

ORGANIZED LABOR, THE SUPREME
COURT, AND HARRIS v QUINN:
DÉJÀ VU ALL OVER AGAIN?

The notion that economic and political concerns are separable
is pre-Victorian.¹

*Harris v Quinn*² presented this issue anew in 2014—it was the most recent chapter of litigation concerning “union security agreements” and their permissibility in the public sector—but by no means will it be the last. *Harris* relates to the constitutionality of such agreements, which compel membership or financial obligations on the part of union represented employees (frequently as a condition of employment) and endure throughout our economy in the private sector, as well as the more recently organized public portion of it.

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¹ *International Association of Machinists v Street*, 367 US 740, 814 (1961) (Frankfurter, J, dissenting).

² *Harris v Quinn*, 134 S Ct 2618 (2014).

The resolution of this and related issues inevitably affects, in some measure, the role of trade unions in American society.³ It cannot be gainsaid that this involves the democratic process itself in a pluralistic society,⁴ through which unions attempt to achieve their objectives through both the collective bargaining and political processes.⁵

For more than two centuries, the issue of so-called “union security agreements,” which compel membership in a labor organization in some sense of the word, has been fought out in American labor-management relations and in the courts.⁶ Complicating the contemporary relationship is that organized labor is in a period of retreat and decline.⁷ Related to this issue is the question of appropriate

³ In reviewing the constitutionality of legislation designed to limit or prohibit union security agreements in an earlier era, Justice Frankfurter had taken into account the rise of unions in rejecting the argument that “the compromise which this legislation embodies is no compromise at all because fatal to the survival of organized labor.” *American Federation of Labor, Arizona State Federation of Labor v American Sash & Door Co.*, 335 US 538, 547 (1949) (Frankfurter, J, concurring). Said Justice Frankfurter:

In the past fifty years the total number of employed, counting salaried workers and the self-employed but not farmers or farm laborers, has not quite trebled, while total union membership has increased more than thirty-three times; at the time of the open-shop drive following the First World War, the ratio of organized to unorganized non-agricultural workers was about one to nine, and now it is almost one to three. However necessitous may have been the circumstances of unionism in 1898 or even in 1923, its status in 1948 precludes constitutional condemnation of a legislative judgment, whatever we may think of it, that the need of this type of regulation outweighs its detriments.

Id at 547 (Frankfurter, J, concurring).

⁴ *Citizens United v Federal Election Commission*, 130 S Ct 876 (2010) (overruling *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990)) (holding that unions as well as corporations are protected under the First Amendment against campaign finance regulations). This controversial Supreme Court decision reversed the previously fashioned assumptions of both Congress and the Court that restraints could be placed upon labor organizations, employers, and corporations “on exactly the same basis.” *United States v UAW-CIO*, 352 US 567, 579 (1957); *United States v CIO*, 335 US 106, 114–15 (1948). See generally Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights*, 53 Wm & Mary L Rev 1 (2011).

⁵ *Eastex Inc. v NLRB*, 437 US 556 (1978) (discussing the right of employees to engage in protected concerted activity through the distribution of literature aimed at legislation relating to working conditions). On the other hand, the distribution of political leaflets designed to promote the candidacy of candidates amongst employees and the support of outside political organizations do not constitute protected activity within the meaning of the act. See *Local 174, UAW v NLRB*, 645 F2d 1151 (DC Cir 1981); *NLRB v Motorola, Inc.*, 991 F2d 278 (5th Cir 1993).

⁶ *Commonwealth v Hunt*, 45 Mass 111 (1842); *Plant v Woods*, 176 Mass 492 (1900) (Holmes, J, dissenting).

⁷ For a discussion of the phenomenon of decline as it was first observed in the 1960s, see generally Solomon Barkin, *The Decline of the Labor Movement: And What Can Be Done About It*

union discipline authority imposed on workers who defy⁸ various kinds of union rules and who are ostracized, for instance, over matters such as strike-breaking.⁹

Since the 1950s, first under the Railway Labor Act of 1926 (RLA)¹⁰ and its regulation of both railroads and airlines, and then through constitutional litigation in the public sector,¹¹ the tension between the political process and collective bargaining has been addressed with a fair measure of frequency. Litigation under the National Labor Relations Act (NLRA) in most of the private sector, outside of the industries covered by the RLA, was soon to follow.¹² Justice Frankfurter's maxim that union political concerns were inevitably bound up with central union objectives to enhance employment conditions

(1961); A. H. Raskin, *The Big Squeeze on Labor Unions*, *Atlantic Monthly* 41 (Oct 1979); A. H. Raskin, *The Squeeze on the Unions*, *Atlantic Monthly* 55 (June 1961); Paul Jacobs, *The State of the Unions* (Atheneum, 1963). I wrote about the relationship of the law in William B. Gould, *Labour and the Law*, *The Economist* 153 (Oct 10, 1964). For a discussion of a continuation of this trend from the 1990s through the present, see William B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law* (MIT, 1993); Bruce Western and Jake Rosenfeld, *Workers of the World Divide: The Decline of Labor and the Future of the Middle Class*, 91 *Foreign Affairs* 88 (2012).

⁸ See, for example, *NLRB v Allis-Chalmers Manufacturing Co.*, 388 US 175 (1967); *Scofield v NLRB* 394 US 423 (1969); William B. Gould IV, *Solidarity Forever—or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 *Cornell L Rev* 74 (1980); William B. Gould IV, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 *Duke L J* 1067 (1970).

⁹ See *Commonwealth v Pullis* (the Philadelphia Cordwainer's case), Mayor's Court of Philadelphia (1806); J. Commons, ed, *A Documentary History of American Industrial Society* 294 (Cleveland, 1910) (Job Harrison testified, "If I did not join the body, no man would sit upon the seat where I worked . . . nor board or lodge in the same house, nor would they work at all for the same employer.").

¹⁰ Railway Labor Act of 1926, Pub L No 69-257, 44 Stat 577 (as amended). See generally *Ellis v Brotherhood of Railway Employees*, 466 US 435 (1984); *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees v Allen*, 373 US 113 (1963); *Street*, 367 US at 740; *Railway Employees' Department v Hanson*, 351 US 225 (1956).

¹¹ Compare *Abood v Detroit Board of Education*, 431 US 209 (1977) (holding that nonmembers of a union can be assessed dues for germane purposes) with *Lehnert v Ferris Faculty Association*, 500 US 507 (1991) (holding that nonmembers of a union can be assessed a service fee for duties pertaining to its role as the "exclusive bargaining agent") and *Locke v Karass*, 555 US 207, 208 (2009) (holding that nonmembers may be charged for extralocal litigation which is local and reciprocal in nature, so long as it "ultimately inure[s] to the local union by virtue of its membership in the parent organization"). These cases were generally characterized as arising under so-called "fair share" agreements.

¹² See, for example, *Communications Workers of America v Beck*, 487 US 735 (1988). A veritable onslaught of executive orders have addressed notice-posting obligations for government contractors under *Beck*. Notification of Employee Rights Concerning Payment of Union Dues or Fees, 57 FR 12985 (1992); Revocation of Certain Executive Orders Concerning Federal Contracting, 58 FR 7045 (1993); Notification of Employee Rights Concerning Payment of Union Dues or Fees, 66 FR 11221 (2001); Notification of Employee Rights Under Federal Labor Laws, 74 FR 6107 (2009).

disappeared—perhaps, in part, because the Court came to assume that associational rights were impinged upon by restrictions upon the individual's right to financially support¹³ one's own ideas¹⁴—and therefore dissenting employees could not be compelled to assist with so-called “nonemployment ideas” with which they disagreed.

Union security agreements in the private sector have been legislatively contentious at least since the Taft-Hartley amendments in 1947.¹⁵ The amendments: (1) prohibited the “closed shop,” compelling membership prior to employment,¹⁶ (2) provided for the voluntary negotiation of a limited type of so-called “union shop” agreement, requiring membership or financial obligations as a condition of employment, and (3) and allowed the states to enact so-called “right-to-work” laws that prohibit such collective bargaining agreement clauses.¹⁷ Almost half the states in the Union have enacted such laws,¹⁸ and in the public sector, where the nomenclature is “fair share” agreements, a storm has been building by virtue of dual attacks upon both relatively successful public-sector unions in particular, and union security agreements generally (in both the public and private sector). One public-sector illustration of this trend is Wisconsin, which pioneered comprehensive collective bargaining legislation¹⁹ and is now in the midst of debate about labor law reform, which

¹³ See *Buckley v Valeo*, 424 US 1 (1976) (establishing the proposition that money is speech). *Buckley* was the precursor to *Citizens United*, 558 US 310 (2010), which created much mischief in both the campaign finance and labor law arenas.

¹⁴ *Abood*, 431 US at 234–36. Of course, employees always have the right to refrain from any union activity by manifesting majority support in opposition to the union, and thus ridding themselves of union representation. See *J. I. Case Co. v NLRB*, 321 US 332 (1944); *Allentown Mack Sales & Service, Inc. v NLRB*, 522 US 359 (1998).

¹⁵ Labor-Management Relations (Taft-Hartley) Act, Pub L No 80-101, 61 Stat 136 (1947) (codified as amended at 29 USC §§ 141–87).

¹⁶ *Algoma Plywood v Wisconsin Board*, 336 US 301 (1949).

¹⁷ See Benjamin Collins, *Right to Work Laws: Legislative Background and Empirical Research* (Congressional Research Service, Dec 6, 2012), online at <http://fas.org/sgp/crs/misc/R42575.pdf>; Vincent G. Macaluso, *The NLRB “Opens the Union,” Taft-Hartley Style*, 36 Cornell L Q 443 (1951); David H. Topol, *Union Shops, State Action, and the National Labor Relations Act*, 101 Yale L J 1135 (1992).

¹⁸ Twenty-four states have enacted such legislation. See *Right to Work States* (National Right to Work Legal Defense Foundation, 2014), online at <http://www.nrtw.org/rtws.htm>. Kentucky, West Virginia, New Mexico, and Wisconsin are now considering such laws. See, for example, *Missouri House Passes Anti-Union Bill, Ignoring Threat of a Veto*, NY Times (Feb 13, 2015). Though Section 14(b) of the NLRA—one of the Taft-Hartley amendments—allows for the enactment of “state and territorial” laws, counties have now passed right-to-work ordinances. See Shaila Dewan, *Foes of Unions Try Their Luck in County Laws*, NY Times A1, A4 (Dec 19, 2014).

¹⁹ See, for example, Arvid Anderson, *Labor Relations in the Public Service*, 1961 Wis L Rev 601 (1961).

threatens the very existence of public-sector unions in that state.²⁰ Even in California, where the labor movement enjoys more membership support than it possesses nationally,²¹ there have been numerous statewide propositions attempting to circumscribe the role of unions in this area.²²

I. THE EARLY UNION DUES—POLITICAL ACTIVITY CASES

As noted above, early cases exploring the legality of union dues were filed under the RLA, attacking the statutorily authorized so-called “union shop” agreements, which required membership as a

²⁰ The Walker administration has enacted much litigated legislation prohibiting a wide variety of union activity. See, for example, *Wisconsin Education Association Council v Walker*, 705 F3d 640 (7th Cir 2012); *Laborers Local 236, AFL-CIO v Walker*, 749 F3d 628 (7th Cir 2014); *Madison Teachers Inc. v Scott Walker*, 851 NW2d 337 (2014); Steven Greenhouse, *The Wisconsin Legacy*, NY Times (Feb 23, 2014). Apparently, Governor Walker has not encouraged passage of a Wisconsin right-to-work law—but so also did the governors of Indiana and Michigan adopt similar stances before their states fell into the right-to-work column. See Monica Davey, *Wisconsin Governor, Starting Second Term, Resists New Union Battle*, NY Times A12 (Jan 6, 2015). However, Governor Walker, like his Indiana and Michigan counterparts, has had a change of heart. See Michael Bologna, *Wisconsin Lawmakers Expected to Take Swift Action on Right-to-Work Legislation*, Bureau of National Affairs A13 (Feb 20, 2015); Monica Davey and Mitch Smith, *Walker Set to Deliver New Blow to Labor and Bolster Credentials*, NY Times A12 (Feb 26, 2015); Mitch Smith, *Word of Threat Cuts Short Hearing on Right-to-Work Measure in Wisconsin*, NY Times A13 (Feb 25, 2015); *Wisconsin, Workers, and 2016*, NY Times (Feb 27, 2015).

²¹ In 2013, the union membership rate—the percent of wage and salary workers who were members of unions—was 11.3 percent, the same as in 2012. During that period, the union membership rate in California was 17.2 percent and 16.4 percent in 2012 and 2013, respectively. See <http://www.bls.gov/news.release/union2.t05.htm>. Public employee unions have kept the American labor movement afloat through organizational activity. But see note 18 for a discussion of efforts to stifle union activity. But it is said that the “public has no appetite for a public-sector *intifada*. . . Governments have no choice but to cut public-sector debt, which is ballooning across the rich world. Mighty private-sector unions were destroyed when they tried to take on elected governments in the 1980s. The same thing could happen to the survivors if they overplay their hands.” *In Two Minds*, The Economist (June 3, 2010), online at <http://www.economist.com/node/16271975>. Meanwhile, the decline in private-sector unions has been addressed through debate about the Employee Free Choice Act of 2009. See William B. Gould IV, *Employee Free Choice Act: Bill No Cure—All for What Ails Labor*, San Jose Mercury News 11A (Mar 6, 2007); William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 La L Rev 1 (2009); William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 USF L Rev 291 (2008). But as I and others have written, organized labor’s decline is attributable to much more than the law itself. See *The Limits of Solidarity*, The Economist (Sept 21, 2006), online at <http://www.economist.com/node/7951699>.

²² See, for example, Bob Egelko, *Prop. 32 Not Unions’ Only Worry*, San Francisco Chronicle (Oct 23, 2012); Bob Egelko, *Romney Favors Restrictions on Union Dues*, San Francisco Chronicle (Nov 1, 2012). This series of attempts began in earnest in 1998. See William B. Gould IV, *Labored Relations: Law, Politics, and the NLRB—a Memoir* 386 (MIT, 2000) (discussing Proposition 226, characterizing it as “deeply flawed from both a policy and constitutional perspective”).

condition of employment negotiated between unions and employers. Until Congress enacted amendments to the statute in 1951, the practice on railways had been that of the “open shop”—where no one could be compelled to become a member or pay dues exacted by a labor organization. The year 1951 altered that, and constitutional litigation attacking negotiated union security clauses soon followed. In the first of these cases, *Railway Employees’ Department v Hanson*,²³ the Court, speaking through Justice Douglas, said that these agreements were made pursuant to the federal law, and by the force of the Supremacy Clause²⁴ could not be invalidated.²⁵ Neither the First Amendment nor the Fifth were violated, in the view of the Court, when the obligation was the payment of “periodic dues, initiation fees, and assessments” permitted by the statute.²⁶ Congress, said the Court, had a compelling interest in seeking to fashion “[i]ndustrial peace along the arteries of commerce,”²⁷ and nothing in the case spoke conclusively about the use to which dues were being put. Thus, the Court was able to reserve the question of possible First Amendment violations in the event of attempts to secure ideological conformity.²⁸

A more important decision in which this issue was presented was one authored by Justice Brennan, *International Association of Machinists v Street*.²⁹ In this case, the Court reiterated the point made in *Hanson*,³⁰ that is, that the payment of dues and initiation fees as a condition of employment was not unlawful or unconstitutional. However, in *Street*, the majority staked out new ground and safeguarded the rights of dissidents when it said the following:

A congressional concern over possible impingements on the interests of individual dissenters from union policies is . . . discernible. . . . We may assume that Congress was also fully conversant with the long his-

²³ *Hanson*, 351 US at 225.

²⁴ US Const, Art VI, § 2.

²⁵ *Hanson*, 351 US at 225.

²⁶ *Id* at 238.

²⁷ *Id* at 233.

²⁸ *Id* at 238.

²⁹ 367 US 740 (1961). Subsequently, the *Street* principle was reiterated in *Brotherhood of Railway Clerks v Allen*, which said that “[t]he necessary predicate for such remedies [vis-à-vis union expenditures over a proper objection] . . . is a division of the union’s political expenditures from those germane to collective bargaining.” *Allen*, 373 US at 113, 121.

³⁰ *Hanson*, 351 US at 225.

tory of intensive involvement of the railroad unions in political activities. But it does not follow that [the Act] places no restriction on the use of an employee's money, over his objection, to support political causes he opposes merely because Congress did not enact a comprehensive regulatory scheme governing expenditures.³¹

Expressing no view on the questions of whether “other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes,”³² the Court held that, though dissent could never be presumed, dissidents could lawfully object to payments used for political causes with which they disagree. Thus began an unfolding drama, the tempo of which has begun to accelerate in this century.

Justice Frankfurter dissented in *Street*,³³ finding no legislative intent to preclude union expenditures on the political process.³⁴ He emphasized, properly, in my view, the deep involvement of the labor movement in the political process through its adoption of a “program of political action in furtherance of its industrial standards.”³⁵ Justice Frankfurter noted that the dissidents had not been denied an ability to participate in the union so as to influence the collective position—nor were they precluded from speaking out in opposition to the union. Rejecting the argument that the union's role in the political process was unrelated to collective bargaining about employment conditions, the Frankfurter dissent noted that the pressure for legislation (e.g., legislation that established an eight-hour day for the railroad industry) “affords positive proof that labor may achieve its desired result through legislation after bargaining techniques fail.”³⁶

The extension of this controversy to the public sector, where constitutional objections articulated by dissenters could be made

³¹ *Street*, 367 US at 766–67.

³² *Id* at 769.

³³ *Id* at 797. Justice Frankfurter was joined by Justice Harlan. Justice Black registered a separate dissent.

³⁴ *Street*, 367 US at 800–802 (Frankfurter, J, dissenting). See generally Alan Hyde, *Economic Labor Law v Political Labor Relations: Dilemmas for Liberal Legalism* 60 U Tex L Rev 1 (1981); David B. Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds*, 14 UC Davis L Rev 591 (1981).

³⁵ *Street*, 367 US at 813 (Frankfurter, J, dissenting).

³⁶ *Id* at 814 (Frankfurter, J, dissenting).

more directly because of the involvement of government itself in the negotiated union security agreements, was accomplished in *Abood v Detroit Board of Education*.³⁷ In considering the expenditure of dues obtained through such union security agreements, the Court in *Abood* drew a line of demarcation between that which was “germane”³⁸ to collective bargaining and chargeable on the one hand, and those which were unrelated, including political activities, which were unconstitutionally imposed upon dissenters where they objected.³⁹ Again, the constitutional issue was directly presented because of the involvement of government.

A circle was closed when the Court, in *Communications Workers of America v Beck*,⁴⁰ held, albeit curiously under the so-called “duty of fair representation”⁴¹ obligation to represent all within the bargaining unit fairly, that the same demarcation line would apply in cases involving the NLRA itself. Notwithstanding the dramatically different legislative history of the RLA and the NLRA—the former arising out of the open shop, where unions had had no union secu-

³⁷ *Abood*, 431 US at 209.

³⁸ *Id* at 235.

³⁹ *Id* at 235–36 (“We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”). The assumptions of campaign expenditure legislation regulating union involvement in politics have proceeded on the assumption that such monies would be obtained voluntarily. See, for example, *Pipefitters Local No. 562 v United States*, 407 US 385 (1972); *FEC v National Right to Work Committee*, 459 US 197 (1982).

⁴⁰ *Beck*, 487 US at 735. See generally Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck*, 27 Harv J Leg 51 (1990).

⁴¹ See, for example, *Hines v Anchor Motor Freight, Inc.*, 424 US 554 (1976); *Vaca v Sipes*, 386 US 171 (1967); *Humphrey v Moore*, 375 US 335 (1964); *Ford Motor Co. v Huffman*, 345 US 330 (1953); *Railroad Trainmen v Howard*, 343 US 768 (1952); *Steele v Louisville and Nashville Railroad*, 323 US 192 (1944). I have expressed the view that the duty of fair representation is not the appropriate standard, given the fact that litigation before and since *Beck* involving employee rights has taken place under the rubric of the so-called “restraint and coercion” standard of § 8(b)(1)(A) under the NLRA. *California Saw & Knife Works*, 320 NLRB 224, 333 n 47 (Chairman Gould concurring), aff’d in *International Association of Machinists & Aerospace Workers v NLRB*, 133 F3d 1012 (7th Cir 1998). This standard, more ambitious in scope than the duty of fair representation standard, proved to be significant in the poorly reasoned Supreme Court’s *Marquez* opinion. *Marquez v Screen Actors Guild, Inc.*, 525 US 33 (1998) (holding that there was no duty of representation obligation to specify workers’ obligations in a collective bargaining agreement, in part because workers did not read them). But see *Monson Trucking Inc.*, 324 NLRB 933, 938 (1997) (Chairman Gould concurring) (referenced by Justice Kennedy in his *Marquez* concurrence, 525 US at 53, Kennedy, J, concurring).

rity agreements at all, and the latter involving Congress's attempt to regulate union power and abuses associated with such in the rest of the private sector—the Court held that the same standard applied. Said the Court in *Beck*: “however much union-security practices may have differed between the railway and NLRA-governed industries prior to 1951, it is abundantly clear that Congress itself understood its actions in 1947 and 1951 to have placed these respective industries on an equal footing insofar as compulsory unionism was concerned.”⁴² Though state action was more difficult to find under the NLRA,⁴³ the same freedom-of-association principles promoted by the First Amendment⁴⁴ seem to be in play.⁴⁵ Thus, the attempt to draw a line between representational activity, manifested through collective bargaining and the adjustment of grievances, and that which was not germane to it emerged in both the NLRA as well as the RLA—and *Beck* was to loom large in the NLRB's deliberations during the 1980s and 1990s.⁴⁶

Finally, the Court in *Lehnert v Ferris Faculty Association*,⁴⁷ a public-sector case like *Abood*, attempted to define “chargeability” in greater detail—noting that the Railway Labor Act cases were “instructive” in delineating the “balance of the First Amendment” as well as *Abood*.⁴⁸ The majority in *Lehnert*, through Justice Blackmun, held that the union dues charges against nonmembers could not be sustained over objections where they involved: (1) lobbying or political activities

⁴² *Beck*, 487 US at 756.

⁴³ Topol, 101 Yale L J at 1135 (cited in note 17).

⁴⁴ See *NAACP v Alabama*, 357 US 449 (1958).

⁴⁵ See, for example, Roger Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act, Dues Objector Cases* 41 Hastings L J 1 (1989); Clyde W. Summers, *Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U Ill L Rev 689 (1986).

⁴⁶ Between 1988, when *Beck* was decided, and 1994, when I became Chairman of the NLRB, no case involving the application of the *Beck* standards to the NLRA was decided, notwithstanding the fact that a substantial number of unfair labor practice charges involving this issue were pending for at least six years. See, for example, Gould, *Labored Relations at 73–74* (cited in note 22).

⁴⁷ *Lehnert*, 500 US at 507.

⁴⁸ In the interim, another vexatious issue had begun to emerge, that is, the precise procedures to be employed. See, for example, *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v Hudson*, 475 US 292, 310 (1986) (“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.”). The union bears the burden of establishing through the preponderance of the evidence that the agency fee is accurate.

for matters “outside the limited context of contract ratification or implementation,”⁴⁹ (2) general legislative efforts to obtain, in this case, public education in the state, (3) litigation unrelated to the bargaining unit, or (4) public relations efforts. But the opinion that appeared to be most influential at the time—and this continues through the present day in the *Harris* litigation which was to follow—was that of Justice Scalia.⁵⁰

In essence, the Scalia view was that First Amendment jurisprudence recognized a “correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other.”⁵¹ Justice Scalia’s opinion in *Lebnert* was that a constitutionally “compelling state interest” standard was synonymous with the obligation imposed upon the union to fairly represent all within the bargaining unit—one which was “mandated by government decree.”⁵² Said Justice Scalia:

I would make explicit what has been implicit in our cases since *Street*: A union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.⁵³

This view was to loom large in *Harris*.

II. RECENT SUPREME COURT LITIGATION

A. PRE-HARRIS V QUINN

Part of the Roberts Court’s profound movement to the right, sometimes addressing matters even without the issues having been

⁴⁹ *Lebnert*, 500 US at 522. See also *Belbumeur v Labor Relations Commission* 732 NE2d 860, 870–71 (Mass 2000) (“the objective of the Statewide strike was to publicize the condition of public education funding, and the simultaneous resolve of educators, thereby raising the profile of the issue of public education funding. We conclude the expenses were not chargeable. . . . The purpose of the activity here [to secure funds for public education] is virtually identical; advocating for funding of public education in general is the type of political speech for which the union may not charge. With one exception, the union expenses related to the statewide strike were not chargeable.”). For a discussion of comparable chargeability issues under the NLRA, see *Meijer Incorporated*, 329 NLRB 730, 735 (1997).

⁵⁰ *Lebnert*, 500 US at 550 (Scalia, J, concurring in part, dissenting in part). Justice Scalia was joined by Justices Souter and O’Connor, and Justice Kennedy joined in part.

⁵¹ *Id.* at 556.

⁵² *Id.*

⁵³ *Id.* at 558.

presented to them in briefs or arguments,⁵⁴ has been manifested in union security cases in connection with the so-called “fair share” arena (these cases involved attempts by unions to require public-sector employees to pay what they viewed to be their “fair share” of representational activity). The backdrop for all of this comes at a time when activist decisions by the Roberts Court usurp, in my view, the role of Congress itself. One such case from the 2013 Term, *Shelby County v Holder*,⁵⁵ invalidated portions of the Voting Rights Act of 1965.⁵⁶ At the same time, the Court has received praise from some corners for alleged recent illustrations of compromise and unanimity.⁵⁷ Whatever the accuracy of this assessment, most decidedly, this has not been the case in labor law.⁵⁸

The first of the recent decisions involving union security issues is *Knox v Service Employees International Union, Local 100*,⁵⁹ where a 5–4 majority—reaching out for issues and arguments not even presented or briefed⁶⁰—held that an agreement under which workers

⁵⁴ See, for example, *Knox v Service Employees International Union, Local 1000*, 132 S Ct 2277, 2296 (2012) (Sotomayor, J, concurring) (“I cannot agree with the majority’s decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing.”). An excellent discussion of this general trend and the Court’s ever rightward shift can be found in Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* (Simon and Schuster, 2013).

⁵⁵ *Shelby County, Alabama v Holder*, 133 S Ct 2612 (2012).

⁵⁶ See William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization and Class Actions: Justice Ginsburg’s Term*, 36 U Hawaii L Rev 371, 375–79 (2014).

⁵⁷ See, for example, Jess Bravin, *Chief Justice’s Balancing Act*, Wall St J A1 (July 2, 2014); Adam Liptak, *Supreme Court’s Shift to Unanimity Veils Rifts*, NY Times A1, A17 (July 2, 2014).

⁵⁸ See, for example, *NLRB v Noel Canning, et al*, 134 S Ct 2550 (2014), on the constitutionality of recess appointments made by the President to the NLRB without the advice and consent of the Senate. But see *Mulhall v Unite Here Local 355*, 667 F3d 1211 (2012), cert granted as *Unite Here Local 355 v Mulhall*, 133 S Ct 2849 (2013), cert dismissed as improvidently granted, 134 S Ct 594. See also William B. Gould IV, *Argument Preview: Unite or Disunite—Another Roadblock to Union Organizing and Collective Bargaining?*, SCOTUSblog (Nov 1, 2013), online at <http://www.scotusblog.com/2013/11/argument-preview-unite-or-disunite-another-roadblock-to-union-organizing-and-collective-bargaining/>. Nonetheless, it must be noted that in the labor arena, this is not unprecedented and does not begin with the Roberts Court. See, for example, William B. Gould IV, *The Burger Court and Labor Law: The Beat Goes on—Marcato*, 24 San Diego L Rev 51 (1987); William B. Gould, *The Supreme Court’s Labor and Employment Docket in the 1980 Term: Justice Brennan’s Term*, 53 U Colo L Rev 1 (1981).

⁵⁹ 132 S Ct 2277 (2012). Justice Alito authored the majority opinion, where he was joined by Chief Justice Roberts and Justices Thomas, Scalia, and Kennedy. Justice Sotomayor wrote a concurring opinion, joined by Justice Ginsburg. Justice Breyer authored the dissent, in which Justice Kagan joined.

⁶⁰ *Id* at 2296 (Sotomayor, J, concurring).

provided compulsory union fees as a condition of employment was a “form of compelled speech and association”⁶¹ which imposes a “significant impingement on First Amendment rights.”⁶² The Court, citing to an earlier opinion of Justice Scalia,⁶³ rejected the proposition that there was a balance to be struck between the rights of unions to finance their own expressive activities, on the one hand, and the rights of unions to collect fees from nonmembers on the other.⁶⁴ *Knox* held that a union, which sought to collect fees from both members and nonmembers through a special assessment to mount a political campaign, was required to give notice to nonmembers and allow them to opt out of it if they so chose. Said Justice Alito, writing for the majority: “This aggressive use of power by the SEIU to collect fees from nonmembers is indefensible.”⁶⁵ Alito commented that if the state ballot proposition fostered by Governor Schwarzenegger had passed (a political campaign that the union opposed), it would have exempted nonmembers from “paying for the SEIU’s extensive political projects unless they affirmatively consented. Thus, the effect of the SEIU procedure was to force many nonmembers to subsidize a political effort designed to restrict their own rights.”⁶⁶ No balancing was required because, in the Court’s view, only nonmembers who objected to the way in which their monies would be spent have constitutional rights at stake.⁶⁷ “Affirmative consent” of nonmembers was required, even though Supreme Court precedent had said that dissent was not to be presumed.

Knox did not involve a union security agreement itself, but rather a special assessment.⁶⁸ Nonetheless, the fact that “affirmative consent” was required and Justice Alito’s comment that the Court’s earlier uniform acceptance of a so-called “opt-out approach” which

⁶¹ *Id.* at 2282.

⁶² *Knox*, 132 S Ct at 2282 (citing *Ellis*, 466 US at 455).

⁶³ *Davenport v Washington Education Association*, 551 US 177, 185 (2007) (holding that First Amendment principles are not violated when a state requires public-sector unions to obtain affirmative consent from a nonmember before spending that nonmember’s agency-shop fees for election-related purposes).

⁶⁴ *Knox*, 132 S Ct 2277, 2291 (citing *Davenport* 551 US at 185). But the Court had earlier found a constitutional right for both members and nonmembers in a fair share union security agreement and had struck a balance between the competing interests of each. *Abood*, 431 US at 231–32.

⁶⁵ *Knox*, 132 S Ct at 2291.

⁶⁶ *Id.* at 2292.

⁶⁷ *Id.* at 2291.

⁶⁸ *Id.* at 2285.

would require nonmembers or dissenters to affirmatively object to expenditure of union dues for purposes that are not germane to the collective bargaining process “appears to have come about more as a historical accident than through the careful application of First Amendment principles”⁶⁹ seemingly spelled out a substantial reconsideration of precedent. Thus, the Court’s holding in *Knox* was ominously indicative of what was to come. Two years later, in *Harris v Quinn*, the Court took matters considerably further and now addressed a fair share, or union security, contract clause itself.

B. HARRIS v QUINN

Harris, a decision both narrow and yet potentially far-reaching, was handed down at the end of the 2014 Term with the Court divided 5–4, the exact same division that had been registered two years earlier in *Knox*.⁷⁰ Justice Alito, also the author of *Knox*, wrote the majority opinion in this case involving the state of Illinois’s provision of home care services to individuals who would otherwise require institutionalization. The Illinois rehabilitation program allowed participants to hire a so-called “personal assistant” who “provides” home care services tailored to the employer’s needs.⁷¹ The statute in question provided that the customer act as the employer of the personal assistant,⁷² an aspect of the legislation upon which a majority of the Court was to place great emphasis.⁷³ The state, with subsidies from the federal Medicaid program, paid the personal assistants’ salaries.

The Illinois Public Labor Relations Act (IPLRA) authorized the labor relations scheme underlying *Harris*—it allowed employees, if they so wished, to join labor unions and to bargain collectively on terms and conditions of employment.⁷⁴ The statute authorized parties to enter into a so-called “fair share” agreement as part of their collective bargaining agreement with an exclusive representative through which employees who are “nonmembers” of an or-

⁶⁹ *Id.* at 2290.

⁷⁰ Justice Alito wrote for the majority, joined by Justices Roberts, Scalia, Kennedy, and Thomas. Justice Kagan wrote a dissent, in which Justices Ginsburg, Breyer, and Sotomayor joined.

⁷¹ *Harris*, 134 S Ct at 2623–24.

⁷² *Id.* at 2624.

⁷³ *Id.* at 2636–38.

⁷⁴ 5 ILCS 315/6(a).

ganization “pay their proportionate share of the costs of the collective bargaining process, contract administration, and [pursuit of] matters affecting wages, hours and conditions of employment.”⁷⁵

After the Illinois Labor Relations Board’s rejection of an SEIU petition to represent the personal assistants, Governor Rod Blagojevich⁷⁶ then—in the words of the Court—“circumvented” this decision through issuance of an executive order authorizing state recognition of a union representing personal assistants on an exclusive bargaining representative basis.⁷⁷ The Illinois legislation codified the executive order by amending the IPLRA, and in so doing, declared the personal assistants to be “public employees” of the state of Illinois, solely for the purpose of the IPLRA.⁷⁸

The *Harris* litigation itself involved a putative class action on behalf of personal assistants employed in the personal rehabilitation program who sought an injunction against enforcement of the fair share clause.⁷⁹ They also prayed for a declaration that the IPLRA violates the First Amendment “insofar as it requires personal assistants to pay a fee to a union to which they do not wish to support.”⁸⁰ Initially, it appeared that the First Amendment attack was aimed at not only the union security clause involved in this legislation, but also the very exclusive bargaining representative status itself, which *Abood* had deemed to be constitutional. But at the time of oral argument, these claims seemed to disappear.⁸¹ The Court did not discuss them in the *Harris* opinion.

⁷⁵ *Id.* However, the Court mischaracterized the provision as mandating such “fair share” clauses rather than simply permitting them.

⁷⁶ Justice Alito expressed great interest in the involvement of Blagojevich, an Illinois governor who was convicted and subsequently sent to prison on corruption charges. See Transcript of Oral Argument at 52–53, *Harris v Quinn*, 134 S Ct 2618 (2014) (No 11-681). This is not the first time that Justice Alito has been so focused upon the political process which led to the legislation before him. His opinions reflect suspicion of corruption or venality. See, for example, *Ricci v DeStefano*, 557 US 557, 598–604 (Alito, J, concurring) (discussing the impact of Reverend Boise Kimber on Mayor Destefano and New Haven politics).

⁷⁷ *Harris*, 134 S Ct at 2626.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* The District Court dismissed on the authority of an earlier Supreme Court ruling in *Abood*, which had upheld fair share clauses as constitutional.

⁸¹ Transcript of Oral Argument at 18–20, *Harris v Quinn*, 134 S Ct 2618 (2014) (No 11-681). (When asked whether the petitioners were challenging the idea of exclusive representation by a public-sector union, the attorney representing the petitioners replied: “It’s not

The Supreme Court concluded⁸² that, while the statutory permission of unions to collect contractual fees from “nonmembers” was designed to avoid nonmember “free riding” on the union’s effort as exclusive bargaining representatives within an appropriate unit, such “free rider” arguments are “generally insufficient to overcome First Amendment objections.”⁸³ In the Court’s view, *Abood*, which had sanctioned such agreements for schoolteachers in Michigan, was a distinguishable case.⁸⁴ Writing for the majority, Justice Alito argued that finding in favor of the State of Illinois would provide for “a very significant expansion of *Abood*—so that it applies, not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization and the collection of an agency fee.”⁸⁵

The Court then proceeded to examine the jurisprudence of the past decades in a rather derisive manner, similar to the tone struck by Justice Alito in *Knox* itself. *Harris* proceeded to attack the Court’s First Amendment analysis in the first of the decisions, *Railway Employees’ Department v Hanson*,⁸⁶ where Justice Alito characterized the First Amendment analysis discussion in it as “thin.”⁸⁷ But the principal focus of the majority in *Harris* was on *Abood* itself, inasmuch as it was a public-sector case like *Harris*. Noting the fact that the public employer response to union demands has a “blend of political ingredients” as acknowledged in *Abood*, Justice Alito was critical of the fact that the earlier cases presented under the RLA have been found to be “essentially controlling . . . despite these acknowledged differences between private- and public-sector bargaining.”⁸⁸ The majority then concluded that the *Abood* analysis was “questionable on

directly challenged in this case, but it becomes relevant under the first *Knox* test, which asks whether the mandatory association being supported by the compulsory fees is justified by a compelling State interest.”)

⁸² The case reached the Supreme Court after being affirmed in part and remanded in part by the Seventh Circuit in *Harris v Quinn*, 656 F3d 692 (7th Cir 2011). Previously, the Northern District of Illinois dismissed the claims of the personal assistants in *Harris v Quinn*, 2010 WL 4736500 (ND Ill).

⁸³ *Harris*, 134 S Ct at 2627.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 351 US 225 (1956).

⁸⁷ *Harris*, 134 S Ct at 2629. Along these lines, the Court also said that the First Amendment analysis in *Hanson* “deserved better treatment.” *Id.* at 2632.

⁸⁸ *Id.* at 2632.

several grounds,” some of which “have become more evident and troubling in the years since then.”⁸⁹

Justice Alito distinguished *Abood* from the earlier private-sector precedent by stating that Michigan had actually “imposed” the fair share fee in question rather than “authoriz[ing]” it,⁹⁰ noting that:

Abood failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. In the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home.⁹¹

The *Harris* opinion said that *Abood* had “failed to appreciate the conceptual difficulty of a demarcation line in public-sector cases between union expenditures for collective bargaining purposes and those that are made to achieve political ends.”⁹² This point alluded to Justice Frankfurter’s earlier view, expressed in private-sector cases, that it was “rather naïve” to view “economic and political concerns [as] . . . separable”⁹³—a point made to support precisely the opposite conclusion in *Harris*, that is, to circumscribe union functions rather than to acknowledge, as Justice Frankfurter had, that unions historically were driven to accomplish their objectives through both collective bargaining and legislative avenues and that dues collected for these purposes did not unconstitutionally suppress speech, so long as dissidents could express their point of view in other arenas.

The Court then claimed that the line between the two in the public sector was “easier to see,” inasmuch as in the public sector, “both collective bargaining and political advocacy and lobbying are directed at the government.”⁹⁴ But this element of the Court’s reasoning fails to take into account not only the substantial private-sector union involvement in the political process to which Justice

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

⁹³ Id at 2630 (citing *Street*, 367 US at 814 (Frankfurter, J, dissenting)).

⁹⁴ Id (citing *Street*, 367 US at 814).

Frankfurter had alluded, but also the fact that unions frequently act in concert with employers⁹⁵ in the private sector—the automobile industry is a good example in connection with the 2008 bailout—in approaching elected representatives.⁹⁶ Moreover, the focus in *Abood* was the associational right of employees,⁹⁷ not the impact upon the public sector and the public-sector enterprise.

Justice Alito then went on to state that *Abood* could not have foreseen the problems that would emerge in determining which portion of dues could be properly collected as “germane” to collective bargaining and the difficult problems that would “face . . . objecting nonmembers.”⁹⁸ The Court also argued that a “critical pillar” of *Abood* rested on “unsupported empirical assumption[s],”⁹⁹ that is, that exclusive bargaining representative status in the public sector was dependent upon union security agreements, which, in the Court’s view, was an “unwarranted” assumption.¹⁰⁰ Thus, the Court again noted that Illinois was seeking a “very substantial expansion of *Abood*” inasmuch as *Abood* involved “full-fledged public employees”¹⁰¹ (i.e., personal assistants) which placed the state of Illinois’s treatment of the personal assistants in question, in the view of the majority, in the private sector.

Personal assistants, in the view of the majority, were “almost entirely answerable to the customers and not to the state.”¹⁰² Moreover, these personal assistants were ineligible for a variety of benefits available to the state employees group for which Illinois did not as-

⁹⁵ In the public sector, this happens as well. The Supreme Court of California has held that expenditures of union dues undertaken in this context are permissible. See, for example, *Cumero v Public Employment Relations Board*, 49 Cal3d 575 (1989).

⁹⁶ See, for example, Micheline Maynard, *U.A.W. at Center of Dispute Over Bailout*, NY Times (Dec 8, 2008); Nick Bunkley, *Ahead of Auto Bailout Hearings, Union Ready to Make Concessions*, NY Times (Dec 3, 2008). The same was true in the earlier Chrysler bailout in 1979. See, for example, *First National Maintenance Corp. v NLRB*, 452 US 666, 682–83 (1981) (“If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable.” To reach this conclusion, the Court referenced the agreement reached in 1979 between the UAW and Chrysler.).

⁹⁷ See *Thomas v Collins*, 323 US 516 (1945); *NAACP v Alabama*, 357 US 449 (1958); *Shelton v Tucker*, 364 US 479 (1960); *Bates v City of Little Rock*, 361 US 516 (1960).

⁹⁸ *Harris*, 134 S Ct at 2633.

⁹⁹ *Id.* at 2634.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

sume “responsibility for actions taken” during the course of their employment.¹⁰³ The majority’s view was that, whereas in *Abood* the union possessed “the full scope of powers and duties generally available under American labor law,”¹⁰⁴ the Illinois statute had sharply circumscribed union powers and duties.¹⁰⁵ The fact that the wage was set by the state law, and the union’s authority in the grievance processing was narrow—the customer having “virtually complete control over a personal assistant’s work”¹⁰⁶—also prompted the Court to refuse to extend *Abood* and its “questionable foundations” to a group of individuals who were “partial-public employees, quasi-public employees, or simply private employees.”¹⁰⁷

The majority then analyzed *Abood* as “not controlling,” discussing the constitutionality of dues payment compelled under “generally applicable” First Amendment standards, relying upon some of its reasoning in *Knox* to do so.¹⁰⁸ Rejecting the contention that the speech in question was “commercial speech,”¹⁰⁹ the majority concluded that “no fine parsing of levels of First Amendment scrutiny is needed because the agency fee provision here cannot satisfy even the test used in *Knox*,”¹¹⁰ that is, that the provision served a “compelling state interest” and cannot be achieved through means significantly less restrictive of associational freedom.¹¹¹ Before concluding that the agency fee played an unimportant role in maintaining labor peace within the meaning of *Abood* because personal assistants do not “work together”—ignoring the rise of telecommuting in both the public and private sector—as well as placing emphasis on the union’s “very restricted role” to represent these employees under

¹⁰³ Id at 2635.

¹⁰⁴ Id at 2636.

¹⁰⁵ Id.

¹⁰⁶ Id at 2637.

¹⁰⁷ Id at 2638.

¹⁰⁸ Id at 2639.

¹⁰⁹ Id. Here, the majority looked to the Court’s holdings in *United States v United Foods, Inc.*, 553 US 405, 409 (2001) and *Virginia Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748, 761–62 (1976) to determine what constitutes commercial speech.

¹¹⁰ *Harris*, 134 S Ct at 2639.

¹¹¹ Id. A rather detailed discussion of these and other relevant constitutional standards is contained in Catherine Fisk and Erwin Chemerinsky, *Political Speech and Association Rights After Knox v SEIU, Local 1000*, 98 Cornell L Rev 1023 (2013). See also Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum L Rev 800 (2012); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 Yale L J 100 (2013).

the Illinois law,¹¹² the Court broadly rejected the free rider argument which had justified union security agreements by proclaiming: “A union’s status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked.”¹¹³ The arrangement in question was unconstitutional, said the Court, because there had been no showing that 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.”¹¹⁴

Justice Alito then considered another argument made, that is, that *Pickering v Board of Education*¹¹⁵ provided “new justification” for *Abood*, consideration not discussed or relied upon in the latter. In *Pickering*, the Court had held that employee speech is unprotected if it is not expressed on a “matter of public concern.”¹¹⁶ This holding was to subsequently shrink so as to eliminate constitutional protections for most public-sector employee speech involving the employment relationship itself. But in *Harris*, the Court concluded that union contractual clauses requiring payment of dues for nonmembers *were* public and thus subject to First Amendment restrictions and standards in the workplace, simultaneously concluding that “a single public employee’s pay [in the *Pickering* line of cases] is usually not a matter of public concern” in contrast to the “entire collective bargaining unit” involving the collective bargaining process in *Harris*, where such matters would have involved substantial statewide budgeting decisions.¹¹⁷ It was necessary for the majority to make this kind of distinction because *Pickering* employee speech involved with previous grievances had a cost which had involved state expenditures, inasmuch as they involved monetary judgments—and they had been previously regarded as constitutionally unprotected.¹¹⁸ Inasmuch as agency fee agreements now

¹¹² *Harris*, 134 S Ct at 2640.

¹¹³ *Id.*

¹¹⁴ *Id.* at 2641.

¹¹⁵ *Pickering v Board of Education of Township High School District 205, Will County*, 391 US 563 (1968).

¹¹⁶ *Harris*, 134 S Ct at 2642 (citing *Pickering*, 391 US at 568). But see *Developments in the Law—Public Employment*, 97 Harv L Rev 1611 (1984).

¹¹⁷ *Harris*, 134 S Ct at 2642 n 28.

¹¹⁸ See *Connick v Myers*, 416 US 138 (1983), *Garcetti v Ceballos*, 547 US 410 (2006), *Borough of Druyeva v Guarnieri*, 131 S Ct 2488 (2011) as examples of employee grievances over First

impose a “heavy burden” on the rights of dissident objecting employees within the bargaining unit, the promotion of labor peace and the problems of free riders, previously acknowledged in *Abood*, could not sustain the constitutionality of such practices even under *Pickering*, in the view of the *Harris* majority.¹¹⁹ Thus, while *Pickering* employee free speech in the workplace withered, the rights of dissident employees who protested their expenditure of dues now blossomed in *Harris*, and before that opinion in *Knox* as well.

Justice Kagan, in a blistering opinion both comprehensive and persuasive, dissented—and she was joined by Justices Ginsburg, Breyer, and Sotomayor.¹²⁰ Justice Kagan noted that the interest in a fair share agreement of the kind involved in Illinois was no less applicable to caregivers than for public employees generally. She pointed out that parties who had negotiated the Illinois agreement had acted in reliance upon the principles of *stare decisis* involved as a result of *Abood*. And though there was no departure from *stare decisis* in this case, notwithstanding the “potshots” at *Abood*,¹²¹ she wrote: “The *Abood* rule is deeply entrenched, and is the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation. Our precedent about precedent, fairly understood and applied, makes it impossible for this Court to reverse that decision.”¹²²

The dissent was of the view that *Abood* resolved *Harris*, inasmuch as Illinois was truly a joint employer with the customer, sharing the authority with them, “each controlling significant aspects of the assistant’s work.”¹²³ Justice Kagan noted that the state-employed

Amendment protections for employee speech that, in the eyes of the Court, did not deserve constitutional protection.

¹¹⁹ The Court also rejected the view that case law upholding the constitutionality of the integrated bar where an association of attorneys, in which membership and dues are required as a condition of practicing law, was inapplicable because licensed attorneys who are subject to ethics rules should be required to pay dues as part of this regulatory scheme. The same was true, said the Court, with regard to mandatory dues paid by students at state universities as administrative problems there would “likely be insuperable.” *Harris*, 134 S Ct at 2643–44.

The *Harris* opinion is thus “a sui generis wedge” between the law of fair share agreements and public employee speech generally, “splashing doubt upon a key tool in the state’s regulation of its own workforce.” *The Supreme Court 2013 Leading Case: First Amendment, Harris v Quimm*, 128 Harv L Rev 211, 216 (2014).

¹²⁰ *Harris*, 134 S Ct at 2645 (Kagan, J, dissenting).

¹²¹ *Id* (Kagan, J, dissenting).

¹²² *Id* (Kagan, J, dissenting).

¹²³ *Id* at 2646 (Kagan, J, dissenting).

counselor developed a service plan relating to the customer, based upon state-established criteria, and that both the state and the customer played a role in determining whether the employee has demonstrated capabilities to the satisfaction of the counselor.¹²⁴ Dependent on the customer's guidance, the state of Illinois withheld payment from an assistant in the event of "credible allegations of consumer abuse, neglect, or financial exploitation."¹²⁵ The grievance procedure had been invoked by the SEIU, and an arbitration award had reversed the state's decision to disqualify an assistant from the program.¹²⁶ Illinois, noted Justice Kagan, had "sole authority" over terms and conditions of employment, those likely to be the subject of collective bargaining, and if the assistant was to receive an increase in pay, she directed her demands to the state, and not to the individual customer.¹²⁷

The dissent emphasized the importance of state regulations regarding employment conditions so as to address both workplace shortages and high turnover, which "have long plagued in-home care programs" principally because of low wages and benefits.¹²⁸ Through the achievement or realization of these policies, said the dissent, the state was able to avoid the costs associated with institutionalization. Thus, the dissent noted that Illinois had acted as a "a veritable poster child for *Abood*" and not, as the majority contended, "some strange extension of that decision."¹²⁹ Said Justice Kagan: "It is not altogether easy to understand why the majority thinks what it thinks: Today's opinion takes the tack of throwing everything against the wall in the hope that something might stick."¹³⁰

In a particularly telling passage, Justice Kagan noted the fact that the union was circumscribed in its right to engage in bargaining

¹²⁴ Id at 2647 (Kagan, J, dissenting).

¹²⁵ Id (Kagan, J, dissenting).

¹²⁶ Id n 2 (Kagan, J, dissenting).

¹²⁷ Id at 2647 (Kagan, J, dissenting).

¹²⁸ Id at 2648 (Kagan, J, dissenting). See also NY Times Editorial Board, *More Hurdles for Home Care Unions*, NY Times A30 (Oct 2, 2014) ("Providing home care services to the elderly and disabled is one of the nation's largest, fastest-growing, least-protected and lowest-paid professions, with typical wages of less than \$9.50 an hour."). See generally NY Times Editorial Board, *Labor Rights for Home Care Workers*, NY Times A22 (Sept 27, 2014) (noting the "indefensible second-class status of home care workers").

¹²⁹ *Harris*, 134 S Ct at 2648 (Kagan, J, dissenting).

¹³⁰ Id (Kagan, J, dissenting).

with regard to pay rates set by the state mattered little. It was hardly different than state labor legislation as a general matter, noted Justice Kagan. Said the dissent:

Most States limit the scope of permissible bargaining in the public sector—often ruling out of bounds similar, individualized decisions. . . . Here, the scope of collective bargaining—over wages and benefits, as well as basic duties and qualifications—more than suffices to implicate the state interests justifying *Abood*. Those are the matters, after all, most likely to concern employees generally and thus most likely to affect the nature and quality of the State’s workforce. The idea that *Abood* applies only if a union can bargain with the State over every issue comes from nowhere and relates to nothing in that decision—and would revolutionize public labor law.¹³¹

The dissent also noted that the mandated legislative uniformity for caregivers was to be found only in the statute’s substantive regulation of wages—not health benefits, which had been obtained through the collective bargaining process. Justice Kagan noted that the regulation of the subject matter in question—even if it covered virtually every item that may fall into the bargaining process—simply served “as suspenders to the duty of fair representation’s belt: That Illinois has *two* ways to ensure that the results of collective bargaining redound to the benefit of all employees serves to compound, rather than mitigate, the union’s free-rider problem.”¹³² From a policy perspective, as the dissent noted, the thrust of the majority’s *Harris* opinion was to penalize disabled persons from participating in their own care, and to produce the applicability of *Abood* only where the system of the employment relationship was centralized.

Two final points in Justice Kagan’s dissent are particularly compelling. The first, and most obvious, is *stare decisis*, that is, special justification is necessary to depart from this principle.¹³³ Here, as the dissent noted, not only was there not “so much as a whisper” which might constitute the basis for such a departure,¹³⁴ but also,

¹³¹ *Id.* at 2650 (Kagan, J, dissenting). In some measure, the same would apply to the private sector. See, for example, *Q-1 Motor Express, Inc.*, 323 NLRB 767, 769 (1997) (Chairman Gould concurring); *NLRB v American National Insurance*, 343 US 395 (1952).

¹³² *Harris*, 134 S Ct at 2650 (Kagan, J, dissenting).

¹³³ See, for example, *Boys Market, Inc. v Retail Clerks Union*, 398 US 235 (1970); William B. Gould IV, *On Labor Injunctions, Unions, and the Judges: The Boys Market Case*, 1970 Supreme Court Review 215 (1970).

¹³⁴ Kagan thus reiterated a point that had been made emphatically by Justice Sotomayor—the lack of any briefing on the arguments that the Court precipitously addressed in *Knox*. See Transcript of Oral Argument at 17, *Harris v Quinn*, 134 S Ct 2618 (2014) (No 11-681).

on the other hand, the presence of an “enormous reliance interest” given that more than twenty states have authorized fair share provisions.¹³⁵ Finally, the dissent addressed an issue barely met in the majority opinion—that is, “that the government has wider constitutional latitude when it is acting as employer than as sovereign.”¹³⁶

III. THE MEANING OF HARRIS

Justice Alito had possessed the votes of four other Justices to produce an opinion which, as Justice Kagan noted for the dissenters, threw “everything against the wall in the hope that something might stick.”¹³⁷ It is not entirely clear why the Alito opinion did not reach further than it did and sweep aside the *Abood* precedent entirely, given the obvious hostility of Alito to it. After all, the majority opinion in *Knox*, also authored by Justice Alito, had no hesitation to reach beyond issues presented or briefed to the Court in that case. The *Harris* opinion itself dismissed *Abood* as “an anomaly”¹³⁸ which rested on “questionable foundations.”¹³⁹

How much has *Harris* decided? One thing seems absolutely clear—that is, that Justice Alito’s opinions in both *Harris* and *Knox* apply not only the First Amendment protection of free speech to dissident nonunion employees, but also a “compelling state interest” standard which, while thus far imprecise, is quite difficult to override. Moreover, the Court stated that “core issues” in the public sector are inevitably political, in contrast to the private sector—even though, as Justice Frankfurter noted in *Street*, the history of trade unions in the private sector is to obtain gains through the political process as well as at the bargaining table. Again, the freedom-of-association cases had never been concerned with the significance of governmental activity prior to *Harris*.

One puzzle about *Harris* is that it enlisted the support of Justice Scalia, who had said in *Lehnert* that compulsory financial support for unions followed logically from the exclusive bargaining representative principle and the duty of fair representation that

¹³⁵ *Harris*, 134 S Ct at 2652 (Kagan, J, dissenting).

¹³⁶ *Id* at 2653 (Kagan, J, dissenting).

¹³⁷ *Id* at 2648 (Kagan, J, dissenting).

¹³⁸ *Id* at 2627.

¹³⁹ *Id* at 2638.

is thrust upon all unions. How can, as Justice Scalia recognized, a union function as a bargaining representative when it provides services that cost money, for which free riders in the bargaining unit do not have an obligation to pay?¹⁴⁰ That is Justice Scalia's point in his *Lehnert* opinion. Yet, Justice Scalia's opinion is only cited twice in *Harris*: (1) for the proposition that Justice Blackmun's opinion for the majority in *Lehnert* is deficient, and (2) for the point that a "State may not force every person who benefits from [an advocacy] group's efforts to make payments to the group."¹⁴¹

It would seem that the Scalia opinion in *Lehnert* is inconsistent with the majority's observations (derided by Justice Kagan as "pot-shots" at *Abood*)—that "a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop."¹⁴² And again, Justice Alito noted that a "union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked."¹⁴³ Yet insofar as Justice Scalia's opinion linked these two concepts—that is, exclusivity for the union as bargaining representative with the union's duty of fair representation—perhaps they remain linked, notwithstanding the *Harris* opinion. It may be that the Court has fudged this distinction, that is, a union's status as exclusive bargaining representative as opposed to its duty of fair representation as exclusive bargaining representative, in order to obtain Justice Scalia's vote. For surely, in Justice Scalia's view in *Lehnert*, there is a direct linkage where the union has an obligation to represent fairly, because of the problem with free riders who will obtain all of the benefits without paying for the services that the law requires the union to perform. The failure of *Harris* to place its explicit imprimatur on what Justice Scalia said in *Lehnert*, or to reject it altogether, means that this is the one critical issue which appears to be left open for future cases and

¹⁴⁰ Justice Alito said that the "the best argument that can be mounted in support of *Abood* is based on the fact that a union, in serving as the exclusive representative of all the employees in a bargaining unit, is required by law to engage in certain activities that benefit nonmembers and that the union would not undertake if it did not have a legal obligation to do so." *Harris*, 134 S Ct at 2637 n 18. This portion of the opinion, like others, goes on to distinguish that proposition from the facts of *Harris* itself.

¹⁴¹ Id at 2638.

¹⁴² Id at 2634.

¹⁴³ Id at 2640.

which will require Justice Scalia's vote in the present Court composition to keep the majority intact.

Yet the compelling state interest and strict scrutiny standard for dissenting nonmembers, accepted in both *Harris* and *Knox*, make this case a difficult one to sustain for the union even if it was charging dissidents for services owed by virtue of the duty of fair representation. In future litigation, the union will have to show that there is a less burdensome way through which it can accomplish its objectives, a burden that seems inconsistent with the thrust of the Scalia opinion. On the other hand, it is perhaps instructive that the Alito opinion refers to Scalia's *Lehnert* dissent as "the" argument for the agency shop, and at no point in the opinion is it explicitly criticized. This is the heart of the unresolved puzzle in *Harris*, which makes the breadth of the opinion and its future applicability to the public sector generally somewhat unclear.¹⁴⁴ The silence of the normally voluble Justice Scalia is both aberrant and enigmatic.

There is another aspect of *Harris* that is curious, though comparatively clear in its meaning as used in the *Harris* opinion. The wellspring for modern jurisprudence relating to public-sector employer-employee relations is the above noted *Pickering* decision, discussed briefly by Justice Alito.¹⁴⁵ Over a quarter of a century ago, in *Connick v Myers*,¹⁴⁶ the Court reiterated the proposition first propounded in *Pickering*, that is, that public employee speech was unprotected where the individual spoke "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."¹⁴⁷

¹⁴⁴ Compare Steven Greenhouse, *Ruling Against Union Fees Contains Damage to Labor*, A12 NY Times (July 1, 2014), with Cynthia Estlund and William E. Forbath, *The War on Workers*, A21 NY Times (July 3, 2014).

¹⁴⁵ *Harris*, 134 S Ct at 2641–42.

¹⁴⁶ *Connick v Myers*, 416 US at 138 (1983). I have addressed *Connick* and some of the cases discussed previously in *Elko County*, 131 LA 1593 (Arb 2013), but see *Alexander v Gardner-Denver Company*, 415 US 36 (1974); *14 Penn Plaza LLC v Pyett*, 556 US 247 (2009). See generally William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, in Paul D. Staudohar and Mark I. Lurie, eds, *Arbitration 2010: The Steelworkers Trilogy at 50*, Proceedings of the Sixty-Third Annual Meeting, National Academy of Arbitrators, 35 (2011); Thomas Keenan, Note, *Circuit Court Interpretations of Garcetti v Ceballos and the Developments of Public Employee Speech*, 87 Notre Dame L Rev 841 (2011); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 Duke L J 1 (2009); Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v Ceballos*, 29 Berkeley J Emp & Lab L 175 (2008); Comment, *Leading Cases, Constitutional Law: Public Employee Speech*, 120 Harv L Rev 273 (2006).

¹⁴⁷ *Connick*, 416 US at 147.

In *Connick*, a 5–4 majority, despite a strong dissent by Justice Brennan, expressed the view that a contrary conclusion, that is, one which would allow employee constitutional litigation about matters of “personal interest,” would “constitutionalize the employee grievance,” a matter of public concern within the meaning of *Pickering* in only the most limited sense.¹⁴⁸ In the opinion supporting the authority cited by Justice Kagan, the Court warned against the constitutionalization of employee grievances and stated that it would be a grave mistake to confuse such with “great principles of free expression.”¹⁴⁹ Later, the Court had warned that constitutional rights in the workplace must be struck within the “realities of employment context.”¹⁵⁰ The Court noted, as discussed in *Garcetti*, that government employers “need a significant degree of control over their employees’ words” in order to “efficient[ly] provi[de] public services.”¹⁵¹

Considerable debate has emerged about the significance of these cases.¹⁵² Curiously, Justice Scalia, who joined the majority opinion in *Harris* without filing a separate opinion on the *Lehnert* issue, expressed much interest in this line of authority vis-à-vis the union security agreement presented during oral argument itself.¹⁵³ Yet here also, Justice Scalia, not speaking separately on any matter, was silent.

It was left to Justice Kagan’s dissent to discuss the applicability of *Abood* to the public-concern principles articulated in Supreme Court jurisprudence of this century, manifested most prominently by *Garcetti*.¹⁵⁴ Justice Kagan noted that *Abood* had placed most speech about the employment relationship outside the public-concern arena,

¹⁴⁸ Id at 154.

¹⁴⁹ Id.

¹⁵⁰ *Harris*, 134 S Ct at 2653 (Kagan, J, dissenting) (citing *Engquist v Oregon Department of Agriculture*, 553 US 591, 600 (2008)).

¹⁵¹ Id (Kagan, J, dissenting) (citing *Garcetti*, 547 US at 418).

¹⁵² See, for example, *Garcia v Hartford Police Department*, 706 F3d 120 (2d Cir 2013); *Handy-Clay v City of Memphis*, 695 F3d 531 (6th Cir 2012); *Ross v Breslin*, 693 F3d 300, 305 (2d Cir 2012); *Fox v Traverse City Area Public Schools*, 605 F3d 345, 349 (6th Cir 2010); *Posey v Lake Pend Oreille School District No. 84*, 546 F3d 1121 (9th Cir 2008).

¹⁵³ Transcript of Oral Argument at 23, *Harris v Quinn*, 134 S Ct 2618 (2014) (No 11-681).

¹⁵⁴ Curiously, this Term, the Court moved back to a protection of public employee speech in *Lane v Franks*, 134 S Ct 2369 (2014). The case was later remanded to the Eleventh Circuit, where it vacated and remanded the decision to the district court on October 8, 2014. *Lane v Central Alabama Community College*, 12-16192, 2014 WL 5002100 (11th Cir, Oct 8, 2014).

articulated in *Connick, Garcetti*, and their progeny, inasmuch as it “pertains mostly to private concerns and implicates the government’s interests as employer; thus, the government could compel fair-share fees for collective bargaining,”¹⁵⁵ given that First Amendment rights were not involved. Thus, as the dissent noted, under decided authority, speech related to politics would have no bearing upon the government’s workforce restructuring interest. Here, upheld fees for such political activities would be unconstitutional under the public-concern authority.

Justice Kagan noted that an employee who speaks out “at various inopportune times and places”¹⁵⁶ for higher wages for himself and for coworkers which will drive up public spending cannot properly bring a First Amendment claim if the employer disciplines him. This would be a private issue notwithstanding its impact upon public spending. Said the dissent:

In both cases . . . the employer is sanctioning employees for choosing either to say or not to say something respecting their terms and conditions of employment. Of course, in my hypothetical, the employer is stopping the employee from speaking, whereas in this or any other case involving union fees, the employer is forcing the employee to support such expression. But I am sure the majority would agree that that difference does not make a difference.¹⁵⁷

IV. THE IMMEDIATE HARRIS AFTERMATH

At least ten jurisdictions have enacted legislation providing for home care as an alternative to institutionalization with procedures allowing for collective bargaining in a manner similar to the Illinois statute declared unconstitutional in *Harris*.¹⁵⁸ As the Court itself noted in *Harris*, there are twenty jurisdictions with provisions for so-called “fair share union security agreements” which were at

¹⁵⁵ *Harris*, 134 S Ct at 2654 (Kagan, J, dissenting).

¹⁵⁶ *Id* at 2655 (Kagan, J, dissenting).

¹⁵⁷ *Id* at 2655–56 (Kagan, J, dissenting).

¹⁵⁸ See, for example, Mass Ann Laws ch 118G, §§ 28–33 (LexisNexis, 2007); Or Rev Stat §§ 410.600–410.614 (2005); Wash Rev Code Ann §§ 74.39A.220–74.39A.300 (West, 2002); Wis Exec Order No 172 (2006); Exec Order No 23 (2006); Iowa Exec Order No 45 (2006); Iowa Exec Order No 46 (2006); Conn Gen Stat § 17b-706a(e)(1); Md Code Ann, Health-Gen §§ 15-901 et seq; Vt Stat Ann tit 21, §§ 1631–44; Mo Rev Stat § 208.853; Pa Exec Order 2010-04 (Sept 14) (rescinded).

the heart of the litigation in the case.¹⁵⁹ These jurisdictions, at least with regard to the so-called “quasi public-private employee” category at issue in *Harris*, would appear to be vulnerable to constitutional attacks launched by dissenting and nonunion employees who object to their dues collection.

The next round of more consequential litigation will relate to public employees where the employment relationship is more firmly established than it was in *Harris*. At this point, it appears that the leading case in this category is *Friedrichs v California Teachers Association*, recently decided by the Court of Appeals for the Ninth Circuit.¹⁶⁰ Certainly, the disparaging commentary provided by Justice Alito in both *Knox* and in *Harris* about the viability of *Abood* would strongly suggest that the Court, at least as currently composed,¹⁶¹ will hold that fair share agreements are inconsistent with the First Amendment’s requirements, at least as they apply to the position of dissenting employees—notwithstanding the Court’s earlier concerns regarding the constitutionalization of disputes between public employees and employers. Despite this logical inconsistency, it appears that the Court has devised one set of rules circumscribing employee rights when they are asserted against the state—as was the case in *Pickering* and *Garcetti*—and an entirely different approach when the interests of dissidents are asserted against unions which have negotiated union security clauses with employers in their collective bargaining agreement. Both *Knox* and *Harris* suggest a dual standard depending upon whether the union’s or the employers’ ox has been gored.

But in truth, the other public-sector shoe cannot drop until the Court clarifies the ambiguity of its opinion, which constitutes “potshots,” as Justice Kagan would have it—regarding the question of whether Justice Alito’s commentary on the status of exclusivity can be equated with the duty of fair representation obligation which springs from exclusivity. Again, that is the unresolved ambiguity in

¹⁵⁹ *Harris*, 134 S Ct at 2652 (Kagan, J, dissenting).

¹⁶⁰ *Rebecca Friedrichs, et al v California Teachers Association, et al*, No 13-57095 (9th Cir) (decided on the basis of *Abood*). Petition for writ of certiorari filed to the Supreme Court on Jan 26, 2015. Illinois, with a new conservative Republican governor, has seen executive branch initiatives predicated upon the view that *Harris* overruled *Abood*. See *A War on Workers in Illinois*, NY Times A20 (Feb 14, 2015); Monica Davey and Mitch Smith, *Illinois Governor Acts to Curb Power of Public Sector Unions*, NY Times A1 (Feb 10, 2015). See also Richard Pérez-Peña, *Governor of Illinois Takes Aim at Labor*, NY Times A13 (Feb 13, 2015).

¹⁶¹ Again, this assumes that Justice Scalia’s vote can be obtained.

Harris, and until it is resolved, one cannot speak with certainty about the applicability of the Scalia dissent in *Lehnert* to *Harris*.¹⁶²

A. THE PRIVATE SECTOR

What does *Harris* mean for private-sector cases arising under both the RLA and the NLRA? Though the early RLA cases indicate some measure of constitutional protection on a state action theory,¹⁶³ similar to that employed in the judge-made promulgation of the duty of fair representation obligation,¹⁶⁴ the rationale of those cases was ultimately predicated upon statutory interpretation¹⁶⁵—just as statutory interpretation dictated the manner in which similar NLRA disputes were resolved.

The lead case on the latter issue is *Communications Workers of America v Beck*,¹⁶⁶ where the Court held that the applicable standard was a “duty of fair representation”—that is, did the union violate its duty to represent employees within the unit fairly by its union security system and provision for dues objectors. This contrasts with the early union discipline cases like *NLRB v Allis Chalmers*,¹⁶⁷ addressing the relationship between a union’s disciplinary authority and the scope of union security agreements resolving such issues under the “restraint and coercion” prohibition of Section 8(b)(1)(A).¹⁶⁸ Thus the standard which has evolved in the pri-

¹⁶² The same was true of Justice Stewart’s concurring opinion in *Fibreboard Paper Products Corporation v NLRB*, 379 US 203, 217 (1964). Later on, his approach became dominant. See, for example, *First National Maintenance Corporation v NLRB*, 452 US at 666; *Allied Chemical & Alkali Workers of America, Local Union No. 1 v Pittsburgh Plate Glass Company, Chemical Division*, 404 US 157 (1971).

¹⁶³ Compare *Marsh v Alabama*, 326 US 501 (1946) (where the Court used the First and Fourteenth Amendments to hold that a state trespassing law could not be used to prohibit the dissemination of religious material on closely held public property) with *Moose Lodge v Irvis*, 407 US 163 (1972) (in which the Court begins to take a much less expansive view of state action). The Court itself has referenced what it views as the appropriate state action standard in *Beck*, alluding to *United Steelworkers of America, AFL-CIO-CLC v Sadlowski*, 457 US 102, 121 n 16 (1982), and *United Steelworkers of America v Weber* 443 US 193, 200 (1979). See also Charles Black, “State Action,” *Equal Protection, and California’s Proposition 14*, 81 Harv L Rev 69, 100–103 (1967).

¹⁶⁴ *Steele v Louisville & Nashville Railroad Company*, 323 US 192 (1944).

¹⁶⁵ See *Hanson*, 351 US 225; *Street*, 367 US 740; *Allen*, 373 US 113.

¹⁶⁶ 487 US 735 (1988).

¹⁶⁷ 388 US 175 (1967). Justice Brennan authored the majority opinion. Justice White authored a concurrence. Justice Black authored the dissent, where he was joined by Justices Douglas, Harlan, and Stewart.

¹⁶⁸ *California Saw*, 320 NLRB at 333 n 47 (Chairman Gould concurring).

vate sector, duty of fair representation, thus far gives considerably more latitude to union action than will be the case with public-sector cases arising under the First Amendment—particularly that which has been circumscribed by the Court’s reasoning in *Knox* and *Harris*.

At the end of 2014, it appears that *Harris* has produced little fallout in the private sector.¹⁶⁹ Curiously, the major cases in the wake of the Supreme Court public-sector authority relate to the almost seventy-year-old Taft-Hartley amendments, which, as noted above, allow the states to prohibit certain forms of union security agreements as part of their right-to-work legislation. The constitutionality of Section 14(b) of the NLRA,¹⁷⁰ which allows states to retain jurisdiction where they enact right-to-work legislation prohibiting the compulsion of membership as a condition of employment, was first addressed by the Supreme Court in *Lincoln Federal Labor Union v Northwestern Company*.¹⁷¹

In *Lincoln Federal*, the Court considered the constitutionality of right-to-work legislation challenged on grounds of interference with the right to freedom of speech, assembly, and petition in the First and Fourteenth Amendments and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In that case, petitioners argued that the state legislation at issue “impair[ed] the obligation of contracts made prior to the [the statute’s] enactment.”¹⁷² Justice Black, writing for the majority, examined the litigation and case authority which had declared numerous labor statutes unconstitutional beginning in 1908,¹⁷³ noting that the Court “at

¹⁶⁹ See, for example, *United Food & Commercial Workers International Union, Local 700 (Kroger Limited Partnership)*, 361 NLRB No 39 (2014). In this case, a 3–2 majority of the Board deemed applicable the same presumption articulated in favor of the opt-out requirement set forth pre-*Knox* and pre-*Harris*. Members Miscimarra and Johnson argued that the holdings in both *Knox* and *Harris* “support . . . [their] view that some greater and earlier notice to private sector employees under our Act is required. Otherwise, even under a duty of fair representation standard, judicial assessment of how our Act works, i.e., the rules of disclosure mandated by a federal agency, will inevitably be that it impermissibly abridges those freedoms.” *Kroger Limited Partnership*, 361 NLRB No 39 at 13 (Members Miscimarra and Johnson concurring in part and dissenting in part).

¹⁷⁰ 29 USC § 164(b).

¹⁷¹ *Lincoln Federal Labor Union v Northwestern Company*, 335 US 525 (1949).

¹⁷² *Id.* at 531.

¹⁷³ *Id.* at 534–35 (citing *Adair v U.S.*, 208 US 161 (1908); *Coppage v State of Kansas*, 236 US 1 (1915)).

least as early as 1934 . . . has steadily rejected the due process philosophy” enunciated earlier. Said the Court:

In doing so, it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs so long as their laws do not run afoul of some specific federal constitutional prohibition or of some valid federal law.¹⁷⁴

The Court’s view was that the Due Process Clause could no longer be broadly construed to place the legislative body in a “strait jacket,”¹⁷⁵ and that the legislation afforded protection to both union and nonunion members.¹⁷⁶ Practices which limited the ability of unions and employers to voluntarily agree to union security provisions were not to be treated differently simply because they can be viewed as more favorable to organized labor.

Attention was now to focus more particularly on the precise language of Section 14(b), beginning with the Court’s 1963 rulings in *Retail Clerks Association v Schermerborn*.¹⁷⁷ The Court noted that agency shops, which require dues and initiation fees rather than full membership, could be prohibited by the states under Section 14(b)—just as the Court had soon thereafter held that the outer limit of union security agreements allowed under the NLRA was the “financial core” of membership, that is, of the same payment of dues—as a “practical equivalent” of an agreement requiring membership as a condition of employment.¹⁷⁸

In oft-cited language, the majority in *Schermerborn* wrote: “Whatever may be the status of less stringent union-security arrangements, the agency shop is within §14(b). At least to that extent did Congress intend §8(a)(3) and §14(b) to coincide.”¹⁷⁹ What was different from that which was considered in the discussions leading to the federal statute’s amendments, the union argued, was that the use of dues under the agreement in *Schermerborn* governed by right-to-work state

¹⁷⁴ *Lincoln*, 335 US at 536.

¹⁷⁵ *Id* at 537.

¹⁷⁶ *Id*.

¹⁷⁷ *Retail Clerks Association v Schermerborn*, 375 US 746 (1963).

¹⁷⁸ *NLRB v General Motors Corp.*, 373 US 734 (1963). At this point, it was thought that the unfair labor practice prohibitions related to employment conditions only. See, for example, *Radio Officers v NLRB*, 347 US 17 (1954).

¹⁷⁹ *Schermerborn*, 373 US at 751–52.

legislation is forbidden “by the union for institutional purposes unrelated to its exclusive agency functions,” in contrast to federal authority, where “the nonmember contributions are available to the union without restriction.”¹⁸⁰ The Court was not persuaded, and concluded that inasmuch as the dues exacted from members and nonmembers were identical in *Schermerborn*, bookkeeping could simply shift union dues collected from union members to cover more so-called “institutional matters” unrelated to collective bargaining and contract administration, thus requiring nonmembers to assume a more substantial financial burden as it relates to grievance adjustments and collective bargaining than was the case with members themselves whose dues could be used for other purposes as well.

The question of whether a form of union security agreement or service fee arrangement may impose smaller amounts of monies on nonmembers has not been explicitly addressed by the Court since *Schermerborn*. In this century, the Board has successfully sought injunctive relief¹⁸¹ against a state statute providing for a lesser form of union security agreement, that is, a charge for the monies expended in connection with grievance processing and arbitration on the grounds that state interference is unconstitutionally preempted by the act itself¹⁸²—and the NLRB has held that such an agreement is in restraint and coercion of the nonmember rights to refrain from union activity protected by the employee right to refrain from union activity contained in the Taft-Hartley amendments under the act.¹⁸³ A fundamental problem here is that the union has an obligation (underlined by Justice Scalia’s opinion in *Lehnert*), as exclusive bargaining representative, to represent all workers in the appropriate unit on the same basis—whether they are union or nonunion mem-

¹⁸⁰ *Id.* at 752.

¹⁸¹ The NLRB has no jurisdiction over public employers, but under *NLRB v. Nash-Finch Co.*, the Board has been held to have authority to enjoin state laws that are inconsistent with federal law. *Nash-Finch*, 404 US 138 (1971).

¹⁸² *NLRB v. North Dakota*, 504 F Supp2d 750 (D ND 2007). I think that this decision would be correctly decided even if the Court ultimately concludes, as I do, that the Board’s decisions in note 183 were wrongly decided. See *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 US 132 (1976); *Garmon v. San Diego Building Trades*, 359 US 236 (1959). Preemption would still oust state jurisdiction.

¹⁸³ *Furniture Workers Division, Local 282 (the Davis Co.)*, 291 NLRB 182, 183 (1988); *Columbus Area Local American Postal Workers Union (U.S. Postal Serv.)*, 277 NLRB 541, 543 (1985); *Machinist, Local Union No. 697 (The H.O. Canfield Rubber Co.)*, 223 NLRB 832, 835 (1976).

bers. Nonmembers are “free riders”—a phenomenon which inevitably encourages employees to escape union membership and its obligations because it is cheaper to do so given the fact that all receive the same benefits—though the Court in *Harris* appeared to deride this assumption, albeit within the context of a union whose bargaining role was circumscribed.

In *Plumbers Local Union 141*,¹⁸⁴ a 1980 case involving a Mississippi state statute which banned payment of union “charges of any kind,”¹⁸⁵ the Board held that even though representation fees might be bargainable under §14(b) of the act, providing states with the authority to outlaw contractual schemes where nonunion dues were equal to union dues was an unlawful membership requirement which could be prohibited by the state under §14(b). On appeal, in *Plumbers Local Union 141 v NLRB*,¹⁸⁶ the Court of Appeals for the District of Columbia affirmed the Board and wrote: “Congress knew of the free rider problem; it knew of the state laws at issue here; it passed §14(b) anyway.”¹⁸⁷ Lesser forms of union security agreements were to be viewed as consistent with the federal interest only if sanctioned through harmonization with state policy.¹⁸⁸ The court reasoned that a post-hiring union security agreement fell directly “within the ambit of §14(b).”¹⁸⁹

Judge Mikva dissented. The dissent noted that in *Schermerhorn* the representation fee at issue was left unresolved inasmuch as equal payment for members and nonmembers made it possible for nonmembers to pay more of the bargaining costs thus impinging upon those right-to-work states which sought freedom for employees to avoid union compulsion, given the ability of the union to shift union member dues to institutional concerns. Judge Mikva also emphasized that Congress never specifically defined what it meant by “compulsory unionism” which was left to the states under §14(b).

¹⁸⁴ *International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions Nos. 141, 229, 681, and 706 and International Paper Company, Southern Kraft Division*, 252 NLRB 1299 (1980).

¹⁸⁵ Miss Const., § 198-A.

¹⁸⁶ *International Union of the United Association of Journeymen Local 141, et al v NLRB*, 675 F2d 1257 (DC Cir 1982).

¹⁸⁷ *Id* at 1261.

¹⁸⁸ *Id* at 1262 (quoting approvingly from Justice Stewart’s dissenting opinion in *Oil, Chemical & Atomic Workers International Union v Mobil Oil Corp.*, 426 US 407, 417 (1976)).

¹⁸⁹ *Journeymen Local 141*, 675 F2d at 1262.

That provision's assumption of state jurisdiction relates to agreements which require "membership" as condition of employment. But "membership" representation fees, under Judge Mikva's view, fell outside state regulation. Said the dissent: "There is no suggestion whatsoever in the legislative history that a worker who pays a fee for services rendered by the union thereby becomes a 'member' of the union. In any other context, such a proposition would be facially absurd."¹⁹⁰ The individuals who pay the fee would not be:

required to support the union, or fund its institutional, union-oriented activities. They would not sign membership cards or be carried on the union's rolls. They would not be required to embrace participation in union activities and maintain "good standing." They would not fill out applications, take oaths, or attend meetings. They would not be subject to union-imposed disciplinary measures enforceable in state courts. They would not have "fulfilled the requirements for membership in such organization."¹⁹¹

But there are at least two problems with the Mikva dissent, which has now been signed onto by Judge Diane Wood (in dissent) in the recent Seventh Circuit decision upholding the constitutionality of Indiana's right-to-work legislation.¹⁹² The first is that, as union disciplinary cases involving union security clauses demonstrate, the demarcation line between membership and nonmembership is less than pristine. In *Allis-Chalmers*, the Court held that a union could impose fines upon workers who had assumed a member's full obligation and later crossed a picket line,¹⁹³ noting that this degree of involvement and obligations was voluntarily assumed since the statute only requires financial contributions as a condition of employment.¹⁹⁴ The fact is that workers (and employers, for that matter) infrequently understand the distinction between membership and nonmembership—that is why the Board itself has thrust upon the unions an obligation to explain in some form¹⁹⁵ the right

¹⁹⁰ Id at 1275 (Mikva dissenting).

¹⁹¹ Id (Mikva dissenting). See *United Stanford Employees, Local 680 v NLRB*, 601 F2d 980, 981 (9th Cir 1979); *NLRB v Hershey Foods Corp.*, 513 F2d 1083, 1085 (9th Cir 1975).

¹⁹² *Sweeney v Pence*, 767 F3d 654 (7th Cir 2014). The Supreme Court of Indiana has ruled to the same effect under state constitutional law. See *Zoeller v Sweeney*, 19 NE3d 749 (2014).

¹⁹³ *Allis-Chalmers*, 388 US at 196.

¹⁹⁴ See *General Motors*, 373 US at 742–44.

¹⁹⁵ Generally, this is imposed through union literature distributed to all employees within the bargaining unit. See *California Saw*, 320 NLRB at 224. But this is generally not imposed

to resign membership and the consequential right to object to expenditure of compulsory dues for political or other purposes not germane to the collective bargaining process.¹⁹⁶ Moreover, as the Court of Appeals for the Ninth Circuit has said, “there is no realistic difference from a legal standpoint between a union shop and an agency shop, although under a union shop the union may, if it wishes, place an employee who only pays dues on its ‘membership’ rolls.”¹⁹⁷

A second concern with Judge Mikva’s opinion is that he cites *Abood* and its ideological activity exception to the fair share obligation as “analogous” to the issue under discussion¹⁹⁸ to which an employee could object—a proposition well accepted since the Railway Labor Act cases and *Abood*. Yet the Mikva opinion would really create three layers of union dues: (1) ideological and nongermane activity to which an employee could object, (2) everything that falls outside of that, which includes the ability to enhance the collective bargaining process outside of the bargaining table and the grievance and arbitration machinery involving the administration of a contract,¹⁹⁹ and (3) the union institutional interests which do not involve any activities in categories (1) or (2). In any event, this multi-layered approach may have difficulty in carrying the day, particularly given the concern of the *Harris* majority with the murkiness of the already-existing dividing line, albeit in the public sector,²⁰⁰

through the language of the collective bargaining agreement itself. See *Marquez*, 525 US 33. The theory expressed by the Court was that the duty of fair representation obligation to explain the collective bargaining agreement to the members was not owed, in part because workers infrequently read the agreements. However, the Court, within a few weeks, held that the language of the collective bargaining agreement was critical to the ability of individual workers to sue for antidiscrimination prohibitions and the like. See *Wright v Universal Maritime Service Corp.*, 525 US 70 (1998). The two nearly simultaneous decisions are squarely at odds with one another. In my judgment, *Marquez* was wrongly decided.

¹⁹⁶ *United Paperworkers International Union, AFL-CIO, CLC*, 320 NLRB 349 (1995). See also *Group Health, Inc.*, 323 NLRB 251 (1997); *Rochester Manufacturing Co.*, 323 NLRB 260 (1997).

¹⁹⁷ *United Food & Commercial Workers Union, Local 1036 v NLRB*, 307 F3d 760, 765 (9th Cir 2002) (citing *General Motors*, 373 US at 743–44).

¹⁹⁸ *Journeyman Local 141*, 675 F2d at 1279.

¹⁹⁹ See *Lehnert*, 500 US at 507.

²⁰⁰ *Harris*, 134 S Ct at 2630. The Court in *Harris* relies upon Justice Frankfurter’s opinion regarding the synthetic nature of an attempt to distinguish political from collective bargaining activities in *Street*, which is a private-sector case. Of course, Justice Alito drew the exact opposite conclusion from this reality. He would have found that the so-called First Amendment right of nonunion employees is in play in connection with the overwhelming

between that which is germane and nongermane to the collective bargaining process.

Nonetheless, as Judge Wood's dissent in *Sweeney* highlights, this issue may well come back to the Supreme Court. Judge Wood's opinion reads Section 14(b) narrowly, as did Judge Mikva in his earlier dissent, which Wood characterized as "prescient."²⁰¹ Both dissents dramatize the inequity and anti-union nature of not only the representation system which allows nonunion employees to free ride and get representation for nothing—as opposed to union members who must pay for it through their dues—but also, in the view of both judges, is beyond the scope of Section 14(b)'s prohibition on union security agreements at the state level. But given the broad expansive and vague nature of the membership construct, this argument seems tenuous.

As noted below, this issue involves questions of federal labor law—that is, whether a service charge rather than dues for non-union members violates either the union's duty of fair representation under the act or the employees' right to refrain under prohibitions against "restraint and coercion" imposed upon unions under the Taft-Hartley amendments to the act. This is one of the more intriguing issues arising out of Judge Wood's dissent, an opinion which stresses the extent to which the union does not have recompense from anyone for the free rider problem. Clearly, it does not, though I am not sure whether this lack of recompense can be fully addressed through resolving the question of what constitutes a "taking" within the meaning of the Constitution as Judge Wood asserts.²⁰² But some of the arguments to the contrary seem to fail: first, that the union gets its recompense by virtue of its seat at the bargaining table, a point put forward by the Seventh Circuit majority. It does not, as Judge Wood correctly points out, even though she is incorrect in assuming that the seat at the bargaining table, which exists by virtue of federal labor laws, can only be obtained through a ballot box election.²⁰³

number of instances involving union activity at the bargaining table in the public sector as opposed to its private counterparts.

²⁰¹ *Sweeney*, 767 F3d 654 at 681 (Wood dissenting).

²⁰² *Id* at 674 (Wood dissenting) (referencing US Const, Amend V, which states in relevant part: "nor shall private property be taken for public use, without just compensation.").

²⁰³ *Linden Lumber Division, Sumner & Company v NLRB*, 419 US 301 (1974); *NLRB v Gissel Packing Company, Inc.*, 395 US 575 (1969) (holding that evidence of majority status manifested

B. SERVICE FEE ARRANGEMENTS

A “service fee” is an arrangement in which nonmembers assume costs for their representation. It is an attempt to skirt the shoals of that which is the equivalent of “membership as a condition of employment” prohibited by Section 14(b) or the federal statute itself.²⁰⁴ Can this done in a manner which is compatible with federal labor law, and state prohibitions against union security agreements contained in right-to-work legislation enacted pursuant to Section 14 (b)? One argument in favor of a prohibition under Section 14(b) is that the states which have enacted right-to-work legislation are unsympathetic and hostile to the free rider problem, notwithstanding the fact that federal labor law, through the Taft-Hartley amendments, recognizes that free riders would undermine the exclusive bargaining agent principle.

What is “membership which may be prohibited”? *Schermerhorn* provides some guidelines through its holding that equality in fees would encourage membership inasmuch as union members would see more of their financial obligations diverted to institutional union financial obligations unrelated to the grievance handling and collective bargaining process, imposing a greater burden on nonmembers in the workplace. Uniformity of fees is thus swept within Section 14 (b)’s strictures as *Schermerhorn* states. What kinds of arrangements would pass muster?

It is possible that an arrangement which did not insist upon the dismissal of the offending nonunion worker for failure to meet his or her obligations, thus failing to make membership a condition of employment, might evade the state’s role in Section 14(b) since that statutory provision speaks in terms of making membership a condition of employment. But the Board has held that a union can lawfully obtain employee monies under the act only pursuant to a union security agreement compelling membership as a condition of employment.²⁰⁵ The Supreme Court of Nevada, under its public-

through union authorization cards, for instance, can compel an employer to recognize a union under some circumstances).

²⁰⁴ Codified at 29 USC § 164[b]. See generally *General Motors*, 373 US at 734; *Schermerhorn*, 373 US at 746.

²⁰⁵ *Professional Association of Golf Officials*, 317 NLRB 774, 778 (1995), but see *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1033–36 (1993) (enforcement denied in *International Union of Electronic, Electric, Salaried, Machine & Furniture Workers, AFL-CIO v NLRB*, 41 F3d 1532 (DC Cir 1994)).

sector statute, has held that the imposition of a fee for nonunion employees for grievance processing was unlawful, holding that a contrary result would “lead to an inequitable result that we cannot condone, by essentially requiring union members to shoulder the burden of costs associated with nonunion members’ individual grievance representation.”²⁰⁶ Yet this straightforward approach would not seem to satisfy federal labor law requirements, in light of *Schermerhorn* and the protection of the right to resign as part of the right to refrain.²⁰⁷

The leading Board decision on this issue is *International Association of Machinists and Aerospace Workers, Local Union No. 697, AFL-CIO (the H. O. Canfield Rubber Company of Virginia, Inc.)*,²⁰⁸ where a majority, over Chairman Murphy’s dissent, held that a union “by charging only nonmembers for grievance representation [as opposed to charging its members for dues], has discriminated against nonmembers.”²⁰⁹ The Board did not say why this was discriminatory, and, indeed, the Supreme Court of Nevada had held that the requirement of “reasonable costs associated with individual grievance representation”²¹⁰ did not “interfere with, restrain or coerce” employees under Nevada’s state public-sector statute.²¹¹

It seems that the idea that any financial imposition upon nonunion members would constitute an unfair labor practice makes little sense as a general proposition. But the Board has continued to adhere to this proposition over the years.²¹² In my judgment, however, the idea of a per se ban on fees for nonunion members as a condition of grievance processing seems wrong as a matter of law.

But what passes muster in light of *Schermerhorn*? The conundrum here is that union members subject to a union security clause have

²⁰⁶ *Cone v Nevada Service Employees Union/SEIU Local 1107*, 998 P2d 1178, 1183 (2000).

²⁰⁷ See *Pattern Makers*, 473 US 95 (1985). See also *NLRB v Boeing Co.*, 412 US 67 (1973).

²⁰⁸ 223 NLRB at 832. See also *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1192, AFL-CIO, CLC (Buckeye Florida Corporation, a Subsidiary of Buckeye Technologies, Inc. and Georgia Pacific, LLC)*, 12-CB-109694 (Mar 24, 2014).

²⁰⁹ *The H.O. Canfield Rubber Company of Virginia, Inc.*, 223 NLRB at 835. The Board relied upon its holding in *Hughes Tool Company*, where a union had both a flat fee of \$15 for grievance processing and \$400 for arbitration. That Board was of the view that a disproportionate burden had been thrust upon the nonmembers. See *Hughes Tool Company*, 104 NLRB 318 (1953).

²¹⁰ *Cone*, 998 P2d 1178, 1182.

²¹¹ *Id.*

²¹² *American Postal Workers*, 277 NLRB 541 (1986); *Furniture Worker Local 282*, 291 NLRB 182 (1988).

already bought into a kind of insurance risk pool by providing dues for their own grievance processing, even though a substantial number of them may never invoke the process and utilize it. The ad-hoc utilization of grievance processing by nonunion members would be more expensive than union dues for this very reason. But it seems unlikely that the argument on behalf of the lawfulness of ad-hoc fees, which are so dramatically different in amount than union dues, would pass muster. Nonetheless, the idea that some union calculation of “proportion of regular dues payments that are used to fund representational activity”²¹³ would seem to be more compatible with the right to refrain policies built into the act.

The devil will always be in the details, but an approach along these lines seems to be the best one, insofar as it would protect both a union’s ability to protect itself against excessive financial burden,²¹⁴ and at the same time protect the state’s promotion of the free rider policy, given the fact that nonunion employees would not have to pay for the cost associated with the collective bargaining process itself, independent of grievance and arbitration matters. The difficulty for the Board and the courts lies in determination of the precise amount of any nonmember obligation. Notwithstanding the risk pool reality, a substantial fee assessment beyond the union dues amount would probably run afoul of the law.²¹⁵

Something along these general lines seems best. In my view, the idea put forward by Professors Fisk and Sachs to the effect that the Board could devise a “members only” bargaining structure in right-to-work states,²¹⁶ so as to avoid the cost-burden problem, is a position at odds with that devised by the National Labor Relations Act.²¹⁷ Though the authors point out that the question of whether exclusive bargaining representative status is the sole representative

²¹³ Catherine Fisk and Benjamin Sachs, *Restoring Equity in Right to Work*, 4 UC Irvine L Rev 859, 879–880 (2014).

²¹⁴ See *id.* at 873–75. This approach might be more persuasive than one that provided for four years worth of dues to pay for one single grievance taken to arbitration (on behalf of nonunion employee). See *American Postal Workers*, 277 NLRB 541, 543. See also *Hughes Tool Company*, 104 NLRB 318, where the charge was more than 100 times that imposed upon union members under their dues structure.

²¹⁵ See *Hughes Tool Company*, 104 NLRB 318.

²¹⁶ See Fisk and Sachs, 4 UC Irvine L Rev at 870–75 (cited in note 213).

²¹⁷ *Dick’s Sporting Goods*, Advice Memorandum, Case 6-CA-34821 (June 22, 2006). But see Charles Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (ILR, 2004), which asserts that compulsory members-only bargaining is contemplated by the statute. Members-only bargaining is permissive under the act, but is generally viewed as noncompulsive.

structure mandated by the act²¹⁸ has never been squarely addressed by the Court, the fact of the matter is that numerous decisions decided by the high tribunal rest upon the idea of exclusivity.²¹⁹

V. CONCLUSION

The 5–4 decision of the court in *Harris v Quinn* reflects the Court’s activist approach to the area of labor law and employment cases, a theme sounded emphatically just a Term before.²²⁰ Justice Alito could scarcely contain himself in *Harris*—indeed, he cannot wait to reverse more than a half century of the Court’s labor law jurisprudence in the area of union security agreements, union dues, and the ongoing litigation regarding political expenditures. *Harris* is another step that reflects this trend. It casts a shadow over the ability of organized labor to rebound and to represent employees

²¹⁸ In dicta, Chief Justice Hughes appears to have suggested that the NLRA mandates recognition of negotiated agreements by a minority, where such agreements have not been superseded by an exclusive relationship. 305 US 197, 237 (1938). See also *Retail Clerks International Association v Lion Dry Goods Inc.*, 369 US 17, 29 (1961).

²¹⁹ See, for example, *International Ladies Garment Workers’ Union v NLRB and Bernhard-Altmann Texas Corp.*, 366 US 731 (1961). *NLRB v Allis-Chalmers*, 388 US at 175; *Emporium Capwell v Western Addition Community Organization*, 420 US 50 (1975); *J. I. Case Co. v NLRB*, 321 US 332. See generally William B. Gould IV, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 Yale L J 46 (1969); William B. Gould IV, *Status of Unauthorized and “Wildcat” Strikes Under the National Labor Relations Act*, 52 Cornell L Q 672 (1967). But Justice Rucker, concurring in *Zoeller*, seems to have taken this argument seriously:

But the parties here vigorously dispute whether it is legally possible for a union to operate as something other than an exclusive representation union, and thus avoid the duty of fair representation and its concomitant costs. Here, the Union has not attempted to demonstrate that the Right to Work Law operates in such a way as to have actually eliminated or reduced its compensation from dues or “fair share” payments. Nor has the Union shown that upon expiration of a valid union security agreement, it was unable to operate in a manner that would allow the Union to charge all of its members for the services the Union provided them. In essence there may very well exist a set of facts and circumstances that if properly presented and proven could demonstrate that a union has actually been deprived of compensation for particular services by application of the Right to Work Law. And thus as to that union the statute would be unconstitutional as applied. However, this is not that case.

Zoeller, 19 NE3d at 755 (Rucker dissenting). Paradoxically, right to work opponents have seized upon this point to support the enactment of right to work legislation which includes “members only” agreements so that unions cannot claim that they are disadvantaged by free riders in an exclusive bargaining arrangement. See Thomas Cole, *A Primer on Right-to-Work Legislation*, Albuquerque Journal (Feb 16, 2015); Dan Boyd, *A Vote on a High-Profile Right-to-Work Bill Was Put Off*, Albuquerque Journal (Feb 19, 2015).

²²⁰ See Gould, 36 U Hawaii L Rev at 371 (cited in note 56).

effectively in the current legal framework and “paints a landscape inhospitable to *Abood*.”²²¹

In the period immediately after Taft-Hartley, and its attempt to reshape a balance between labor and management,²²² the Court appeared to be above the fray,²²³ and it was Justice Frankfurter in particular who noted how much the prospects for organized labor had changed in such a short period of time,²²⁴ after an era in which the Court had cabined labor rights substantially.²²⁵ It has done so again today. *Harris* takes us back to that history and imperils union participation in a more egalitarian democratic political process.²²⁶

The good news is that Justice Scalia (whose views—not directly addressed in *Harris*—looked so sensible in the union dues arena two decades earlier)²²⁷ could still tip the delicate balance. The bad news is that Justice Scalia could tip the balance.

²²¹ *The Supreme Court 2013 Leading Case*, 128 Harv L Rev 211, 220 (cited in note 119).

²²² See William B. Gould IV, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 Yale L J 1421 (1972).

²²³ See, for example, *Lincoln*, 335 US at 525.

²²⁴ *AFL v American Sash & Door Co.*, 335 US 538, 547 (1949) (Frankfurter, J, concurring).

²²⁵ See Gould, 24 San Diego L Rev at 51 (cited in note 58); *Lechmere Inc. v NLRB*, 502 US 527 (1992); *First National Maintenance*, 452 US at 666; *Pattern Makers*, 473 US at 95.

²²⁶ See David Cooper and Lawrence Mishel, *The Erosion of Collective Bargaining Has Widened the Gap Between Productivity and Pay*, Economic Policy Institute (Jan 5, 2015); Lawrence Mishel and Will Kimball, *Unions' Decline and the Rise of the Top 10 Percent's Share of Income*, Economic Policy Institute (Feb 3, 2015).

²²⁷ See *Lehnert*, 500 US at 550 (Scalia, J, concurring in part, dissenting in part).