

2. *Freedom of Speech — Compelled Subsidization.* — 2011 was, in many respects, the year of union politics. Sweeping into statehouses and legislatures after the November 2010 elections, a victorious coalition of conservatives promised transformative cutbacks to the rights and benefits of organized labor.¹ The most dramatic ensuing battle played out in Wisconsin, which enacted a law depriving the majority of public sector workers of “most of [their] rights” to unionize.² And Indiana became the first state in over a decade to enact “right to work” legislation, already on the books in twenty-two other states.³ “Right to work” laws outlaw agency-shop arrangements, which require even workers who decline to join a union to pay dues.⁴ Agency shops in public sector workplaces received constitutional sanction in 1977’s *Abood v. Detroit Board of Education*,⁵ although the Supreme Court recognized that the First Amendment forbids unions from requiring nonmembers to subsidize union political speech.⁶ Under *Abood*’s follow-up case, *Chicago Teachers Union, Local No. 1 v. Hudson*,⁷ unions may satisfy this limit on compelled subsidization by annually providing nonmembers notice of the dues and a chance to opt out of funding union political activities.⁸

Last Term, against the backdrop of this “ongoing, intense political debate,”⁹ the Supreme Court held in *Knox v. Service Employees International Union, Local 1000*¹⁰ that when public sector unions charge special midyear fees, they must go further than providing a new notice and opt-out opportunity. Instead, unions may procure funds from nonmembers only if those nonmembers affirmatively opt *in* to the special contribution.¹¹ Although the majority stood on solid doctrinal footing in assuming that the state possessed no legitimate interest that would satisfy “exacting First Amendment scrutiny,”¹² its decision inadequately substantiated its threshold assumption that opt-out condi-

¹ Dan Kaufman, *Land of Cheese and Rancor: How Did Wisconsin Get to Be the Most Politically Divisive Place in America?*, N.Y. TIMES, May 27, 2012, § 6 (Magazine), at 30.

² Wis. Educ. Ass’n Council v. Walker, 824 F. Supp. 2d 856, 859 (W.D. Wis. 2012).

³ Monica Davey, *Indiana Governor Signs a Law Creating a ‘Right to Work’ State*, N.Y. TIMES, Feb. 2, 2012, at A12.

⁴ Some “right to work” laws govern both government and nongovernment workplaces. See, e.g., VA. CODE ANN. §§ 40.1-58.1, 40.1-62 (2002). Indiana’s, however, covers only the private sector. 2012 Ind. Acts 8 (P.L.2-2012).

⁵ 431 U.S. 209 (1977).

⁶ *Id.* at 235–36.

⁷ 475 U.S. 292 (1986).

⁸ See *id.* at 310.

⁹ *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2306 (2012) (Breyer, J., dissenting).

¹⁰ 132 S. Ct. 2277.

¹¹ *Id.* at 2296.

¹² *Id.* at 2289.

tions meaningfully burden First Amendment rights. This strident opposition to an opt-out framework reflects the broadening of the rationale for constitutionally restricting compelled-subsidy regimes. The Court has seemingly jettisoned a narrow focus on protecting individual objectors in favor of an effort to safeguard the “marketplace of ideas” from the distorting impact of government orders to subsidize private speech.

In September 2005, Edward Dobrowolski, a California state employee who had refused to become a union member, received a letter from Local 1000 of the Service Employees International Union (SEIU).¹³ The notice informed Dobrowolski that the SEIU would temporarily withdraw 0.25% of his monthly paycheck on top of the ordinary monthly dues charged to all employees.¹⁴ Just days before, the union’s governing council had approved the special assessment as a measure to finance its “Political Fight Back Fund” in response to two anti-union ballot initiatives.¹⁵

Dobrowolski was confused. Just months earlier, he had received the annual notice required by *Hudson* (his “*Hudson* notice”).¹⁶ At the time, he had chosen to exercise his constitutional right not to cede a portion of his paycheck to fund political expenses unassociated with “tasks of negotiating and administering a collective-bargaining agreement.”¹⁷ *Abood* had condoned compelled support of these tasks as essential to thwart free-rider obstacles to the successful formation of unions,¹⁸ which wrest a significant, though potentially declining, wage premium for represented employees.¹⁹

Skimming his *Hudson* notice, Dobrowolski would have read that in 2004, the union had expended 56.35% of its resources on chargeable receipts and the remainder on political activities.²⁰ Though “imperfect,”²¹ the method the Court approved in *Hudson* permits unions to rely upon the previous year’s expenditure breakdown as the basis for setting the next year’s agency fees.²² In 2005, Dobrowolski thus paid 56.35% of the ordinary annual fee. And “[a]s a consolation” from the SEIU, he and other nonmembers who had opted out of annual politi-

¹³ See *Knox v. Westly*, No. 2:05-cv-02198-MCE-KJM, 2008 WL 850128, at *2–3 (E.D. Cal. Mar. 28, 2008).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at *2.

¹⁷ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977).

¹⁸ *Id.* at 224.

¹⁹ GERALD MAYER, CONG. RESEARCH SERV., RL 32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 6–7 (2004).

²⁰ *Knox*, 2008 WL 850128, at *2.

²¹ *Knox*, 132 S. Ct. at 2301 (Breyer, J., dissenting).

²² *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 307 n.18 (1986).

cal charges in 2005 saw their contributions to the special assessment reduced to the same 56.35% share.²³

Joining with similarly aggrieved state employees, Dobrowolski launched a class action on behalf of all nonunion workers, both nonmembers like him who had opted out of annual political contributions and others who had declined to opt out.²⁴ In 2008, a federal district court held narrowly that, in part because the SEIU's special assessment "depart[ed] drastically from its typical spending regime . . . to focus on activities that were political,"²⁵ the union should have provided a fresh notice with the chance for nonmembers to opt out.²⁶

The Ninth Circuit reversed.²⁷ Writing for the panel, Judge Thomas concluded that the "balancing test"²⁸ in *Hudson* required no further action on the SEIU's part because even if an objector like Dobrowolski effectively sponsored union political speech in 2005, the *Hudson* method, "never [predicated on] more than a prediction," assumed his overall liability would "even out over time" with underpayments in later years.²⁹ Judge Wallace dissented, construing *Hudson* as a procedural floor, adequate only insofar as nonmembers could accurately forecast union spending plans.³⁰

The Supreme Court reversed.³¹ Starting from the perspective that *Abood*'s reliance on foiling free-rider problems to justify agency-shop regimes represented "an anomaly" in First Amendment law,³² Justice Alito — in a passage that has led some commentators to predict that the Court may eventually enshrine "right to work" policies as constitutional dogma³³ — disclaimed an interest in "revisit[ing] today whether" *Abood* and its progeny "have given adequate recognition to . . . critical First Amendment rights."³⁴ The majority then found the SEIU's handling of the special assessment insufficient even under *Hudson*'s permissive standard. Like Judge Wallace in dissent, the majority found that *Hudson* stands for the principle that nonmember employees must receive "'a fair opportunity' to assess the impact of paying for

²³ *Knox*, 132 S. Ct. at 2286.

²⁴ *Knox*, 2008 WL 850128, at *1.

²⁵ *Id.* at *8.

²⁶ *Id.* at *10.

²⁷ *Knox v. Cal. State Emps. Ass'n, Local 1000*, 628 F.3d 1115, 1117 (9th Cir. 2010).

²⁸ *Id.* at 1120 & n.3.

²⁹ *Id.* at 1121 (emphasis omitted).

³⁰ *Id.* at 1137 (Wallace, J., dissenting).

³¹ *Knox*, 132 S. Ct. at 2296. Justice Alito penned the majority opinion and was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

³² *Id.* at 2290.

³³ See, e.g., Garrett Epps, *The Court's Scott Walker Moment*, AM. PROSPECT (June 21, 2012), <http://prospect.org/article/court%E2%80%99s-scott-walker-moment>.

³⁴ *Knox*, 132 S. Ct. at 2289.

nonchargeable union activities” so as “to make an informed choice.”³⁵ Yet in June 2010, when nonmember workers received their annual *Hudson* notices, they could not have anticipated union efforts to defeat the two ballot propositions.³⁶ Fully informed, these nonmembers may have had an incentive to opt out when they otherwise would not have bothered.³⁷ The Court further held that even workers like Dobrowolski who had paid only 56.35% of the special fee suffered a First Amendment injury because of the “risk that, at the end of the year, [they might] have paid” a portion of the union’s political expenses.³⁸

The majority then drew a line in the sand. Dissatisfied with the prospect of meting out an “additional burden” on First Amendment rights beyond the opt-out procedure for annual dues, Justice Alito could find “no way to justify . . . imposing yet another opt-out requirement to collect special fees whenever the union desires.”³⁹ Without explicitly reaffirming *Hudson*, the majority assumed that its opt-out framework for annual fee setting remained on defensible constitutional ground.⁴⁰ It then held that unions may levy special assessments upon only the nonmembers who affirmatively agree to contribute.⁴¹

Justice Sotomayor, joined by Justice Ginsburg, concurred in the judgment, agreeing with the majority only that nonmembers should have received notice and an opportunity to opt out of the special assessment.⁴² The focus of Justice Sotomayor’s opinion, however, was on lambasting Justice Alito’s decision for disregarding the Court’s rules by reaching out to resolve “significant constitutional issues not contained in the questions presented, briefed, or argued.”⁴³ In particular, petitioner-employees requested only that the Court extend the *Hudson* opt-out rule to special assessments, not that it craft a new opt-in requirement.⁴⁴

³⁵ *Id.* at 2291 (quoting *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986)).

³⁶ *Id.* at 2292.

³⁷ *Id.* Justice Alito did not limit the Court’s holding to politically motivated special assessments because “even if the new fee were spent . . . for nonpolitical activities, it would free up other funds . . . for political purposes.” *Id.* at 2293 n.6.

³⁸ *Id.* at 2295.

³⁹ *Id.* at 2293.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2296 (Sotomayor, J., concurring in the judgment). Justice Sotomayor limited her analysis to special assessments “intended to fund solely political lobbying efforts.” *Id.*

⁴³ *Id.* at 2297.

⁴⁴ *Id.* at 2298 n.2. Justice Alito purported to locate a basis for reaching the opt-in rule in the second question presented, *id.* at 2296 n.9 (majority opinion), but as Justice Sotomayor pointed out, that question referred only to the designation of expenses as chargeable or nonchargeable, not to the procedure for objecting to those expenditures, *id.* at 2298 n.2 (Sotomayor, J., concurring in the judgment).

Justice Breyer, along with Justice Kagan, dissented.⁴⁵ The dissent emphasized that *Hudson* contemplated that sometimes nonmembers would contribute to a current year's political activities but that aggregated over many years, over- and underpayments would roughly balance to equipoise.⁴⁶ Objectors like Dobrowolski still financed only 56.35% of the SEIU's total expenditures for 2005, and the dissent saw no reason to believe that any overpayment in 2005 would not be offset eventually.⁴⁷ Justice Breyer conceded that for nonmembers who had not opted out initially, the case for a new chance to opt out was stronger.⁴⁸ But ultimately, he concluded that forcing unions to undertake this costly administrative step was not constitutionally mandatory, particularly in light of the small likelihood that an apathetic nonmember would decide to object for the first time following the imposition of a special fee.⁴⁹

With the majority's eyes trained on matters beyond the strict confines of the case, Justices Sotomayor and Breyer had little difficulty scoring easy points against Justice Alito's decision. Moreover, the majority offered no defense of its opt-in requirement specifically tailored to special midyear assessments⁵⁰ — a failure that almost certainly portends the extension of *Knox* to annual agency fees. But on its own terms, the majority's antagonism toward opt-out conditions is more difficult to assail. Although the *Knox* majority neglected to undertake a careful justification of its threshold assumption that an opt-out condition actually burdened the First Amendment right against compelled subsidization, Justice Alito's determination that the government lacked a legitimate interest in steering money toward union political activities was founded upon a solid doctrinal basis. Ultimately, the majority's rush to mandate this opt-in framework was likely driven by its subscription to a sweeping marketplace-protection rationale for enforcing the compelled-subsidization doctrine.

The harshest criticism of *Knox* charges the majority with politicized decisionmaking and hostility to organized labor.⁵¹ Though avoiding the vituperative tone of this commentary, Justice Breyer's dissent sketched the theoretical basis for such a critique by drawing upon Professors Cass Sunstein and Richard Thaler's seminal work on "libertarian paternalism."⁵² Sunstein and Thaler build upon advances

⁴⁵ *Id.* at 2299 (Breyer, J., dissenting).

⁴⁶ *Id.* at 2301.

⁴⁷ *Id.* at 2302–03.

⁴⁸ *Id.* at 2304–05.

⁴⁹ *Id.* at 2305.

⁵⁰ *Id.* at 2299 (Sotomayor, J., concurring in the judgment); *id.* at 2306 (Breyer, J., dissenting).

⁵¹ See, e.g., Editorial, *The Anti-Union Roberts Court*, N.Y. TIMES, June 23, 2012, at A18.

⁵² *Knox*, 132 S. Ct. at 2307 (Breyer, J., dissenting) (citing Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003)).

in behavioral psychology that reveal a strong anchoring effect in which individuals often stick with predetermined policy choices.⁵³ By setting default policies paired with opt outs, policymakers can advance regulatory goals by taking advantage of entrenched human indifference while preserving liberty for strong-minded individuals.⁵⁴ Thus, so long as opt-out rights exist, setting defaults becomes simply a legislative tussle about who gets to reap the benefits of human inertia. Justice Breyer found this perspective no less germane to union fee setting and accordingly interpreted the majority as taking the indefensible step of intervening in this revenue-sorting contest.⁵⁵

The *Knox* majority evidently found this application of libertarian paternalism unpersuasive for two reasons: first, it interpreted the opt-out condition as a constitutionally cognizable burden,⁵⁶ and second, it identified no legitimate government interest in boosting union political expenditures.⁵⁷ This presumed inadequacy of the government interest was doctrinally unimpeachable. As propounded in *Buckley v. Valeo*⁵⁸ and eventually reaffirmed in *Citizens United v. FEC*,⁵⁹ the state may aver no legitimate interest in “equalizing” the abilities of different speakers to communicate their messages to the public.⁶⁰ Although unions may be disadvantaged relative to their corporate counterparts in the political speech market,⁶¹ the government cannot burden First Amendment rights in a drive to correct that imbalance. And though a compromise preserving “play in the joints”⁶² between union and non-member speech rights may appear tempting, the majority properly concluded that unions have no right to speak with nonmembers’ money.⁶³

⁵³ RICHARD THALER & CASS SUNSTEIN, *NUDGE* 34–35 (2008) (labeling this status quo bias the “yeah, whatever” heuristic).

⁵⁴ See Sunstein & Thaler, *supra* note 52, at 1184.

⁵⁵ *Knox*, 132 S. Ct. at 2307 (Breyer, J., dissenting).

⁵⁶ See *id.* at 2295 (majority opinion).

⁵⁷ See *id.* at 2290.

⁵⁸ 424 U.S. 1 (1976).

⁵⁹ 130 S. Ct. 876 (2010).

⁶⁰ *Id.* at 904 (quoting *Buckley*, 424 U.S. at 48). Between *Buckley* and *Citizens United*, the Court recognized an exception aimed specifically at diminishing corporate political influence. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 130 S. Ct. 876. Scholars and jurists have continued to defend this interest in balancing corporate and individual-voter speech capacities. See, e.g., *Ognibene v. Parkes*, 671 F.3d 174, 198 (2d Cir. 2011) (Calabresi, J., concurring), *cert. denied*, 2012 WL 950086 (U.S. June 25, 2012). But it is not at all clear that these holdouts would likewise esteem government attempts to balance the speaking abilities of two collective actors, like unions and corporations.

⁶¹ See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 803 (2012).

⁶² *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970).

⁶³ *Knox*, 132 S. Ct. at 2295. The administrative expenses associated with forcing unions to undertake an opt-out process may impose a collateral burden on union speech rights. Sachs, *su-*

As a *prima facie* disposition, even the Court's threshold assumption that an opt-out regime would burden First Amendment rights appears reasonable. Sunstein and Thaler, for example, understand opt outs as, ordinarily but not invariably, the least burdensome imposition along a continuum of restrictions on liberty — but an imposition nonetheless.⁶⁴ And First Amendment jurisprudence has traditionally declined to vary the level of judicial scrutiny according to the degree of burden on speech rights.⁶⁵ Yet given both the validation of opt outs in the related doctrinal field of compelled speech and the traditional basis for restricting compelled-subsidy regimes, the absence in *Knox* of a more comprehensive defense of this assumption is surprising.

Longstanding precedent in the compelled-*speech* context has expressed comfort with opt-out requirements,⁶⁶ and prior to *Knox*, the Court had tendered greater constitutional protection to dissenters from compelled-speech obligations than to objectors to compelled-subsidy regimes, which do not necessarily force anyone to speak.⁶⁷ Compelled-speech doctrine, however, may have overlooked the degree to which forcing dissenters to opt out actually undermines the constitutional value at stake. The Court's compelled-speech precedents stand, at their core, for the principle that the government may not "prescribe what shall be orthodox" by ordering its citizens to endorse an oath or creed.⁶⁸ Yet an opt-out obligation forces dissenters to identify themselves as outsiders and thereby may codify societal orthodoxy as effectively as compelling recital of a creed in the first place.⁶⁹ These concerns could not have moved the *Knox* majority directly: nonmembers opt out of agency fees in private, and they would already have suffered any social stigma associated with dissent from union solidarity at the time of declining membership. But solicitude for this cost of "outing" dissenters in the compelled-speech context may have allowed the majority to consider subsidy opt outs free of any doctrinal encumbrance.

Even within the parameters of compelled-subsidization doctrine, the *Knox* majority's dismissive treatment of an opt-out requirement was controvertible. Since *Abood* first determined that compelled sub-

pra note 61, at 860–61. However, the opt-in alternative may ironically free unions from this administrative burden even while dramatically downsizing contributions to union political coffers.

⁶⁴ See THALER & SUNSTEIN, *supra* note 53, at 252.

⁶⁵ See Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994 (2012).

⁶⁶ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 (2004) (reaffirming the opt-out rule of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

⁶⁷ See Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 381 (2011).

⁶⁸ *Barnette*, 319 U.S. at 642.

⁶⁹ See Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 643–44 (2001).

sidization of private speech may abridge First Amendment rights, the dominant rationale for the doctrine has been a hypothesis that, with objection to forced contribution to religious orthodoxy as a baseline,⁷⁰ the government risks forcing an individual to violate her conscience when it coerces her to support even nonreligious speech with which she disagrees.⁷¹ In this regard, compelled-subsidization doctrine is perhaps better understood as a secularized application of the Religion Clauses than as a straightforward derivation from free-speech jurisprudence.⁷² Nevertheless, the only persons potentially wronged by a requirement to opt out of compelled financing schemes are those who care too little — whose consciences are not sufficiently distressed — to take the step of opting out.⁷³ *Coercion* of conscience necessarily involves more obtrusive government impingement than the imposition of merely any burden. As borne out by debates among the Justices who understand the Establishment Clause as a limit on coerced religious practice, the line between coercion and limited interference may sometimes be difficult to draw, but an assumption underlying their dispute is that an insubstantial burden cannot constitute coercion.⁷⁴ And a straightforward procedure for opting out does not plausibly rise to the level of coercing unwilling nonmembers to fund union speech.⁷⁵

Opt-out conditions on financial-support requirements may even solve a problem with the doctrinal underpinning of this line of cases. Assuming abstractly that compelled subsidization necessarily abridges freedom of conscience and therefore automatically burdens First Amendment rights can lead to dramatically overbroad results — for example, an order for a losing litigant to pay attorneys' fees is a com-

⁷⁰ The proposition that religiously motivated financial exactions impinge on freedom of conscience is rich in historical support. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 354 (2002). Yet *Abood's* extension of that principle to nonreligious subsidies under the auspices of the Free Speech Clause enjoys no such validation in the intellectual commitments of the Founders. See Kathleen M. Sullivan & Robert C. Post, *It's What's for Lunch: Nectarines, Mushrooms, and Beef — The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 382 (2007) (statement of Professor Post).

⁷¹ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 & n.31 (1977); see also *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472 (1997); Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1110–17 (2005).

⁷² See Schwartzman, *supra* note 67, at 324–26.

⁷³ See *Knox*, 132 S. Ct. at 2307 (Breyer, J., dissenting) (recognizing that an opt-out condition poses little harm to “those who are politically near neutral”).

⁷⁴ Compare *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (finding that the imposition of “subtle coercive pressures” associated with opting out of prayer during high school graduation ceremonies is impermissible), *with id.* at 646 (Scalia, J., dissenting) (deriding the notion that “psychological coercion” is sufficiently onerous).

⁷⁵ This appraisal could be shaken, however, if opt-out requirements proliferated to something on the order of a “world of opt outs” imposing a cumulative burden on workers. See Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1211–13 (2003) (arguing that defaults undermine, inter alia, the crucial ability to learn from mistakes).

pelled subsidy, but few would expect it to trigger First Amendment scrutiny.⁷⁶ Courts could examine whether a class of plaintiffs holds ideological convictions with fervor redolent of religious belief such that compelled subsidization would trench on the autonomy of conscience.⁷⁷ But this enterprise forces courts to engage in subjective line drawing.⁷⁸ By contrast, an opt-out mechanism encourages persons logging wary consciences to request and receive a pass, signaling that no one has subsidized speech against her will and thereby offering courts a neutral alternative to such subjectivity.

The *Knox* majority's indifference to the traditional conscience-shielding view of limits on compelled subsidization likely reflects a revised understanding of the doctrine as a restraint on government power to rig the marketplace of ideas⁷⁹ by compelling Americans to subsidize "speech on the side that [the government] favors."⁸⁰ Though the marketplace analogy had long been "the most familiar metaphor in the First Amendment lexicon,"⁸¹ it was conspicuously missing from compelled-subsidy discourse until 2001, when Justice Kennedy's majority opinion in *United States v. United Foods, Inc.*⁸² explained the threat of compelled subsidization to a freely functioning speech marketplace.⁸³ The *United Foods* Court, however, went on to articulate a standard, repeated by the *Knox* majority, that permits compelled subsidization only when "there [is] a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay the subsidy," and the subsidy obligation is a "necessary incident" of the larger regulatory scheme.⁸⁴ Although *United Foods* seemed to back the market-protection rationale in the abstract, its approval of subsidy mandates linked to larger regulatory regimes must have been grounded in a perspective similar to the traditional conscience-shielding ratio-

⁷⁶ See Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 210-11 & n.83.

⁷⁷ See Seana Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 LOY. L.A. L. REV. 317, 322-23 (2007) (pointing to case examples, like farmers "who farm organically for moral and political reasons," that show how such a case-specific standard would function).

⁷⁸ Cf. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457 (1988) ("[T]he dissent [favors] holding that some sincerely held religious beliefs . . . are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit.").

⁷⁹ See *Knox*, 132 S. Ct. at 2288 ("The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." (quoting *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 801 (2008))).

⁸⁰ *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

⁸¹ Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1.

⁸² 533 U.S. 405.

⁸³ See *id.* at 411. The Court struck down a requirement for fresh mushroom handlers to fund generic pro-mushroom advertising. *Id.* at 409.

⁸⁴ *Knox*, 132 S. Ct. at 2289 (quoting *United Foods*, 533 U.S. at 414).

nale.⁸⁵ After all, anxiety about further government distortion of the marketplace of ideas should be at its peak when nonspeech regulation has collaterally stamped out ideational diversity, making audible dissent crucial.

Even beyond its troubled *United Foods* debut, the expanded role of the marketplace-protection rationale in compelled-subsidization law encounters pronounced doctrinal hiccups. For one, the Court has granted the government enormous latitude to subsidize private speech itself,⁸⁶ likewise empowering the state to distort the marketplace in favor of ideas it prefers.⁸⁷ Moreover, in rejecting “drown out” critiques of contemporary campaign-finance doctrine,⁸⁸ the Court seemingly denied the notion that disproportionate dissemination of an idea may illegitimately enhance its ability to persuade listeners. Nevertheless, adopting this broad marketplace-protection lens, the Court would have had little reason to preoccupy itself with the degree of burden imposed on the plaintiffs so long as the subsidization mandate artificially boosted one side of a debate. And by steering nonmember payments to union treasuries, the opt-out framework in *Knox* certainly amplified the pro-union message.⁸⁹

Knox undoubtedly represents a watershed moment in the field of union campaign finance. But the decision may even spark claims for opt-in protections against other forms of compelled subsidization. Most government employees, for example, must pay into defined pension plans, which in turn purchase stock in corporations that spend some of that capital on political causes.⁹⁰ And now that the Court has upheld the Affordable Care Act’s individual mandate to purchase health insurance,⁹¹ every American faces a requirement to fund the health insurance industry, notoriously active in national politics.⁹² The *Knox* majority’s apparent reliance upon reasonably established doc-

⁸⁵ See *United Foods*, 533 U.S. at 418 (Stevens, J., concurring).

⁸⁶ See *Citizens United v. FEC*, 130 S. Ct. 876, 958 (2010) (Stevens, J., dissenting).

⁸⁷ See *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2834 (2011) (Kagan, J., dissenting) (summarizing this corner of doctrine).

⁸⁸ Perhaps government subsidization of private speech *is* equally problematic, but the Court finds judicial oversight unnecessary because competition for scarce budgetary resources sufficiently restrains the state’s ability to distort the speech marketplace. Cf. Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 1034–35 (1998) (defending an identical argument in the dormant commerce clause context).

⁸⁹ See Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 396 (2008).

⁹⁰ Benjamin I. Sachs, Op-Ed., *How Pensions Violate Free Speech*, N.Y. TIMES, July 13, 2012, at A19.

⁹¹ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601 (2012).

⁹² See, e.g., Raymond L. Goldstein et al., *Harry and Louise and Health Care Reform: Romancing Public Opinion*, 26 J. HEALTH POL. POL’Y & L. 1325, 1325 (2001) (describing the ad campaign that helped sink President Clinton’s attempt at health care reform).

trinal sources can blunt charges of political bias today, but claims for opt-in rights unrelated to union campaigning, should they materialize, would truly test the Court's genuine loyalty to such an expansive bar on compelled subsidization.

3. *Freedom of Speech — False Statements of Fact.* — The Stolen Valor Act of 2005¹ makes it a federal misdemeanor for an individual to lie about having received military awards, and provides an enhanced penalty for those who misrepresent themselves as recipients of the Congressional Medal of Honor.² Last Term, in *United States v. Alvarez*,³ the Supreme Court held that the Act violated the First Amendment of the U.S. Constitution. For much of its history, the Supreme Court's doctrine on the First Amendment status of content-based speech restrictions has wandered, not always elegantly, between two approaches: first, declaring some categories of speech to be wholly unprotected based on historical precedent, and second, assessing regulations in an ad hoc manner based in part on the relevant speech's affirmative social value. The plurality in *Alvarez* first determined that false statements of fact are not an unprotected category, and then found that the Act was invalid under strict scrutiny.⁴ While the Court reached the correct result, a better approach would have been to assess the speech's protected status in terms of the harm it causes rather than focusing entirely on traditional categories. Such an approach would render First Amendment doctrine in this area more flexible while preserving the speech-protective benefits of the categorical method.

In 2007, at a meeting of the Three Valley Water District Board in Claremont, California, Xavier Alvarez falsely introduced himself as a "retired marine of 25 years" who had been "awarded the Congressional Medal of Honor" in 1987 after being wounded repeatedly in service.⁵ Alvarez was subsequently indicted under the Stolen Valor Act.⁶ He claimed that the statute was invalid under the First Amendment, but the United States District Court for the Central District of California rejected this argument.⁷ Alvarez pleaded guilty to the violation and was sentenced to three years' probation, 416 hours of community service, and a \$5000 fine.⁸ However, he appealed his First Amendment claim to the Court of Appeals for the Ninth Circuit.⁹

¹ 18 U.S.C. § 704 (2006).

² *Id.* § 704(b)-(c).

³ 132 S. Ct. 2537 (2012).

⁴ *Id.* at 2551 (plurality opinion).

⁵ *Id.* at 2542.

⁶ *Id.*

⁷ *Id.*

⁸ *United States v. Alvarez*, 617 F.3d 1198, 1201 (9th Cir. 2010).

⁹ *Id.*