



## **FRIEDRICHS: AN UNEXPECTED TOOL FOR LABOR**

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Today, about half of U.S. states allow unions and public-sector employers to privately negotiate for agency shop arrangements. Under such an arrangement, employees in a bargaining unit who choose to not join the union (and thus do not pay membership dues) are required to pay a fee to the union that covers their share of the costs the union bears as their collective bargaining representative.<sup>1</sup> Unions cannot avoid these costs. As is the case under the NLRA for private-sector unions, states require an exclusive bargaining representative regime. That is, if workers want to guarantee that their employer will sit down and bargain with their representative, those workers must ensure that their chosen representative is not just chosen by them but supported by a majority of workers in their bargaining unit – a bargaining unit they do not get to choose for themselves.<sup>2</sup> Once their

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<sup>1</sup> See, e.g., Jurupa Unified School District and National Education Association – Jurupa, Collective Bargaining Agreement at section 6 (July 1, 2014) (Membership/Service Fees provision) (the CBA at issue in *Friedrichs*).

<sup>2</sup> For public teachers in California this is mandated under the Education Employment Relation Act. Under the Act, public school teachers have the right to “form, join,

representative is chosen by a majority in that unit, the representative is then the exclusive representative for all the unit members, even those who do not want that representative bargaining on their behalf. Because the union represents all members of the bargaining unit, the law also requires the union to represent all members equally. The union cannot, for instance, bargain for a raise for union members only. If the union extracts additional benefits from the employer on behalf of workers, both union members and non-members must share in those gains equally.<sup>3</sup>

As a result of government-imposed exclusive representation and fair representation requirements, the government has created its own free rider problem. Once the union has been elected, a worker knows she will get any benefits the union can provide without ever having to join, and thus pay membership dues to, that union. Agency fees (also known as “fair share” fees) are intended to combat this problem. By requiring non-members of the bargaining unit to pay their share of the costs, some free riding is avoided.

Despite the importance of agency fees to avoiding the problem of the free rider, this Court may soon find that the agency fee system violates the First Amendment rights of the workers required to pay them. The Supreme Court previously considered and rejected this argument in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). There, the Court held that requiring non-members to pay the union for the costs it incurred for collective bargaining and contract administration did not violate the First Amendment, though requiring non-

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and participate in the activities of employee organizations of their choosing for the purpose of representation on all matters of employer-employee relations.” Cal. Gov’t Code § 3543(a). Exclusive representation is required under § 3544-3544.9.

<sup>3</sup> This includes arbitration over statutory rights. See *Penn Plaza LLC v. Pyett*, 556 U.S. 247, 271 (2009) (finding duty extended to arbitrating age discrimination claims under the Age Discrimination in Employment Act of 1967 (ADEA) when the collective bargaining agreement required arbitration of those claims).

members to pay for the union's political activities would. In *Friedrichs v. California Teachers Association*, the Court will squarely address whether it should overturn *Abood*. The argument is that the distinction *Abood* drew between political and non-political union speech is an impossible one, as all union speech in the public-sector context is political and thus all compelled funding is unconstitutional. The Court will also decide whether an opt-in system of dues payments is constitutionally required. Betting on what the Court will do is a dangerous game but, at least prior to Justice Scalia's unexpected death, it seemed likely, given language in other recent cases, that *Abood* would be overturned and public-sector employers will no longer be free to negotiate agency shop arrangements with their workers' unions.<sup>4</sup> Now, though, the outcome is even less certain, though it seems plausible the Court will split 4-4 and *Abood* will live to see another day.

There are a lot of issues that have to be dealt with in *Friedrichs* – why and when compelled funding compelled speech and whether the fact that the government is acting as an employer will come to bear on the Court's First Amendment analysis being just two of them. These are important questions that many scholars will cover in the lead-up to this case. I will not add to the pile. Instead, here I want to think about this case from a different perspective. That is, if the Court were to overturn *Abood*, now or in the future, what that means for unions and the future of labor more generally. There are three questions I want to focus on: first, does the government-created free rider problem, where unions are required to provide free services to non-members, create a takings issue? I think under current precedent the answer is no. Second, if it violates the First Amendment to require

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<sup>4</sup> See *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277 (2012); see also *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (refusing to apply *Abood* to "quasi" public sector workers and thus finding the agency shop arrangement to violate the First Amendment).

non-members to pay agency fees, does the entire exclusive bargaining regime and corresponding duty of fair representation violate the First Amendment rights of unions? I think there are reasons to believe it does. And last, what effect will *Friedrichs* and its progeny have on the future of labor organization? Here I suggest that while it is possible these cases will “kill” labor, there is another story that is possible and indeed supported by history and current events: a backlash against union repression resulting in the mobilization of labor. No longer finding the NLRA and state-equivalent bargain worth the price, workers may decide it better to fight outside that system. Below I take each of these questions in turn.

#### TAKINGS FROM UNIONS

Does requiring the union to provide services to non-paying non-members constitute a taking, at least when doing so requires the union to expend money? If you take the position that “all regulations, all taxes, and all modifications of liability rules [should be understood as] takings of private property prima facie compensable by the state” the answer is easy: yes.<sup>5</sup> Conversely, if you are an originalist and believe the Takings Clause was narrowly meant to require compensation when the government exercises its power of eminent domain – that is, when the government physically seized property – the answer is also easy: no.<sup>6</sup> But if what we are asking is whether there is a colorable argument that requiring exclusive representation that non-members do not have to pay for constitutes a takings given current case law, the answer is complicated. The Court’s takings jurisprudence is a conceptual mess.<sup>7</sup> Given that, while there are some cases

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<sup>5</sup> RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

<sup>6</sup> For this view see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *COLUM. L. REV.* 782, 840 (1995).

<sup>7</sup> See *id.* at 782 n.6 (listing other scholars who have taken this view).

that support such a conclusion, those cases stand on unstable conceptual grounds.<sup>8</sup>

That the prohibition on agency fees could constitute a taking when combined with the duty of fair representation appears to have been first suggested by Chief Judge Wood, in her dissent in *Sweeney v. Pence*.<sup>9</sup> There, the Seventh Circuit had to decide whether Indiana's "right to work" law was preempted by federal labor legislation and, even if it was not preempted, whether it violated the First Amendment rights of unions.<sup>10</sup> As Chief Judge Wood saw it, the duty of fair representation in conjunction with the Indiana statute, which prohibited the employer and union from negotiating any contract that required non-members to pay money to the union to cover their share of the costs,<sup>11</sup> meant the state took the union's money by requiring the union to expend money to provide services to non-members. Judge Wood found this scheme to look like the one struck down in *Brown v. Legal Foundation of Washington*.<sup>12</sup> There, a state required interest income that was generated by clients' funds held in lawyers' trust accounts to be transferred from the account to a foundation that provided legal services to the poor. The Court held in *Brown* that the interest was the property of the clients and if the government was going to require it to be transferred from the account to the foundation, that action had to be justified under the Takings Clause.<sup>13</sup> *Brown* involved the government explicitly required a transfer of money from one private party to another while the Indiana statute required unions to provide services but was agnostic about which money (if

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<sup>8</sup> This is a change from my prior position. See, e.g., Heather Whitney, *When Does Labor Law Violate the Takings Clause*, PRAWFSBLAWG (July 2, 2015); see also Heather Whitney, *Guest Post: The Takings Clause and Sweeney v. Pence*, ONLABOR (Sep. 4, 2014).

<sup>9</sup> Full disclosure: I clerked for Chief Judge Wood.

<sup>10</sup> *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014).

<sup>11</sup> See Ind. Code § 22-6-6.

<sup>12</sup> 538 U.S. 216 (2003).

<sup>13</sup> See *id.* at 235.

any) had to be spent to provide them, that distinction was thought irrelevant for purposes of a takings analysis by both the majority and dissent. For its part, the majority found that to the extent there was a taking, the union was justly compensated for it through its continued exclusive bargaining representative power.<sup>14</sup>

While the majority's response is unconvincing,<sup>15</sup> there is another difficulty with finding a taking and it happens at the threshold. What private property does the government take when it requires a private party to provide services to another?<sup>16</sup> In this case, it appears to be the money a particular union would have to spend to provide the requisite services. But the argument that whenever the government

<sup>14</sup> *Sweeney*, 767 F.3d at 21.

<sup>15</sup> For one, this argument looks much like the one rejected in *Loretto*. There the Court said that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. The Court went on to say that such an argument "would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices." *Id.* The majority's argument is similar. A union could avoid the requirement by ceasing to be the bargaining representative of the workers who exercised their federal and state rights to be represented by one just as a landlord could refuse the requirement by ceasing to be a landlord, but being a landlord and being a bargaining representative may not be so conditioned. *See id.* at 439 n.17. Moreover, as the Court most recently reaffirmed in *Horne*, its "cases have set forth a clear and administrable rule for just compensation: 'The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.'" *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419, 2432 (2015) (citing *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934))). The compensation is the market value of the property (here, money) the government took, not a hazy theory that the mandated exclusive representation regime is a form of compensation for another mandate the union did had little choice but to accept.

<sup>16</sup> As scholars have noted, this threshold requirement is too often assumed. *See* Thomas Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 891 n.20 (collecting scholarship criticizing the Court and scholars for overlooking this question). It is an assumption I have been guilty of in prior writings on this topic. *See supra* note 8.

requires someone to provide a benefit to another the Takings Clause applies was rejected by a majority of the Justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). There, a statute enacted in 1992 required companies that used to be in coal mining business to contribute to a fund providing for the health-related expenses of retired miners and their families. The statute required Eastern Enterprises to pay for such benefits for miners it employed between 1946 and 1965, even though it never agreed to provide those benefits in the original collective bargaining agreements. The expected liability created by the statute was between \$50 and \$100 million. While the parties did not raise the issue, nor did the Justices at oral arguments, the Justices were split on whether the Coal Act took any property within the meaning of the Takings Clause at all. In total, five justices found that it did not.<sup>17</sup> As Justice Kennedy put it, “[t]he law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so . . . To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and . . . unwise.”<sup>18</sup> Indeed, the Court had previously rejected the argument that a takings occurs “whenever legislation requires one person to use his or her assets for the benefit of another.”<sup>19</sup>

While the line between a taking and regulation is already “difficult to discern or to maintain,” extending the regulatory takings doctrine to situations like this one, where the duty merely requires the union to perform a service, and where no specific property right or

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<sup>17</sup> While there were five votes to find the Act unconstitutional, four did so as a takings and the fifth vote, by Justice Kennedy, found the act a violation of substantive due process while expressly finding the Act did not take property within the meaning of the Takings Clause.

<sup>18</sup> *Eastern Enters. v. Apfel*, 524 U.S. 498, 540 (1998).

<sup>19</sup> *Eastern Enters.*, 524 U.S. at 555–556 (Breyer, J. dissenting) (quoting *Connoll v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225 (1986)).

interest is at stake, arguably takes what is already “one of the most difficult and litigated areas of the law” and makes it more so.<sup>20</sup> This is not to say that the requirement that unions provide free services to non-members is not a burden, but if the line between takings on one side and permissible taxes and regulations on the other is to be maintained, finding a takings is more trouble than it is worth.

#### COMPELLED SPEECH AND ASSOCIATION BY UNIONS

The next question worth considering in a post-*Friedrichs* world is whether, if compelling non-members to pay agency fees to public sector unions violates the First Amendment, *union's* First Amendment rights are infringed by both the exclusive bargaining regime and corresponding duty of fair representation.

If the Court overturns *Abood*, it will likely do so by rejecting the distinction *Abood* made between a union's non-political and political speech and instead find all public sector union speech to be political.<sup>21</sup> Once collective bargaining-related speech is considered political, requiring unions to engage in that speech on behalf of non-members (by imposing on them the duty of exclusive representation) should also be considered compelled political speech and compelled

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<sup>20</sup> *Id.* at 540, 542.

<sup>21</sup> Of course, the Court could go the other way. That is, it could take the position that compelled funding raises no First Amendment issues at all, even with the union speaking politically. Like in *Rumsfeld v. Forum for Academic Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Court could find that agency fees do not involve compelled speech because the non-members are not required to say anything and remain “free ... to express whatever views they may have on the [union's collective bargaining activities].” *Id.* at 60. Or the Court could find the compelled funding “ancillary to a more comprehensive program restricting [labor relations] autonomy” and thus acceptable. See *United States v. United Foods*, 533 U.S. 405, 406 (2001) (distinguishing *Glickman*, where mandatory assessments to promote tree fruit were upheld against a First Amendment challenge). I do not mean to suggest the Court could not come to such a conclusion. However, here I mean to imagine a post-*Friedrichs* world where plaintiffs win.

expressive association. The same is true of the requirement that they provide services to non-members (the duty of fair representation).

Start with the duty of fair representation. As mentioned previously, the duty arises from the union's role as the exclusive bargaining representative and requires the union to represent all employees within the unit "without hostile discrimination, fairly, impartially, and in good faith."<sup>22</sup> The duty applies at all stages of collective bargaining, from negotiations to contract enforcement. Between requiring the union to represent and bargain on behalf of non-members, prohibiting it to favor its own members, and requiring equal treatment through contract enforcement, the law compels unions to speak and negotiate with certain individuals. Post-*Friedrichs* that is compelled political speech and association.<sup>23</sup>

To overcome this infringement on the union's First Amendment rights, other scholars have argued that the government must demonstrate that it has a "compelling interest in requiring unions to negotiate and grieve their nonmembers' complaints without receiving just compensation and that this duty [is] narrowly tailored to effectuate that interest."<sup>24</sup> But that is the wrong question for two reasons. First,

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<sup>22</sup> *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 204 (1944) (under the Railway Labor Act). The duty was extended to unions operating under the auspices of the National Labor Relations Act in *Ford Motor Co. v. Huffman*. California mandated the duty via statute. See e.g., California Educational Employment Relations Act, Government Code section 3544.9; Higher Education Employer-Employee Relations Act section 3578. California adopted the federal test for determining whether a union violated the duty of fair representation in *Romero v. Rocklin Teachers Association* (1980). A union violates this duty if it acts in an "arbitrary, discriminatory, or bad faith" manner. See *Vaca v. Snipes*, 386 U.S. 171, 177 (1967).

<sup>23</sup> Indeed, *Harris*, where the Court held that the agency fee arrangement for quasi public sector workers violated the First Amendment already found that bargaining is political speech in the public-sector context. See *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

<sup>24</sup> Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 Loy. L.A. L. Rev. 439, 488 (2014).

whether the union is reimbursed for the compelled speech and association the government requires it to take on may be relevant to whether the system exacts as *taking* from the union but is irrelevant to whether the government has a compelling interest in compelling that speech and association in the first instance. We do not think the problem in *Barnette*, where school children were unconstitutionally compelled to salute the American flag, was that the government required that salute without paying the students, nor do we think the problem would have been different if payment were involved; the issue was whether the government had a compelling interest in forcing the students to salute. In the exclusive representation context, the government compels the union to speak on behalf of non-members and to speak for them equally as much as the union speaks for its own members. Post-*Friedrichs*, this set-up compels the union to speak and associate politically. Thus, in order to overcome the First Amendment challenge, the government must demonstrate a compelling interest in requiring that exclusive representation regime.

One might stop here and argue that the government does not compel an exclusive bargaining regime. The union could instead operate a “members only” union, and indeed the language of the statute at issue in *Friedrichs* suggests the availability of that option.<sup>25</sup> However, that option is not in fact available to the union. In order for public sector workers to exercise their right to have their employer sit down and negotiate with the representative of their choosing, that representative is required under California law to be the exclusive representative of that workers’ bargaining unit.<sup>26</sup> The same is true under the NLRA. While the plain language of section 7 guarantees

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<sup>25</sup> See Cal. Gov’t Code § 3543.1(a) (“Employee organizations shall have the right to represent their members in their employment relations with public school employers”).

<sup>26</sup> See Cal. Gov’t Code § 3543.

covered employees “the right to . . . bargain collectively through representatives of their own choosing,” the Board has held that employers are not required to bargain with member-only labor organizations.<sup>27</sup> Thus, in order for workers to guarantee their ability to bargain through representatives of their own choosing, that representative must represent all members of that worker’s bargaining unit. In the same way a non-member of the bargaining unit is “forced” to pay agency fees (or find another job), the members and union are “forced” to associate with and speak with non-members (or lose their statutory right to negotiate through the representative of their choosing). As long as the former constitutes an unconstitutional condition,<sup>28</sup> so too should the latter; their First Amendment challenges should rise and fall together.<sup>29</sup>

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<sup>27</sup> See NLRB Advice Memorandum, *Dick’s Sporting Goods*, Case No. 6-CA-34821 (June 22, 2006), available at [http://www.nlr.gov/shared\\_files/Advice%20Memo/RecenfReleases/6-CA-34821\(06-22-06\).pdf](http://www.nlr.gov/shared_files/Advice%20Memo/RecenfReleases/6-CA-34821(06-22-06).pdf) (NLRB General Counsel refused to issue a complaint against employer who declined to recognize and bargain with member-only union, finding “the employer in these circumstances had no obligation to recognize and bargain with the Council. This principle is well-settled and not an open issue . . . the statutory obligation to bargain is fundamentally grounded on the principle of majority rule.”). See also NLRB Advice Memorandum, *Charleston Nursing Center*, Case No. 11-CA-8753, available at <http://apps.nlr.gov/link/document.aspx/09031d45800b2f0b> (finding employer did not interfere with employees’ section 7 right to bargain collectively when it refused to meet with a group of workers).

<sup>28</sup> And recall in the context of the NLRA, the Court has found the right of employees to self-organize and select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer a “fundamental right.” See *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 33 (1937).

<sup>29</sup> Another parallel worth drawing is between the First Amendment rights giving to corporations and unions. If one believes states cannot condition access to incorporation on the waiver of First Amendment rights, then one should also believe states cannot condition the right to negotiate collectively through a chosen representative on the waiver of First Amendment rights. While there are interesting arguments for why the state should be able to condition access to the corporate form in this way but assume for purposes of this article that the current Supreme Court does not take that position.

The question we are now left with is whether the government, in 2016, can demonstrate a compelling interest in requiring an exclusive representative regime. The Court has previously recognized “that a single employee [is] helpless in dealing with an employer; that he [is] dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he [is] nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union[s] [are] essential to give laborers [the] opportunity to deal on an equality with their employer.”<sup>30</sup> This is the reality for a large share of workers and as the Court has said, Congress “[is] not required to ignore” the need for collective action given this reality, and can thus “safeguard it.”<sup>31</sup> Let us then assume that the government has a compelling interest in regulating the employer-employee relationship in light of the risk of arbitrary and unfair treatment of the much less powerful workers at the hands of employers. Promoting and safeguarding worker collective action is a reasonable way to approach it, but we are still left with whether an exclusive bargaining regime is sufficiently tailored to promote that interest. And here the argument becomes more difficult. The government does not require unionization. The default is non-unionization and at least one of the aims of the NLRA regime is to ensure employees can freely choose to unionize or not.<sup>32</sup> Why, if workers choose to unionize, must they unionize under an exclusive bargaining regime? It is understandable why the state of California *prefers* exclusive representation based on majority rule – dealing with a single representative for all workers may be easier than dealing

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<sup>30</sup> *Jones*, 301 U.S. at 33–34.

<sup>31</sup> *Id.*

<sup>32</sup> See *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (explaining that Congress requires the Board to establish the rules and “safeguards necessary to insure the fair and free choice of bargaining representatives by employees”).

with many.<sup>33</sup> But, first, in the absence of unionization, public-sector employers are in the much more burdensome position of negotiating individually with each employee. And second, convenience is no response to whether exclusive representation is properly tailored to the government's legitimate interest. The government and labor scholars must accept the challenge of justifying the imposition of exclusive representation where, post-*Friedrichs*, it compels political speech and association. I am doubtful it can be done.

Instead of scholars defending the government's compelling interest in having an exclusive bargaining regime, some scholars have argued for members-only (also known as minority) unions.<sup>34</sup> At least one has argued that the NLRA can be read to allow for member only unions today.<sup>35</sup> In my own work I have highlighted how workers have worked together to extract gains totally outside the exclusive representation regime.<sup>36</sup> While it may be that in a world without exclusive representation workers need additional protections when striking, picketing, and engaging in secondary boycotts, all of those protections could be given without compelling union and non-members political speech and association.

#### MOBILIZATION OF LABOR

So far I have raised and speculated about potential post-*Friedrichs* First and Fifth Amendment issues. I want to end by speculating

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<sup>33</sup> See *San Mateo City Sch. Dist. v. Pub. Employment Relations Bd.*, 663 P.2d 523, 531 (1983).

<sup>34</sup> Though they have only argued for this in right to work states and do not suggest it replace the exclusive bargaining regime elsewhere. See Catherine Fisk & Benjamin I. Sachs, *Restoring Equity in Right to Work*, 4 U.C. IRVINE L. REV. 859 (2014).

<sup>35</sup> See CHARLES MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005).

<sup>36</sup> See Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 CARDOZO L. REV. 101 (2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2663593](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663593).

about the social and political implications of not just overturning *Abood* but of overturning it in an environment where NLRA-style unionization is already difficult to achieve and an increasingly unattractive option for those interested in furthering the interests of workers.<sup>37</sup> Here I suggest that while the dominant story is that *Friedrichs* and its progeny are killing off unions, that story may be wrong. There is instead an alternative story and it is one of worker and union backlash against courts and business interests they perceive as attacking them.<sup>38</sup> On this story, *Friedrichs* and its progeny have unintentionally created a focal point – a rallying cry – around which workers and unions can mobilize, radicalize, and develop creative and powerful alternatives to New Deal-type unionization. Indeed, we may be in the early days of that backlash now.

In her *Harris* dissent, Justice Kagan rightly pointed out that where the law compels the union to represent members and non-members equally while also prohibiting agency fee arrangements, it is in the economic self-interest of both those who support and oppose the union to withhold payment.<sup>39</sup> However, while Justice Kagan seemed to worry that the absence of short-term economic self-interest would result in the financial ruin of unions, we know that is not the case. Today, 25 states already have right-to-work laws and in

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<sup>37</sup> Many scholars, myself included, have documented the Board and court-created difficulties modern unions face. See, e.g., *id.*, DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE* (2014); Katherine Stone, *Rethinking Labour Law: Employment Protections for Boundaryless Workers*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW* 155 (Guy Davidov & Brian Langille eds., 2006).

<sup>38</sup> Backlash against Court decisions has been documented previously. See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

<sup>39</sup> See *Harris*, 134 S. Ct. at 22 (Kagan, J., dissenting).

those states we have not seen unions fall into financial peril.<sup>40</sup> Instead the enactment of such laws appears to result in a small drop in union membership.<sup>41</sup> But given that paying the union in right-to-work jurisdictions can be understood as financially irrational, what might explain worker support? Justice Kagan thought altruism or loyalty the only available alternative explanations,<sup>42</sup> but there are others. Unions are among the types of private associations that make up a vibrant civil society and make available to individuals a community and sense of identity. Joining and supporting a union can be an important social and political act, particularly in the wake of court decisions that are perceived as an attempt to kill unions. Worker solidarity and mutual aid, upon which unions are founded, are after all political and social ideals.<sup>43</sup> And, while it is too early to say, it may well be that as the Court exacerbates the free rider problem unions face, unions will look to stoke within workers the embers of a solidarity ethos that were neglected so long as access to member money did not require activation of such class consciousness.<sup>44</sup> Group solidarity is in turn an important precondition for the creation of social

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<sup>40</sup> See Scott Cohn, *An American Workplace War That's Reached a Tipping Point*, CNBC (May 29, 2015), <http://www.cnbc.com/2015/05/29/the-right-to-work-battle-has-reached-a-tipping-point.html>.

<sup>41</sup> Here I am referring to drops in membership among bargaining units already organized prior to the enactment of the right to work law. Bureau of Labor Statistics data from 2000 to 2014 suggests that in right to work states union membership stabilizes at around 84 percent of represented workers. In contrast, states with agency fees over the same 14-year period saw approximately 93 percent of represented workers as full union members. See Bureau of Labor Statistics, Economic News Release: Union Members Summary (Jan. 23, 2015), available at <http://www.bls.gov/news.release/union2.nr0.htm>. The Mackinac Center for Public Policy shows these findings most clearly. See Mackinac Center for Public Policy, Amicus Brief in Support of Petitioners at 21-22, *Friedrichs v. California Teachers Association* 2015 WL 407687 (U.S. 2015).

<sup>42</sup> See *id.*

<sup>43</sup> See PETER KROPOTKIN, *MUTUAL AID: A FACTOR OF EVOLUTION* (1902).

<sup>44</sup> See JULIUS G. GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* (2010) (arguing that organized labor needs to return to its activist member-powered

movement organization, like labor organizations, and social movement activism more generally.<sup>45</sup>

Public sector unions' preemptive response to *Friedrichs* suggests such stoking has begun. Not intending to sit passively by and await their demise, the possible elimination of agency fees has mobilized the organizations. The president of AFSCME said in a recent interview that agency fee arrangements had made the teachers' union complacent. "I think we took things for granted. We stopped communicating with people, because we didn't feel like we needed to. That was the wrong approach, and we don't want to fall back in to that trap."<sup>46</sup> In anticipation of *Friedrichs* the union has taken steps to remedy that error, creating a more engaged membership – a membership that feels invested in and solidarity with the union and its leadership.<sup>47</sup> Other union leaders have expressed similar sentiments.<sup>48</sup>

Workers and union mobilization in response to a judiciary it thinks illegitimate would not be a historical anomaly. In the early twentieth century, something similar happened and labor went outside the formal channels of politics and litigation and instead acted

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roots and abandon, among other things, its current focus on money and economic power).

<sup>45</sup> See Marc Dixon et al., *Unions, Solidarity, and Striking*, 83 SOC. FORCES 3, 8–10, 23–24 (2004).

<sup>46</sup> See Lydia DePillis, *The Supreme Court's Threat to Gut Unions is Giving the Labor Movement New Life*, WASH. POST (July 1, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/01/the-supreme-courts-threat-to-gut-unions-is-giving-the-labor-movement-new-life/>.

<sup>47</sup> See *id.*

<sup>48</sup> See, e.g., Lydia DePillis, *Why Harris v. Quinn Isn't as Bad for Workers as it Sounds*, WASH. POST (July 1, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/07/01/why-harris-v-quinn-isnt-as-bad-for-workers-as-it-sounds/> (quoting Gay Casteel, the Southern region director of the United Auto Workers, who said: "This is something I've never understood, that people think right to work hurts unions. To me, it helps them").

directly, through mass protests, strikes, and boycotts.<sup>49</sup> Today, we see workers doing something not dissimilar, though admittedly so far on a much smaller scale. Recognizing that the benefits of massive government regulation is no longer worth the costs, workers are developing non-traditional forms of worker organizations that entirely bypass the NLRA and its state equivalents. “Fight for \$15,” a movement backed heavily by the SEIU to raise the minimum wage for fast food workers to \$15 an hour, is one particularly successful version of this. The Immokalee Workers, who work to better conditions of tomato pickers in Florida by targeting reputation-sensitive companies like Taco Bell and national grocery stores at the top of the food supply chain (instead of their direct employers) are another.<sup>50</sup> For these non-traditional organizations, *Friedrichs* does nothing to slow their momentum.

In short, while *Friedrichs* may well overturn *Abood* and with it a compromise that has lasted for decades, between the First Amendment arguments it makes available to unions and the backlash that is already brewing in response to it and the conditions in which workers currently find themselves, I suspect the case will ultimately be to the good of workers and their organizations.

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<sup>49</sup> See generally James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L. J. 941 (1997).

<sup>50</sup> For additional information about these and other non-traditional worker organizations developing in response to the challenges and unavailability of NLRA-style unionization see Whitney, *supra* note 36.