did so through application of "traditional" First Amendment analysis, weighing the asserted burden against the government interest.<sup>66</sup>

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the nuclear arms race, from their self-assessed taxes in 1982. *Welch*, 750 F.2d at 1103.

<sup>58</sup> 455 U.S. 252 (1982).

<sup>59</sup> *Id.* at 254–55.

<sup>60</sup> *Id.* at 257.

<sup>61</sup> *Id.* at 260–61; *see also* 26 U.S.C. § 1402(g)(1) (2016).

<sup>62</sup> *Lee*, 455 U.S. at 258–59, 260.

<sup>63</sup> *See, e.g.*, *Kahn v. United States*, 753 F.2d 1208, 1217 (3d Cir. 1985); *Welch v. United States*, 750 F.2d 1101, 1109 (1st Cir. 1985); *Drefchinski v. Regan*, 589 F. Supp. 1516, 1526 (W.D. La. 1984); *Franklet v. United States*, 578 F. Supp. 1552, 1556 (N.D. Cal. 1984), *aff'd*, 761 F.2d 529 (9th Cir. 1985).

<sup>64</sup> *Lee*, 455 U.S. at 260 ("If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

<sup>65</sup> *See infra* notes 295–306 and accompanying text.

<sup>66</sup> *See, e.g.*, *Lee*, 455 U.S. at 258–59 (weighing government interest in "mandatory and continuous taxation" against the burden on Lee's religious exercise).

## 2. Government Speech

This analysis has changed with the Supreme Court's expansion of the government speech doctrine—the notion that the government does not have to maintain viewpoint neutrality when it speaks for itself—to compelled subsidy challenges.<sup>67</sup> Of particular relevance to the Paycheck Problem are a trio of cases in which the Supreme Court treated similar challenges to similar collective funding programs quite differently.

The first of the three cases, *Glickman v. Wileman Bros. & Elliott*, asked the Court to judge the constitutionality of a mandatory assessment levied on California growers to fund generic advertising promoting California stone fruits.<sup>68</sup> In upholding the scheme, the Court explained that its previous compelled speech jurisprudence was inapplicable because the assessments were at best an indirect burden; they did not “require respondents to repeat an objectionable message out of their own mouths, use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another’s message.”<sup>69</sup> As for a compelled *subsidy* of speech claim, the Court observed that the farmers’ objection was not rooted in politics or conscience but merely in a belief that “their money is not being well spent,” which was not a First Amendment complaint.<sup>70</sup> The collective marketing program did not “warrant special First Amendment scrutiny” under even the less strict standard that applied to commercial speech because it was predominantly an economic regulation.<sup>71</sup> The majority admonished the lower court, which had reached the opposite conclusion, that it ought not substitute its policy judgment for that of Congress.<sup>72</sup>

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<sup>67</sup> See *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”).

<sup>68</sup> *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 460 (1997).

<sup>69</sup> *Id.* at 471 (internal quotation marks and citations omitted).

<sup>70</sup> *Id.* at 472–73 (“The mere fact that objectors believe their money is not being well spent ‘does not mean [that] they have a First Amendment complaint.’ . . . [O]ur cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group.” (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 456 (1984))).

<sup>71</sup> *Id.* at 474 (“Respondents’ criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgment of anybody’s right to speak freely. Similar criticisms might be directed at other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market.”).

<sup>72</sup> *Id.* at 476 (“[D]oubts concerning the policy judgments that underlie many features of this legislation do not . . . justify reliance on the First Amendment as a basis for reviewing economic regulations.”).



Just four years later in *United States v. United Foods*, the Court reversed course in a case that appeared substantially similar: commercial mushroom growers objected to a mandatory assessment for generic mushroom advertising.<sup>73</sup> Taking a different tack than it had in *Glickman*, a different majority of the Court explained that “First Amendment concerns apply . . . because of the requirement that producers subsidize speech with which they disagree” and held that the compelled subsidies were unconstitutional.<sup>74</sup> Although the majority suggested that it was applying an intermediate level of scrutiny, it cited opinions critical of lower levels of scrutiny for commercial speech without deciding the issue.<sup>75</sup> The mushroom assessment was different from the tree fruit assessment in *Glickman*, the majority explained, because “it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place,” and here there was no associational purpose beyond the advertising itself.<sup>76</sup> The assessment was not ancillary to a larger scheme of economic regulation; it was the scheme.<sup>77</sup>

Notwithstanding this narrow distinction, the majority’s language in *United Foods* swept broadly. “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors,” Justice Kennedy wrote for the majority.<sup>78</sup> Justice Breyer’s dissent offered the first of many critiques of the scope of this language:

Nearly every human action that the law affects, and virtually all governmental activity, involves speech. . . . Were the Court . . . to apply the strictest level of scrutiny in every area of speech touched by law . . . it would, at a minimum, create through its First Amendment analysis a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect.<sup>79</sup>

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<sup>73</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 408 (2001).

<sup>74</sup> *Id.* at 410–11.

<sup>75</sup> *Id.* at 409–10.

<sup>76</sup> *Id.* at 413. The dissent argued that this logic created an “unreasoned distinction between heavily regulated and less heavily regulated speakers.” *Id.* at 428 (Breyer, J., dissenting).

<sup>77</sup> *Id.* at 415–16 (majority opinion) (“[T]he expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself”).

<sup>78</sup> *Id.* at 411.

<sup>79</sup> *Id.* at 424–25 (Breyer, J., dissenting); see also Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1107 (2005) (criticizing the decision’s “unprincipled character”); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 Val. U.L. Rev. 555, 557 (2006) (criticizing *United Foods* as having “fundamentally altered received First Amendment doctrine” in ways that are “novel” and “seriously misguided”).

As the dissent anticipated, in the immediate aftermath of *United Foods* the case was cited in a “cascade” of lawsuits challenging economic cooperatives.<sup>80</sup> Commentators suggested these would be the tip of the iceberg, noting that the implications of *United Foods* “were breathtaking, suggesting that every time tax dollars were used to support government speech, persons who objected to their use could challenge it on free speech grounds.”<sup>81</sup> Against these new lawsuits the government introduced an argument that it had raised too late in *United Foods*: that the compelled subsidies were permissible because they were funding government speech.

In one of these cases, cattle ranchers objected to funding the Department of Agriculture’s “Beef: It’s What’s for Dinner” campaign.<sup>82</sup> Relying on *United Foods*, the Eighth Circuit ruled for the ranchers, finding that the government speech doctrine (the government’s new argument) only protected the government from charges of viewpoint discrimination, not compelled funding arguments.<sup>83</sup> The Supreme Court quickly granted certiorari and reversed, explaining in *Johanns v. Livestock Marketing Association* that it had presumed in *United Foods* that the compelled subsidy there was supporting private speech.<sup>84</sup> By contrast, “[c]ompelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.”<sup>85</sup>

Much of Justice Scalia’s plurality opinion in *Johanns* was concerned with describing how the beef check-off program and advertisements—which were attributed simply to “America’s Beef Producers”—were government speech.<sup>86</sup> This was the contention over which the Court split. In dissent, Justice Souter, joined by Justices Stevens and Kennedy, did not dispute the premise that the First Amendment was implicated by the assessment program, nor that one could be compelled to fund government speech (although he recognized that

<sup>80</sup> Post, *supra* note 29, at 196.

<sup>81</sup> G. Edward White, *The Evolution of First Amendment Protection for Compelled Commercial Speech*, 29 J.L. & POL. 481, 496–97 (2014); see also Post, *supra* note 79, at 557.

<sup>82</sup> *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 554 (2005) (plurality opinion).

<sup>83</sup> *Livestock Mktg. Ass’n v. U.S. Dep’t of Agric.*, 335 F.3d 711, 717, 722, 725–26 (8th Cir. 2003), *vacated sub nom. Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005) (plurality opinion); see also *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage which seeks to deal with the problem in another way. In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. ‘[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe that right.’” (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983))).

<sup>84</sup> *Johanns*, 544 U.S. at 558.

<sup>85</sup> *Id.* at 559.

<sup>86</sup> *Id.* at 555, 560–65. Justices Breyer and Ginsburg, while concurring in the judgment because the program was a form of permissible economic regulation, expressed skepticism that the speech could be properly deemed “government speech.” See *id.* at 569 (Breyer, J., concurring); *id.* at 569–70 (Ginsburg, J., concurring in the judgment).

the government speech doctrine was still “new and . . . imprecise”).<sup>87</sup> However, he disagreed that the government speech doctrine applied in the present case. He reasoned that compelled subsidization of government speech is “tolerable” because, in part, of the “adequacy of the democratic process.”<sup>88</sup> But this process could not safeguard the ranchers’ rights when the beef advertisements did not identify the government as speaker.<sup>89</sup>

What is most notable for purposes of the Paycheck Problem is that unlike the *Glickman* decision less than a decade earlier, both the plurality and primary dissent in *Johanns* understood the ranchers to state a viable First Amendment claim; they just disagreed as to whether the speech at issue qualified as government speech.<sup>90</sup> The Court also declined to take the opportunity to overrule *United Foods*, leaving intact its prior holding that even where commercial speech is at issue, “using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced,” to fund private speech violates the First Amendment.<sup>91</sup> As discussed below, both of these observations have implications for Sam’s situation beyond the tax context.

It is rather remarkable—and perhaps a sign of the growing ambitions of litigants regarding the First Amendment’s deregulatory potential—that it was not until well into America’s third century that the Supreme Court recognized a categorical exception barring free speech compelled subsidy challenges to taxes. (The Court, it should be noted, has taken a different approach to religious-based challenges to special assessment schemes.<sup>92</sup>) For

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<sup>87</sup> *Id.* at 574–75 (Souter, J., dissenting).

<sup>88</sup> *Id.* at 575.

<sup>89</sup> *Id.* at 577–78.

<sup>90</sup> Compare *id.* at 565 n.8 (plurality opinion) (recognizing the argument that “being forced to fund someone else’s private speech unconnected to any legitimate government purpose violates personal autonomy,” but disagreeing as to whether there was a legitimate government interest), with *id.* at 575–76 (Souter, J., dissenting) (arguing that “the relative palatability of a remote subsidy shared by every taxpayer is not to be found when the speech is funded with targeted taxes. For then, as here, the particular interests of those singled out to pay the tax are closely linked with the expression, and taxpayers who disagree with it suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say”).

<sup>91</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 4010 (2001).

<sup>92</sup> For example, in *Burwell v. Hobby Lobby Stores* the Court permitted closely-held private companies to opt out of the Affordable Care Act’s (“ACA”) contraception coverage mandate, finding that the mandate was not the “least restrictive means” for the government to achieve its purpose. 134 S. Ct. 2751, 2805 (2014); cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (upholding the individual mandate of the ACA as a permissible exercise of Congress’s taxing power). The challenge was brought under the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb-1 (2012), not the Constitution, and government speech was not at issue. *Hobby Lobby*, 134 S. Ct. at 2782. The majority distinguished *Lee* because “[r]ecognizing a religious accommodation under RFRA for particular coverage requirements . . . does not threaten the viability of ACA’s comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.” *Id.* at 2783–84. This may misread *Lee*, which was in fact an objection to a *targeted* assessment and expenditure, and in a context in which Congress had already

Sam's purposes, *Johanns* would seem to resolve at least one of the questions presented in the Paycheck Problem, albeit in a manner that does not resolve the larger question because it provides limited guidance on the contours of the government speech doctrine or its justifications.

### C. Union Agency Fees

#### 1. Early Cases

Our analysis of Sam's challenge to his union agency fee begins with *Abood v. Detroit Board of Education*.<sup>93</sup> *Abood* was the last in a trio of cases between 1956 and 1977 that set the contours for federal and state labor laws.<sup>94</sup> Under them, once a group of employees votes to unionize, a single union is empowered to serve as their exclusive representative, and the employer is bound to negotiate with the union in good faith.<sup>95</sup> In exchange, unions are required to represent all covered employees—members and nonmembers—equally in collective bargaining and related contract administration, they are limited in their ability to picket, and they must comply with detailed reporting and accounting requirements.<sup>96</sup> Unions cannot require a worker to become a full card-carrying member or support all union activities.<sup>97</sup> They can, however, charge all employees they represent an “agency” or “fair share” fee of “peri-

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provided an opt-out option for individuals with similar objections to Mr. Lee, but that is an issue for another day. See *United States v. Lee*, 455 U.S. 252, 261–63 (1982) (Stevens, J., concurring) (arguing that granting an exemption for Amish people would not threaten the Social Security tax scheme as the majority suggested, but nonetheless agreeing “that there is virtually no room for a ‘constitutionally required exemption’ on religious grounds from a valid tax law that is entirely neutral in its general application” (quoting *id.* at 256 (majority opinion))). Of more interest to the present inquiry was the Court's explanation that “protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies,” *Hobby Lobby*, 134 S. Ct. at 2768, thus suggesting that in some circumstances the Court views the constitutional rights of corporations as emanating from the rights of its individual shareholders.

<sup>93</sup> 431 U.S. 209 (1977).

<sup>94</sup> See *id.*; see also National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151–169 (2012); Railway Labor Act (“RLA”), 45 U.S.C. §§ 151–188 (2012); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225 (1956).

<sup>95</sup> See *Abood*, 431 U.S. at 220–21 (describing the benefits and burdens that federal law assigns to a designated union); see also 29 U.S.C. §§ 153(a), 159 (2012) (requiring employer to bargain with employee representatives and providing that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .”); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 196–99 (2015) (noting that an employer's duty to bargain exclusively with certain employee representatives in good faith “is an extraordinary departure from the background principle of freedom of contract”).

<sup>96</sup> See Estlund, *supra* note 95, at 199–204.

<sup>97</sup> *Id.* at 181–83.

odic dues, initiation fees, and assessments” to cover the costs of union services.<sup>98</sup> While the federal laws prevent states from banning unions, they have been interpreted to permit states to bar the imposition of these fair share or agency fees, and to date twenty-eight states have passed such statutes.<sup>99</sup>

In the first of the cases leading to *Abood*, *Railway Employees’ Department v. Hanson*, the Supreme Court upheld a law permitting mandatory agency fees against several constitutional challenges, including a First Amendment argument brought by dissenting employees who had voted against unionization and did not want to pay the agency fee.<sup>100</sup> The Court recognized that the mandatory assessment provision of the Railway Labor Act (“RLA”) was controversial, but it reasoned that so long as its imposition was “relevant or appropriate to the constitutional power which Congress exercises,” the wisdom of the decision “is one of policy with which the judiciary has no concern.”<sup>101</sup> Congress was allowed to impose the agency fee because “[i]ndustrial peace along the arteries of commerce is a legitimate objective.”<sup>102</sup>

The *Hanson* Court specifically reserved judgment on situations in which the dues, fees, or assessments were wielded as fines or penalties, or situations in which they served as “cover for forcing ideological conformity or other action in contravention of the First Amendment.”<sup>103</sup> The latter question came back to the Court five years later in *International Association of Machinists v. Street*,<sup>104</sup> a case in which the employees built a substantial record that a portion of their union payments were being used to support political causes and candidates with which they disagreed.<sup>105</sup> In evaluating whether the challenged “union shop” provision of the RLA could be construed in a manner consistent with the Constitution, the Court looked at the legislative history discussing the authorization of the mandatory fees. Union representatives

<sup>98</sup> 45 U.S.C. § 152 (2012); see also *Hanson*, 351 U.S. at 238 (“[N]o conditions to membership may be imposed except as respects ‘periodic dues, initiation fees, and assessments.’” (quoting 45 U.S.C. § 152 (2012))); 29 U.S.C. § 158(b)(2) (2012) (prohibiting unions from causing discriminatory treatment of an employee whose membership has been denied “on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership”).

<sup>99</sup> See Estlund, *supra* note 95, at 181 n.57; *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <http://www.nrtw.org/rtws.htm> (last visited Nov. 22, 2017); see also *Sweeney v. Pence*, 767 F.3d 654, 657, 671 (7th Cir. 2014) (upholding as constitutional Indiana’s Right to Work law, which prevented individuals from being required to pay fair share fees); *id.* at 683 (Wood, J., dissenting) (offering an alternative reading of the relevant statutory provisions).

<sup>100</sup> *Hanson*, 351 U.S. at 238.

<sup>101</sup> *Id.* at 234.

<sup>102</sup> *Id.* at 233.

<sup>103</sup> *Id.* at 238 (“On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.”).

<sup>104</sup> 367 U.S. 740 (1961).

<sup>105</sup> *Id.* at 747–48.

had argued to Congress that because the law tasked the union with considerable—and costly—responsibilities, including collective bargaining and handling employee grievances, the law would create a “free rider” problem if it lacked a mechanism to require everyone to pay their fair share of these expenses.<sup>106</sup> The Court upheld the imposition of agency fees for these reasons; however, it found no evidence that Congress intended that the mandatory fees permit unions to force employees, “over their objection, to support political causes which they oppose.”<sup>107</sup> The union was free to make political expenditures, but not with the money of objecting union-shop employees, who needed only pay a lower agency fee for covered services.<sup>108</sup>

In so construing the statute, the *Street* Court avoided the constitutional question. It also avoided passing judgment on expenses that fell into the grey area “between the costs which led directly to the complaint as to ‘free riders,’ and the expenditures to support union political activities.”<sup>109</sup> Both of these issues were presented in *Abood*. Detroit public school teachers in a recently unionized workplace sought to overturn a state law that mirrored federal labor laws in substantial respects, including the grant of exclusive representation to unions and their duty of fair representation for all covered employees.<sup>110</sup> The Michigan law, however, explicitly allowed the union to spend its agency fees on “legislative lobbying and in support of political candidates.”<sup>111</sup> Both the mandatory fee and its use for political purposes were challenged.<sup>112</sup>

The *Abood* Court answered the two questions quite differently. As to the mandatory agency fee, the Court agreed that petitioners raised a valid First Amendment objection, but found that the resolution of the question was answered by *Hanson*, which sustained agency fees against a First Amendment challenge, and *Street*, which read the RLA to bar the use of nonmember fees for unrelated ideological or political purposes.<sup>113</sup> While the Court acknowledged that differences between public- and private-sector workplaces existed

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<sup>106</sup> *Id.* at 761.

<sup>107</sup> *Id.* at 764; *see also id.* at 767–68 (“Congress . . . was made fully aware that it was deciding these critical issues of individual right versus collective interests . . . . Indeed, Congress gave very concrete evidence that it carefully considered the claims of the individual to be free of arbitrary or unreasonable restrictions resulting from compulsory unionism. It did not give a blanket approval to union-shop agreements. Instead it enacted a precise and carefully drawn limitation on the kind of union-shop agreements which might be made. The obvious purpose of this careful prescription was to strike a balance between the interests pressed by the unions and the considerations which the Carriers have urged.” (internal quotation marks and citations omitted)).

<sup>108</sup> *Id.* at 770.

<sup>109</sup> *Id.* at 769–70.

<sup>110</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223–24 (1977).

<sup>111</sup> *Id.* at 215.

<sup>112</sup> *Id.* at 212–13.

<sup>113</sup> *Id.* at 226–32.

and might bear on policy judgments regarding the decision to authorize public-sector unions, it rejected the contention that the public/private sector distinction meaningfully altered the constitutional burden the agency fee imposed on an individual employee.<sup>114</sup> The Michigan law did not limit any employee's ability to express her views about issues subject to the collective bargaining agreement, the Court noted, and employees in the private sector might also object to "a variety of union activities [that] conflict with their beliefs."<sup>115</sup> Petitioners' emphasis on public-sector employment as being inherently political was misplaced in this context, the Court explained. First, "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."<sup>116</sup> Second, the Court's previous cases had already assumed that the agency fees imposed a significant First Amendment burden. The fee could be assessed not because it did not impact speech rights, but because even in light of that impact it was a reasonable legislative solution to a significant issue that was within Congress's power to regulate.<sup>117</sup>

As to the question of how the union could spend the money collected via mandatory fees, the Court overturned the state law insofar as it permitted agency fees to be used for "political and ideological purposes unrelated to collective bargaining."<sup>118</sup> In doing so, it employed soaring and oft-quoted rhetoric to declare that

at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections.<sup>119</sup>

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<sup>114</sup> *Id.* at 232 ("The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.").

<sup>115</sup> *Id.* at 230 ("The very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees."); *id.* at 231–32 ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs."). Just a year before, the Court had held that even commercial speech was due some level of constitutional protection. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

<sup>116</sup> *Abood*, 431 U.S. at 232.

<sup>117</sup> *Id.* at 219.

<sup>118</sup> *Id.* at 232.

<sup>119</sup> *Id.* at 234–35 (citations omitted). The Court quoted from both *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642, a compelled speech decision, and *Buckley v. Valeo*, 424 U.S. 1, 22–23, a money-for-speech decision, in this section of its opinion, ignoring any distinction between a direct and indirect imposition of a speech compulsion. *Abood*, 431 U.S. at 234–35.

The best way to reconcile these apparently discordant descriptions of an employee's First Amendment rights is to recognize the work done by the dependent clause "unrelated to collective bargaining"—which the Court repeats several times throughout its opinion<sup>120</sup>—to focus the First Amendment inquiry on whether the union has unduly leveraged its position as exclusive representative to extract funds that exceed its statutory purpose.<sup>121</sup> Whereas the *Abood* litigants had argued that the touchstone of their case rested in the notion of whether the speech at issue was "political," the Court's ruling instead turned on whether it was "related" to the overriding statutory scheme. So long as the funds at issue are being spent on activities intended to benefit employees and that the union is required to furnish, an employee can be asked to provide them; funds used to benefit the union's political goals must be voluntary.<sup>122</sup>

Until recently, this "related/unrelated" distinction guided the Court's analysis of compelled subsidy claims raised in similar contexts, with compelled fees for provided services held constitutional even if potentially controversial speech were involved, and compelled fees for ideological activity not part of the organization's core mission barred by the First Amendment.<sup>123</sup> For example, in *Lehnert v. Ferris Faculty Association*, the Court held that a union could not use agency fees to fund litigation by a national affiliate that did not concern its unit, but it could charge nonmembers for strike preparation in support of its collective bargaining goals.<sup>124</sup> Similarly, in *Keller v. State Bar*, the Court applied *Abood* to hold that state bar associations could

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<sup>120</sup> See *id.* at 215, 232, 236, 241.

<sup>121</sup> See *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 786 (1961) (Black, J., dissenting) (noting that the "imposition of 'assessments . . . not germane to collective bargaining' would present 'a different problem'" (quoting *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225, 235 (1956))).

<sup>122</sup> *Abood*, 431 U.S. at 235–36.

<sup>123</sup> *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); see also *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984) ("[W]hen employees . . . object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."); cf. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2326–27 (2013) (holding that a federal program that "compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program" violates the First Amendment); *Keller v. State Bar*, 496 U.S. 1, 14 (1990) (noting that a group "may not . . . fund activities of an ideological nature" that are "not 'germane' to the purpose for which compelled association was justified"). Employees with a religious objection to an agency fee are typically allowed by statute to contribute the funds they would have paid to a union to a charity of their choice. See, e.g., 29 U.S.C. § 169 (2012); ALASKA STAT. § 23.40.225 (2016); WASH. REV. CODE § 47.64.160 (2017).

<sup>124</sup> *Lehnert*, 500 U.S. at 528. If the union had actually engaged in a strike, that would have been illegal and not chargeable. *Id.* at 531.



only extract compulsory fees from attorneys for purposes related to the regulation and improvement of the profession and not for unrelated ideological initiatives, such as lobbying for gun regulations.<sup>125</sup>

Given that the union activity to which Sam objects—negotiating for the increased use of BWCs—arises within the context of the union’s collective bargaining duties, it would seem that he has no viable First Amendment claim to opt out of payments. Or so it would have seemed up until 2012, when the Supreme Court began openly questioning the balance struck in *Abood*.

## 2. *Knox and Harris*

Notwithstanding *Hanson* and its progeny, Sam’s objection to paying his union agency fee comes at a time when the Court appears ready to reconsider the lines it drew in its earlier union cases. A shift in the winds—or a shaking in the foundation—was signaled in 2012 with *Knox v. Service Employees Union International, Local 1000*.<sup>126</sup> The case appeared to present a relatively discrete procedural issue—the administration of a mid-year assessment by a union for political lobbying—but in his majority opinion against the union, Justice Alito spent several paragraphs criticizing *Abood* in dicta, calling the Court’s previous “[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues . . . something of an anomaly—one that we have found to be justified by the interest in furthering ‘labor peace.’”<sup>127</sup> Crucially, the majority opinion also blurred the distinction the Court had long observed between speech and financial support for speech, holding that “the compulsory fees constitute a form of compelled speech,” not mere subsidy of speech.<sup>128</sup>

Litigants saw, if not an invitation, certainly an opportunity in *Knox*’s language, and within two years a union agency fee case directly challenging *Abood* was before the Court. The petitioners in *Harris v. Quinn* were home health aide workers in Illinois who had recently been unionized and objected to the imposition of agency fees.<sup>129</sup> The majority of the Court, in an opinion again written by Justice Alito, upheld their challenge but sidestepped the big question, finding that because the employees in question were only “quasi” rather than “full” government employees—for example, they were paid by the state but hired by individual patients—*Abood* and its progeny did not apply; the

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<sup>125</sup> *Keller*, 496 U.S. at 12 (finding “a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other”).

<sup>126</sup> 567 U.S. 298, 309–11 (2012).

<sup>127</sup> *Id.* at 311 (quoting *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986)).

<sup>128</sup> *Id.* at 310; see also *supra* notes 44–45 and accompanying text.

<sup>129</sup> *Harris v. Quinn*, 134 S. Ct. 2618, 2626 (2014).

focus thus was on the nature of the speech restriction itself rather than whether the fee supported activities “germane” to collective bargaining.<sup>130</sup> Free of the force of precedent, the case proceeded under “generally applicable First Amendment standards.”<sup>131</sup> The Court subjected the fee to “exacting scrutiny,”<sup>132</sup> asking whether the mandatory agency fee served “a ‘compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.’”<sup>133</sup> In using this test to strike down the agency fee, the majority rejected the underlying rationales for *Abood*, which it seemed to leave standing only out of deference to precedent.

It is telling to look at how the majority in *Harris* (and, to a large extent, *Knox*) analyzed the First Amendment issues presented. Both *Harris* and *Knox* held that the compelled subsidy of speech “presents the same dangers as compelled speech”; there was no difference between being forced to say something and forced to pay for someone else to say something, even if one’s own ability to speak up is unfettered.<sup>134</sup> Thus it followed that because the agency fees required an employee to support speech on a matter of public concern, they placed a severe First Amendment burden on the dissenting workers.<sup>135</sup>

If the majority took a broad view of the First Amendment burden, it took a narrow view of the government’s countervailing interests. In a cramped reading of history, Justice Alito framed the government’s interest in “labor peace” as simply a desire to avoid disputes between unions vying to represent employees.<sup>136</sup> Because the union in *Harris* retained its exclusive bargaining

<sup>130</sup> *Id.* at 2638. The dissent and commentators have critiqued the majority opinion as seizing on a distinction without a difference—or, if it was a meaningful difference, without adequately describing what unique aspects of the Illinois home health aide scheme merited departure from *Abood*. *Id.* at 2645 (Kagan, J., dissenting). Justice Alito did take the opportunity to criticize *Hanson* and *Abood* in dicta as, variously, “thin,” “unsupported,” and “questionable.” *Id.* at 2621, 2629, 2632 (majority opinion). *Street* was dismissed because “[it] was not a constitutional decision.” *Id.* at 2621.

<sup>131</sup> *Id.* at 2639.

<sup>132</sup> *Id.* at 2639 (“[A]n agency-fee provision imposes ‘a significant impingement on First Amendment rights,’ and this cannot be tolerated unless it passes ‘exacting First Amendment scrutiny.’” (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 310 (2012))).

<sup>133</sup> *Id.* at 2639 (quoting *Knox*, 567 U.S. at 310).

<sup>134</sup> *Id.*; *Knox*, 567 U.S. at 309–11, 313–14. Justice Alito doubled down on this reading in the recent *Janus v. AFSCME* oral argument, comparing union nonmembers to Thomas Moore in *A Man for All Seasons*, and asking: “When you compel somebody to speak, don’t you infringe that person’s dignity and conscience in a way that you do not when you restrict what the person says?” Transcript of Oral Argument at 38–45, *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.* (“AFSCME”), Council 31, No. 16-1466 (U.S. Feb. 26, 2018); *A MAN FOR ALL SEASONS* (Highland Films 1966); see also Transcript of Oral Argument at 4–7, *Janus supra* (reflecting that Petitioner’s counsel framed an agency fee as compelled speech, not compelled subsidization).

<sup>135</sup> *Harris*, 134 S. Ct. at 2642.

<sup>136</sup> *Id.* at 2631; see *Gen. Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962); see also *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 750–63 (1961) (giving a history of labor negotiations). Attempting to swing an existing union is in fact already barred by NLRB rules.

status, he explained that this interest was irrelevant.<sup>137</sup> As for the government's interest in everyone paying their "fair share," Justice Alito only mentioned this concern in passing, relying on his statement in *Knox* to dismiss "free-rider arguments . . . [as] generally insufficient to overcome First Amendment objections" without further discussion.<sup>138</sup> To reconstruct, then, the Court's argument between *Knox* and *Harris*: the free-rider argument is only relevant as it pertains to furthering labor peace; labor peace is only about inter-union rivalries; thanks to exclusive representation provisions, there is no risk of inter-union rivalries; thus, there is no need to be concerned for labor peace; ergo: free-rider arguments are no longer compelling.<sup>139</sup> This, of course, reads out any possibility that preventing free-riding might promote labor peace—the proposition from which *Knox* had started—in ways unrelated to inter-union rivalries (for example, reducing workplace tensions between members and nonmembers), or that it might serve other important purposes, such as avoiding the constitutionally problematic scenario of requiring unions to provide services to those who refuse to pay for them.<sup>140</sup>

The *Harris* majority also significantly restated the test to determine if the government's interests could be met by "means significantly less restrictive" than the mandatory agency fee. The union argued that all home health care workers had received significant benefits due to union representation and thus, it was implied, should equally bear the costs of representation.<sup>141</sup> Justice Alito explained that this showing was insufficient.<sup>142</sup> The fair share mandate could only be sustained if "the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join."<sup>143</sup> It was not enough to show that the loss of the funds would hurt the union; the loss must be fatal

<sup>137</sup> *Harris*, 134 S. Ct. at 2640; see also 29 U.S.C. § 158(b)(4)(C) (2012) (establishing that it would be an unfair labor practice for a union to "forc[e] or requir[e] any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees . . .").

<sup>138</sup> *Harris*, 134 S. Ct. at 2627 (quoting *Knox*, 567 U.S. at 311). As for the fact that the union's privileges as an exclusive agent came with the responsibility to represent all employees equally, whether or not they were union members, the majority reasoned that this burden was of little import because Illinois law already constrained many of the terms on which the union could bargain. *Id.* at 2640.

<sup>139</sup> See *Knox*, 567 U.S. at 311 ("[T]he free-rider argument [is] . . . one that we have found to be justified by the interest in furthering 'labor peace.'" (quoting *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986))); *Harris*, 134 S. Ct. at 2631.

<sup>140</sup> See *infra* note 303.

<sup>141</sup> *Harris*, 134 S. Ct. at 2640–41.

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

<sup>143</sup> *Id.* at 2641; see also Transcript of Oral Argument at 72, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam) (No. 14-915) ("*Abood* never said, and no case since *Abood* has ever said, that agency fees are necessary to union survival. *Abood* couldn't have said that, because when *Abood* ruled as it did, Taft-Hartley had been on the books for decades.").

to it. The majority, which introduced this reformulated test with no citation, seemed to put the burden for proving this counterfactual on the union.<sup>144</sup>

Four Justices dissented in an opinion authored by Justice Kagan.<sup>145</sup> Among other points, she revisited the question of whether the government had shown a compelling interest justifying the fee. Justice Kagan argued that the majority had fundamentally misunderstood (or ignored) the argument advanced by the state and union. The “free rider” justification was not (only) about the fairness of nonunion members receiving some ancillary “spillover” benefit from the union’s activities, but about the fact that the union was legally bound to represent the nonmembers and could not discriminate against them in its negotiations.<sup>146</sup> Justice Kagan quoted at length from an earlier opinion by Justice Scalia upholding agency fees:

The “compelling state interest” that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of “free-riding” nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the “free riders” [in unions] . . . is that . . . the law *requires* the union to carry [free riders]—indeed, requires the union to go *out of its way* to benefit [them], even at the expense of its other interests. . . . [T]he free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.<sup>147</sup>

The *Harris* majority, which included Justice Scalia, did not address this argument.<sup>148</sup>

Justice Scalia’s forceful earlier opinion justifying agency fees and his failure to write separately in *Knox* and *Harris* did not go unremarked by commentators. “The silence of the normally voluble Justice Scalia is both aberrant and enigmatic,” William Gould observed in a review of the 2014 Supreme Court term.<sup>149</sup> He noted that a majority of the Court appeared poised to overrule *Abood* squarely if presented with the right case, and he flagged a recent Ninth Circuit decision that might provide just such a vehicle, *Friedrichs v. California*

<sup>144</sup> See *Harris*, 134 S. Ct. at 2641 (“[A] majority of the personal assistants voted to unionize. When they did so, they must have realized that this would require the payment of union dues, and therefore it may be presumed that a high percentage of these personal assistants became union members and are willingly paying union dues. Why are these dues insufficient . . . ?”).

<sup>145</sup> *Id.* at 2644 (Kagan, J., dissenting).

<sup>146</sup> *Id.* at 2656.

<sup>147</sup> *Id.* at 2657 (quoting *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part)).

<sup>148</sup> While not in direct response to the dissent, the majority opinion did note that the health care union’s “scope of bargaining” was “sharply limited” by statute, presumably implying that the services provided were not significant, but this goes only to the amount charged, not the underlying principle. *Id.* at 2635 (majority opinion).

<sup>149</sup> William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v. Quinn: Déjà Vu All Over Again?*, 2014 SUP. CT. REV. 133, 157 (2014).

*Teachers Association*.<sup>150</sup> “The good news is that Justice Scalia . . . could still tip the delicate balance,” Professor Gould wrote. Then again, he added wryly, “The bad news is that Justice Scalia could tip the balance.”<sup>151</sup>

### 3. *Friedrichs v. California Teachers Association*

We know now that Justice Scalia would have tipped the balance, although we may never know for sure which way.<sup>152</sup> Rebecca Friedrichs was a veteran California public school teacher who objected to many of the policy positions advocated by her union and challenged the mandatory agency fee in court.<sup>153</sup> Her eponymous lawsuit was rushed through the lower courts by groups long opposed to unions, but it arrived at the Supreme Court just a bit too late.<sup>154</sup> The case was argued on January 11, 2016.<sup>155</sup> Barely a month later, on February 13, Justice Scalia passed away suddenly, and *Friedrichs* became the first significant case to be summarily affirmed by a 4-4 vote in the 2015–2016 term.<sup>156</sup>

For observers, *Friedrichs* presented a rare opportunity of extended equipoise, the legal equivalent of an insect frozen in amber. More than fifty briefs were filed either in support of or in opposition to the questions presented, which asked the Court, first, whether *Abod* should be overruled, and second, whether the First Amendment requires that union membership be determined via opt-in rather than opt-out clauses.<sup>157</sup> The Paycheck Problem is concerned with the first question, which consumed the bulk of the briefing and oral argument.

<sup>150</sup> *Id.* at 160 (citing *Friedrichs v. Cal. Teachers Ass’n*, No. 13–57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff’d* No. SACV 13–676–JLS (CWx), 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013), *aff’d by an equally divided court*, 136 S. Ct. 1083 (2016) (per curiam)).

<sup>151</sup> *Id.* at 173.

<sup>152</sup> *But see* Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> (quoting Justice Ginsburg that “[t]his court couldn’t have done better than it did” with the 4-4 result in *Friedrichs*).

<sup>153</sup> *Friedrichs v. Cal. Teachers Ass’n*, No. SACV 13–676–JLS (CWx), 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013), *aff’d*, No. 13–57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff’d by an equally divided court*, 136 S. Ct. 1083 (2016) (per curiam).

<sup>154</sup> The petitioners did not even pause to develop a record. Transcript of Oral Argument at 61–62, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915).

<sup>155</sup> *Id.*

<sup>156</sup> *Friedrichs*, 136 S. Ct. 1083; *see* Lyle Denniston, *Opinion Analysis: Result but No Guidance on Public Unions’ Fees*, SCOTUSBLOG (Mar. 29, 2016, 11:44 AM), <http://www.scotusblog.com/2016/03/opinion-analysis-result-but-no-guidance-on-public-unions-fees/> (“Tuesday’s result in this key case marked the second time that the Court, with its membership reduced by one, had divided evenly in a case it had reviewed. A week ago, it did so in a case about spouses’ responsibility for each others’ debts.” (citing *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072 (2016) (per curiam))). Petitioners’ request for a new hearing before nine Justices was denied. *Friedrichs v. Cal. Teacher’s Ass’n*, 136 S. Ct. 2545 (2016) (mem.).

<sup>157</sup> *Friedrichs v. California Teachers Association*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/friedrichs-v-california-teachers-association/> (last visited Jan. 31, 2018) (indicating that 58 amicus briefs were filed).

Petitioners did not attempt to distinguish *Abood* but challenged it as wrongly decided.<sup>158</sup> Thus their argument was framed by an effort to distinguish *Hanson* and *Street*, which involved private-sector unions, from situations involving public-sector unions.<sup>159</sup> Advancing again the argument the Court had rejected nearly forty years earlier, Petitioners contended that virtually all terms of public employment were “political” and thus the agency fee should be subject to exacting First Amendment scrutiny.<sup>160</sup> To the extent they made this argument in an effort to distinguish the private sector cases from *Abood*, they may have proved too little; *Abood* itself subjected the public teachers’ agency fee to “exacting scrutiny.”<sup>161</sup> To the extent they made this argument to suggest that the previous union cases had underestimated the First Amendment burden the agency fee places on public employees, they may have proved too much. “[C]ompelled subsidization of speech and mandated association receive exacting First Amendment scrutiny even in the ‘mundane’ contexts of commercial speech and general civic groups,” Petitioners argued in their opening brief.<sup>162</sup> Given this, one might wonder—as several of the Justices did at oral argument—why Petitioners’ argument did not also sweep into its ambit private union agreements such as those in *Hanson* and *Street*.<sup>163</sup>

While Petitioners did acknowledge that their lawsuit presented a compelled subsidy rather than a compelled speech challenge, it is not clear that they viewed the First Amendment burden in any way attenuated by the fact.<sup>164</sup> California Teachers Association’s (“CTA”) collective bargaining activities raised special First Amendment concerns, Petitioners explained, because they included speech that was potentially “politically controversial or inconsistent with the beliefs of some teachers,”<sup>165</sup> they involved issues of “public concern”

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<sup>158</sup> Brief for the Petitioners at 16, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915), 2015 WL 5261564 [hereinafter *Friedrichs* Pet’r Br.].

<sup>159</sup> *Id.* at 29, 2015 WL 5261564.

<sup>160</sup> *Id.* at 20, 2015 WL 5261564; see *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977) (“Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective ‘political’ can properly be attached to those beliefs the critical constitutional inquiry.”).

<sup>161</sup> *Id.* at 259 (Powell, J., concurring in the judgment).

<sup>162</sup> *Friedrichs* Pet’r Br., *supra* note 158, at 18.

<sup>163</sup> Transcript of Oral Argument at 6, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915). Petitioner Counsel’s explanation that private union agreements are distinguishable because “the First Amendment doesn’t apply to private employers, and because in [prior private union cases] the Court established the rules for agency shops based on the statute without any First Amendment [analysis]” was met by some skepticism by certain members of the Court. *Id.* at 6–15; see also *supra* notes 73–79 (discussing *United Foods*).

<sup>164</sup> See, e.g., *Friedrichs* Pet’r Br., *supra* note 158, at 10–11.

<sup>165</sup> *Id.* at 22.

and attempts to “influence governmental policymaking,”<sup>166</sup> and they had a fiscal impact of the state budget.<sup>167</sup> Consider these objections in light of the full range of activities that prompt Sam’s concerns in the Paycheck Problem.

A review of the oral argument transcript suggests that the case may have come down to the “narrowly tailored” question, as re-shaped in *Harris*: could the union survive without the mandatory agency fee? Justice Scalia focused on this question during oral argument, and parties disputed which of them bore the burden of proof for it.<sup>168</sup> In the end, the point was moot as far as *Friedrichs* was concerned. At the end of its 2016 term, the Court rejected a motion for rehearing on the case.<sup>169</sup>

The sword suspended over public union agency fees may be about to fall. At the start of the October 2017 term, following Neil Gorsuch’s confirmation to fill its vacant ninth seat, the Court agreed to hear *Janus v. American Federation of State, County and Municipal Employees* (“AFSCME”), *Council 31*.<sup>170</sup> The case again asks the Court to overrule *Abood*, and most Court watchers believe that this will happen.<sup>171</sup>

The briefs filed supporting and opposing the *Janus* petition for certiorari suggest that advocates read the tea leaves in *Friedrichs*. For example, significant attention is given to the question of whether abolishing the mandatory agency fee would significantly harm unions.<sup>172</sup> In addition to defending *Abood*’s reasoning, Respondents appear ready to raise again two arguments rehearsed in *Friedrichs*: that the government is held to a less high burden when it impacts free speech rights as an employer rather than a sovereign, and that the absence of any record below makes the case a poor vehicle for overruling a forty-year-old precedent.<sup>173</sup> Petitioner too raises similar claims: that unions

<sup>166</sup> *Id.* at 22–23 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (majority opinion)).

<sup>167</sup> *Id.* at 25–26.

<sup>168</sup> See Transcript of Oral Argument at 50–51, 57, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915).

<sup>169</sup> *Friedrichs v. Cal. Teacher’s Ass’n*, 136 S. Ct. 2545 (2016) (mem.).

<sup>170</sup> 851 F.3d 746 (7th Cir.), *cert. granted sub nom. Janus v. Am. Fed’n*, 138 S. Ct. 54 (2017) (mem.).

<sup>171</sup> *Id.*; see also Ross Runkel, *Janus v. AFSCME Could End Public Sector “Agency Shop” Agreements*, ROSS RUNKEL REP. (Sept. 28, 2017), <https://www.rossrunkelreport.com/blog/janus-v-afscme-cert> (“I don’t know anyone who thinks *Abood* will survive.”). The question of whether the Constitution demands an opt-in versus an opt-out procedure to determine union membership, the second question in *Friedrichs*, is not presented in *Janus*. See Brief of Amici Curiae Rebecca Friedrichs & Freedom Found. in Support of Petitioner at 2–4, *Janus*, 138 S. Ct. 54 (2017) (mem.) (No. 16-1466).

<sup>172</sup> See, e.g., Brief of Amicus Curiae of the Buckeye Inst. for Pub. Policy Sols. in Support of Petitioner at 2–4, *Janus*, 138 S. Ct. 54 (2017) (mem.) (No. 16-1466); Brief of Amicus Curiae Mackinac Ctr. for Pub. Policy in Support of Petitioner at 1–3, *Janus*, 138 S. Ct. 54 (2017) (mem.) (No. 16-1466).

<sup>173</sup> Compare Brief in Opposition for Respondents Lisa Madigan & Michael Hoffman at 6, *Janus*, 138 S. Ct. 54 (2017) (mem.) (No. 16-1466), with Brief for the Union Respondents at 109, *Friedrichs*, 136 S. Ct. 1083 (per curiam) (No. 14-915). See also *Harris v. Quinn*, 134 S. Ct. 2618, 2653 (2014) (Kagan, J., dissenting) (“This Court has long acknowledged that the government has wider constitutional latitude when it is acting as employer than as sovereign.”).

routinely engage in political activities with agency fees notwithstanding procedural safeguards established to administer *Abood*, and that the nature of public unions is such that all of their activity is political and therefore one cannot be compelled to pay for it.<sup>174</sup> As for the “free rider” question, Petitioner disputes the underlying legislative rationale for agency fees, arguing that many employees receive no benefit from the union and that the grant of exclusive representation provides “advantages [that] far outweigh any minor disadvantages that may come with exclusive representative power.”<sup>175</sup> These preliminary briefs do not address the line articulated in *Abood* between, on the one hand, the nature of a union’s speech in public and private contexts and the policy judgments implicated in authorizing unions in the public and private sectors (where the *Abood* Court agreed distinctions could be drawn), and, on the other, the nature of the First Amendment burden that agency fees impose on public as opposed to private employees (where it found no meaningful distinction).<sup>176</sup>

The deciding vote on the question of public union agency fees is now on the Court. Widely regarded as an originalist in the mold of Justice Scalia, Justice Gorsuch appears to take a robust view of the protections of the First Amendment, although he has not yet considered a case that presents the agency fee question.<sup>177</sup> During his first few months on the Court he has consistently voted with its most conservative members.<sup>178</sup> Officer Sam could be forgiven for eagerly anticipating the day he can stop paying his agency fee.

#### D. Public Pension Contributions

A discussion of the law relevant to the pension prong of the Paycheck Problem begins with two observations. First, there are very few cases reported in any court in which shareholders have filed a lawsuit based on a company’s

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<sup>174</sup> Compare Petition for Writ of Certiorari at 10–13, *Janus*, 138 S. Ct. 54 (2017) (mem.) (No. 16-1466), with *Friedrichs* Pet’r Br., *supra* note 158, at 9–11.

<sup>175</sup> Petition for Writ of Certiorari at 28–29, *Janus*, 138 S. Ct. 54 (2017) (mem.) (No. 16-1466).

<sup>176</sup> See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977).

<sup>177</sup> See *id.* at 211; see also *Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017) (noting that Justice Gorsuch joined with Justice Thomas to dissent from the Court’s summary affirmance of a lower court case upholding contribution limits to political parties), *affg* 219 F. Supp. 3d 86, 88–89 (D.D.C. 2016); *Little Sisters of the Poor v. Burwell*, 799 F.3d 1315, 1316–18 (10th Cir. 2015) (Hartz, J., dissenting) (reflecting that Justice Gorsuch joined a dissent that would have found filing a one-page form to opt out of contraception coverage an unconstitutional burden of religious liberty), *vacated sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); Ramesh Ponnuru, *Neil Gorsuch: A Worthy Heir to Scalia*, NAT’L REV. (Jan. 31, 2017), <http://www.nationalreview.com/article/444437/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir>.

<sup>178</sup> See Nina Totenberg, *Justice Neil Gorsuch Votes 100 Percent of the Time with Most Conservative Colleague*, NPR (July 1, 2017, 12:25 PM), <http://www.npr.org/2017/07/01/535085491/justice-neil-gorsuch-votes-100-percent-of-the-time-with-most-conservative-collea>.



political spending,<sup>179</sup> even fewer where the plaintiffs raised a First Amendment objection to such expenditures,<sup>180</sup> and none that either my research assistants or I could locate in which the corporate shareholder (or functional equivalent) was victorious. Second, notwithstanding this fact, the very first amicus brief to be filed with the Supreme Court in support of the union's position in *Friedrichs* was submitted by nineteen prominent corporate law professors.<sup>181</sup> The brief was filed to disabuse the Court of the assumption it had made in previous cases “that if shareholders disapprove of corporate political expression, they can easily sell their shares or exercise control over corporate spending.”<sup>182</sup> It is not difficult to read between the lines of the brief an awareness of the potential of the union cases to unsettle the relationship between corporations and shareholders, including pension funds and beneficiaries.<sup>183</sup>

To understand this apparent incongruity, it is necessary to understand the key role that the concept of “corporate democracy” has assumed in cases that involve the constitutionality of corporations using their shareholders' money to make political expenditures. While the dissenting shareholder has played only a bit part in shareholder derivative actions—and for good reason, as discussed below—she has made a regular appearance in the Supreme Court's campaign finance cases.<sup>184</sup>

Prior to *Citizens United*, both corporations and unions were required to use segregated accounts (“political action committees” or “PACs”) to make contributions to politicians and to make political independent expenditures.<sup>185</sup>

<sup>179</sup> See *Marsili v. Pac. Gas & Elec. Co.*, 124 Cal. Rptr. 313, 315 (Cal. Ct. App. 1975) (addressing whether California state law allowed corporate contribution to a political cause); *Barnes v. State Farm Mut. Auto. Ins. Co.*, 20 Cal. Rptr. 2d 87, 88 (1993) (addressing whether insurance company could spend premium revenues on political cause that some policyholders opposed); *Stern v. Gen. Elec. Co.*, 837 F. Supp. 72, 74 (S.D.N.Y. 1993) (addressing shareholder's claims that General Electric's contributions to its political action committee constituted corporate waste and violation of fiduciary duties), *aff'd*, 23 F.3d 746 (2d Cir. 1994).

<sup>180</sup> See *Barnes*, 20 Cal. Rptr. 2d at 91–94; see also *Marsili*, 124 Cal. Rptr. at 322 (refusing to consider counterargument by corporation that it had a First Amendment right to make the challenged contribution).

<sup>181</sup> Brief of Corporate Law Professors as Amici Curiae in Support of Respondents at 1–3, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915) (per curiam), 2015 WL 7068957 [hereinafter *Corporate Law Professors' Brief*].

<sup>182</sup> *Id.* at 4 n.3 (listing cases).

<sup>183</sup> See, e.g., *id.* at 6 (“What can a shareholder do if she disagrees with a corporate expenditure, whether on a particular business strategy or in support of a political position? The short answer is very little.”).

<sup>184</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 361–63 (2010); *McConnell v. FEC*, 540 U.S. 93, 204 (2003); *FEC v. Beaumont*, 539 U.S. 146, 163 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792–93 (1978).

<sup>185</sup> See *Citizens United*, 558 U.S. at 320–21 (citing 2 U.S.C. § 441b(b)(2) (2006) (current version at 52 U.S.C. § 30118(b)(2) (2012))).

Contributions to PACs are voluntary and subject to contribution limits.<sup>186</sup> (In addition, unions continue to have significant accounting requirements to ensure that nonmembers are not charged for other activities that are not germane to the union's representation.<sup>187</sup>) Citizens United, a corporation, produced and wanted to distribute a movie attacking Hillary Clinton.<sup>188</sup> It argued, *inter alia*, that it should be able to use its general treasury funds to do so.<sup>189</sup>

In defense of the PAC requirement, the Government argued that if corporations could use their unlimited general treasury funds to support political issues and candidates, they would put corporate investors in the position of funding political speech—speech that the Court has long recognized lies at the heart of the First Amendment.<sup>190</sup> It was not writing on new ground. Professor Adam Winkler has argued that a concern about the misuse of “other people’s money” significantly advanced and informed early campaign finance reform efforts.<sup>191</sup> And in several prior cases upholding laws that limited corporate political speech, the Supreme Court in fact recognized the concerns of dissenting shareholders.<sup>192</sup> For example, in *Austin v. Michigan Chamber of Commerce*, which upheld a state law banning corporations from using general treasury funds on independent expenditures, Justice Brennan invoked the image of a “captive stockholder of a business corporation” in his concurrence against the corporate interests.<sup>193</sup> He rejected the idea that

<sup>186</sup> 52 U.S.C. § 30118(b)(3) (2012); 52 U.S.C.A. § 30116 (West 2017).

<sup>187</sup> *Chi. Teacher Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306–07, 310 (1986) (“We hold today that the constitutional requirements for the Union’s collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”); see also Fisk & Chemerinsky, *supra* note 22, at 1038; Sachs, *supra* note 19, at 861; cf. *Citizens United*, 558 U.S. at 337.

<sup>188</sup> See *Citizens United*, 558 U.S. at 320–21.

<sup>189</sup> *Id.*

<sup>190</sup> See *id.* at 361 (discussing the Government’s argument “that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech”).

<sup>191</sup> Adam Winkler, “Other People’s Money”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 *GEO. L.J.* 871, 876 (2004) (“[T]he early emphasis on excessive corporate power was insufficient to lead to broad reform; it was only after the ‘other people’s money’ theme supplemented other concerns about corporate politics and shifted the focus of public debate that the ban [on corporate political contributions] attracted the necessary support.”).

<sup>192</sup> See, e.g., *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (recognizing that the ban on corporate political contributions protected shareholders); *McConnell v. FEC*, 540 U.S. 93, 204 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 663 (1990) (noting that “many of [the Chamber’s] members may be . . . reluctant to withdraw as members even if they disagree with the Chamber’s political expression, because they wish to benefit from the Chamber’s nonpolitical programs and to establish contacts with other members of the business community”); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (describing the importance of persons connected with a corporation having “no economic disincentive for disassociating with it if they disagree with its political activity”).

<sup>193</sup> *Austin*, 494 U.S. at 674–75 (Brennan, J. concurring); see also *id.* at 675 (“[T]he State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not

stockholder divestment could provide a remedy because that “would impose a financial sacrifice on those objecting to political expenditures.”<sup>194</sup>

Justice Kennedy dissented in *Austin*, and he wrote the majority opinion in the case that overruled it. *Citizens United* eliminated the PAC requirement for everything except direct political contributions.<sup>195</sup> Justice Kennedy explained that PACs did not reasonably accommodate competing interests because they were “burdensome,” “expensive,” and “subject to extensive regulations.”<sup>196</sup> As for the interests of dissenting shareholders in the face of unrestrained corporate political spending, Justice Kennedy reached back to *First National Bank of Boston v. Bellotti*, an earlier case in which the Court had overturned a state ban on corporate expenditures on political referenda, to explain, with little discussion, that shareholders’ interests could be protected “through the procedures of corporate democracy.”<sup>197</sup>

The reader who perceives a potential conflict between this logic and the union cases described above (which nowhere reference union democracy but do impose significant accounting responsibilities to segregate political funds<sup>198</sup>) is not alone. Indeed, *Bellotti* itself had featured a strenuous dissent by Justice White arguing that *Abood* had already answered the question presented—individuals could not be forced to subsidize an organization’s political speech.<sup>199</sup> The majority there rejected the analogy because “[t]he critical distinction here is that no shareholder has been ‘compelled’ to contribute anything.”<sup>200</sup> Justice White in turn observed that the “employees in *Street* and *Abood* were also free to seek other jobs where they would not be compelled to finance causes with which they disagreed, but we held in *Abood* that First Amendment rights could not be so burdened.”<sup>201</sup>

In the Paycheck Problem, all of Sam’s payments are required by law, so the degree of compulsion does not distinguish one from the other.<sup>202</sup> The

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wish to contribute to the Chamber’s political message.”).

<sup>194</sup> *Id.* at 674.

<sup>195</sup> *Citizens United*, 558 U.S. at 365–66.

<sup>196</sup> *Id.* at 337.

<sup>197</sup> *Id.* at 362 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)); *see also id.* at 370–71.

<sup>198</sup> *See supra* note 187 and accompanying text.

<sup>199</sup> *Bellotti*, 435 U.S. at 814–19 (White, J., dissenting) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

<sup>200</sup> *Id.* at 794 n.34 (majority opinion).

<sup>201</sup> *Id.* at 818 (White, J., dissenting) (“Clearly the State has a strong interest in assuring that its citizens are not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities.”).

<sup>202</sup> 26 U.S.C. § 3301 (2016) (requiring employers to withhold income taxes from all employees); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding state laws may constitutionally impose the withholding of union agency fees); NAT’L ASS’N OF STATE RETIREMENT ADM’RS, EMPLOYEE CONTRIBUTIONS TO PUBLIC PENSION PLANS 1 (2017), <https://www.nasra.org/files/Issue%20>

question remains, however, whether corporate democracy sets compelled subsidies of corporations apart from union dues, which brings us back to the corporate law professors' amicus brief in *Friedrichs*. A brief review may be helpful. Corporations are, like unions, entities authorized by state law to harness and channel the collective resources of stakeholders.<sup>203</sup> While technically the shareholders own the capital and thus the corporation, they have virtually no control over the corporation's day-to-day activities, which is vested in managers and officers.<sup>204</sup> As with union officers, corporate officers owe their stakeholders a fiduciary duty to, *inter alia*, avoid self-dealing and act in good faith.<sup>205</sup> Even if this were not a highly deferential standard, it requires information to monitor. This is not the venue for a protracted discussion of the requirements, timing, and effectiveness of corporate disclosures, but for present purposes suffice it to say that to date the SEC has not mandated disclosure of corporate political spending.<sup>206</sup> Nor is it likely to do so soon; the

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Briefs/NASRAContribBrief.pdf (noting that almost all public sector employees are required to contribute towards public pension plans); *see also supra* note 98.

<sup>203</sup> *See Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.").

<sup>204</sup> *See, e.g.*, Corporate Law Professors' Brief, *supra* note 181, at 7 ("Indeed, a core goal of corporate law is to give directors and officers legal authority to act in ways with which shareholders may profoundly disagree."); *see also* DEL. CODE ANN. tit. 8, § 141 (2017) (vesting power and duties vis-à-vis a corporation in its directors and officers); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 927 (2013) (advocating for SEC rules to require public companies to disclose their political spending because "the interests of directors and executives with respect to such spending may frequently diverge from those of shareholders"); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 340 (2015) ("*Citizens United* rests on the notion that stockholders in corporations are well positioned to exercise influence over corporate political-spending decisions and that corporate political spending will therefore be a legitimate reflection of stockholder sentiment. But conservative corporate law theory is founded in important part on the premise that stockholders are poorly positioned to monitor corporate managers even for their fidelity to a profit-maximization goal. Indeed, conservative corporate law theory teaches that it is often irrational for stockholders to exercise voice over even profit-related issues, much less to influence a particular corporation's approach to political spending.").

<sup>205</sup> *See* DEL. CODE ANN. tit. 8, § 145 (2017); *see also* Melvin Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1 (2006) (describing the duty of good faith as recognized by Delaware courts).

<sup>206</sup> A rulemaking petition calling for the disclosure of corporate political spending was submitted to the SEC in mid-2011, and as of December 2015 it had garnered more than 1.2 million comments but no action from the agency. *See* Lucian Bebchuk & Robert J. Jackson, Jr., *Hindering the SEC from Shining a Light on Political Spending*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 21, 2015), <https://corpgov.law.harvard.edu/2015/12/21/hindering-the-sec-from-shining-a-light-on-political-spending/> (discussing omnibus budget rider to prevent SEC from proceeding with a rulemaking on disclosure of political spending); *see also* Alex Guillén, *Senate Sends SEC Disclosure Rule to the Dust Bin*, POLITICO (Feb. 3, 2017, 7:06 AM), <http://www.politico.com/story/2017/02/senate-votes-to-kill-sec-disclosure-rule-234590> (reporting on vote to nullify SEC rule that would have required companies to disclose payments to foreign governments).

most recent federal budgets have barred the SEC from moving forward with any rulemaking on disclosure of political spending.<sup>207</sup> As a result, “[s]hareholders in most public companies in the United States do not have the information they need to determine whether the company engages in political spending, how much is spent, or who the recipients are.”<sup>208</sup>

Even if shareholders do learn about a corporation’s spending decisions, they would have limited recourse to object under corporate law. As Lucian Bebchuk and Robert Jackson observed after *Citizens United*, “Under existing law, political speech is governed by the same rules as ordinary business decisions, which give directors and executives virtually plenary authority.”<sup>209</sup> Shareholders—individual or institution—have three choices to make their displeasure felt: vote for a new board of directors, sell their shares, or sue the company.<sup>210</sup> Voting is of limited value.<sup>211</sup> Many stocks are now held by intermediaries such as pension or mutual funds, so the actual source of the capital may not have a vote at all.<sup>212</sup> Moreover, the likelihood of any single investor owning enough shares to impact corporate policy is slim.<sup>213</sup> Selling the shares, even if an option (it is not for Sam or many investors), presents a Hobson’s choice of staying in the market and subsidizing expression one opposes or leaving and absorbing significant financial consequences.

That leaves a lawsuit. A successful derivative lawsuit must prove a breach of the fiduciary duty of loyalty, such as waste, fraud, or self-dealing.<sup>214</sup> However, corporate directors can raise as a defense the “business judgment rule,” which prevents courts from second-guessing corporate board decisions “if

<sup>207</sup> The 2017 budget continues to block the SEC from using any appropriated funds “to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.” Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 635, 131 Stat. 135, 376 (2017).

<sup>208</sup> Bebchuk & Jackson, *supra* note 204, at 930. Some large institutional investors, such as pension funds, have adopted policies recommending the disclosure of corporate political spending. See, e.g., CAL. PUB. EMPS.’ RETIREMENT SYS., GOVERNANCE & SUSTAINABILITY PRINCIPLES ¶ III.B.7.f.iii. (Mar. 16, 2017), <https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf> (mandating “disclos[ure] on an annual basis [of] the amounts and recipients of monetary and non-monetary contributions,” including any political spending done through intermediaries). Even this is cold comfort to the employee who provided the capital being invested.

<sup>209</sup> Bebchuk & Jackson, *supra* note 19, at 83.

<sup>210</sup> See, e.g., Joseph K. Leahy, *Are Corporate Super PAC Contributions Waste or Self-Dealing? A Closer Look*, 79 MO. L. REV. 283, 287–89 (2014).

<sup>211</sup> See Corporate Law Professors’ Brief, *supra* note 181, at 6–17.

<sup>212</sup> See *id.* at 25 (showing that in 1950 more than 90% of stocks were held by individuals; that by 2009 it was less than 40%; and that most of that percentage drop reflects the rise of institutional investors, who now own more than 50% of equities).

<sup>213</sup> See *id.* at 10–23 (arguing that “most investors have little influence, direct or indirect, on a typical corporate board”).

<sup>214</sup> See generally Leahy, *supra* note 210; Joseph K. Leahy, *Corporate Political Contributions as Bad Faith*, 86 U. COLO. L. REV. 477, 478, 481 (2015).

ordinary business-persons could differ on the sufficiency of benefit received” and if there is no motive of personal interest or self-dealing.<sup>215</sup> As Joseph Leahy recently explained:

[The business judgment rule] instructs courts that, rather than look at the *quality* of the board’s *decision* (i.e., was the decision negligent?), the court should look to *integrity* of the board’s *decision-making process* (i.e., was the decision made in good faith, uninterested, independent, minimally informed, and not made in a grossly negligent manner?). As a result, judges are effectively prohibited from evaluating the merits of rational, good faith business decisions.<sup>216</sup>

It is difficult to imagine that a rule of judicial deference to corporate decision-making would trump a constitutional concern should a shareholder pursue a First Amendment objection to corporate activity akin to the recent union fee challenges, but that issue has not yet reached the courts, and it is unlikely to until there is better disclosure of actual political expenses.<sup>217</sup> It is also not clear how a shareholder or pension participant might best assert her rights. Since *Citizens United* opened avenues for corporate political spending while dismissing shareholders’ constitutional concerns, considerable scholarship has explored whether corporate law provides avenues to respond to the increase in corporate political spending.<sup>218</sup> However, given the expanding reach of the First Amendment, it may well be that shareholders can look to constitutional law to make their case. Indeed, the crux of the Court’s opinion in *Hobby Lobby* was that a company’s constitutional interest—there, religious liberty—resides in its shareholders.<sup>219</sup>

From Sam’s vantage, the law requires him to give money to a corporation through his pension and allows it to be spent on a range of political activities over which he has no input or control. If “corporate democracy” does not in fact meaningfully protect shareholders, the best defense corporations may be able to offer against First Amendment challenges to mandatory pension laws is to draw parallels to the mandatory agency fee provisions of federal

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<sup>215</sup> *Stern v. Gen. Elec. Co.*, 837 F. Supp. 72,76 (S.D.N.Y. 1993), *aff’d*, 23 F.3d 746 (2d Cir. 1994).

<sup>216</sup> Leahy, *supra* note 210, at 298–99 (footnotes omitted).

<sup>217</sup> In *Barnes v. State Farm*, 20 Cal. Rptr. 2d 87, 90 (1993), an insurance policy holder challenged the company’s expenditures on a no-fault insurance initiative on both constitutional and corporate law grounds. The court dismissed the constitutional claim on the merits, noting that the insurance company also had free speech rights to be balanced and rejecting a comparison to *Abouod* because of “differences between compelled membership in a union and voluntary investment in a corporation.” *Id.* at 92, 94. It considered the corporate law claims separately, there applying the business judgment rule. *Id.* at 94–95.

<sup>218</sup> *See generally, e.g.*, Bebchuk & Jackson, *supra* note 204 (exploring the increased corporate political spending and the possible rules that would broaden access to such information for shareholders); William Alan Nelson II, *Post-Citizens United: Using Shareholder Derivative Claims of Corporate Waste to Challenge Corporate Independent Political Expenditures*, 13 NEV. L.J. 134 (2012) (exploring how shareholders may bring derivative claims to challenge corporate political spending they find to be detrimental to the corporation).

<sup>219</sup> *See supra* note 203.

labor laws.<sup>220</sup> Thus, it would seem, the corporate law professors' brief and the implicit caution therein.<sup>221</sup>

To sum up the unsettled law undergirding the Paycheck Problem: the government cannot force Sam to speak on its behalf.<sup>222</sup> There is, however, absolutely no constitutional problem with Sam's being compelled to subsidize a program that constitutes government speech (even if the government is not identified as the speaker).<sup>223</sup> If Sam were a "quasi-government" employee, it would be a violation of his constitutional rights to be forced to pay a fair share fee to his union, even if the union is bound to represent him and he benefits from this representation.<sup>224</sup> As he appears to be a "full" government employee, the Constitution allows a fair share fee to be assessed against him but he does not have to contribute to his union's political spending—although the jury (or Justice) is still out on whether that is only by grace of a teetering precedent.<sup>225</sup> He does have to contribute to a corporation's political speech on the same issue, however. Corporations are free to make independent expenditures for or against political candidates and engage in other expressive activity with little, if any, obligation to protect the constitutional rights of those who are putting up money to support the enterprise.<sup>226</sup> Officer Sam may find recent trends encouraging for his own purposes, but we cannot blame him if he is left scratching his head.

The first step to resolving these issues is to develop a coherent theory of how to approach individual claims of conscience when they seek to dismantle or substantially undermine collective enterprises. That is the task that the second half of this Article takes up. The next Part considers the import of the cases discussed above on the Paycheck Problem and questions, first, whether under current doctrine there are any solid theoretical grounds to treat mandatory pension contributions differently than mandatory agency fees and, second, whether the Court has articulated a coherent rationale for setting taxes apart from these other forms of compelled subsidy.

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<sup>220</sup> Of course, unions remain barred from using nonmembers funds on political activity. *See supra* Part I.C.1.

<sup>221</sup> This analysis is my own. I know none of the authors of the corporate law professors' amicus brief, and it carefully avoids connecting these dots, observing only that "[i]f this Court chooses to grant additional First Amendment rights to union nonmembers, it will only further increase the extent to which they enjoy greater rights than do corporate shareholders." Corporate Law Professors' Brief, *supra* note 181, at 39.

<sup>222</sup> *See supra* text accompanying notes 40–42.

<sup>223</sup> *See supra* text accompanying notes 82–92.

<sup>224</sup> *See supra* text accompanying notes 130–135.

<sup>225</sup> *See supra* text accompanying notes 177–178.

<sup>226</sup> *See supra* text accompanying notes 195–218.

## II. RECONCILING DOCTRINE AND THEORY

The cases discussed above may simply reflect the proclivities of a pro-corporate, anti-union, libertarian Court. But the language used in the Court's recent decisions has serious implications, particularly for our ability to address problems through collective action. In the first Subpart, I consider grounds on which we might distinguish unions from pensions for the purposes of compelled subsidy analysis and find none. I then turn to whether the Court's discussion of the compulsion to fund government speech offers solid theoretical grounds to distinguish taxes from pensions and unions and again come up short. This is not to say that we cannot distinguish taxes from other payments under the First Amendment, but that the Court's focus on the burden compelled subsidies pose to individual liberty interests has prevented it from doing so. For those who do not want to see the First Amendment used as a "blunderbuss" to dismantle collective programs, these analyses highlight some shortcomings within the current doctrine and set the scene for the following Part, where I propose three possible paths forward.<sup>227</sup>

### A. Comparing Unions and Pensions

As we have seen, the Supreme Court in recent years has glossed over differences between compelled speech and compelled subsidy, and it has taken an increasingly broad view of what kind of speech might trigger First Amendment scrutiny and an increasingly constricted view of the government's interests and the fit between the law and its intended purpose. Based on the arguments advanced by a majority of the Justices in *Knox*, *Harris*, and the *Friedrichs* oral argument, funding of not only political speech but also speech that touches on matters of public concern and speech that has the potential to impact the government's budget raise constitutional issues; under the reasoning of *United Foods*, compelled support for any speech, even purely commercial speech, appears to merit, at the least, exacting scrutiny.<sup>228</sup> It appears only a matter of time before a public pension contributor brings a First Amendment challenge to the requirement that he subsidize corporate political activity or, more broadly, corporate actions affecting public policy.<sup>229</sup> The following discussion sets union agency fees and pension contri-

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<sup>227</sup> See Ciara Torres-Spelliscy, Essay, *A Locked Phone; Unlocked Corporate Constitutional Rights*, 164 U. PA. L. REV. ONLINE 287, 287 (2016), <https://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-287.pdf> (discussing the Roberts Court's "blunderbuss use of the First Amendment to invalidate key laws, including those regulating money in politics").

<sup>228</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); see also *supra* Part I.C.2-3; *supra* note 37 and accompanying text.

<sup>229</sup> Then again, as John Oliver has observed, "if you want to do something evil, put it inside something



butions next to each other and considers potential justifications for differential, or asymmetric, treatment. The question being considered is not what should be done to protect the interests of dissenters—I save that for the final Part—but simply whether there are valid grounds to distinguish agency fees from pension contributions for First Amendment purposes.

### 1. *The Case for Symmetry*

It is not difficult to make the case for symmetrical treatment of union agency fees and pension contributions, particularly when one considers the percentage of pension funds that flows to corporations. Today 50% or more of the average public pension is invested in public equities, a marked departure from the 1950s, when 96% of public pension holdings were invested in fixed-income assets and cash.<sup>230</sup> The most obvious point of overlap, as discussed above, is the fact that both organizations can use their accumulated funds to make political expenditures. Yet under *Abood* and its progeny, non-germane union political speech cannot be funded by dissenting employees; by contrast, under *Citizens United*, corporations are free to use shareholder funds for identical political spending.<sup>231</sup>

The Supreme Court’s placating statements about dissenting contributors’ rights being safeguarded by “corporate democracy” do not provide a basis for distinguishing corporations from unions; in fact, quite the opposite. Corporations and unions do share many features, such as regular election of directors,<sup>232</sup> a fiduciary duty of loyalty,<sup>233</sup> and detailed reporting requirements.<sup>234</sup> For unions, these are set out in the Labor Management Reporting and Disclosure Act (“LMRDA”), which also provides a detailed “bill of rights” protecting employees’ ability to participate in the union to a greater

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boring.” Last Week Tonight (@LastWeekTonight), TWITTER (June 2, 2014, 8:21 AM), <https://twitter.com/LastWeekTonight/status/473484569757638656>.

<sup>230</sup> See *Investment*, NAT’L ASS’N OF STATE RETIREMENT ADM’RS, <http://www.nasra.org/investment> (last visited Jan. 15, 2018); see also PEW CHARITABLE TRUSTS & LAURA & JOHN ARNOLD FOUND., STATE PUBLIC PENSION INVESTMENTS SHIFT OVER PAST 30 YEARS 2 (2014), [http://www.pewtrusts.org/~media/assets/2014/06/state\\_public\\_pension\\_investments\\_shift\\_over\\_past\\_30\\_years.pdf](http://www.pewtrusts.org/~media/assets/2014/06/state_public_pension_investments_shift_over_past_30_years.pdf) (“Data from the Federal Reserve’s Financial Accounts of the United States reveal that in 1952, nearly 96 percent of public pension assets were invested in fixed-income asset classes and cash. By 1992, the proportion of pension assets in fixed-income investments and cash had decreased to 47 percent, and by 2012, it had fallen to 27 percent.” (citations omitted)).

<sup>231</sup> See *supra* notes 93–125, 195–218 and accompanying text.

<sup>232</sup> 29 U.S.C. § 481 (2012); DEL. CODE ANN. tit. 8, §§ 141–42 (2017).

<sup>233</sup> 29 U.S.C. § 501 (2012); see, e.g., *Stern v. Gen. Elec. Co.*, 837 F. Supp. 72, 74 (S.D.N.Y. 1993); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

<sup>234</sup> 29 U.S.C. §§ 431–441 (2012); see also Torres-Spelliscy, *supra* note 23, at 116 (observing that “corporations and unions have been subjected to nearly identical legal schemas” for the last six decades). See generally DIV. OF CORP. FIN., U.S. SEC. EXCH. COMM’N, FINANCIAL REPORTING MANUAL (2017) (providing an overview of the copious regulations that govern corporate financial disclosures).

extent than the average shareholder—and certainly someone who invests through a pension or mutual fund—can participate in corporate decision-making.<sup>235</sup> As Catherine Fisk and Erwin Chemerinsky recently noted, “In contrast to the extensive federal regulation of union governance and dues collection under the LMRDA, the law of corporations gives shareholders relatively little power to control the decision making or disclosures of corporations and absolutely no power over its political speech.”<sup>236</sup> Thus to the extent dissenters’ free speech interests can be assuaged by referral to internal procedures, any comparison between unions and corporations suggests that these procedures are stronger in the union context.

This disconnect has already attracted calls for better transparency and accountability for corporate political spending.<sup>237</sup> Even before the Court’s opinions in *Knox* and *Harris* confirmed a widening substantive gap in how some Justices view the rights of dissenting union-shop employees as opposed to dissenting shareholders, commentators observed that post-*Citizens United* it was structurally far more difficult for a dissenting shareholder to identify problematic political speech and object to subsidizing it than for a dissenting union member to do the same.<sup>238</sup> Two prominent law review articles, one by Professor Benjamin Sachs, and the other by Professors Fisk and Chemerinsky, engaged in thorough analyses of the Court’s holdings and considered whether any arguments supported the differential treatment of unions and corporations vis-à-vis their political transparency, accountability, and spending.<sup>239</sup> Both concluded that unions and corporations should be treated the same in these regards and, moreover, that union-shop employees and shareholders had equally valid interests in how their money was spent.<sup>240</sup> The authors differed, however, regarding the solution. Professor Sachs would like to see corporations become more transparent and offer shareholders an opt-out or refund of political spending in line with unions’ agency fees; Professors Fisk and Chemerinsky believe that continuing to separate the “political” from the “germane” would be too difficult to administer for both unions and

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<sup>235</sup> See Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.); 29 U.S.C.A. § 411 (establishing a “[b]ill of rights; constitution and bylaws of labor organizations”).

<sup>236</sup> Fisk & Chemerinsky, *supra* note 22, at 1083–84 (“Surely that unions are compelled by law to run as democracies and to respect the free speech rights of minorities, while corporations are not, is reason to suggest that employees should not have greater dissenters’ rights than shareholders.”).

<sup>237</sup> See, e.g., Reza Dibadj, *Expressive Rights for Shareholders After Citizens United?*, 46 U.S.F. L. REV. 459 (2011); Russell Mangas, *Citizens United Against Dissenting Shareholders*, 46 TULSA L. REV. 409 (2011); Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019 (2011).

<sup>238</sup> See, e.g., Bebchuk & Jackson, *supra* note 204 (explaining that the law currently requires unions to disclose more information than corporations); Sachs, *supra* note 19.

<sup>239</sup> See Fisk & Chemerinsky, *supra* note 22, at 1083–84; Sachs, *supra* note 19.

<sup>240</sup> See Fisk & Chemerinsky, *supra* note 22, at 1080–85; Sachs, *supra* note 19.

corporations and fails to recognize that these organizations have their own First Amendment rights.<sup>241</sup>

This Article will not resolve this dispute, although it adds to the discussion. For present purposes, the salient fact is that a rising tide of scholarship—and, indeed, regulatory rumblings<sup>242</sup>—recognizes that shareholders may have a constitutionally-protected interest infringed when their investment is used by a corporate board for political purposes in a way that is closely analogous to the interests of an objecting union nonmember. In light of the Court’s holdings in *Knox* and *Harris*, Sam’s concerns about his inability to opt out of his pension seem well-placed.

What few scholars have noted is that the cases discussed above suggest that a shareholder’s First Amendment rights may be implicated not only when a corporation engages in political speech, but also when it merely engages in speech affecting matters of public concern or that impacts government spending.<sup>243</sup> Recall that the Court’s decision in *United Foods* appeared to indicate—as have some of its other recent holdings on speech restrictions—that it is no longer willing to provide a less exacting review to commercial speech or economic regulations.<sup>244</sup> There the Court found the First Amendment implicated simply because the petitioners were required to “subsidize speech with which they disagree,” and when given the opportunity to soften that language in *Johanns*, it declined to do so.<sup>245</sup>

Sam’s objection to his pension investment is not just that the company runs ads promoting political candidates he opposes. He does not want his money invested in a company that promotes a product he opposes, lobbies to advance its interests on a politically-charged topic, negotiates state contracts, and receives taxpayer money through its government contracts. Consider

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<sup>241</sup> See Fisk & Chemerinsky, *supra* note 22, at 1087; Sachs, *supra* note 19, at 869.

<sup>242</sup> See *supra* note 206; see also BRUCE FREED ET AL., CTR. FOR POLITICAL ACCOUNTABILITY, THE 2015 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY (2015), [http://files.politicalaccountability.net/index/CPA-Zicklin\\_Index\\_Final\\_with\\_links.pdf](http://files.politicalaccountability.net/index/CPA-Zicklin_Index_Final_with_links.pdf) (scoring companies on voluntary actions they have taken to disclose political and ideological spending).

<sup>243</sup> Cf. Corporate Law Professors’ Brief, *supra* note 181, at 4 (“[M]ost individual shareholders cannot obtain full information about corporate speech or political activities, even after the fact, *nor can they prevent their savings from being used to speak in ways with which they disagree.*” (emphasis added)).

<sup>244</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 409–10 (2001); see also *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570–72 (2011) (finding a Vermont statute that imposed burdens on corporate speech to warrant heightened scrutiny); *United States v. Stevens*, 559 U.S. 460, 467 (2010) (finding a law that criminalizes the commercial creation, sale, or possession of certain depictions of animal cruelty was invalid under the First Amendment).

<sup>245</sup> *United Foods Inc.*, 533 U.S. at 411; see also *id.* at 410 (“The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.”).

these objections in light of cases we have already reviewed. In both *Knox* and *Harris*, a majority of the Court suggested that a public employee subject to an agency fee faced an “exacting” First Amendment burden because public union collective bargaining negotiations were “political” in that they touched on a matter of “public concern.” For example, for proof that the home health workers’ collective bargaining involved matters of “public concern,” Justice Alito pointed to the fact that salary negotiations had the potential to affect “Medicaid funding” or “state spending for employee benefits.”<sup>246</sup>

Under this logic, it is not difficult to show how pension contributions raise compelled subsidy concerns beyond corporate political spending. Pension money is invested in many corporations that lobby, engage in activities of public concern, and make decisions that have the potential to significantly impact federal or state spending programs, including Medicaid. Consider some of the top holdings of CalPERS, the state pension fund to which California teachers are required to contribute.<sup>247</sup> Some of the companies receiving CalPERS pension funds impact government spending directly—Johnson & Johnson, for example, negotiates Medicaid reimbursement rates with government regulators<sup>248</sup>—while others have significant indirect impacts. For

<sup>246</sup> *Harris v. Quinn*, 134 S. Ct. 2618, 2642–43 (2014).

<sup>247</sup> *CalPERS Retirement Benefits*, CAL. TEACHERS ASS’N, <http://ctainvest.org/home/CalSTRS-CalPERS/about-calpers/calpers-retirement-benefit.aspx> (last visited Jan. 15, 2018).

<sup>248</sup> See CALPERS, 2014–15 COMPREHENSIVE ANNUAL FINANCIAL REPORT 103 (2015) (listing Johnson & Johnson as the fourth largest holder of CalPERS stock); see also Janet Elliott, *Johnson & Johnson Settles Texas Medicaid Fraud Lawsuit for \$158 Million*, DALL. MORNING NEWS (Jan. 2012), <http://www.dallasnews.com/business/headlines/20120119-johnson-johnson-settles-texas-medicaid-fraud-lawsuit-for-158-million>. The “top 10” list also includes companies such as JP Morgan and Exxon Mobile, both companies that had significant impact on public budgets in recent decades. CALPERS, *supra* note 248, at 103; Damian Carrington & Harry Davies, *US Taxpayers Subsidising World’s Biggest Fossil Fuel Companies*, GUARDIAN (May 12, 2015, 7:00 AM), <https://www.theguardian.com/environment/2015/may/12/us-taxpayers-subsidising-worlds-biggest-fossil-fuel-companies> (listing state subsidies received by oil companies); Steven Davidoff, *JPMorgan’s \$12 Billion Bailout*, N.Y. TIMES: DEALB%K (Mar. 18, 2008, 9:22 AM), <https://dealbook.nytimes.com/2008/03/18/jpmorgans-12-billion-bailout/> (“Even assuming that JPMorgan ultimately has to pay more for Bear than its \$2-per-share-offer—a big assumption—the market’s initial view is that this takeover of an imploding Wall Street firm was a wealth transfer to JPMorgan’s shareholders of this amount. Where did this transfer come from? Well, it came from the Federal Reserve and from Bear. The Federal Reserve has guaranteed Bear’s liabilities to the tune of \$30 billion.”); Brendan Greeley, *JPMorgan’s \$10 Billion Subsidy*, BLOOMBERG BUSINESSWEEK (July 2, 2012, 6:05 AM), <https://www.bloomberg.com/news/articles/2012-07-02/jpmorgans-10-billion-subsidy> (citing study estimating that from 2007 to 2010 “JPMorgan saved just under \$10 billion thanks to its size and importance”); Joanna Walters, *Exxon Valdez - 25 Years After the Alaska Oil Spill, The Court Battle Continues*, TELEGRAPH (Mar. 23, 2014), <https://www.telegraph.co.uk/news/world-news/northamerica/usa/10717219/Exxon-Valdez-25-years-after-the-Alaska-oil-spill-the-court-battle-continues.html> (noting that 25 years after the Exxon Valdez oil spill, Alaskan officials were seeking nearly \$100 million to compensate for environmental damages caused by the accident).

example, Chevron decided in late 2015 to lay off several thousand employees,<sup>249</sup> and Wells Fargo recently settled a case for mortgage loan violations with the Federal Housing Administration for \$1.2 billion.<sup>250</sup> As for affecting “state spending for employee benefits,” 82% of all public employees (including California public school teachers) are covered by a defined benefit (as opposed to a defined contribution) pension plan, which means that if the pension plan investments fail to perform as expected, the funds to cover the promised benefits come from the public treasury.<sup>251</sup> One need only review the names of some of the companies in which public pensions invest—Apple, Exxon Mobile, General Electric, Microsoft, Verizon—to appreciate that these entities, and how they choose to spend their money, broadly implicate many areas of “public concern.”<sup>252</sup>

It is fair to ask whether all corporate or pension fund activities are expressive and subject to First Amendment protection. Certainly some do not comport with our traditional understanding of “speech,” but as noted above, the Court has long applied the First Amendment to non-speech activities with expressive elements.<sup>253</sup> Regardless, this argument resolves nothing. Many corporate activities, such as promoting ideas or products, negotiating contracts, lobbying, and making and communicating a decision, are clearly expressive; many are activities, indeed, described by the Court in *Harris*.<sup>254</sup> To the extent Sam wishes to opt out of an organization’s expressive activities, however defined, the contexts appear symmetrical.

Moreover, Sam’s compelled union and pension payments strike equally at his autonomy interests. The personal indignation that individuals may feel at the thought of their money going towards a negotiation that advances positions with which they disagree in the union context is of a kind with the indignation individuals may feel about their money subsidizing decisions made by a pension fund to, for example, invest in fossil fuels or firearms manufacturers, or the decision of a corporation in which individuals’ money is

<sup>249</sup> Shiv Mehta, *Chevron to Lay Off 6000–7000 Employees*, INVESTOPEDIA (Nov. 2, 2015, 9:17 AM), <http://www.investopedia.com/articles/investing/110215/chevron-lay-60007000-employees.asp>.

<sup>250</sup> Brena Swanson, *It’s Official: Wells Fargo Reaches Largest Settlement in FHA History*, HOUSINGWIRE (Apr. 8, 2016), <http://www.housingwire.com/articles/36749-its-official-wells-fargo-reaches-largest-settlement-in-fha-history>.

<sup>251</sup> EMP. BENEFIT RESEARCH INST., EBRI DATABOOK ON EMPLOYEE BENEFITS tbl.5.1d (2015), <https://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2005.pdf>.

<sup>252</sup> See CALPERS, *supra* note 248, at 103.

<sup>253</sup> See *supra* notes 38–45 and accompanying text.

<sup>254</sup> *Harris v. Quinn*, 134 S. Ct. 2618, 2642–43 (2014); see, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567–71 (2011); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.”).

invested to, for example, discriminate against LGBT employees or engage in a corporate tax inversion.<sup>255</sup>

Of course, pension funds also provide contributing employees with a significant personal financial benefit. According to the U.S. Census Bureau, in 2015 the average state and local pension annual payment was \$26,684.<sup>256</sup> But union membership also provides employees significant personal financial benefits. According to the Bureau of Labor Statistics, in 2015 full-time unionized wage and salary workers earned an average of \$980 a week; non-unionized workers earned \$776.<sup>257</sup> At fifty-two weeks a year for thirty years, this is a premium of \$318,240. In the public sector, the advantage of being represented by a union is, on average, \$145 a week, or \$226,200 over thirty years.<sup>258</sup> Employees represented by unions also receive better benefits.<sup>259</sup> It is not surprising

<sup>255</sup> In a recent article, James Nelson argues that the “freedom-of-conscience principle” provides grounds for distinguishing corporations from unions because “the degree of intermediation in modern capital markets . . . render[s] claims of shareholder complicity much less compelling.” James Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969, 2015 (2016). This is a troubling argument for many reasons, not the least of which is that it suggests that the more complex a system, the fewer constitutional rights one has when participating in it. Thus, it would not matter for First Amendment purposes if corporations amass and spend political war chests several times greater than unions, corporations make significant undisclosed electioneering expenditures with shareholder funds, or even that employees can opt out of their union’s political activities. This argument also rests on assumptions about what one might call “reasonable indignation” as a trigger for constitutional rights, which would discount the interests of more politically and socially aware investors. Saliency is a difficult constitutional touchstone.

<sup>256</sup> PHILLIP VIDAL, U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC PENSIONS: STATE- AND LOCALLY-ADMINISTERED DEFINED BENEFIT DATA SUMMARY BRIEF: 2015, at 2 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/econ/g15-asp-sl.pdf>.

<sup>257</sup> BLS 2015 LABOR DATA, *supra* note 3; see also JULIE ANDERSON ET AL., INST. FOR WOMEN’S POLICY RESEARCH, BRIEFING PAPER NO. R409, THE UNION ADVANTAGE FOR WOMEN 4–9 (2015), <http://www.iwpr.org/publications/pubs/the-union-advantage-for-women> (reporting that the income gap between men and women is smaller for unionized employees). These numbers do not control for other variables. A study in 2011 did attempt to isolate the effect of right-to-work laws. “All told, our model controls for 42 demographic, economic, geographic, and policy factors. After controlling for this full complement of differences, we find wages in [right-to-work] states to be statistically and economically significantly lower than in non-[right-to-work] states. On average, ‘right-to-work’ laws are associated with wages—for everyone, not just union members—that are 3.2% lower than they would be without such a law.” ELISE GOULD & HEIDI SHIERHOLZ, ECON. POLICY INST., BRIEFING PAPER NO. 299, THE COMPENSATION PENALTY OF “RIGHT-TO-WORK” LAWS 5 (2011), <http://www.epi.org/files/page/-/old/briefingpapers/BriefingPaper299.pdf>.

<sup>258</sup> BLS 2015 LABOR DATA, *supra* note 3, at tbl.4. As reported by Petitioners in *Friedrichs*, agency fees for California public school teachers run about \$600–650 a year, while full union membership “is often approximately \$1,000 per teacher” a year. *Friedrichs* Pet’r Br., *supra* note 158, at 7. This can be up to 2% of an entry-level salary, and presumably less as they become more senior. *Id.* Pension contributions, by contrast, are set at 7% of a teacher’s salary throughout their career. *CalPERS Retirement Benefits*, CAL. TEACHERS ASS’N, <http://ctainvest.org/home/CalSTRS-CalPERS/about-calpers/calpers-retirement-benefit.aspx> (last visited Jan. 15, 2018).

<sup>259</sup> See George Long, Bureau of Labor Statistics, *Differences Between Union and Nonunion Compensation, 2001–2011*, MONTHLY LABOR REV., Apr. 2013, at 17, <https://www.bls.gov/opub/mlr/2013/04/art2full.pdf> (reporting that in 2011 unionized employees received employee benefits worth

that, according to counsel at the *Friedrichs* oral argument, “Ms. Friedrichs has said publicly she’s happy with the positions the union is taking on pay.”<sup>260</sup>

To the extent one is concerned about a dissenting union-shop employee subsidizing union political speech, a very similar concern arises in the pension context. Likewise, to the extent one is concerned about a dissenting union-shop employee subsidizing union activities that affect matters of public concern or the public fisc, pension contributions are also implicated. The question is whether there are any good justifications for not treating these instances of compelled subsidy the same for First Amendment purposes.

## 2. *The Case for Asymmetry*

We can begin by looking at some of the potential grounds for distinction that have already been discussed in legal scholarship. In his analysis of corporate political spending in the wake of *Citizens United*, Professor Sachs argued that shareholders should be given the opportunity to opt out of corporate political spending in a manner analogous to the opt-out allowed union nonmembers.<sup>261</sup> He considered and rejected three sets of arguments for treating the corporate and union contexts differently. Two of these—the degree of compulsion and the presence of state action—are not implicated in the Paycheck Problem, where contributions to the public pension fund are required by law as a term of state employment.<sup>262</sup> The third—“potential differences between the kinds of speech and associational rights that are implicated in the union and corporate contexts”—is worth examining more closely.<sup>263</sup>

Professor Sachs identified two differences in kind between unions and corporations that could be relevant to fine-tuning an opt-out right in each context. The first is the nature of the association. While unions may strike one as expressive organizations and corporations commercial ones, in fact—and as the Supreme Court has recognized—both are mixed-purpose entities, with both economic and expressive functions.<sup>264</sup> However, to the extent that un-

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\$7.11 an hour more than benefits received by non-unionized employees).

<sup>260</sup> Transcript of Oral Argument at 62, *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (per curiam) (No. 14-915).

<sup>261</sup> Sachs, *supra* note 19, at 851.

<sup>262</sup> See NAT’L ASS’N OF STATE RETIREMENT ADM’RS, NASRA ISSUE BRIEF: EMPLOYEE CONTRIBUTIONS TO PUBLIC PENSION PLANS app. A (2017), <http://www.nasra.org/files/Issue%20Briefs/NASRAContribBrief.pdf> (listing the percentage of income various public employees are required to contribute to their pension). Professors Fisk and Chemerinsky also consider state action as a potential basis for separate treatment. Fisk & Chemerinsky, *supra* note 22, at 1080–85. Their second ground for distinction—democratic protections—is discussed above as it appears to be more of a symmetry than an asymmetry. See *id.* at 1081–84; *supra* note 236 and accompanying text.

<sup>263</sup> Sachs, *supra* note 19, at 851.

<sup>264</sup> *Id.* (citing, *inter alia*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986), to demonstrate

ions engage not just in political expression but also in the germination of political ideas—and to the extent that corporations do not fill the same role in shaping public opinion<sup>265</sup>—Professor Sachs suggests that union nonmembers might be afforded greater opt-out rights than shareholders, as potentially more union activity could be considered political.<sup>266</sup> Even if this distinction has merit, it speaks to a question of degrees. It does not undercut the point that compelled subsidy arguments would apply in the corporate context.<sup>267</sup>

The second difference Professor Sachs identifies is that as a matter of salience and personal identity, some attach greater significance to being a union member than to being a corporate shareholder.<sup>268</sup> But again, even if true, this might provide an additional cause of action for an employee whose identity is tightly bound with the union; it would not support ignoring the First Amendment rights of corporate shareholders. It is also difficult to see why payment of agency fees by *nonmembers* makes their relationship to the organization more salient or burdensome than, in our case, pension contributions. No one is required to be a member of a union. To the extent that payment of an agency fee does lead to union speech being actually attributed to a nonmember—the functional equivalent of putting words into the employee’s mouth—this could mean that in the union context both compelled subsidization *and* compelled speech arguments are implicated, while in the corporate context only compelled subsidization would provide a basis for complaint. As Professor Sachs notes, however, under the Supreme Court’s current cases “either type of objection is sufficient for First Amendment purposes.”<sup>269</sup>

The differences identified by Professor Sachs offer potential analytical nuances in how we think about mandatory contributions to corporations and unions, but they do not change the fact that similar First Amendment interests arise in both the corporate and union contexts vis-à-vis political spending. Below I consider a few additional arguments for treating the compelled subsidy of speech in these two areas asymmetrically.

One argument goes not to whether the First Amendment is implicated but whether the compelled subsidization should be found unconstitutional under a balancing test: if objecting pension contributors were allowed to opt

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that the Court understands that “the predominant purpose of both [corporations and unions] is economic”).

<sup>265</sup> *But see* Michelle Conlin & Lucas Iberico Lozada, *The New U.S. Office Politics: Funding Your Boss’s Political Causes*, REUTERS (May 11, 2015, 9:01 AM), <http://www.reuters.com/article/us-usa-election-workers-insight-idUSKBN0NW0AC20150511> (reporting on a sharp uptick by employers encouraging their employees to make political donations to particular candidates). Such germination occurs in the employer-employee context, however, not the corporation-shareholder context.

<sup>266</sup> Sachs, *supra* note 19, at 851.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 855.

<sup>269</sup> *Id.* at 858.



out of pension payments, there would be significant externalities in that the cost would be borne by the taxpayer.<sup>270</sup> This is because the vast majority of public pensions are still defined benefit plans, in which the payout to the beneficiary is fixed regardless of the amount of money invested in the plan or the plan's returns on investment.<sup>271</sup> There are three ways to frame this concern: that allowing the opt-out would hurt the public fisc (in that it would be required to do more with less); that it would hurt taxpayers (in that they would be required to pay more to maintain the required benefit level); or that it would hurt other employees (whose own pension contributions may be increased to make up for the shortfall).

These are three potential government interests that could be framed as compelling, but they are not much different than the government interests that have been raised in the union cases (they also bear close parallels to interests the Court recently rejected in *Hobby Lobby*<sup>272</sup>). To take them in reverse order, the concern that allowing an opt-out would result in negative externalities for similarly-situated employees is identical in both contexts; both would be asked to bear additional costs, while their dissenting colleagues would reap the benefits without paying. The concerns about the impact on taxpayers and on the public fisc is similar in both contexts, although not the same. The connection between allowing opt-outs and the effect on the public treasury is cleaner in the pension context, as the commitment to the beneficiary has already been established. In the union context, the nature and distribution of the costs involves legislative judgments, but these are exactly the kind of decisions to which the judiciary traditionally defers.<sup>273</sup> We will leave to one side suggestions by Justice Scalia in the *Friedrichs* oral argument that any shortfall that the CTA experienced as a result of lost agency fee revenue could be made up by government (taxpayer) funding<sup>274</sup>—a suggestion that would allow a direct parallel to the pension context but was rejected out of hand by the union's counsel as antithetical to the notion of collective bargaining.<sup>275</sup> The government's interests in maintaining "labor peace" and

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<sup>270</sup> *But see* *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (“[T]his Court has rejected as ‘startling and dangerous’ a ‘free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.’” (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010))).

<sup>271</sup> *See supra* note 251.

<sup>272</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–82 (2014).

<sup>273</sup> *See, e.g., Ry. Emp. Dep’t v. Hanson*, 351 U.S. 225, 234–36 (1956) (finding that “the question is one of policy with which the judiciary has no concern”).

<sup>274</sup> *See* Transcript of Oral Argument at 27, *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (per curiam) (No. 14-915) (asking if government funding of a union would be “bargainable”—“It’s never existed in American society” was, in part, counsel’s response); *see also* Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144 (2016) (proposing a “government-payer alternative” to union agency fees).

<sup>275</sup> *See* Transcript of Oral Argument at 27–28, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (arguing that a

preventing “free riding” ultimately reflect a determination by the state or locality that the costs of negotiating and administering a set of employee contracts without a compulsory union is greater than doing so with a union. The legislature may base this judgment on many factors, including the potential costs of declining union representation,<sup>276</sup> the potential costs of workplace protests,<sup>277</sup> or the potential costs of training and equipment that the union would no longer be able to offer.<sup>278</sup> Or it may simply see the disadvantage of separately negotiating, in the case of the CTA, more than 325,000 individual contracts.<sup>279</sup> As demonstrated in the briefs filed in the *Friedrichs* case, economic data can be marshaled on both sides—employees in “right to work” states, for example, are less likely to receive pensions or health insurance, creating costs that may be borne by other taxpayers,<sup>280</sup> yet many of these states have lower average tax rates<sup>281</sup>—but the point of this exercise is not to resolve the economic impact of labor laws, merely to say that governments that support agency fees may have reasonable financial interests for keeping

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public employer could not “all of a sudden say, sure, we’re going to take our taxpayer dollars and start giving money to unions”); *see also id.* at 40. Justice Scalia also mentioned at the oral argument that federal unions do not charge nonmembers agency fees. *Id.* at 50. This is true, but federal law permits employee union representatives to work on union matters during their regular working hours, meaning that taxpayers are literally subsidizing federal unions. *See, e.g.,* F. Vincent Vernuccio & Trey Kovacs, *Official Time: Government Workers Perform Union Duties on the Taxpayers’ Dime*, COMPETITIVE ENTERP. INST. (Nov. 1, 2011), <https://cei.org/content/official-time-government-workers-perform-union-duties-taxpayers%E2%80%99-dime> (describing how “[t]here is no law or regulation requiring the government to determine and report how much time union members spend on union work at the public’s expense”).

<sup>276</sup> *See, e.g.,* Jenn Hagedorn et al., *The Role of Labor Unions in Creating Working Conditions That Promote Public Health*, 106 AM. J. PUB. HEALTH 989 (2016) (associating the decline of union power with the “greatest level of economic inequity in our nation’s history”).

<sup>277</sup> *See, e.g.,* Brief for the Attorney General of California at 8, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (“[E]xclusive representation can provide an efficient mechanism for school employers to learn about employee needs, to resolve issues that could otherwise cause conflict in the workplace . . .”).

<sup>278</sup> *See, e.g.,* Transcript of Oral Argument at 57–58, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (arguing that “[i]t’s actually essential to have agency fees, because they are using those fees to benefit all of the workers in the—in the unit through getting additional equipment that the county may not be able to afford, additional training . . .”).

<sup>279</sup> *About Us*, CAL. TEACHERS ASS’N, <http://www.cta.org/About-CTA/Who-We-Are/CTA-Fact-Sheet.aspx> (last visited Jan. 15, 2017).

<sup>280</sup> *See* GOULD & SHIERHOLZ, *supra* note 257, at 6. *Compare* Brief of Amici Curiae State of Michigan and Seventeen Other States in Support of Petitioners at 9–20, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (relying on economic data to blame municipal bankruptcies, in part, on public unions), *with* Brief for Cities, Counties, and Elected Officials as Amici Curiae in Support of Respondents at 18–29, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915) (relying on economic data to argue that public unions promote efficiency and save tax dollars).

<sup>281</sup> *See Tax Burdens Lighter in Right to Work States*, NAT’L RIGHT TO WORK COMMITTEE (Apr. 6, 2015), <https://nrtwc.org/tax-burdens-lighter-in-right-to-work-states>; *see also* Tamara Kay, *The Lies, Damn Lies, and Statistics Behind the Boom in America’s Right-to-Work Laws*, QUARTZ (May 1, 2015), <http://qz.com/396598/the-lies-damn-lies-and-statistics-behind-the-boom-in-americas-right-to-work-laws/> (arguing that “right-to-work laws result in lower wages and lower likelihood of health care and pensions for union and non-union workers”).

them in place. It would take some overreach for the judiciary to supplant legislative judgment on a question of fiscal impact.<sup>282</sup>

Of course, the argument above rests on the troubling presumption that a First Amendment right could be abrogated for purely economic reasons.<sup>283</sup> Likewise, an argument that pension funds and corporations have, by virtue of corporate and pension law, a fiduciary duty that already safeguards a contributor's money is both, at some levels, non-responsive to the symmetry inquiry—unions also have fiduciary duties and reporting requirements<sup>284</sup>—and suggests a hierarchy of analysis that places fiduciary protections over constitutional ones.<sup>285</sup> A more powerful expression of a government interest in preventing externalities, and one that a few labor law scholars have advanced in recent years, would recognize that allowing an opt-out would create a class of what I have elsewhere termed “unwilling donors,” who themselves have a First Amendment interest in not being compelled to subsidize speech in support of non-contributors.<sup>286</sup> This does not serve, however, to distinguish pension payments from union payments; so long as the unions or pension funds are required to distribute benefits equally among contributors and non-contributors, an unwilling donor problem will exist, and First Amendment issues appear on both sides.

A final argument for asymmetric treatment of unions and pension payments is the possibility that the government would be able to assert that the actions of the pension fund and, by virtue of the pension fund's intervention, the corporation, are government speech and thus not susceptible to First Amendment challenges. At the *Friedrichs* oral argument, Respondents answered in the negative when asked whether unions were governmental actors for the purposes of the government speech doctrine.<sup>287</sup> For present purposes,

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<sup>282</sup> *But see* Jennifer Mason McAward, Foreword, *The Confident Court*, 47 LOY. L.A. L. REV. 379, 379 (2012) (observing that “a majority of the Supreme Court is increasingly willing to supplant both the prudential and legal judgments of other institutional actors”).

<sup>283</sup> This is not to say that fiscal impact has no place in a constitutional analysis, but it does not alone manifest a compelling interest. *Cf.* *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (overturning a collective marketing program).

<sup>284</sup> *See, e.g.*, 29 U.S.C. §§ 431–441 (2012) (setting forth reporting requirements for unions); OFFICE OF LABOR-MGMT. STANDARDS, U.S. DEP'T OF LABOR, RIGHTS AND RESPONSIBILITIES UNDER THE LMRDA AND CSRA 8–9 (2009), [https://www.dol.gov/olms/regs/compliance/rights\\_resps.pdf](https://www.dol.gov/olms/regs/compliance/rights_resps.pdf) (listing a union officer's fiduciary obligations).

<sup>285</sup> *Cf.* *Lowe v. SEC*, 472 U.S. 181, 231 (1985) (White, J., concurring) (“Surely it cannot be said, for example, that if Congress were to declare editorial writers fiduciaries for their readers and establish a licensing scheme under which ‘unqualified’ writers were forbidden to publish, this Court would be powerless to hold that the legislation violated the First Amendment.”).

<sup>286</sup> *See, e.g.*, Estlund, *supra* note 95; Fisk & Poueymirou, *supra* note 28; *cf.* Jennifer Mueller, *The Unwilling Donor*, 90 WASH. L. REV. 1783 (2015) (arguing that campaign finance jurisprudence should broaden to take into account the interests of donors who feel “shaken down”).

<sup>287</sup> Transcript of Oral Argument at 23–25, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam) (No. 14-915).

we need not exhaustively analyze what does and does not—or should and should not—constitute government speech.<sup>288</sup> Happily, the instant question already has been examined in some depth. In response to *Citizens United*, Professor Eric Alden considered whether individuals compelled to contribute to public pensions could raise First Amendment objections to corporate political activity, answering the question in the affirmative.<sup>289</sup> In doing so, he evaluated the potential counterargument that public pensions—with particular reference to CalPERS—should be shielded by the government speech doctrine.<sup>290</sup> In brief, Professor Alden compared the agricultural marketing scheme at issue in *Johanns*—which was found to constitute government speech—and the state bar at issue in *Keller*—which was found, despite being considered a state agency in other contexts, not to engage in government speech—and determined that in structure, governance, and independence, the state pension fund operates too independently for its actions to be considered government speech.<sup>291</sup>

There is, of course, a paradox embedded in this last argument, and in suggestions that the government could—and perhaps should—subsidize union activities directly.<sup>292</sup> Why are we so concerned about protecting the rights of dissenters qua employees who object to union speech while at the same time those same dissenters qua taxpayers would have no ability to refuse to pay for essentially the same speech?

The next Subpart considers possible explanations for this dichotomy. The analysis reveals not that taxes are not unique, but that, as articulated, the Supreme Court's theory of the First Amendment's protections fails to capture what makes them so. This in turn leads to suggestions in the final Part of this Article for how the Supreme Court might move forward with a more robust limiting principle in its First Amendment cases.

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<sup>288</sup> See Finseth Alden, *supra* note 19, at 290.

<sup>289</sup> *Id.* at 333–45.

<sup>290</sup> *Id.* at 344.

<sup>291</sup> See *id.* at 331–44 (developing an “independent instrumentality” test to determine if speech qualifies as government speech: “If a body or organization established by statute is governed administratively in a manner not subject to effective control by the executive branch of government (and not subject to detailed statutory prescription of the precise content of its political and ideological activities and messages), that body or organization should be regarded as an independent public instrumentality with sufficient autonomy in its operations that its political and ideological activities should be regarded as its own and not necessarily ascribed to the government generally for purposes of the government speech doctrine.”); see also *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 555, 560–65 (2005) (plurality opinion); *Keller v. State Bar*, 496 U.S. 1, 14 (1990).

<sup>292</sup> See *supra* note 274 (discussing the feasibility of union funding coming from the employer rather than members).

B. *Considering the Case for “Tax Exceptionalism” in Compelled Subsidy of Speech Cases*

1. *The Court’s Justifications Do Not Provide Grounds to Distinguish Taxes from Pensions and Unions*

To start with the obvious: the U.S. tax system is massive. The Internal Revenue Code weighs in at nearly four million words, and in 2016 nearly 140 million tax returns were filed.<sup>293</sup> The analysis below, however, proceeds from the assumption that this characteristic alone distinguishes the tax system from unions and pensions only as a matter of degree, not kind. “Too big to opt out” is not a satisfying constitutional principle. The question is whether there is a more meaningful basis for distinction and, if so, what that might mean for the Court’s future First Amendment cases. What is remarkable is not that such a basis exists—I suggest one below—but that the Court has not articulated one, hence its “ipse dixit” creation of the government speech doctrine.<sup>294</sup>

Let us consider the reasons the Court has provided in recent years for refusing to grant taxpayers “opt outs,” starting with *United States v. Lee*, where the Court declined to exempt an Amish employer from the Social Security tax.<sup>295</sup> First were administrative considerations. The argument, as paraphrased in *Hobby Lobby*, was that “allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos.”<sup>296</sup> Relatedly, the *Lee* majority argued that opening the door to religious challenges would undermine the effectiveness of the tax system.<sup>297</sup>

Increasing the complexity of the U.S. tax system has not deterred policymakers to date—indeed, the Social Security system itself accommodates individual religious objections—nor did it deter the Court in *Hobby Lobby*.<sup>298</sup> It is difficult

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<sup>293</sup> TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, U.S. DEP’T OF TREAS., 2017-40-014, RESULTS OF THE 2016 FILING SEASON 1 (2017), <https://www.treasury.gov/tigta/audit-reports/2017reports/201740014fr.pdf>; 1 TAXPAYER ADVOCATE SERV., THE COMPLEXITY OF THE TAX CODE 6 (2012) [hereinafter TAS Report], <http://www.taxpayeradvocate.irs.gov/2012-annual-report/downloads/most-serious-problems-tax-code-complexity.pdf>.

<sup>294</sup> Post, *supra* note 29, at 197.

<sup>295</sup> 455 U.S. 252 (1982).

<sup>296</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784 (2014); *see also Lee*, 455 U.S. at 263 (Stevens, J., concurring) (opining that although Mr. Lee’s challenge could presumably be easily accommodated—the statute already excepted self-employed Amish people—opening the door to these types of challenges would open the door to all sorts of “difficulties associated with processing other claims to tax exemption on religious grounds”). The *Hobby Lobby* Court, by contrast, rejected the possibility that its decision could similarly “lead to a flood of religious objections regarding a wide variety of medical procedures and drugs.” *Hobby Lobby*, 134 S. Ct. at 2783.

<sup>297</sup> *Lee*, 455 U.S. at 260 (“The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”).

<sup>298</sup> *See, e.g.*, TAS Report, *supra* note 293 (“There have been approximately 4,680 changes to the tax code since 2001, an average of more than one a day.”); *see also supra* note 61; *cf. Hobby Lobby*, 134 S.

to see how allowing additional exemptions would create a significantly greater burden than the Internal Revenue Code already imposes. Further, to the extent the burden of administering an opt-out is a valid concern, it is not unique to the world of federal taxes. Unions and pension funds are already required to engage in complicated accounting and reporting that distinguishes, for example, between germane and non-germane expenditures in the union context and between categories of employees and fiscal obligations in the pension context.<sup>299</sup> Allowing an opt-out for certain taxpayers or employees would certainly be burdensome, but it is not readily apparent why the comparative administrative burden would be significantly greater in one context than another.

Similarly, it is difficult to reconcile the *Lee* Court's assumption that allowing an expanded religious opt-out would jeopardize a "comprehensive scheme," presumably because the Government would not receive adequate funding if an opt-out were permitted, with the "but-for" version of the least restrictive means test that animates the Court's recent union decisions.<sup>300</sup> Rational people would prefer to get something for free, and so it is safe to assume that whether one is talking about taxes, agency fees, or pension contributions, if given the option of not paying while retaining the benefit, many would choose to do so. The reason that we developed a system of laws is the recognition of the limits of self-interest as a social organizing principle.<sup>301</sup> It is not clear why this risk to a "comprehensive scheme" poses a greater threat to the general treasury than to unions or pensions or why the burden of proof or assumptions about the continued vitality of programs in the absence of full funding should be different in the different contexts.<sup>302</sup>

A related justification offered in *Lee* was the concern that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees,"<sup>303</sup> or, more accurately, it makes employees bear the cost of their employer's religious views. Similarly, in the case of a tax, union, or pension dissenter, an exemption would force others

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Ct. at 2783 (allowing certain employers a religious-based exemption).

<sup>299</sup> See, e.g., 29 U.S.C. § 411 (2012); CAL. GOV'T CODE §§ 20220–20239 (West 2017); *supra* notes 232–235 and accompanying text. *But see supra* note 196 and accompanying text (noting that in *Citizens United* the Supreme Court struck down the PAC requirement for corporate independent expenditures as overly "burdensome").

<sup>300</sup> See *supra* notes 141–144 and accompanying text.

<sup>301</sup> See THE FEDERALIST NO. 10 (James Madison); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) ("Freedom in a commons brings ruin to all.").

<sup>302</sup> If anything, the general treasury fund created from taxes is a larger pool than unions or corporations, and the federal government seems better positioned to make up any shortfall.

<sup>303</sup> *United States v. Lee*, 455 U.S. 252, 261 (1982). *But see Hobby Lobby*, 134 S. Ct. at 2782–83 (finding that because female employees could obtain contraception coverage elsewhere, this concern was not triggered). *Contra id.* at 2799–803 (Ginsburg, J., dissenting) ("Impeding women's receipt of benefits 'by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit' was scarcely what Congress contemplated.").

to internalize greater expenses, spending their money to subsidize the dissenter's right to opt out. Whether one thinks about this as a First Amendment or a Takings Clause problem, it is not obvious why different assumptions would apply to a tax opt-out, or why the externalities would be different than in the context of agency fees or pension payments.<sup>304</sup> Indeed, in the latter cases the impact on individual participants would be more acute as it would be less diffuse (i.e., not shared across the entire tax base).

Another justification offered by the Court in *Lee* is perhaps its most provocative: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."<sup>305</sup> This contention turns on its head the argument that a subsidy has been illegally compelled by questioning the argument's very premise; viz., compulsion. This is not the venue to determine whether an individual can realistically avoid taxes, unionized employment, or a mandatory pension scheme, but two points bear noting. First, to the extent the *Lee* rationale that one who willingly enters a system is bound by its terms holds, it applies equally to unions and pensions. Second, to the extent that a greater degree of compulsion triggers greater First Amendment scrutiny because the dissenter has no realistic avenue to sail clear of the system, taxes raise a greater, not lesser, concern as they are far more difficult to avoid.

The *Lee* Court also emphasized that deference was due to legislative judgments about the need for the funding mandate and the lines drawn in the granting of exemptions.<sup>306</sup> This in itself is more a rule of decision-making rather than a theory of decision, and of course public unions and public pension plans are also creatures of a democratically-elected legislature.

This point does foreshadow, however, yet another possible distinction between the compulsion to pay taxes and the compulsion to fund unions and pensions, one that appears in the Court's more recent government speech cases.<sup>307</sup> The majority in *Johanns* explained that the new doctrine was supported by "democratic accountability," or the notion that government speech

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<sup>304</sup> See *Sweeney v. Pence*, 767 F.3d 654, 683 (7th Cir. 2014) (Wood, J., dissenting) ("If . . . one were to conclude that Indiana has worked out a way to conscript the union into providing uncompensated services to anyone who decides to opt out of union membership, it would become necessary to decide whether such a rule is permissible under the Takings Clause of the Fifth Amendment, as applied to the states under the Fourteenth Amendment."); see also U.S. CONST. amend. V, § 5 ("[N]or shall private property be taken for public use, without just compensation.").

<sup>305</sup> *Lee*, 455 U.S. at 261.

<sup>306</sup> *Id.* at 260–61; see also *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 (3d Cir. 1999) ("[T]ax exemptions are a matter of legislative grace. It does not follow from Congressional action on such matters that the Commissioner or the courts are therefore encouraged to carve out exceptions to the statutory scheme." (citations omitted)).

<sup>307</sup> See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009); *Johanns v. Livestock Mktg.*

reflects the will of the people as expressed in the voting booth.<sup>308</sup> As Justice Souter pointed out in his dissent, it is not clear how well this justification actually aligned with the facts of *Johanns*.<sup>309</sup> In addition, the argument may prove too much. While the Supreme Court has held that an individual does not have standing to challenge a federal spending program merely by the virtue of being a taxpayer, in the Court's compelled speech (as opposed to its compelled subsidy) cases, the fact that laws compelling, for example, recitation of the Pledge of Allegiance were passed by democratically elected officials did not save them from review and rejection.<sup>310</sup> Being able to "vote the bums out" is a limited, after-the-fact remedy. Moreover, many taxpayers—including immigrants, foreign nationals, residents of the District of Columbia, and corporations—do not have voting rights but are still required to pay federal tax.

As a basis for distinguishing this prong of the Paycheck Problem, "democratic accountability" offers, again, a difference in degree rather than kind. As discussed above, both unions and corporations provide some form of internal "democracy," with procedural protections more robust in the union context. While this satisfies the Court in the corporate context with regard to all spending, even political, it appears that it provides no assurances with regards to any union functions. The word "democracy" does not even appear in *Harris*. The Court's reliance on democratic safeguards to justify compelled subsidies is sporadic at best.

## 2. *A Meaningful Distinction*

The rationales offered above do not provide a sound basis for distinguishing objections to being compelled to pay one's taxes from an objection to contributing to a collective bargaining fund or pension plan. This is because they also share another commonality: they all proceed from the assumption that the First Amendment harm done by the compelled payment is to one's autonomy, or liberty, interests. Even the justification of "democratic accountability" appears designed to assuage the indignant individual, not offer a chance of meaningful participation in a spending decision. But autonomy does not, and cannot, distinguish one government compulsion from the next.

Once we move past thinking of the Paycheck Problem through the frame of how the compelled payments burden Sam's personal liberty, the reason

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Ass'n, 544 U.S. 550, 563 (2005) (plurality opinion) ("Some of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability.").

<sup>308</sup> *Id.* at 563.

<sup>309</sup> *Id.* at 577 (Souter, J., dissenting) (arguing that "the Beef Act does not establish an advertising scheme subject to effective democratic checks").

<sup>310</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("[No one] who acts under color of law is beyond the reach of the Constitution."); *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923).



that taxes are different than unions or pensions is obvious.<sup>311</sup> The First Amendment was designed in the furtherance of a larger purpose: to establish the conditions necessary for government to be legitimate and effective. Allowing anyone with an objection to refuse to contribute to the enterprise would threaten not just a regulatory system, but our constitutional structure. It would functionally replace majority rule with a widely dispersed minority veto power, undermining the system of representative democracy established by the Constitution.<sup>312</sup>

This leads to a few further observations. First, the Court is not unaware of this argument. It was raised in Justice Breyer's dissent in *United Foods* quoted above,<sup>313</sup> and in dicta twenty-eight years ago in *Keller*, the challenge to mandatory state bar fees:

If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.<sup>314</sup>

But it appears rarely, seldom in the majority, and as a supporting rather than decisive factor. As a matter of First Amendment doctrine, one finds at best “scattered references” to this constitutional purpose of democratic legitimacy, so prominent in campaign finance cases and even beginning to infuse commercial speech cases, in the Court's compelled subsidization cases.<sup>315</sup> Indeed, even though Justice Souter cited *Keller* in his dissent in *Johanns*, he appeared to view it as a pragmatic rather than constitutional consideration.<sup>316</sup> This may be because of the roots of the compelled subsidy doctrine in the Court's compelled speech cases, which were heavily concerned with individual liberty interests.

Second, as demonstrated by the analysis above, First Amendment autonomy objections provide a poor touchstone to evaluate compelled subsidies to collective schemes. As Dean Robert Post has observed, “The difficulty with

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<sup>311</sup> See *supra* note 119 and accompanying text.

<sup>312</sup> See THE FEDERALIST NO. 10 (James Madison); Richard Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L. J. 804, 807 (2014) (suggesting that “[rights-oriented] approaches can spawn, and have spawned, doctrines and policies that undermine the capacity of the democratic system as a whole to function effectively”).

<sup>313</sup> See *supra* note 79.

<sup>314</sup> *Keller v. State Bar*, 496 U.S. 1, 12–13 (1990); see also *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in judgment) (“[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people.”).

<sup>315</sup> Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1127–28 (2005) (noting that “these have remained voices in the wilderness, as most justices and many commentators still hold fast to the idea that the harm is to individual dissenters”).

<sup>316</sup> *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (“To govern, government has to say something.”).

regarding autonomy as a fundamental First Amendment interest is that it is omnipresent; every restriction and compulsion will to some degree compromise autonomy.”<sup>317</sup> The problem is not just that entertaining autonomy objections fails to offer a limiting principle for the Paycheck Problem; it is that it tilts towards anarchy.<sup>318</sup> Taken to their logical limits, “conscience” objections may have the effect of actually working against what most recognize to be the primary purpose of the First Amendment—to preserve, in the words of the *Buckley* Court, “discussion of public issues and debate on the qualifications of candidates.”<sup>319</sup>

Third, “freedom of belief” objections to compelled subsidy cases short-circuit the traditional First Amendment free speech balancing test. It is not clear what kind of work tailoring can do when a “conscience” objection is raised. When access to the marketplace of ideas is limited, a reasonable “tailoring” question may be whether the claimant has other ways to make his or her voice heard. Tax resisters, for example, retain the ability to petition the government, seek to change the legislature, post their views on line, or engage in other democratic activities. Union dissenters can speak up at school board meetings, write their representative, or even file a high-profile lawsuit. When the objection is that a law infringes on one’s concept of self, however, there is no ready work-around.<sup>320</sup> Indeed, the best way to explain the restrictive “but-for” test the Court applied in *Harris* is to understand the agency fee as impeding an individual’s sense of personal autonomy rather than her access to the “marketplace of ideas.”

The Court’s expansive First Amendment penumbra, its heightened scrutiny for even the most “mundane” or indirect of communications, and its emphasis on the role of the First Amendment as a defender of individual autonomy threatens to spark a deregulatory cascade. But this may merely be a parade of horrors (or an argument for reversing course in the union cases). With a new ninth Justice, the Supreme Court is, perhaps, at a crossroads. The next Part contemplates a new path forward.

### III. THE PATH FORWARD: THREE OPTIONS

The discussion above reveals the line-drawing challenges inherent in a First Amendment jurisprudence based on individual autonomy interests. It

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<sup>317</sup> Post, *supra* note 29, at 226.

<sup>318</sup> Cf. Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 341 (2011).

<sup>319</sup> *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *see also id.* (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

<sup>320</sup> *See, e.g., United States v. Lee*, 455 U.S. 252, 261 (1982) (Stevens, J., concurring) (recognizing that the “clash between appellee’s religious obligation and his civic obligation is irreconcilable”).

also demonstrates that current Supreme Court jurisprudence provides a theoretical basis for Sam, or any public employee, to assert opt-out rights under the First Amendment as to both his union and pension payments. This result may please pure libertarians (and, of course, Sam), but it is unlikely to satisfy the vast majority of those who recognize the value of external constraints to solve structural issues in the marketplace and in governance. The purpose of engaging in the analysis above is not to green-light thousands of lawsuits by employees unhappy with how their money is spent. It was to illustrate that in seeking to avoid one “slippery slope”—“ad hoc” balancing of First Amendment rights and insidious governmental limits on expression—the Court is heading towards another, one in which speech, conduct, and money are so muddled that a large swath of government regulation is constitutionally suspect.<sup>321</sup> The discussion below suggests three paths forward and considers how the Paycheck Problem might be resolved under each of them.

#### A. The “Functional” Path

One approach the Court might take would be to pull back from some of its more recent and expansive statements of First Amendment rights and re-establish lines drawn in earlier cases that distinguish among kinds of speech, burden, speakers, and scrutiny level, returning to the framework that guided First Amendment analysis for several decades. Of particular relevance to the Paycheck Problem, under this approach the Court would re-affirm the notion that laws regulating commercial speech receives more permissive review than those affecting political speech, and it would recognize that the government gets more latitude when it restricts speech while acting as an employer than it does when acting as a sovereign.<sup>322</sup>

The Court would also wind back the language in *Knox* and *Harris* (and suggested in *Hobby Lobby*) equating compelled funding with compelled speech and recognize that requiring someone to pay something is meaningfully different than requiring someone to do something.<sup>323</sup> Until *Knox* and *Harris*, the Supreme Court had observed this distinction. For example, while the government can require Sam to pay taxes, it cannot require him to recite the Pledge of Allegiance, recite an oath promising not to overthrow the government, or expressly oppose prostitution.<sup>324</sup>

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<sup>321</sup> See *supra* note 270.

<sup>322</sup> See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (setting forth the “*Pickering* principle,” allowing the government to impose speech restrictions as a condition of public employment that it could not impose under the First Amendment); see also *Harris v. Quinn*, 134 S. Ct. 2618, 2654–56 (2014) (Kagan, J., dissenting) (discussing the relevance of the *Pickering* principle to the question of mandatory agency fees for public unions).

<sup>323</sup> See *supra* notes 43–45 and accompanying text.

<sup>324</sup> See, e.g., *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2331–32 (2013);

Scholars who have analyzed the issue of indirect speech have reached a similar conclusion. Shortly after *United Foods* was decided, Gregory Klass sought to identify the constitutional right infringed in compelled subsidy of speech cases.<sup>325</sup> He considered and rejected two possibilities: that a compelled subsidy interest is rooted in an individual's freedom of belief (as articulated in *Abood*) or in an individual's freedom of speech (as implied in *Buckley*). As to the former, Klass observed that while "it is often central to our most deeply held beliefs that we be able to express them in words" and thus laws that compel speech impinge directly on our ability to communicate who we are and what we value, laws that require the subsidization of speech do not impinge the freedom of belief in the same way.<sup>326</sup> First, there is less moral content in the act of underwriting an activity than actually performing it (consider, perhaps, some of your own investments).<sup>327</sup> Second, the "mere act of paying a mandatory assessment does not identify the payer with the message her payments help fund [and,] . . . [c]onsequently, the mere act of paying does not interfere with the dissenter's ability to express her beliefs."<sup>328</sup>

As to whether a subsidy implicates an individual's freedom of speech, Professor Klass observed that a required payment "is neither intended as a communicative act nor understood as one."<sup>329</sup> We may look up someone's political contribution record and form opinions about him from candidates to whom he had voluntarily donated, but we do not meet a public school teacher and assume that because she is required to pay her agency fee we know what her views are on class size, structured lay-offs, or the Common Core Standards, nor even that she is a union member. Nor do we meet fellow taxpayers and assume we are all in agreement on government policies and priorities. In this context, a mandatory subsidy does not infringe on one's freedom of speech.<sup>330</sup>

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*Speiser v. Randall*, 357 U.S. 513, 513 (1958); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 624 (1943).

<sup>325</sup> See Klass, *supra* note 315, at 1089.

<sup>326</sup> *Id.* at 1115.

<sup>327</sup> *Id.* at 1115–16. The Court in *Hobby Lobby* functionally elided action and payment in holding that the RFRA does not allow the Court "to say that [the asserted] religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

<sup>328</sup> Klass, *supra* note 315, at 1116–17.

<sup>329</sup> *Id.* at 1124.

<sup>330</sup> *Id.* In contrast, a voluntary payment may possess some value as symbolic speech. *Id.* at 1118 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). For this reason, as I have argued in another venue, we should recognize the First Amendment rights of both those who want to make voluntary donations and those that feel coerced into doing so. See Mueller, *supra* note 286, at 1832–33 (arguing that while a political donation may technically be voluntary, many contributors do not feel as though they can say no and consequentially give far more than they otherwise would).

Of course, this approach may well describe a golden era of First Amendment doctrine as it never actually existed.<sup>331</sup> It also does not resolve many difficult questions of line drawing and balancing. It does, however, lead us away from an absolutist approach in which any infringement on speech or one's "freedom of belief" is cause to overturn a law or, in Sam's case, prohibit the compelled payment. It re-introduces nuance into the equation.<sup>332</sup>

For the Paycheck Problem, the result of a turn down this path would be, to some extent, a return to status quo. Sam could not sue to opt out of paying a portion of his taxes, and while he would not have to support his union's political activities so long as he remains not a member, he would still have to pay his agency fee. The question of the pension contribution is more difficult, however. Unless the Supreme Court truly backtracks and reverses *Citizens United*, Sam's mandatory contribution requires him to fund political activities of a corporation, in effect supplementing the political funding preferences of corporate directors.<sup>333</sup> This is exactly what *Aboud* banned in 1977 and, as demonstrated above, the two contexts share significant overlap.<sup>334</sup>

### B. The "Individual" Path

A second path would be to accept the autonomy interest that is driving the Court's current First Amendment jurisprudence, but to demand more rigor in its application. As described above, the tax, union, and pension schemes to which Sam objects do more than extract money from him. They provide a benefit under terms in which others in the scheme—e.g., the union and its members—cannot opt out of providing that benefit. None of these are pure libertarian systems that one can exit without creating externalities.

This observation recently prompted Cynthia Estlund to propose that the only way to ascertain the degree of First Amendment burden that one aspect of labor laws—agency fees—places on an actor in the system is to consider

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<sup>331</sup> Cf. P. Gordon Lippy, *So, Mr. Trump, Exactly When Was America Great?*, DAILY KOS (Sept. 7, 2015), <http://www.dailykos.com/story/2015/9/7/1419125/-So-Mr-Trump-exactly-when-was-America-great>.

<sup>332</sup> Cf. Laurence H. Tribe, *Dividing Citizens United: The Case v. The Controversy*, 30 CONST. COMMENT. 463, 493 (2015) (presenting "a plea for judicial open-mindedness, sensitivity to nuance, and a measure of old-fashioned humility").

<sup>333</sup> See Bebchuk & Jackson, *supra* note 19, at 90 ("The basic problem arises from the fact that political spending decisions may be a product not merely of a business judgment regarding the firm's strategy, but also of the directors' and executives' own political preferences and beliefs. Political spending might often have consequences that are exogenous to the firm's performance . . .").

<sup>334</sup> In *Citizens United* the Court rejected as a compelling interest the potentially distorting impact of accumulated wealth, but its discussion of the issue makes it clear that what it was really dismissing was a compelling interest in leveling the campaign funding playing field. See *Citizens United v. FEC*, 558 U.S. 310, 350 (2010). As demonstrated above and in the Court's recent analysis in *Harris*, Sam's objection to his pension contribution is a liberty interest, not an equality interest.

the challenged provision in the context of all the mutual benefits and obligations the law imposes.<sup>335</sup> Professor Estlund focused her inquiry on the union context, but her analysis bears on other areas of compelled subsidy as well. She reasoned that “[u]nions are distinct constitutional actors governed by an array of unusual rights, privileges, responsibilities and duties, the whole of which ought to be considered in assessing a challenge to any of the parts.”<sup>336</sup> This argument echoes Justice Scalia’s dissent in *Lehnert*, quoted above, but with an important caveat: “Where he invokes the ‘free rider’ problem as a ‘compelling state interest’ justifying the agency fee requirement,” Estlund argues that “no significant constitutional infringement arises, and no compelling state interest need be identified, because the agency fee is offset and justified by the costs (to the union) and benefits (to the individual) of union representation.”<sup>337</sup> It is a value-for-money exchange.

Catherine Fisk and Margaux Poueymirou recently engaged in a similar analysis, although rather than focusing on the standard of review, they argued that a proper balancing of First Amendment interests in agency fee cases must account not only for the rights of dissenters, but also the First Amendment rights of the union and its members.<sup>338</sup> Even under a strict scrutiny analysis, agency fees would pass constitutional muster because

they protect three sets of interests simultaneously: nonmembers from having to subsidize the political and ideological pursuits of the union, union members from having to subsidize the political and ideological beliefs of nonmembers, and unions who strive to protect their workers’ interests and can only do so when they are able to fully participate in the political landscape.<sup>339</sup>

These arguments suggest an autonomy-focused approach that would permit compelled subsidies only if two conditions are satisfied: first, the challenged payments are reasonably related to a regulatory scheme that provides a benefit; and second, any opt-out would impact the expressive interests of others bound in the scheme. Under this approach, expenditures with no reasonable relation to the benefit provided, such as certain investments in political activism, would be walled off from compulsory funding, but funding for services that an entity is bound to provide and that offer a benefit to the dissenter would be permissible. Conversely, if a dissenter could opt out of receiving a benefit, he would be able to opt out of the compelled funding. This point reinforces the conclusion that one cannot opt out of taxes; it is impossible, after all, to avoid the benefits provided by government spending, however much one might disagree with some of it.

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<sup>335</sup> See Estlund, *supra* note 95, at 213.

<sup>336</sup> *Id.* at 206.

<sup>337</sup> *Id.* at 220.

<sup>338</sup> Fisk & Poueymirou, *supra* note 28, at 442–43.

<sup>339</sup> *Id.* at 491.

As a descriptive and normative proposition, this approach is appealing. It provides a better account of the forces at play in compelled subsidy cases, and the various constitutional interests implicated, than the Court's recent decisions in this area. It also works with the Roberts Court's focus on the First Amendment as a protector of individual autonomy, although it demands that the scope of the inquiry be broadened to recognize all relevant autonomy interests.

Nevertheless, although it may satisfy the Court's concern for autonomy interests, this proposal may be at odds with the Court's current "absolutist" approach to First Amendment cases.<sup>340</sup> With few exceptions, the Court seems to be moving away from the kind of balancing approach suggested here, as demonstrated by its reliance on "corporate democracy" to dismiss concerns about dissenting shareholders in *Citizens United* and its disregard for the additional costs its *Hobby Lobby* decision created for the government or employees. Relatedly, this proposal is susceptible to the same criticism that animated Justice Breyer's dissent in *United Foods*: under it, the government might be more exposed to First Amendment challenges when it takes a light regulatory hand rather than when it enacts comprehensive legislation binding others in a scheme.<sup>341</sup>

How would the Paycheck Problem resolve itself along this path? As noted above, Sam would have no constitutional objection to taxes; he receives a benefit from them and any exit is likely to create increased costs for others in the system. Likewise the agency fee, which already excludes non-germane political and ideological expenditures, would likely be viewed as an acceptable accommodation of the constitutional interests of the various parties involved. Pension contributions, however, would continue to be problematic so long as corporations are allowed to make unlimited political expenditures. Notwithstanding the Court's holding in *Citizens United* that political dollars need not be kept in a separate account of voluntary contributions, to the extent one conceives of a corporation as a group of individuals who have combined capital, the result in *Citizens United* clearly elevated the core First Amendment interests of some members over others.<sup>342</sup>

One might imagine two responses under this approach defending the status quo and denying investors' constitutional interests in how their money is spent. First, one might argue that a corporation's political spending decisions

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<sup>340</sup> See *supra* notes 37–39.

<sup>341</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 428 (2000) (Breyer, J., dissenting) (criticizing the majority's "unreasoned distinction between heavily regulated and less heavily regulated speakers" because it "could lead to less First Amendment protection in that it would deprive the former of protection").

<sup>342</sup> *But see* *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* . . . who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.").

are reasonably related to the benefit received by the investor. This is a debatable, fact-specific proposition that cannot be resolved here. Professors Bebchuk and Jackson have offered several reasons that the political preferences (and spending) of a corporation's directors might diverge from the views of the shareholders and the interests of the company.<sup>343</sup> One obvious area of such divergence might be issues relating to corporate governance or shareholder rights.<sup>344</sup> For now it is enough to note that these arguments would also open the door to allowing union agency fees to be used on political spending on the same theory, upending the compromise struck in *Street* and *Abood*.<sup>345</sup> Second, one might argue, as the Court suggested in *Lee*, that an employee agrees to fund corporate political speech when she enters into public employment and is required to make pension contributions. Again, this raises symmetry issues with unions, especially where someone is hired into an existing union shop. Even if it did not, history rebuts this account. Before *Citizens United*, the last time corporations and unions could make independent expenditures was 1947, long before pensions seriously invested in private companies.<sup>346</sup> It is highly improbable that any such trade-off was contemplated as a part of the pension scheme.

Last, to the extent the pension is a defined contribution plan as opposed to a defined benefit plan—meaning that the benefit paid out correlates to the money paid in—Sam may be able to opt out of his pension scheme, although this would mean foregoing a significant earnings advantage. Opting out of a union benefit is less feasible. An objecting police officer or teacher might theoretically be able to forego salary increases and health insurance improvements negotiated by the union, but it would be more difficult to cordon her off from negotiated employment conditions like vacation time, class size, hiring and firing seniority, and shift hours. Indeed, allowing an individual employee to reject the terms of collective bargaining would undermine the chief benefits employers receive from unions—namely, administrative convenience.<sup>347</sup>

### C. The “Structural” Path

A final approach would build on the analysis above and re-frame the First Amendment as protecting a larger constitutional system, one in which indi-

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<sup>343</sup> Bebchuk & Jackson, *supra* note 19, at 90.

<sup>344</sup> *Id.* at 91.

<sup>345</sup> See, e.g., *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 801 (1961) (Frankfurter, J., dissenting) (arguing that in fact, unions' “political side . . . is as organic, as inured a part of [their] philosophy and practice . . . as their immediate bread-and-butter concerns”).

<sup>346</sup> See *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106 (1948).

<sup>347</sup> Transcript of Oral Argument at 39–50, *Friedrichs v. Cal. Teachers Ass'n*, 578 U.S. 1083 (2016) (per curiam) (No. 14-915).



vidual liberty is important but not always a “trump.” Even beyond compelled subsidy cases, many laws impede free will or require someone to indirectly support something with which she may disagree.<sup>348</sup> If these were all potential First Amendment violations, challenges to previously unobjectionable regulations would threaten to overrun the courts and, of greater concern, dilute the actual purpose of the First Amendment and the Constitution it supports. We had been able to ignore the expansion of the autonomy interest in free speech jurisprudence because we had gatekeepers such as categories of speech and scrutiny levels that kept it in check. But if the Court is going to shine a First Amendment light on all regulation, it may be time to develop a more robust theory of the First Amendment.

This approach does not ignore the autonomy interests that undergird much of the Court’s recent First Amendment jurisprudence. Rather, it recognizes that the Constitution’s preservation of individual autonomy is purposeful. We protect it because we value an individual’s participation in society and in the democratic process.<sup>349</sup> The legitimacy of the constitutional structure rests on the presumption that people will participate, both in the selection of leaders and in the formation of public policy. Recognizing this allows us to see that what we might call “exit” actions, such as Sam contemplates in the Paycheck Problem, pose unique First Amendment challenges in that they not only question the legitimacy of the government to craft collective solutions to what are often collective action problems—the very purpose, some would say, of government—but also force us to evaluate how our system of republican self-government can function if everyone can pick up their metaphorical ball and go home.

Thinking systemically about the purpose of the Constitution is not a new endeavor. Thirty years ago Owen Fiss proposed a “structural approach” in which “the enrichment of public debate is substituted for the protection of autonomy” as the impetus of the First Amendment, and “free speech operates as a justification rather than as a limit on state action.”<sup>350</sup> More than

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<sup>348</sup> See Post, *supra* note 29, at 210 (citing *Banning v. Newdow*, 14 Cal. Rptr. 3d 447 (Cal. Ct. App. 2004), in which a father in a child custody dispute objected that an order requiring him to pay a portion of the mother’s attorney’s fees violated his First Amendment right not to be compelled to fund speech with which he disagreed).

<sup>349</sup> See *id.* at 227 (“The interest of autonomy, which would be compromised by compulsory taxation[,] . . . does not well explain the configuration of existing or desirable First Amendment jurisprudence. The interest of participation in public debate, by contrast, . . . does have considerable explanatory power . . .”); cf. Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167, 1210 (2001) (“It is intolerable that the First Amendment, long treasured as an essential feature of self-government, has been made by the Court into an instrument for the subordination of the democratic process to government controlled by the highest bidders.”).

<sup>350</sup> Fiss, *supra* note 46, at 1419.

thirty years before that, Alexander Meiklejohn argued that the First Amendment did not protect an individual right so much as a system of self-government and political freedom; the First Amendment, he noted, does not state that the government may not abridge speech, but “the freedom of speech.”<sup>351</sup> More recently, in his book *Citizens Divided*, Robert Post suggested that the twin pillars of the First Amendment are “democratic legitimation” and “discursive democracy”; in *Citizens United*, he posited, the Supreme Court had erred in elevating the latter over the former.<sup>352</sup>

The purpose of the First Amendment will not be resolved here, nor does it need to be. It is enough to re-direct our attention in the Paycheck Problem to the structural issues it might pose. Under this approach, we worry about compelled subsidies because they might skew either the political process or public discourse in a way that contravenes the First Amendment’s purpose. Taking a lead from Post’s analysis, the risk can further be broken down into two separate concerns: first, that a compelled subsidy that is aggregated and spent by another with whom one is not politically aligned on an election or policy question might undermine the legitimacy of the political process; and second, that a compelled subsidy spent to promote a particular public policy might impact government decision-making in a way disproportionate to the actual support for that policy, either because it drowns out dissenting voices or because it does not leave sufficient alternate avenues for expression. To collapse the inquiry back down to its essence: is the system sound, and can you meaningfully participate in it?<sup>353</sup>

It bears noting that evaluating system integrity and meaningful participation in an electoral process may well have different touchstones than in public discourse. There are reasons to more closely safeguard the former. First, unlike public policy discussions, an election is not an adaptable, iterative process; once a vote happens, that choice is locked in for two, four, or six years. Second, to the extent preventing corruption continues to be a government interest, the personal stakes and, again, winner-take-all nature of elections may make them more susceptible to manipulation. Third, our constitutional expectations about the democratic process are different in the two cases. Our right to vote is deeply personal and inalienable, and any manipulation of our exercise of the franchise more directly impacts our interaction with our system of government than our views on various public policy issues, which we process into a tapestry that may ultimately inform our vote. The courts, for

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<sup>351</sup> MEIKLEJOHN, *supra* note 46, at 19.

<sup>352</sup> POST, *supra* note 46, at 36; *see also id.* at 93 (concluding that “the Court in its recent campaign finance cases has posed the wrong constitutional questions and has failed to consider the material constitutional facts”).

<sup>353</sup> *See generally* Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655 (2017) (re-conceptualizing voting and campaign finance cases under a proposed “right to participate”).

example, recognize the value of equality in elections but have consistently rejected its significance in campaign finance cases.<sup>354</sup>

Under this approach, Sam's compelled payment of taxes would pass muster. In addition to the structural arguments raised above, it is worth noting that taxes do not impinge his ability to fully participate the electoral process in any way, and they pose only limited constraints on his ability to engage with public discourse on matters of policy. Sam is still, as the lower courts noted in an earlier tax resister case, "free to announce and publish" his opinions about matters of public concern.<sup>355</sup> Indeed, to the extent that one will not speak up unless inspired to do so by a message one opposes (consider much of social media), it may be that the compulsion to pay taxes inspires greater participation in public debate.

The case of Sam's pension and union payments is, as noted above, different from his taxes as both corporations and unions are extra-constitutional; they are not in themselves necessary for government. Nevertheless, in both cases Sam's objection to his payments rests on the fact that they fund expression likely to shape public discourse and political outcomes. Applying the structural line of analysis, a court would be tasked with considering whether assessment unduly skews either process. One way to approach this might be a test with two prongs: first, is the assessment itself protected by meaningful safeguards; and second, does the assessment compromise the dissenter's ability to meaningfully participate in the electoral process or in public discourse?

The devil is of course in the details, but we can think in broad terms about how this might play out in the Paycheck Problem. As to the first question, the democratic safeguards are more robust in the union context than in the pension one. Union shops can only be formed once a majority of employees vote to do so, all represented employees are permitted to join as voting members, and any employee—union member or not—can speak in school board meetings and in public about matters of policy.<sup>356</sup> If anything, the fact that dissenting members may opt out of full union membership allows them to telegraph a message of disapproval to both the union officers and to their employers about the union's activities and positions. Further, agency fees can only be spent for limited purposes, for which the union must provide an accounting. Political contributions remain voluntary. As discussed above, none of these safeguards are available in the pension context. Even if members of the state

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<sup>354</sup> Compare *Evenwel v. Abbott*, 136 S. Ct. 1120, 1130 (2016) (reaffirming the principle of "one-person, one-vote"), with *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) ("No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field' . . .").

<sup>355</sup> *Kahn v. United States*, 753 F.2d 1208, 1216–17 (1985).

<sup>356</sup> *Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167 (1976).

pension board have political accountability, there are no avenues for participation by investors. As seen in the discussion of “corporate democracy” above, in fact “a core goal of corporate law is to give directors and officers legal authority to act in ways with which shareholders may profoundly disagree.”<sup>357</sup>

As to the second question—does the assessment impede a dissenter’s ability to participate—here too the union fees raise fewer concerns. This is due in part to the fact that, in contrast to those making mandatory pension contributions, no one can be compelled to fund unions’ non-germane political activity. (A dissenting employee might argue that they could better use their agency fees for advocacy if they did not have to direct them to their union, but again pensions would implicate similar if not greater concerns, as pension contributions are typically far higher than agency fees.<sup>358</sup>) Indeed, under any of the approaches proposed here, the asymmetry between union and corporate political spending remains an untenable problem. It is particularly acute in an environment where public-private partnerships, quasi-public regulatory bodies, and corporate strategies to grow profits not through the markets but via government engagement are more and more present.<sup>359</sup>

Further, while neither the union nor pension contributions prevent anyone from speaking out in public, corporate investments suffer from a lack of disclosure, making it difficult for an investor to recognize when speech on a particular issue is warranted. It is not unusual for individuals to decide to engage in public debate only upon learning about controversial statements or events that merit a response. If we cannot identify these—and currently the SEC does not require corporations to disclose political spending—then it is hard to say that the ability to participate is meaningful. For reasons discussed above, the lack of transparency and exit rights is particularly troubling in the political context, but it also has implications for a corporation’s other expressive activities and may give a constitutional dimension to calls for greater disclosure.

## CONCLUSION

The Paycheck Problem provides as a framework to consider the trajectory of the Court’s recent First Amendment cases and its implications for the government’s ability to craft collective solutions to systemic problems. We live in an increasingly interdependent and interconnected society. Yet as

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<sup>357</sup> Corporate Law Professors’ Brief, *supra* note 181, at 7.

<sup>358</sup> See *supra* note 258.

<sup>359</sup> See, e.g., John C. Coates IV & Ron Fein, *Corporations Are Perverting the Notion of Free Speech*, NEWSWEEK (Aug. 4, 2015), <http://www.newsweek.com/corporations-are-perverting-notion-free-speech-359785> (“Companies increasingly place bets not on *technological* innovation but on *legal and political* ‘innovation’—what business schools teach under the Orwellian name ‘non-market strategies.’ As corporate success shifts toward extracting wealth via the political and judicial systems, career advancement will depend on learning the levers of power in courts, legislatures and regulatory agencies, and different skills and forms of ‘talent’ will be rewarded.”).

movements from school choice to Brexit demonstrate, the question of when an individual should have the right to exercise an exit strategy is only going to become more pressing in the coming decades. The Supreme Court's compelled subsidy cases raise issues that are central to our concepts of self-determination, governmental power, and social structures, and they provide guidance as to how we should respond when any of these constructs come into conflict. This makes it all the more unfortunate that this area of jurisprudence has also been one of the Court's least consistent. The analysis above illustrates several serious shortcomings with the Supreme Court's current approach to compelled subsidy of speech cases, including a failure to recognize the implications of its recent union jurisprudence for cases arising in the corporate context, an overemphasis on the First Amendment's role protecting individual autonomy, an undifferentiated expansion of the First Amendment "penumbra," and a blurring of the line the Court has long marked between money and speech. With a new Justice on the Court, it is time to identify a path forward that can bring more coherence to a disorganized but vitally important body of law.<sup>360</sup>

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<sup>360</sup> As this Article was in the final stage of preparation for publication, the Supreme Court heard arguments in *Janus v. AFSCME*. Transcript of Oral Argument, *supra* note 134. Due to publication constraints, I was not able to give full consideration to this case throughout this Article. However, the oral argument indicated little to change the analysis in this Article, nor did it suggest that any Justice has altered his or her views since the Court deadlocked on *Friedrichs*. The tensions noted in this Article among the Court's various lines of compelled subsidy jurisprudence went entirely unexplored. No one mentioned the Court's ruling in *Citizens United* upholding the use of corporate or general treasury funds for political advertisements, and in fact the author of that opinion, Justice Kennedy, appeared to disfavor the union, admonishing State Respondent's counsel that, "What we're talking about here is . . . compelled subsidization of a private party, a private party that expresses political views constantly." Transcript of Oral Argument, *supra* note 134, at 36. Justice Gorsuch, who will likely be the swing vote, said nothing during the argument.

