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Harris v. Quinn and the Contradictions of Compelled Speech

Catherine L. Fisk & Margaux Poueymirou<sup>1</sup>

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Abstract

*In Harris v. Quinn, the Supreme Court held that unionized home care workers have a First Amendment right to refuse to pay their fair share of the cost of services that the union is statutorily required to provide. The Court thus transformed what had been a legislative debate about so-called right-to-work laws, which about half of states have adopted, into a constitutional requirement for one narrow category of public sector employees. The problem with transforming this policy argument into a First Amendment requirement is that treating fair share payments to a union as compelled speech raises First Amendment rights of both supporters and opponents of the union. If expenditures on union representation are speech—as the majority in Harris thinks they are—then the union’s obligation to provide free representation compels speech by the union and its members. While, in our view, the requirement to pay for legal services is not compelled speech, the Court’s entire agency fee jurisprudence, including Harris, insists that it is. On the Court’s analysis, then, laws and contracts that require unionized employees to pay for union representational services compel speech of dissenters exactly to the same extent that their prohibition compels speech of unions and their members. Moreover, to the extent that a union must rely on member dues that it would otherwise spend on political activities to cover the costs of services for free riders, the duty of fair representation owed to nonpayers would violate the First Amendment rights of the union by siphoning off money that would otherwise be used to support these activities. Accordingly, the Court must alter its usual analysis of the constitutionality of agency fee agreements and recognize that union representation requires balancing competing freedom of speech and association interests. Once the First Amendment rights of unions and union members are recognized, agency fee or fair share provisions emerge as a constitutionally sound accommodation of the interests of dissenters, unions, and union members.*

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## I. Introduction

In Harris v. Quinn, the Supreme Court held that unionized home care workers have a First Amendment right to refuse to pay their fair share of the cost of services that the union is statutorily required to provide.<sup>2</sup> The Court therefore invalidated a fair share (or agency) fee provision of a collective bargaining agreement between Illinois and the Service Employees International Union's Illinois health care local (SEIU-HII) representing home care workers paid with Medicaid funds.<sup>3</sup> The Court thus transformed what had been a legislative debate about so-called right-to-work laws, which about half of states have adopted,<sup>4</sup> into a constitutional requirement for one narrow category of public sector employees.

Right-to-work laws have long been controversial. Supporters say they prevent workers from being compelled to provide financial support to a union that they do not want.<sup>5</sup> Critics insist that right-to-work laws compel unions and their dues-paying members to expend money on behalf of nonmembers; they argue that if a majority of employees choose union representation, everyone gets the benefits and everyone should share in the costs.<sup>6</sup> The problem with transforming this policy argument into a First Amendment requirement, we will explain, is that treating fair share payments to a union as compelled speech raises First Amendment rights of both supporters and opponents of the union. If expenditures on union representation are speech—as the majority in Harris thinks they are, but, as we explain below, we do not—then the union's obligation to provide free representation compels speech by the union and its members.

Our argument comprises three interrelated contentions. First, unions possess First Amendment rights as “expressive associations.”<sup>7</sup> The Court's failure to recognize these rights has led the Court to impose restrictions on how unions raise and spend money from their stakeholders that corporations and other associations do not experience. And the Court's union dues objector cases are out of step with its campaign finance and freedom of association jurisprudence.<sup>8</sup> Second, to the extent the Court continues to enable or

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<sup>2</sup> Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014).

<sup>3</sup> Collective Bargaining Agreement, Ill. Dept. of Cent. Mgmt. Servs. (Dec. 16, 2013), [http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp\\_seiupast.pdf](http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_seiupast.pdf).

<sup>4</sup> Right to Work Resources, Nat'l Conf. St. Legislatures, <http://www.ncsl.org/issues-research/labor/right-to-work-laws-and-bills.aspx> (last visited Sept. 7, 2013).

<sup>5</sup> See, e.g., AFL-CIO, Right to Work, available at <http://www.aflcio.org/Legislation-and-Politics/State-Legislative-Battles/Ongoing-State-Legislative-Attacks/Right-to-Work>

<sup>6</sup> See, e.g., National Right to Work Legal Defense Foundation Inc., Right to Work Frequently Asked Questions, available at [http://www.nrtw.org/b/rtw\\_faq.htm](http://www.nrtw.org/b/rtw_faq.htm)

<sup>7</sup> Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). See *infra* Section IV for a discussion of how unions satisfy the criteria established in the Court's expressive association jurisprudence beginning with Jaycees.

<sup>8</sup> Others, including one of these authors, have previously examined the Court's unequal treatment of the speech rights of unions and corporations. See Cynthia Estlund, Are Unions a Constitutional Anomaly? [unpublished paper available on SSRN]; Catherine L. Fisk & Erwin Chemerinsky, Political Speech and Association Rights After Knox v. SEIU, Local 1000, 98 Cornell L. Rev. 1023 (2013); Benjamin I. Sachs, Unions, Corporations, and Political Opt-Out Rights After Citizens United, 112 Colum. L. Rev. 800 (2012);

require states to prohibit unions from collecting agency fees, the duty of fair representation in the right-to-work context, which forces unions and their members to pay for legal and other services for non-paying workers, is unconstitutional on the Court's own analysis. While, in our view, the requirement to pay for legal services is not compelled speech, the Court's entire agency fee jurisprudence, including Harris, insists that it is. On the Court's analysis, then, laws and contracts that require unionized employees to pay for union representational services compel speech of dissenters exactly to the same extent that their prohibition compels speech of unions and their members. Accordingly, and this is our third argument, the Court must alter its usual analysis of the constitutionality of fair share fee agreements and recognize that union representation requires balancing competing freedom of speech and association interests. The Court has recognized that "unions have the right under the First Amendment to express their views on political and social issues without government interference."<sup>9</sup> In our view, agency fees do not compel speech of union dissenters any more than the duty of fair representation compels speech of unions in right-to-work states. But the Court thinks otherwise. Once the First Amendment rights of unions and union members are recognized, agency fee or fair share provisions – which allow unions to collect from every represented person the pro rata cost of contract negotiation and administration but prohibit collecting fees for expressive activity not germane to contract negotiation and administration -- emerge as a constitutionally sound accommodation of the interests of dissenters, unions, and union members.

The structure of this Article is as follows. First, in Part II, we explain Harris and the dues-objector cases that preceded it. In Part III, we explain that fair share fees—payment of money to an organization in exchange for services—should be held to raise no viable First Amendment claim. In Part IV, we explore the First Amendment rights of unions and their members and explain that if the payment of fees for contract negotiation and administration is compelled speech, then it is equally compelled speech to require, as Harris does, a union to expend money to negotiate and administer a contract on behalf of free-riding nonpayers. In sum, the same First Amendment analysis that led the Court to conclude that right-to-work is constitutionally compelled for home care workers leads also to the conclusion that right-to-work laws are unconstitutional for other workers.

In Part V we consider union representation in the post-Harris world. In particular, we explore the implications of Harris for the duty of fair representation, exclusivity, and agency fees. Although agency-fee provisions were originally designed to protect the First Amendment rights of nonmembers, once the First Amendment interests of unions and union members are thrown into the mix, agency-fee provisions acquire even stronger constitutional support. They protect three sets of interests simultaneously: nonmembers

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Charlotte Garden, Citizens, United and Citizens United: The Future of Labor Speech Rights? 53 **Wm. & Mary L. Rev.** 1 (2011).

<sup>9</sup> Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2295 (2012).

from having to subsidize the political and ideological pursuits of the union, union members from having to subsidize representational services for nonpaying nonmembers, and unions who strive to protect their workers' interests and can only do so when they are able to fully participate in the political landscape. Rather than force unions and their members to pay for services for nonpaying nonmembers (as Harris requires), or nonmembers to pay for political activities by unions and their members (which, as we explain, is not constitutionally objectionable), the reasonable compromise is the rule prior to Harris in non-right-to-work states: the union must represent nonmembers, and nonmembers can be required to pay only that portion of dues attributable to representation.

## II. Harris v. Quinn and the Origin of Fair Share Fees

### A. The Background of Harris v. Quinn and the Law of Agency Fees

#### 1. Unionization of Home Care Work

Home care work has been identified by the U.S. Department of Labor as one of the fastest growing occupations. This growth has been fueled by an aging population that desires to stay home longer and by the recognition that in-home care is more economic than institutional care.<sup>10</sup> Like many other services—health care, fire protection, and the protection of parks and open spaces—home care work was formerly provided privately or through charity but became government-funded and government-regulated as governments began to see the service as a public good rather than a private obligation.<sup>11</sup> Today, almost every state pays for in-home care through the Medicaid program.<sup>12</sup> And, thus, home care workers, like firefighters, teachers, librarians, and park rangers before them, became government employees once the government started paying their wages and asserting regulatory control over them. Illinois, along with many other states, eventually chose to make state-funded home care workers part of the government workforce.<sup>13</sup>

The home care labor force, which is predominantly female and immigrant,<sup>14</sup> began to organize unions in the 1980s to improve wages and working conditions. In

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<sup>10</sup> Melanie Trottman & Kris Maher, Labor Department Adds Protection for Home-Health-Care Workers, *Wall St. J.* (Sept. 18, 2013, 12:05 AM), <http://online.wsj.com/news/articles/SB10001424127887323981304579081251516291502>.

<sup>11</sup> See Eileen Boris & Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* ch. 1 (2012).

<sup>12</sup> *Harris v. Quinn*, 134 S. Ct. 2618, 2623 (citing Janet O'Keeffe et al., *Dep't of Health and Human Servs., Understanding Medicaid Home and Community Services: A Primer* (2010)).

<sup>13</sup> See Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 *Minn. L. Rev.* 1390, 1403–04 (2008).

<sup>14</sup> See Peggie R. Smith, *Who Will Care for the Elderly?*, 61 *Buff. L. Rev.* 323, 328–29 (2013).

states that acknowledged the right of state-paid home care workers to unionize and bargain collectively, the state agency that oversees home care work recognized that a unionized labor force can ensure a higher caliber of service by reducing competition from lower-paid and less-skilled providers. Illinois argued precisely this in Harris—that unionization benefitted the state government by regularizing and rationalizing a labor market for the twenty thousand workers in its Disabilities Program. The state and union supporters argued that unionization benefitted the recipients of care by facilitating the training and recruitment of workers, and even critics of unions must concede that in Illinois wages rose and health benefits were provided to home care workers as a result of unionization.

Under the Illinois law at issue in Harris, a care recipient (called a customer) first establishes, in consultation with his physician and a government program counselor, that he is eligible for Medicaid-paid in-home care, and then selects and supervises the worker (called a personal assistant) from the pool of people who meet the state program requirements. The state determines the hourly wage and pays the personal assistant directly, withholding income taxes. The state sets minimum requirements for personal assistants, dictates the terms of the employment agreement, and requires personal assistants to provide recommendations from past employers and have related work experience or training.<sup>15</sup> A state-employed counselor works with the customer to develop a service plan detailing the assistant's job responsibilities, hours, and working conditions, and also helps the customer conduct the state-mandated annual performance review of the assistant and mediates disagreements between the customer and the assistant.<sup>16</sup> After legal setbacks, Illinois amended its public sector labor law in 2003 to cover personal assistants, who are state employees for purposes of collective bargaining.<sup>17</sup> A majority of the workers chose to unionize, and since 2003 the SEIU-HII has negotiated three successive collective bargaining agreements raising wages and improving working conditions of the personal assistants.<sup>18</sup>

Over the nine years from the first collective bargaining agreement in 2003 to the current one, wages increased for home care workers in Illinois from \$7 per hour to \$11.65 an hour, going up to \$13 on December 1, 2014. Moreover, the agreements provided health benefits through a fund designed and administered by the union, to which the state contributes 75 cents an hour (for a total annual state contribution in 2013-2014 of \$27 million). And the agreements established a state-funded training program administered jointly by the state and the union, while also providing assistants with the

<sup>15</sup> Id.; **Ill. Admin. Code** tit. 89, §§ 686.10, 686.40 (2013).

<sup>16</sup> **Ill. Admin. Code** tit. 89, §§ 686.10, 686.30, 686.40 (2013); see also Harris, 234 S. Ct. at 2647 (Kagan, J., dissenting) (a counselor develops a service plan and assists the customer in state-mandated performance review, and mediates any resulting disagreements).

<sup>17</sup> Public Act 93-204, 5 **Ill. Comp. Stat.** 313/3(n)-(o), 315/7 (2013).

<sup>18</sup> The current CBA is available on the Illinois Department of Central Management Services website. Collective Bargaining Agreement, Ill. Dept. of Cent. Mgmt. Servs. (Dec. 16, 2013), [http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp\\_seiupast.pdf](http://www2.illinois.gov/cms/Employees/Personnel/Documents/emp_seiupast.pdf).

ability to attend a training program on state-paid time. Furthermore, the agreements required the state to provide safety equipment (such as gloves) and created a process for addressing safety issues, and helped assistants find jobs and customers select an assistant by creating a registry and by requiring the state to run criminal background checks on prospective assistants. The agreements created a grievance and arbitration system to resolve payment issues and other contractual disputes and provided that the state and the union would work together to address late, lost, or inaccurate paychecks.<sup>19</sup>

Six states allow for unionization of state-paid home care workers on models like Illinois': California, Connecticut, Minnesota, Missouri, Oregon, and Washington.<sup>20</sup> Home care workers in all of these states except Minnesota have voted to unionize and unions have gained a variety of wage, benefit, and working condition improvements through collective bargaining.<sup>21</sup> In addition, although this is an issue beyond the scope of this paper, sixteen states have enacted laws providing for unionization of some publicly subsidized in-home child care workers, although some of the models differ from that of the Medicaid-paid home care workers.<sup>22</sup>

## **2. Collective Bargaining and Agency Fees**

Laws protecting the right to unionize and bargain collectively typically provide that when a majority of workers choose to form a union and secure recognition of their

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<sup>19</sup> *Id.*; see also *Harris*, 134 S. Ct. at 2641 (“a procedure was established to resolve grievances arising under the collective-bargaining agreement”).

<sup>20</sup> California enacted legislation in 1999 (AB 1682, Ch. 90, 1999), which required all counties that had not yet done so to either establish a public authority or adopt one of the alternate methods provided in statute for managing their home care workforce. Subsequent legislation, AB 2235 (Ch. 1135, 2002), provided that any county that had not adopted one of the alternatives set out in AB 1682 by January 1, 2003, would be required to become the employer of its home care workers. In Washington, Oregon, and Missouri, home care workers won bargaining rights through voter initiatives that were later implemented by legislation, and all three of these states provide that a government official or agency is the employer of record for purposes of bargaining. See *Or. Rev. Stat.* §§ 410.595–625 (2014); *Wash. Rev. Code* §§ 7439A.095, 7439.A.30, 7439.A.220–.300, 41.56.026 (2010). *Mo. Rev. Stat.* § 208.856–.865 (2013). In Massachusetts, Maryland, and Connecticut, home care workers won bargaining rights through executive order followed by legislation: *Mass. Gen. Laws Ann.* ch. 118E, §§70-75 (West 2006). *Md. Code Ann.*, Health-Gen. §§ 15-901-07 (LexisNexis 2014), which was enacted in 2011, Md. Exec. Order 01.01.2007.15 (2007). In 2012, the Connecticut legislature passed Public Act 12-33, codified at *Conn. Gen. Stat.* § 17b-1706 *et seq.* (2014). Vermont and Minnesota have brand new legislation granting bargaining rights to home care workers but the Minnesota workers have not yet voted to unionize. Act 48 of 2013, *Vt. Stat. Ann.* tit. 21, §§ 1631-44 (2013); 2013 Minn. Laws ch. 128.

<sup>21</sup> See SEIU Local 503, *Overview of Home Care Collective Bargaining*, [seiu503.org](http://www.seiu503.org), (Dec. 13, 2013), <http://www.seiu503.org/2013/12/overview-of-home-care-collective-bargaining/>.

<sup>22</sup> The states with bargaining rights for in home child care workers are Oregon, Iowa, New Jersey, New York, Pennsylvania, Kansas, Maryland, New Mexico, Connecticut, Massachusetts, Rhode Island, and Ohio. Minnesota enacted legislation authorizing home-based child care providers to organize, but that law has been stayed by court order. Helen Blank *et al.*, *Nat'l Women's Law Ctr., Getting Organized: Unionizing Home-Based Child Care Providers* (Feb. 2014), [available at http://www.nwlc.org/sites/default/files/pdfs/nwlc\\_gettingorganized2013update.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlc_gettingorganized2013update.pdf).

union from the employer, the union becomes the exclusive representative of the employees for purposes of bargaining over wages and other conditions of employment, which means that the employer cannot bargain over those topics with employees individually or with any other union.<sup>23</sup> A corollary of the power conferred by the principle of exclusive representation is that the union has the duty to represent all employees fairly and adequately in negotiating and enforcing the contract.<sup>24</sup> This duty of fair representation applies to all workers in the bargaining unit, even though employees can choose not to join the union or to pay dues to it.<sup>25</sup>

Unions and their members have often considered employees who do not support the union to be a threat to their power to secure the best possible working conditions because the power of the union comes from its ability to speak with one voice on behalf of all workers.<sup>26</sup> Early in the history of labor-management relations, some unions and employers therefore agreed to require all employees to be union members. These types of contract terms were known as union security agreements, and they took a variety of forms, ranging from requirements that prospective employees must be a union member at the time of hire (closed shop), to those requiring employees to join the union shortly after hire (union shop), to those requiring every employee simply to pay the equivalent of union dues to cover the employee's pro rata share of the union's cost as exclusive bargaining representative (agency shop).<sup>27</sup> From the union's perspective, union security agreements maximize a union's bargaining power, and from the employer's perspective, limiting the labor pool to union members can ensure workers meet the union's standards of training and experience. (This is still the view of the medical and legal professions today.)

Union security agreements were controversial in some cases, and so a number of states enacted so-called "right-to-work" laws prohibiting them. Under section 14(b) of the National Labor Relations Act (NLRA), these state right-to-work laws are saved from federal preemption.<sup>28</sup> Labor groups challenged the constitutionality of these statutes on the ground that they denied union workers and their employers the right to agree to the contract terms that they preferred and denied union workers the right to associate in the workplace only with those who shared their commitment to improved working conditions

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<sup>23</sup> See, e.g., 29 U.S.C. § 159(a) (2012). See generally **Martin H. Malin, et al., Public Sector Employment: Cases and Materials** 341–46 (2d ed. 2011) (discussing principle of exclusive representation in public sector labor relations).

<sup>24</sup> See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 194 (1944).

<sup>25</sup> *Id.* at 202; see also *id.* at 204 ("So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft . . . [and it must] represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.").

<sup>26</sup> See generally **Kenneth Dau-Schmidt et al., Labor Law in the Contemporary Workplace** 1039 (2d ed. 2014) (exploring the history and development of laws governing organized labor, with strong emphasis on dimensions of political and social power at play between employers, employees, unions, and government).

<sup>27</sup> See *id.* at ch. 8.

<sup>28</sup> 29 U.S.C. § 164(b) (2012).



through unionization.<sup>29</sup> The Court rejected these constitutional challenges, finding that the freedom of contract arguments had been repudiated with the demise of the Lochner era and that the union members' freedom of association was not infringed by a statute prohibiting discrimination in employment on the basis of union membership.<sup>30</sup>

Until Harris, the law with respect to union security was as follows. First, in the private sector and in the majority of states that allow government employees to unionize, a union is the exclusive representative of employees when a majority of employees choose to unionize, and the union owes the duty of fair representation to all employees it represents.<sup>31</sup> Second, nowhere is it legal for an employer and union to agree to either a union shop or a closed shop.<sup>32</sup> Third, in the half of states without right to work legislation, unions and employers can require employees to pay an agency fee representing the employee's fair share of the union's costs germane to its role as exclusive bargaining representative; however, employees who choose not to join the union cannot be required to share the union's costs for political activities not germane to contract negotiation and administration.<sup>33</sup> Fourth, in the remaining states that ban any form of union security provision (the so-called right-to-work states), the union owes a duty of fair representation to all workers but cannot require them to pay what members pay to cover its costs.<sup>34</sup>

Harris made Illinois a right-to-work state for its home care workers only; private sector and government employers can continue to negotiate agency fee provisions for all other workers in the state. Therefore, while Illinois is not a right-to-work state, it now encompasses a right-to-work regime that only applies to certain home care workers paid with Medicaid funds.

### **3. The Background of Harris v. Quinn**

Harris v. Quinn is the product of a litigation and legislative campaign of National Right to Work (NRTW), a corporate-funded organization that seeks to dismantle unions

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<sup>29</sup> Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 529 (1949). See *infra* text accompanying notes 111.

<sup>30</sup> Id. at 537.

<sup>31</sup> Steele v. Louisville & Nashville RR Co., 323 U.S. 192, 202–03; Vaca v. Sipes, 386 U.S. 171, 186 (1967).

<sup>32</sup> NLRB v. Gen. Motors Corp., 373 U.S. 734, 743–45 (1963).

<sup>33</sup> See Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991); Comm'ns Workers of Am. v. Beck, 487 U.S. 735, 762–63 (1988); Abood v. Detroit Bd. Of Educ., 431 U.S. 209 (1977).

<sup>34</sup> Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 373 U.S. 746, 756–57 (1963). One of us has argued elsewhere that section 14(b) should be read to preempt state right to work laws to the extent that they prohibit contract provisions requiring employees to pay less than the full amount of union dues and, alternatively, that in any state where employees are permitted to avoid paying anything to unions, federal law should either allow unions to represent only those who choose to become union members and pay dues or should allow unions to charge nonpaying nonmembers if they wish the union to represent them in disciplinary matters. Catherine Fisk & Benjamin Sachs, Restoring Equity in Right-to-Work Law, 4 *U.C. Irv. L. Rev.* 857 (2014).

and the regulatory regime built on worker collective action. The organization's particular focus in sixty years of federal and state litigation and legislative efforts has been union security agreements. NRTW has been the driving force behind efforts to prohibit union security agreements by legislation or ballot initiative. And it has litigated every major case on this topic at the Supreme Court including most of the cases discussed here.

The NRTW theory has changed little over sixty years. In its view, employment agreements requiring workers to join a union, to finance any of its operations, or even that allow the union to negotiate on behalf of employees, violate the First Amendment rights of employees. In the first Supreme Court case on this, Railway Employees Department v. Hanson in 1956, NRTW argued that the Railway Labor Act, which allows railways and airlines to negotiate union security provisions with unions, violated the First Amendment because it allows the contracts to compel employees to support unions.<sup>35</sup> The Court rejected this argument, holding that the contractual requirement that employees pay for the services that the union was required to provide was not compelled speech.<sup>36</sup> But five years later, in International Association of Machinists v. Street, the Court suggested that railroad collective bargaining agreements that require payment of union dues or fees do raise issues of compelled speech prohibited by the First Amendment to the extent that the union spends the money to support political causes including candidates for public office and political programs.<sup>37</sup> The Court avoided the First Amendment issue by reading the Railway Labor Act not to authorize union security provisions that require employees to pay fees to support political activity.<sup>38</sup>

Three aspects of Hanson and Street are noteworthy because the Court in Harris disregarded them. First, the Court in Street emphasized that Congress in enacting the RLA had chosen to rely on private entities—railroads, airlines, and the unions

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<sup>35</sup> Brief for the National Right to Work Committee as Amicus Curiae, Railway Employees Department v. Hanson, 351 U.S. 225 (1956) (No.451), 1956 WL 88890.

<sup>36</sup> Because the payments were required by a contract between private entities (a railroad and a union), there was no state action and the First Amendment would ordinarily not apply. The Court found state action in the Railway Labor Act preempting Nebraska law that prohibited such provisions. Justice Douglas explained:

If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.<sup>4</sup> The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

Ry. Emps. Dep't v. Hanson, 351 U.S. 225, 232 (1956) (internal citations omitted). This is a variation of the state action analysis the Court adopted in Shelley v. Kraemer, 334 U.S. 1, 20 (1948), holding that government enforcement of a private contract is state action. The Court has never extended Shelley beyond restrictive covenants, for to do so would turn all private contracts into state action. And it has never extended beyond Street the principle that preemption of state law invalidating a contract makes the contract term state action. If this position were accepted today, it would raise a constitutional issue in every employment, consumer and other agreement containing provisions that are valid only because a federal law preempts state law, which is the case for virtually all arbitration agreements.

<sup>37</sup> Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 768–69 (1961).

<sup>38</sup> Id. at 764.

representing employees in those industries—to develop and administer rules and processes to ensure that employees were properly trained, that working conditions in these dangerous and difficult jobs were safe, that wages and benefits were sufficient to attract and retain a talented workforce, and that issues about working conditions were resolved peacefully among the transportation company managers and employees who were in the best position to resolve them.<sup>39</sup> This regulatory framework, Congress and the Court realized, “entails the expenditure of considerable funds.”<sup>40</sup> Whereas the companies could recoup their share of the costs through increased fares, unions had to rely on member dues. As the Court explained, “because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the costs to all employees who benefited. They [the unions] advanced as their purpose the elimination of the ‘free riders’—those employees who obtained the benefits of the unions’ participation in the machinery of the Act without financially supporting the unions.”<sup>41</sup>

Second, the Court did not accept the argument that contracts requiring employees to pay their fair share of the costs of maintaining the regulatory system constituted compelled speech or compelled association when the union used the money to perform the services it is statutorily required to provide to all employees. On the contrary, the Court recognized the Railway Labor Act allowed contracts to require “employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes” because “fairness justified the spreading of the costs to all employees who benefited.”<sup>42</sup>

Third, while the Court read the RLA to prohibit rail unions from using money exacted from dissenting employees “to support political causes which they oppose,”<sup>43</sup> it also recognized that legislation restricting the union from using its funds “for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them . . . would work a restraint on the expression of political ideas which might be offensive to the First Amendment.”<sup>44</sup> Thus, the Court recognized that unions did not simply possess statutory rights but also possessed constitutional rights under the First Amendment and, moreover, that these rights were inextricably connected to the ability of unions to fund their political activities.

The Court extended the regime it invented in Street to government workers in 1977 in Abood v. Detroit Board of Education.<sup>45</sup> Abood arose from a Michigan public sector labor relations statute that allowed school districts to agree to agency shop provisions and allowed unions to spend agency fees on political activities. The Court held that Michigan could not constitutionally allow expenditure of agency fees on political

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<sup>39</sup> Id. at 758–59.

<sup>40</sup> Id. at 760.

<sup>41</sup> Id. at 761.

<sup>42</sup> Id. at 761, 763–64.

<sup>43</sup> Id. at 764.

<sup>44</sup> Id. at 773.

<sup>45</sup> 431 U.S. 209 (1977).

activities over the objection of nonunion teachers, but that the union was entitled to collect and expend agency fees for purposes germane to its role as bargaining representative. Justice Powell's opinion for a unanimous Court explained why unions must be able to charge fees for the services they are legally required to provide workers:

The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged fairly and equitably to represent all employees, union and nonunion, within the relevant unit. A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.<sup>46</sup>

Abood was the first case to hold that government employees have a First Amendment right to refuse to pay for union political activities, but it was also unanimous in holding that employees can be required to share the costs of union representational services. Thus, what Abood confirmed—and what later cases reiterated—was that membership dues potentially implicated the First Amendment but that this depended upon the types of activities for which the dues were used. Dues spent on collective bargaining and germane activities were constitutional because the government had a compelling interest in spreading the costs to cover these services. However, to compel an employee to subsidize a union's political activities offended the First Amendment.

After Abood, the Court decided a series of cases distinguishing between costs that are chargeable to dissenters and those that are not. Many of the cases sparked dissent, as Justices disagreed with one another about whether certain union expenses benefitted all members of the bargaining unit and should be paid for by all or whether they impermissibly allowed the union to spend money on political or ideological causes that dissenters opposed. One such case, Lehnert v. Ferris Faculty Association,<sup>47</sup> is noteworthy for the recognition by the entire Court, including Justices who joined the majority opinion in Harris, of the reasons why statutes allow unions to charge dissenters for the cost of activities germane to its role as bargaining agent. As Justice Scalia explained in his concurring and dissenting opinion:

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<sup>46</sup> Id. at 221–22.

<sup>47</sup> 500 U.S. 507 (1991).

Our First Amendment jurisprudence . . . recognizes 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. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The “compelling state interest” that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of “free-riding” nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the “free riders” who are nonunion members of the union's own bargaining unit is that in some respects they are free riders whom the law requires the union to carry—indeed, requires the union to go out of its way to benefit, even at the expense of its other interests. In the context of bargaining, a union must seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.<sup>48</sup>

Justice Scalia’s observation that it is the duty of fair representation imposed by law that creates the free rider problem disappeared entirely in Harris.

## B. Harris v. Quinn

Harris v. Quinn was brought by NRTW on behalf of a putative class of home care workers who did not wish to be represented by a union. In the district court, NRTW characterized the workers as recipients of government benefits and the services the union provided to them as being lobbying for expenditure of government funds.<sup>49</sup> The district court dismissed the suit, reasoning that the assistants were state employees, the fees were charged for collective bargaining not lobbying, and under Abood and Lehnert, the Illinois law was constitutional.<sup>50</sup> The Seventh Circuit affirmed, finding the case to be controlled by Abood.<sup>51</sup>

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<sup>48</sup> Id. at 556.

<sup>49</sup> Harris v. Quinn, No. 10—cv—02477, 2010 U.S. Dist. WL 4376500, at \*7 (N.D. Ill. Nov. 12, 2010). As the district court explained, “Plaintiffs do not deny that fair share fees in the collective bargaining context have been found constitutional. Rather, Plaintiffs argue that the exclusive representation arrangement here is ‘nothing short of compulsory political representation’ that violates Plaintiffs’ First Amendment rights by compelling them to support a state-designated entity for purposes of lobbying the State for additional benefits from a government program.” Id. at \*6.

<sup>50</sup> Id. at \*6–9.

<sup>51</sup> Harris v. Quinn, 656 F.3d 692, 699, 701 (7th Cir. 2011).

In the Supreme Court, the plaintiffs expanded their argument from distinguishing the Court's fair share fee jurisprudence to attacking it. While they persisted in arguing that home care workers are not government employees and that union representation is akin to lobbying over expenditure of government funds, they asked the Court not only to strike down the Illinois law but also to overrule Abood and make it unconstitutional for any public sector employer to agree to an agency fee provision.<sup>52</sup>

The Court did not go that far. Although a substantial portion of Justice Alito's opinion for the five-Justice majority was devoted to criticizing Abood, the majority in the end limited its holding to home care workers paid by the state yet selected and supervised by private individuals.<sup>53</sup> Harris thus leaves undisturbed all state public sector labor laws except those governing workers with arrangements like the home care law in Illinois. The holding and reasoning are composed of five major propositions.

First, to make the case for a First Amendment right to refuse to pay agency fees, the Court began by criticizing Hanson, Street, and Abood for rejecting the First Amendment as a limit on agency fees. To do so, the majority faulted these cases' First Amendment analysis and, especially, their reliance on the analogy between agency fee provisions and state laws requiring lawyers to join and pay dues to the state bar. Acknowledging that in Lathrop v. Donohue the Court rejected a First Amendment challenge to the integrated bar, Justice Alito quoted at length from Justice Douglas's Lathrop dissent in which he complained that requiring lawyers to join the bar gives "carte blanche to any legislature to put . . . professional people into goose-stepping brigades."<sup>54</sup>

Second, the Harris majority criticized the notion that dissenters' First Amendment rights are sufficiently protected by being able to resist paying for political activities. Here, Justice Alito's opinion emphasized that in the public sector, everything a union does is political.<sup>55</sup> Public sector collective bargaining over wages, pensions and benefits, the majority maintained, "are important political issues,"<sup>56</sup> "both collective bargaining and political advocacy and lobbying are directed at the government"<sup>57</sup> and the line between these activities, for which employees must pay, and political activities is difficult to draw.<sup>58</sup> Therefore, the division between chargeable and nonchargeable expenses is

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<sup>52</sup> Brief for Petitioner at 1–2, Harris v. Quinn, 134 S. Ct. 2618 (2014) (No. 11-681), 2014 WL 131659, at \*2 ("The time has come to overrule Abood.").

<sup>53</sup> Harris split along the ideological line that has become familiar. The five Justices appointed by Republican presidents (Chief Justice Roberts and Justices Alito, Scalia, Thomas, and Kennedy) ruled the Illinois law unconstitutional; the four appointed by Democrats (Justices Ginsburg, Breyer, Sotomayor and Kagan) dissented.

<sup>54</sup> Harris, 134 S. Ct. at 2629 (quoting 367 U.S. 820, 885 (1961) (Douglas, J., dissenting)).

<sup>55</sup> Id. at 2632.

<sup>56</sup> Id.

<sup>57</sup> Id. at 2632–33.

<sup>58</sup> Id. at 2633.

illusory because one cannot distinguish between “nonpolitical” and “political” union activities and expenditures.

Third, although the majority criticized Abood, apparently there were not enough votes to overrule it. So the majority held only that home care workers paid by Medicaid, whom the majority variously termed “partial-public employees,” “quasi-public employees,” or “not full-fledged public employees,”<sup>59</sup> have a First Amendment right to refuse to pay agency fees. Justice Alito emphasized all the ways in which these workers were not like other government employees: they are selected by the recipient of care, not by the government; the recipient of care approves— along with the state agency, though the majority does not mention this—the service plan defining the job duties; and the state and the recipient of care jointly control the annual review of the care provider’s job performance. Additionally, Illinois’ home care workers do not participate in the state employees’ retirement and health benefit plans but in the union’s plans with funding contributed by the state, and they are ineligible to participate in other state employee programs, including those covering job sharing, banking and sharing sick leave and vacation time, and behavioral health programs.<sup>60</sup> Finally, the government disclaims tort liability for the acts of home care workers and therefore excludes them from the protections of the indemnification law.<sup>61</sup>

Under Illinois law, however, home care workers are public employees. And as Justice Kagan pointed out in dissent, home care workers in programs structured like Illinois’ are treated by the United States Department of Labor as joint employees of the state and the care recipient.<sup>62</sup> They are paid entirely through government funds and the state regulates a number of aspects of eligibility for, and conditions of employment as, a home care worker. In rejecting Illinois’ determination that home care workers are state employees as a matter of state law, then, the Court ignored its usual rule that it does not decide state law questions. Other than home care workers in Illinois, moreover, it is not clear which workers fall into this new category of workers exempt from Abood, which makes this one of the most puzzling parts of the Court’s opinion.

There are two additional puzzling aspects of this step in the Court’s reasoning. First, what is the line between full-fledged government employees (who do not have First Amendment rights to resist agency fee provisions) and “quasi-public employees” who have the Harris right? The majority never explained why the coverage of these myriad Illinois laws is relevant to the question whether different types of state employees should have different First Amendment rights. Whether they can participate in the state job-sharing program, or whether they get health care from a program funded by the state but administered by SEIU as opposed to one funded by the state and administered by the state’s chosen plan administrator has nothing to do with whether employees should have

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<sup>59</sup> Id.

<sup>60</sup> Id. at 2634–35.

<sup>61</sup> Id. at 2635.

<sup>62</sup> Id. at 2646 n.1 (Kagan, J., dissenting); 78 Fed. Reg. 60483-60484 (2013).

a First Amendment right to resist paying fair share fees. And it is ironic that the Court granted greater First Amendment rights to a category of government workers who are less than full-fledged, while simultaneously attacking collective bargaining by them as being more political than the bargaining approved in Abood.

At a more practical level, the absence of any logical connection between the reasons the majority gives for finding home care workers not to be state employees makes it difficult for states to respond to the decision. How many of the programs identified by the majority would Illinois have to extend to home care workers in order to bring them back into the usual rule for agency fee agreements? The uncertain implications of this decision are further illuminated by focusing on state employees other than home care workers. If some state employees are excluded from, say, the State Employee Vacation Time Act or the State Employee Health Savings Account Law, but are covered by the State Employee Job Sharing Act and by the State Employee Indemnification Act, do they have the enhanced First Amendment rights of home care workers or the same First Amendment rights as state troopers, park rangers, or DMV clerks? Because the majority never explained why the coverage of these Illinois laws is relevant to the issue in the case, it provided no basis for Illinois lawyers and legislators to figure out how to respond, nor any basis for determining what other states' labor relations laws might be vulnerable to a Harris-type challenge.

The fourth major conceptual step in the Harris majority opinion is an empirical claim: in Justice Alito's view, agency fee contracts are not necessary for public sector collective bargaining to work, at least in relation to this category of workers.<sup>63</sup> In the majority's view, collective bargaining supported by agency fees is unnecessary because state law limits the scope of bargaining to the terms within the State's control, and many conditions of employment are set by the recipient of services, not the state.<sup>64</sup> Additionally, the union is not responsible for handling very many grievances because the statutorily required grievance procedure "appears to relate solely to any grievance that a personal assistant may have with the State."<sup>65</sup>

This is the heart of the Court's response to the free rider argument in Harris: the subjects of bargaining and the grievance procedure are limited, so the union's obligations to nonpayers are also limited, so collective bargaining isn't truly necessary to protect workers, so unions do not need to collect fees from dissenters in order to achieve whatever benefits unionization provides. The majority opinion phrased this point in terms of a burden of proof that the union had not sustained: an agency fee provision "cannot be sustained unless 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. No such showing has been made."<sup>66</sup> Although Justice Alito

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<sup>63</sup> Harris, 134 S. Ct. at 2636.

<sup>64</sup> Id. at 2636.

<sup>65</sup> Id. at 2637.

<sup>66</sup> Id. at 2641.



noted various improvements in wages, working conditions, and training attained through unionization, he speculated that unions need not collect fees from nonmembers to achieve these benefits because members' dues were sufficient. Justice Alito also speculated that unions need be no different from organizations that depend on voluntary contributions to advocate on behalf of occupational groups.<sup>67</sup> This aspect of the opinion is in tension with Justice Scalia's opinion in Lehnert, which argued that the free-rider problem is more acute for unions than for other organizations, because only unions have a legal duty of fair representation to all employees.<sup>68</sup>

Whether agency fee provisions are necessary to an effective labor relations regime is, as Justice Alito explained, fundamentally an empirical issue.<sup>69</sup> Justice Kagan's dissent disputed the majority's speculation about the empirics, including the nature and extent of the union's burdens in providing services to nonpaying workers. Union advocates, for example, point to the fact that union density and wages are lower in right-to-work states than in states in which unions can charge agency fees. Scholars have attributed the difference in union density between Canada and the United States, and especially the sharper decline in union density in the U.S. as compared to Canada, to right-to-work laws.<sup>70</sup> Reasonable minds have been differing for a century on the question of whether collective bargaining improves productivity, wages or working conditions, and whether some form of agency fee provision is necessary to make the entire architecture of labor relations run.

Advocates of judicial restraint would argue that the majority was wrong to arrogate to itself the responsibility for deciding what kinds of contract provisions are necessary for state agencies to effectively manage the state labor force and for the majority's unsupported empirical claims that free riding is not a major problem and that unions do not need agency fees in order to effectively represent home care workers. Advocates of an activist and pragmatic federal judiciary would perhaps find nothing amiss in the Court determining whether particular regulatory regimes are necessary or desirable, although they might want more engagement with the empirical studies on whether agency fees are necessary to enable unions to operate effectively. And of course disputants over federalism might line up over this one too. One side might complain that the Court gave too little respect to the Illinois government's judgments about how to manage its own workforce; the other might celebrate the Court's protection of the First Amendment rights of state workers. But what is amusing about Harris is that it is the Republican-appointed Justices who are both activist and anti-state's rights here, substituting their policy views about the importance of certain labor contract terms for

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<sup>67</sup> Id.

<sup>68</sup> Lehnert v. Ferris Faculty Association, 500 U.S. 507, 556 (1991).

<sup>69</sup> Harris, 134 S. Ct. at 2634.

<sup>70</sup> Daphne Gottlieb Taras & Allen Ponak, Mandatory Agency Shop Laws as an Explanation of Canada-U.S. Union Density Divergence, 22 **J. Lab. Res.** 541 (2001) (finding that mandatory agency shop laws in Canada and spread of right to work laws in U.S. may explain why U.S. union density, which was similar to Canada until 1960s, fell more sharply than in Canada).

those of the Illinois legislature and governor about a matter of state governance. The majority in Harris departed from the view that has prevailed since 1937, when the Court abandoned substantive due process jurisprudence and upheld the NLRA against exactly the kind of challenges as were made in this case—that it limited the freedom of nonunion workers and was unnecessary to protect labor relations.<sup>71</sup> The doctrinal difference is that then it was the Due Process Clause that was the basis for invalidating labor legislation; here it is the First Amendment.

The final step in the majority’s analysis was its effort to distinguish the speech rights of home care workers from those of government employees generally. Under Garcetti v. Ceballos, government employees have no First Amendment protection for their speech on the job and in the scope of employment.<sup>72</sup> Ironically, therefore, government employees have a robust First Amendment right to refuse to pay agency fees while they have no First Amendment right to engage in other on-the-job speech. Under Pickering v. Board of Education, government employees have a right to comment off the job “as a citizen” on matters of public concern only when this right is not outweighed by “the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>73</sup> The Harris majority did not discuss Garcetti, only mentioning the case in a footnote.<sup>74</sup> Pickering did not apply to home care workers, the majority claimed, because “the State [i]s not acting in a traditional employer role.”<sup>75</sup> If Pickering did apply, the Court asserted that the home care workers’ First Amendment rights outweighed the government’s interests.<sup>76</sup>

### III. Agency Fees Are Not Compelled Speech

#### A. The Flaws in the Compelled Speech Analysis of Agency Fees

The five steps in the majority’s reasoning outlined above rest on a fundamental flaw: the Court sees a First Amendment violation where there should be none. Contractually required fees for union representational services are not speech. Payment

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<sup>71</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

<sup>72</sup> Garcetti v. Ceballos, 547 U.S. 410 (2006).

<sup>73</sup> Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Garcetti involved a deputy district attorney who was disciplined for writing a memo to his supervisor complaining about the office’s handling of evidence and police testimony. Pickering involved a teacher who wrote a letter to the local newspaper critiquing the way in which the school board had handled raising revenue for the district’s schools. The United States and Justice Kagan’s dissent both argued that bargaining over terms and conditions of employment is unprotected under Garcetti because it concerns working conditions. Harris, 134 S. Ct. at 2653–54 (Kagan, J., dissenting). If the Deputy District Attorney in Garcetti had no First Amendment protection against discipline for writing a memo to his supervisor, so, too, employees should have no heightened First Amendment protection for refusing to pay fees to a union to bargain on their behalf on all of those topics.

<sup>74</sup> Harris, 134 S. Ct. at 2642.

<sup>75</sup> Id.

<sup>76</sup> Id. at 2643.

of fees for services is just that: purchasing a service.<sup>77</sup> It is a form of conduct, like giving someone a twenty-dollar bill. Writing a check or authorizing a credit card transaction or payroll deduction for the same twenty-dollar bill involves speech (writing, or typing, or clicking a box), but the operative part of the transaction is conduct—transfer of funds—not speech. This action has no more expressive content than does compulsory payment of library fines, taxes, homeowners' association dues, or insurance premiums—all of which the recipient will use to fund a variety of speech and other activities.

There are, of course, circumstances when giving someone money is expressive because the donor intends it as an endorsement of someone's views and gives money in order for those views to be propagated widely, as when one contributes to a political campaign or to an organization like the ACLU or the NRA. But when the payment is compulsory, it loses its expressive aspect. If a political candidate extorts money from someone, the payment sends no message of endorsement or the desire to support speech. When a pacifist and death penalty opponent pays her taxes knowing some part of them will be used by generals to promote war and by prosecutors to advocate the death penalty, she does not endorse war or the death penalty. And when a lawyer pays her state bar dues, she conveys no message one way or the other about the content or enforcement of the state bar ethics rules or its administration of the admission and discipline system.

Even though compulsory payments are not themselves expressive conduct, they might still raise First Amendment issues because they compel a person to subsidize another's speech. Whether compulsory financial support for another's expressive activity violates the First Amendment is a difficult issue because it involves the unwilling donor's speech rights, the recipient's own free speech rights, and the viability of regulatory regimes that have nothing to do with speech.<sup>78</sup> Living in a community requires financial support of organizations that may spend money on speech activities as well as other services that have little or nothing to do with expressive conduct. Many live in neighborhoods or condominium complexes and are compelled to pay homeowners' association dues that are spent on speech activities as well as on non-expressive activities like landscaping. We all pay taxes that support, among other things, libraries, schools, and other programs that engage in speech activities we may abhor. The community

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<sup>77</sup> As Robert Post pointed out in an article criticizing the incoherence in the Court's cases on compelled subsidies for speech, if any compelled requirement to pay for services involving speech raises a First Amendment issue, then the First Amendment is implicated by statutes requiring litigants to pay their opponents' attorneys' fees, permitting registration of automobiles only if mechanics have certified they meet emissions standards, allowing children to enroll in public school only if physicians certify they have been immunized against diseases, or requiring publicly owned corporations to pay for financial reports of independent accountants. Robert Post, Compelled Subsidization of Speech: *Johanns v. Livestock Marketing Association*, 2005 **Sup. Ct. Rev.** 195, 211-212. See also Robert Post, Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech, 2007 **U. Ill. L. Rev.** 939, 942-43 (discussing the compelled speech issues raised by a South Dakota statute requiring physicians performing abortions to first inform the patient that she is terminating the life of "a whole, separate, unique, living human being" and that abortion may cause a significant risk of psychological trauma).

<sup>78</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

typically has a much greater interest in requiring financial support of organizations that provide collective goods than it does in forcing anybody to speak.

In a long series of cases, the Supreme Court has struggled to articulate rules governing which uses of compelled financial contributions or property violate the First Amendment rights of unwilling donors or property owners and when the rights of the collective to speak outweigh the rights of the individual to object.<sup>79</sup> The Court has sometimes upheld mandatory fees finding that they do not involve any compelled speech. It upheld student activity fees at public universities in Board of Regents of the University of Wisconsin System v. Southworth.<sup>80</sup> The Court held that such a fee was constitutional, even when some funds were spent on political speech, so long as the university distributed the funds in a viewpoint-neutral manner.<sup>81</sup> In Keller v. State Bar of California, the Court said that the Bar could use compulsory dues only if the dues were “reasonably incurred for the purpose of regulating the legal profession, including operating the disciplinary system, or ‘improving the quality of the legal service available to the people of the State.’”<sup>82</sup> In Glickman v. Wileman Bros. & Elliott, the Court upheld federal regulations that required fruit producers to contribute funds to pay for generic advertising for fruit.<sup>83</sup> In all of these cases, the compelled subsidy was for speech as well as other services and activities. And, as the Court remarked in Glickman, in none of them did the assessments “engender any crisis of conscience.”<sup>84</sup>

In cases that the Court found a compulsory payment to violate the First Amendment, the Court found the subsidy for speech to be unrelated to other regulatory or community goals or to present a risk that the audience might erroneously attribute the message to the unwilling donor. United States v. United Foods, Inc., decided four years after Glickman,<sup>85</sup> invalidated mandatory assessments for generic product advertising of mushrooms, finding the compelled subsidy to be separable from the regulation of mushrooms.<sup>86</sup> Other cases found compelled speech where the government required someone to make his or her property or resources available to a speaker when there was a risk that the audience would attribute the speaker’s message to the unwilling donor. Thus, in Miami Herald Publishing Co. v. Tornillo, the Court invalidated a state law that required newspapers to provide space to political candidates who had been verbally

<sup>79</sup> See Catherine L. Fisk & Erwin Chemerinsky, Political Speech and Association Rights After Knox v. Seiu, Local 1000, 98 Cornell L. Rev. 1023 (2013).

<sup>80</sup> Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217 (2000).

<sup>81</sup> Id. at 233–34.

<sup>82</sup> Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) (citing Lathrop v. Donohue, 367 U.S. 820, 843 (1961)).

<sup>83</sup> Glickman v. Wileman Bros., 521 U.S. 457 (1997).

<sup>84</sup> Id. at 472.

<sup>85</sup> United States v. United Foods, Inc., 533 U.S. 405, 408 (2001).

<sup>86</sup> Id. Justice Kennedy distinguished Glickman on the ground that “the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy” and California tree fruit producers were constrained in other aspects of their marketing, but no similar restrictions applied to mushroom producers who were not bound by the statute to “associate as a group which makes cooperative decisions.” Id. at 411, 413.

attacked in print.<sup>87</sup> And in Pacific Gas & Electric Co. v. Public Utilities Commission of California, the Court invalidated a regulation that required a private utility company to include in its billing envelopes materials prepared by a public interest group.<sup>88</sup>

But where there is little risk that people will erroneously attribute the message to the entity required to allow the speaker to use its property, the Court has rejected the compelled speech argument. In Rumsfeld v. Forum for Academic Institutional Rights, Inc., the Court held that the Solomon Amendment, which required universities receiving federal funds to open their premises to military recruiters, did not involve compelled speech because it “neither limits what law schools may say nor requires them to say anything” but leaves them “free . . . to express whatever views they may have on the military’s congressionally mandated employment policy, all the while retaining eligibility for federal funds.”<sup>89</sup> Similarly, in PruneYard Shopping Center v. Robins, the Court held that a state constitution requiring shopping center owners to allow protesters to speak on their premises did not compel speech: “The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.”<sup>90</sup> Moreover, the Court said that “no specific message is dictated by the State to be displayed on appellants’ property . . . . [A]ppellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.”<sup>91</sup>

In most of the cases addressing when mandatory payments constitute compelled speech, the Court has explored the extent to which the payments are part of a larger system for regulating conduct. As we noted above, in United Foods, for example, Justice Kennedy emphasized that the mandatory assessments upheld in Glickman to promote fruits “were ancillary to a more comprehensive program restricting marketing autonomy” and that the regime bound growers into “a group which makes cooperative decisions,” but that the mushroom assessments were not.<sup>92</sup> Similarly, in Southworth, the Court emphasized the diversity of uses to which student activity fees were put in the context of the intellectual environment a university seeks to create.<sup>93</sup> And, of course, Street and Abood emphasized that agency fee requirements facilitated a comprehensive statute creating self-governance in labor relations.

## B. The Communitarian Argument for Compelled Fees

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<sup>87</sup> Miami Herald Publ’g. Co. v. Tornillo, 418 U.S. 241, 256–58 (1974).

<sup>88</sup> Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 20–21 (1986).

<sup>89</sup> Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 60 (2006).

<sup>90</sup> PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

<sup>91</sup> Id.

<sup>92</sup> U.S. v. United Foods, 533 U.S. 405, 406 (2001).

<sup>93</sup> Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 217 (2000).

Communitarian activities always involve a balance of the rights of the community and the rights of the individual. A community organization requires financial support, and usually some of the money it receives will be spent on speech activities. The Supreme Court has long recognized that the community typically has a much greater interest in requiring financial support of organizations that provide collective goods than it does in forcing anybody to speak. This underlies the distinction the Court has drawn between government speech and private speech: when the government speaks (as the community does when it funds libraries) or when the government funds private entities to speak (as it does when it funds legal services organizations or health care programs), the Court has held that its choice of message does not violate the First Amendment rights of those who fund the speech or those private entities that receive funds for purpose of speech.<sup>94</sup> In yet another agricultural advertising case, Johanns v. Livestock Marketing Association, the Court upheld a requirement that cattle producers pay a fee that was used by the Beef Board, a group of beef producers appointed pursuant to a federal law, to promote the sale of beef.<sup>95</sup> Justice Scalia rejected the First Amendment challenge brought by dissenting beef producers, finding the subsidy to be analogous to taxes that fund government speech and emphasizing the importance of allowing the government to speak.<sup>96</sup>

The concurring and dissenting opinions in Johanns, as well as the scholarly commentary, noted that the majority had not satisfactorily explained how the mushroom advertising regime struck down as compelled speech in United Foods differed from the beef advertising found to be government speech in Johanns.<sup>97</sup> The more significant problem for the Court's analysis was not identified in that case: how does a statute and regulations appointing a private organization to speak in general terms about beef differ from a statute and regulations appointing a private organization (a union) to speak in general terms about wages, hours, and other conditions of employment in a bargaining unit? If government involvement in appointment of the organization, a law compelling financial contribution, and general statutory guidelines about the topics of speech make the advertising in Johanns government speech, it would seem that government certification of a union as the exclusive bargaining representative and regulation of the subjects of bargaining would make bargaining government speech in the public sector.

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<sup>94</sup> See Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (stating that where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest); Rust v. Sullivan, 500 U.S. 173, 193 (1991) (stating that the Government does not violate the Constitution when it selectively funds a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way).

<sup>95</sup> Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 56465 (2005).

<sup>96</sup> Id. at 561 (quoting 7 U.S.C. §§ 2901(b), 2902(13) and 7 C.F.R. § 1260.169(d) (2004)).

<sup>97</sup> Robert Post, Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association, 2005 **S. Ct. Rev.** 195, 197 (arguing that the fundamental premise of the Court's compelled subsidization of speech doctrine is flawed and it is "simply not true that First Amendment concerns are implicated whenever persons are required to subsidize speech with which they disagree").

The significance of Johanns for us is not that collective bargaining is government speech, but rather that the Court recognized in Johanns that communities routinely rely on compelled financial support of private organizations to achieve regulatory goals and that the Court in some cases recognizes the importance of allowing the community to do so. In Harris, the state of Illinois chose to rely on a partnership between the state agency and the union to develop standards and processes to ensure quality service in the government-funded home care sector, believing it would improve the lives of both patients and care providers. The state could fund the union's operations directly through tax revenue, which would raise no First Amendment issue, or it could empower the union to fund it through compulsory fees. Either way, compulsory payments fund a regulatory regime which involves expressive activities. In Johanns, the Court acknowledged the government's own interests in achieving its regulatory goal – the promotion of beef production and consumption. This is the same point the Court emphasized in Street.<sup>98</sup> Congress chose to regulate labor relations by relying on private entities (in that case railroads and the unions representing employees) to develop and administer a regulatory regime ensuring safe and efficient transportation with minimal service interruptions and with adequate working conditions. As noted above, the Court recognized this regulatory framework imposed considerable expense on the private organizations and it allowed the unions to charge workers for the cost of running it, just as the Beef Board can charge producers for the cost of maintaining that regulatory regime.<sup>99</sup> Similarly, in Harris Illinois chose to rely on the union to administer certain aspects of the regulatory regime governing home care workers and the health insurance plan for them.<sup>100</sup>

The Court's elemental mistake in its compelled speech jurisprudence was to extend the rule from cases where the government actually was trying to compel speech—as in West Virginia Board of Education v. Barnette, which invalidated a compulsory flag salute law<sup>101</sup>—to cases involving the requirement to pay money. As shown above, the cases involving compelled financial support are difficult to reconcile, but laws that include financial support as an integral part of a regulatory regime much broader than promoting speech tend to be upheld.

One final aspect of compelled expenditures requires attention: even if compelled financial support does not violate the First Amendment's Free Speech Clause, does the mere fact of giving money to an organization make the donor complicit in the organization's activities and, if so, does the complicity give the dissenter a First Amendment right to opt out? The Court has generally (but not consistently) held that compelled payments to an organization that acts in ways one opposes does not violate the Free Speech Clause of the First Amendment, and until the summer of 2014 when the Court decided Burwell v. Hobby Lobby, it had also rejected arguments that compelled

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<sup>98</sup> Johanns, 544 U.S. at 560-61; Street, 367 U.S. at 760-61.

<sup>99</sup> Street, 367 U.S. at 760.

<sup>100</sup> Harris, 134 S. Ct. at 2624-25.

<sup>101</sup> W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

financial support violated the Free Exercise Clause of the First Amendment.<sup>102</sup> However, in *Hobby Lobby*, the Court held that compelled financial contributions may substantially burden religious exercise if the recipient uses some part of the money to fund other people to engage in conduct that the donor finds religiously objectionable.

That case considered the Patient Protection and Affordable Care Act's requirement that employers fund health insurance benefits and whether this provision violated the free exercise rights of owners of a corporation when they insisted that paying money to a health insurance plan contravened their religious beliefs if the plan covered contraceptive methods the owners thought would destroy human embryos.<sup>103</sup> In earlier cases, the Court rejected the argument that compelled payments substantially burden religious exercise, thus, for example, rejecting a claim by Amish businessmen that paying Social Security taxes violated their religion.<sup>104</sup> In *Hobby Lobby*, the Court distinguished two cases in which taxpayers objected to government subsidies to religious organizations, pointing out that in both cases the financial support was not alleged to violate the taxpayers' religious beliefs, only their beliefs about proper church-state relations.<sup>105</sup> It would take another article to sort out the difference between the complicity argument that prevailed in *Hobby Lobby* and those in the compelled speech cases and in the other cases in which the Court has rejected the contention that compelled financial support makes one complicit in another's conduct that the individual finds morally repugnant. For present purposes it is sufficient to note that the Court has never accepted the notion that financial support always or even usually equals complicity sufficient to establish a free speech violation.

Moreover, as we argue in Part IV, even if the majority is right and paying fees is a form of compelled speech, then the majority's requirement that union members pay fees that the union must use for contract negotiation and administration for their free-riding co-workers is equally compelled speech of the union and its members. As we explain below, on the Court's analysis, unions and their members' First Amendment rights are implicated when laws require unions to provide services to nonpaying nonmembers.

#### **IV. When It's Not "Other People's Money": The First Amendment Rights of Unions and Union Members**

The heart of the argument that unions violate employees' rights when they spend fees and dues on expressive activity is that the unions are spending the employees'

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<sup>102</sup> There is a vast literature on compelled financial support and claims of freedom of conscience and speech, and a number of the arguments we present here are essayed in different contexts at greater length there. See, e.g., Micah Schwartzman, *Conscience, Speech and Money*, 97 *Va. L. Rev.* 317, 372–82 (2011) (exploring the contentions that money isn't conscience, association, or speech).

<sup>103</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778–79 (2014).

<sup>104</sup> *United States v. Lee*, 455 U.S. 252, 261 (1982).

<sup>105</sup> *Id.* at 2779, citing *Tilton v. Richardson*, 403 U.S. 672, 689 (1971), and *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 248–49 (1968).



money rather than the union's. This is fundamentally false. Like insurance companies, homeowners' associations, and other organizations, unions pool money contributed by many stakeholders and spend it to provide services and to engage in expressive activity. When they do so, they advance the interests of the entity and its stakeholders who support the action, and, sometimes, they thwart the interests of stakeholders who oppose it. But a full First Amendment analysis of the issues must consider the interests of the entity and its members as well as those who contribute to the union but oppose the action in question.

Harris and the fee-objector cases that preceded it consider only one set of First Amendment interests: the speech and associational rights of dissenters who object to paying dues or special assessment fees that might subsidize a union's political activities. The Court has not examined the competing First Amendment interests of unions and union members to engage in these political activities. The Court's expansion of First Amendment protection for corporate speech and rights of "expressive association" for other groups necessitates a re-assessment of the speech rights of unions in the context of fee objections.

The Court has assessed the constitutionality of agency-fee agreements in relation to the First Amendment rights of dissenters on the one hand, and Congress' interest in combatting free riders and promoting labor peace through its adoption of federal labor statutes on the other.<sup>106</sup> But this skews the balance of rights because it considers only one side – the objectors – to have First Amendment rights while portraying the other side as having only a statutory interest in avoiding free riding.<sup>107</sup> As we explain below, unions enjoy First Amendment protection as expressive associations. Moreover, to the extent that union membership dues constitute speech, union members also possess strong First Amendment claims in relation to their dues being used to subsidize free riders. If the First Amendment is going to be deployed as a limit on union speech it must also be considered in defense of union speech. The ability of unions to raise and spend money to advance

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<sup>106</sup> See Harris, 134 S. Ct. at 2643 ("Agency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees. And on the other side of the balance, the arguments on which the United States relies – relating to the promotion of labor peace and the problem of free riders – have already been discussed.") (internal citations omitted).

<sup>107</sup> Justice Alito's majority opinion in Knox proves illustrative here. Rebuking the Ninth Circuit for suggesting that the Supreme Court had "call[ed] for a balancing of the 'right' of the union to collect an agency fee against the First Amendment rights of nonmembers" Justice Alito reiterated the point first raised in Davenport that "unions have no constitutional entitlement to the fees of nonmember-employees." Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2291 (2012). (internal citations omitted). He then stated that "[a] union's 'collection of fees from nonmembers is authorized by an act of legislative grace,'—one that we have termed 'unusual' and 'extraordinary.'" Far from calling for a balancing of rights or interests . . . exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights. And to underscore the meaning of this careful tailoring . . . [the] measures burdening the freedom of speech or association must serve a "compelling interest" and must not be significantly broader than necessary to serve that interest." Id. (internal citations omitted).

the interests of workers is core First Amendment activity.<sup>108</sup> When the Court interprets the duty of fair representation to require unions to expend money to promote the working conditions of those who have a right to refuse to pay, it impinges upon the union's First Amendment rights and does so in a way that is not sufficiently narrowly tailored.

### A. The First Amendment Rights of Unions: Recognized and then Forgotten

The Court has long recognized that unions possess First Amendment rights and that these rights are inextricably linked to a union's ability to collect and spend member dues.<sup>109</sup> Perhaps the earliest instance was in 1949 in Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.,<sup>110</sup> a case involving the legality of the "closed-shop" agreement. Unions and union members collectively challenged a North Carolina statute and Nebraska constitutional amendment that prohibited employers from denying employment opportunities based on union membership. They alleged that these laws violated their "right of freedom of speech, of assembly and of petition guaranteed unions and their members by 'the First Amendment and protected against invasion by the state under the Fourteenth Amendment.'"<sup>111</sup> The Court rejected the contention on the ground that a closed shop was not "'indispensable to the right of self organization . . . [and] to achievement of sufficient union membership to put unions and employers on a full equality for collective bargaining'"<sup>112</sup> was not an essential "'concomitant' of 'the right of employees to assemble into and associate together through labor organizations.'"<sup>113</sup> Nevertheless, in recognizing that the closed shop did not infringe these rights, the Court assumed that unions and union members had a constitutional and not just statutory right to assemble and organize to improve their working conditions.<sup>114</sup>

In Street, the Court explicitly recognized that unions and union members possessed First Amendment rights as unions and union members. While the Court spoke at great length about safeguarding the rights of dissenting employees who objected to their dues being used for political purposes, it also rejected an injunctive remedy as an

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<sup>108</sup> See Brian Olney, Note, Paycheck Protection or Paycheck Deception? When Government "Subsidies" Silence Political Speech, 4 U.C. Irv. L. Rev. 882 (2014) (noting that union political activity is essential to their mission of protecting working and middle class people's interests and voice in the political process and discussing the First Amendment right of workers to raise money through payroll deduction).

<sup>109</sup> As many have observed, the Court has paid less attention in recent years to these rights, focusing instead on the rights of dissenters. See, e.g., Garden, supra note 8, at 32–39.

<sup>110</sup> Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 527–37 (1949).

<sup>111</sup> Id. at 528–29.

<sup>112</sup> Id. at 530.

<sup>113</sup> Id.

<sup>114</sup> Id. at 531 ("The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans.")

appropriate form of remedial relief on the grounds that it would substantially impinge a union and the majority of its members from engaging in a variety of political activities:

[M]any of the expenditures involved in the present case are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters.<sup>115</sup>

In Street, therefore, the Court recognized that laws restricting the ability of a group to spend money in the name of protecting the speech rights of dissenters also restricts the speech of the majority.<sup>116</sup>

Yet, in the years following Street, the Court gave less emphasis to unions and their members possessing constitutional rights. Rather, in the context of challenges to the “open-shop,” the Court developed a body of case law attentive to the First Amendment rights of dissenters only. These rights were persistently and precariously balanced against the statutory rights of unions and Congress’ desire to promote labor peace through its adoption of this statutory scheme. Nowhere is this more evident than in Harris where Justice Alito, reiterating sentiments he had last raised in Knox, stated that “‘preventing nonmembers from free-riding on the union’s efforts’ is a rationale ‘generally insufficient to overcome First Amendment objections,’ and in this respect, Abood is ‘something of an anomaly.’”<sup>117</sup> However, as Justice Scalia noted in Lehnert, agency fees are justified because of the free rider problem that the duty of fair representation creates,<sup>118</sup> and

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<sup>115</sup> Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 773 (1961).

<sup>116</sup> See Fisk & Chemerinsky, supra note 8, at 1035 (stating that the Court recognized that protecting dissenters within the entity does not justify restricting the First Amendment rights of the entity to spend money because it gives the government power to restrict the speech activities of the entity).

<sup>117</sup> Harris v. Quinn, 134 S. Ct. 2618, 2621 (2014).

<sup>118</sup> Lehnert v. Ferris Faculty Association, 500 U.S. 507, 556 (1991). Justice Scalia explained the constitutional dimensions of the free rider problem:

Our First Amendment jurisprudence therefore recognizes 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. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The “compelling state interest” that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of “free-riding” nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the “free riders” who are nonunion members of the union’s own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

Justice Alito in Harris was careful not to reject the free rider rationale entirely, but rather simply to find there was no significant free rider problem in the particular case of Illinois home care workers. When there is a significant free rider problem, Justice Alito's analysis, like many Supreme Court cases before Harris, will compel recognition of the First Amendment rights of unions or union members. Abood might still evoke animosity but it would surely not be treated as an anomaly.

Another union dues case in which the Court implicitly acknowledged that unions might possess First Amendment rights in regard to their membership dues was Davenport v. Washington Educational Association.<sup>119</sup> In Davenport, a public sector union representing Washington's public educational employees was sued by the State and by nonmembers who charged the union with violating a provision of the Fair Campaign Practices Act, a state initiative approved by Washington voters in 1992 that prohibited unions from "mak[ing] contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by [nonmembers]."<sup>120</sup> The Washington Supreme Court held that the initiative "upset[] the balance of members' and nonmembers' rights" and violated the First Amendment because it "impermissibly shift[ed] to the union the burden of the nonmembers' rights," which had "the practical effect of inhibiting one group's political speech (the union and supporting nonmembers) for the improper purpose of increasing the speech of another group (the dissenting nonmembers)."<sup>121</sup> The Court expressly connected the "weight of the administrative burden" that the initiative imposed on the union, with the ability of union members to assert their "collective political voice."<sup>122</sup> Additionally, the Court stated that the initiative's opt-in requirement, in regulating "the relationship between the union and agency fee payers with regard to political activity,"<sup>123</sup> undermined the unions' expressive associational rights pursuant to the U.S. Supreme Court's decision in Boy Scouts v. Dale.

In a 9–0 opinion, with Justice Scalia writing for the majority, the Court reversed, concluding that the restriction imposed by the initiative was "of no great constitutional concern" because Washington could have gone much further by either restricting agency-fees to the amount devoted to collective bargaining or by "eliminat[ing] agency fees entirely."<sup>124</sup> In other words, since Washington could have become a right-to-work state, a statute creating an opt-in regime rather than the opt-out rule typically followed under Abood was permissible. Moreover, the Court rejected the balancing approach pursued by the lower courts, stating that this interpretation extended the "agency-fee cases . . . well beyond their proper ambit" because unions have "no constitutional

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Id.

<sup>119</sup> Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 190 (2007).

<sup>120</sup> Id. at 182.

<sup>121</sup> State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n, 130 P.3d 352, 359 (2006).

<sup>122</sup> Id. at 360.

<sup>123</sup> Id. at 362.

<sup>124</sup> Davenport, 551 U.S. at 184 (2007).

entitlement to the fees of nonmember-employees.”<sup>125</sup> The crucial aspect of the Court’s reasoning was its view that the Washington statute did not restrict the way that a union spent its money by requiring nonmember approval. Rather, the statute restricted use of dues, which the Court characterized as “other people’s money.”<sup>126</sup>

Because the assertion that the statute regulated expenditure of other people’s money was so essential to the reasoning, Justice Scalia acknowledged that the union “might have had a point if, as it suggests at times, the statute burdened its ability to spend the dues of its own members” and not just the dues of nonmembers.<sup>127</sup> His opinion for the Court further noted that if the union were restricted from spending its members’ dues, the expressive associational rights of unions would be at stake. In support of this assertion, Justice Scalia cited Boy Scouts v. Dale, which suggests the Court recognized unions as expressive associations with First Amendment rights.<sup>128</sup> Implicitly, then, the Court recognized the possibility of a First Amendment dimension to a statute that burdened the union’s ability to use “its” money and expressly connected this to a somewhat newer body of case law regarding expressive associations. We turn now to those cases and explain why they are implicated by any legal rule, such as the one adopted in Harris, that regulates how a union spends money it collects from its members.

## **B. Freedom of Association, The Association, and Unions as Expressive Associations**

At least since the Supreme Court’s landmark 1958 decision in NAACP v. Alabama,<sup>129</sup> the Court recognized that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association”<sup>130</sup> and declared it “beyond debate” that freedom of association was an “inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”<sup>131</sup> The right of association unfolded, then, not as an “independent, cognate right, but rather as a means to enable free speech.”<sup>132</sup> Moreover, organizations serve as a means for individuals to best effectuate their shared goals such that an organization’s values mirror its members’.<sup>133</sup>

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<sup>125</sup> Id. at 185.

<sup>126</sup> Id. at 187.

<sup>127</sup> Id. at 187, n. 2.

<sup>128</sup> Id.

<sup>129</sup> NAACP v. State of Ala. ex rel. Patterson, 357 U.S. 449 (1958).

<sup>130</sup> Id. at 460.

<sup>131</sup> Id.

<sup>132</sup> Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978, 985 (2011); see also John D. Inazu, The Forgotten Freedom of Assembly, 84 Tul. L. Rev. 565, 568 (2010) (“This core role of assembly and its broad appeal to groups of markedly different ideologies makes it a better ‘fit’ than the right of association within our nation’s legal and political heritage.”).

<sup>133</sup> This mirroring underscores the basis for associational standing, which does not treat an entity as autonomous from its members, but rather as representative. See Hunt v. Wash. State Apple Adver.

Nearly thirty years later, in Roberts v. U.S. Jaycees, which involved a challenge to the Jaycees' bylaws forbidding all women and some men (those of a certain age) from acquiring full membership in the organization, associational rights were similarly framed "as an indispensable means of preserving other liberties."<sup>134</sup> Delineating between two types of constitutionally protected freedoms of association, "intimate" and "expressive," the Court stated that expressive association, wherein individuals decide to associate "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends,"<sup>135</sup> enjoyed constitutional protection because it facilitated an individual's exercise of her First Amendment rights.<sup>136</sup> The value of protecting collective efforts on behalf of common goals was further linked to preserving diversity of thought by ensuring that potentially unpopular and dissident viewpoints had a forum for being heard.<sup>137</sup>

While the Court recognized that the Jaycees participated in a range of First Amendment activities, it ultimately found "no basis in the record for concluding that admission of women as full voting members w[ould] impede the organization's ability to engage in these protected activities or to disseminate its preferred views."<sup>138</sup> The local chapters of the Jaycees were large and basically unselective groups. Other than sex and age, no criteria existed for judging applicants, and new members were recruited and admitted with no inquiry into their backgrounds. Moreover, nonmembers were able to participate in social functions and attend meetings. Thus, even if requiring the Jaycees to conform to the Human Rights Act would "interfere with the internal organization or affairs of the group," the Court found these interferences to be minor and therefore not likely to "impair the ability of the original members to express only those views that brought them together."<sup>139</sup>

In the years immediately following Jaycees, several legal challenges were brought against organizations pursuant to antidiscrimination statutes, providing the Court with ample opportunities to develop further its notion of what constituted expressive association. In Board of Directors of Rotary Club International v. Rotary Club, a case challenging the International Rotary Club's all-male membership policy, the Court acknowledged that while the Clubs participated "in a variety of commendable service

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Comm'n, 432 U.S. 333, 343 (1977) ("Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

<sup>134</sup> Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

<sup>135</sup> Id. at 622. The Court additionally acknowledged instances in which intimate and expressive association coincided and singled out instances "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor" as a prime example. Id. at 618.

<sup>136</sup> Id. ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed").

<sup>137</sup> Id. at 622.

<sup>138</sup> Id. at 627–28.

<sup>139</sup> Id. at 623.

activities . . . protected by the First Amendment,”<sup>140</sup> requiring the California branches to adhere to California’s Unruh Civil Rights Act did not substantially infringe the ability of the organization to participate in these activities: “[The Act]. . . does not require [the Rotary Clubs] to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community.”<sup>141</sup> Thus, any infringement that existed was ultimately too weak to defeat the State’s compelling interest in eradicating discrimination and promoting gender equality.

Likewise, in New York State Club Association v. City of New York, which involved a legal challenge brought by an association of private associations contesting an amendment to New York’s Civil Rights statute, the Court held that requiring the associations to adhere to the statute did not “affect ‘in any significant way’ the ability of individuals to form associations that will advocate public or private viewpoints.”<sup>142</sup> More recently, in Rumsfeld v. Forum for Academic and Institutional Rights, where the Court upheld the Solomon Amendment, which required law schools to allow military recruiters on their campuses, the Court stated that the law did not violate the First Amendment because students and faculty remained “free to associate to voice their disapproval of the military’s message” and “nothing about the statute affect[ed] the composition of the group by making group membership less desirable.”<sup>143</sup>

In each of these cases, then, the substance and scope of what constituted expressive association was defined in relation to infringements that either made it more difficult for organizations to participate in First Amendment activities for which they had been formed, or which made membership less attractive, or which made it more onerous for an organization to express its values internally as well as publicly. In Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, for example, a turning point in the Court’s expressive association jurisprudence, the Court held that Boston’s St. Patrick’s Day parade could exclude a group formed by gay, lesbian, and bisexual descendants of Irish Americans because a parade was “a form of expression, not just motion”<sup>144</sup> and when its organizers selected the parade’s “expressive units,” they were acting like a “composer” creating a score. To force the parade organizers to include groups that conveyed a message at odds with the organizer’s vision was therefore unconstitutional.

What began as a freedom of individuals to associate in furtherance of their shared goals and aspirations gradually morphed into a freedom of the “association qua association.”<sup>145</sup> The notion of an entity enjoying First Amendment protection severed

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<sup>140</sup> Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987).

<sup>141</sup> Id. at 548.

<sup>142</sup> N.Y. State Club Ass’n v. City of New York, 487 U.S. 1, 13 (1988).

<sup>143</sup> Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 69–70 (2006).

<sup>144</sup> Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568 (1995).

<sup>145</sup> Wayne Batchis, Citizens United and the Paradox of “Corporate Speech”: From Freedom of Association to Freedom of the Association, 36 N.Y.U. Rev. L. & Soc. Change 5, 16 (2012)

from its members, and potentially substantively distinct from its members, was indeed central to the Court's holding in Boy Scouts v. Dale that the forced inclusion of a gay scoutmaster unconstitutionally infringed the Boy Scouts' First Amendment rights as an expressive association.<sup>146</sup> Dispelling the notion that First Amendment protection of expressive association was available only to advocacy groups, the Court found that a group need only "engage in some form of expression, whether it be public or private," in order to come within the ambit of expressive association. The Boy Scouts clearly satisfied this requirement because they existed to "transmit a system of values"<sup>147</sup> to their members and the public at large, and the presence of a gay scoutmaster evidently subverted their ability to do so: "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."<sup>148</sup>

In a telling passage, the Court stated that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."<sup>149</sup> The Court's acknowledgement of an association's First Amendment rights as somehow autonomous from its members was further augmented by its suggestion that an organization could take an official position that was contrary to its members' interests and yet still protected by the First Amendment. This expansion of First Amendment protection for expressive associations aligns with the Court's expansion of First Amendment protection for corporate speech.

Unions not only satisfy the Court's articulation of an expressive association, they are the paradigmatic expressive association. They are political, expressive, and associational. They advocate for labor rights, which are—and have always been—civil rights. As Justice Frankfurter memorably remarked in his dissent in Street: "To write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation."<sup>150</sup> Indeed, it was the Court's recognition of unions as political that animated its agency-fee jurisprudence. In order to protect dissenters from subsidizing beliefs that they did not hold, the Court first had to recognize that unions were creatures of politics and ideology.

Unlike in Boy Scouts where the organization's stance on allegedly correct sexual norms was "discovered" in the context of litigation and rested almost entirely upon the expression "morally straight," which even the Court conceded was not universally

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<sup>146</sup> Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)

<sup>147</sup> Id. at 650.

<sup>148</sup> Id. at 653.

<sup>149</sup> Id. at 655.

<sup>150</sup> Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 800 (1961) (Frankfurter, J., dissenting).



understood to mean any particular thing, a union's mission, values, and civic and political posturing are unavoidably self-evident. The SEIU, for example, adopted its own constitution in order to broadcast and frame its devotion to workers' rights. Its preamble declares that "almost every improvement in the condition of working people has been accomplished by the efforts of organized labor" and that unions provide the best means for protecting "the welfare of wage, salary, and professional workers."<sup>151</sup> And in a section entitled "Our vision of society," the virtues of collective action and the importance of ensuring that workers have a meaningful voice in decisions that affect them unfold through a series of aphorisms.<sup>152</sup> This mantra is classic political speech that undoubtedly satisfies the extremely low bar that Justice Rehnquist established in Boy Scouts regarding how to discern if an association was expressive by nature and therefore protected under the First Amendment.

Moreover, many of the activities on which the Jaycees Court focused when defining what constituted an expressive association, including support for political candidates and lobbying, are routine for unions. Unions propose and back a wide range of legislation that they believe will benefit the employees they represent and file amicus briefs in appellate and Supreme Court cases. And as NRTW has gained ground and strategically deployed ballot initiatives in its fight against labor, unions spend money and other resources attempting to defeat these initiatives. In 2008, for example, the Colorado AFL-CIO in collaboration with a coalition of liberal donors entitled Protect Colorado's Future, spent close to thirty-five million dollars in an effort to prevent Colorado from becoming a right-to-work state through the adoption of Initiative 47, or Colorado Mandatory Labor Union Membership Prohibition Initiative.<sup>153</sup> One could fairly say that unions have become increasingly political as they've become increasingly threatened.

Insofar as the centerpiece of the NLRA is exclusivity, which could be described as an experiment in compelled association, unions certainly differ from the Boy Scouts, the Jaycees, and other types of membership organizations, public or private. They are creatures of a statute with an all-comers policy written into their infrastructure. To this extent, many of the expressive association cases, which focused on compelled membership in the context of antidiscrimination statutes and the ways that this compulsion might infringe an organization's ability to broadcast its message, may not be factually analogous. But the Court's underlying reasoning as to why and at what point infringements become unconstitutional is nonetheless applicable, because unions, like the Boy Scouts and the Jaycees, are expressive associations protected under the First

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<sup>151</sup> **Service Emps. Int'l Union, CTW, CLC, Constitution and Bylaws** (2008), available at <http://www.seiu.org/images/pdfs/Con.BylawsFinal3.4.9.pdf>.

<sup>152</sup> Id.

<sup>153</sup> Colorado Mandatory Labor Union Membership Prohibition Initiative 47 (2008), **Ballotpedia**, [http://ballotpedia.org/Colorado\\_Mandatory\\_Labor\\_Union\\_Membership\\_Prohibition\\_Initiative\\_47\\_\(2008\)](http://ballotpedia.org/Colorado_Mandatory_Labor_Union_Membership_Prohibition_Initiative_47_(2008)) (last visited Oct. 29, 2014).

Amendment, regardless of whether they also possess unique statutory rights and obligations.<sup>154</sup>

### C. Subsidizing Free Riders and Subsidizing Union Speech

Harris held that compelled agency fees violate dissenters' First Amendment rights because the fees force dissenters to subsidize speech. As we have shown, unions and their members also possess their own First Amendment rights. Therefore, under the Harris rule, the duty of fair representation requires unions and their members to subsidize speech – bargaining, contract administration, and even lobbying for legislation to benefit workers – on behalf of nonpaying nonmembers. The majority in Harris acknowledged the fact of the subsidy but dismissed its significance because the subjects of bargaining are quite limited under Illinois law and because the union apparently does not have to represent individual workers in grievance proceedings. This was crucial to the holding in Harris because, as Justice Scalia explained in Lehnert, “[w]hat is distinctive ... about the free riders who are nonunion members of the union's own bargaining unit is that ... they are free riders whom the law *requires* the union to carry--indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. ... Thus, the free ridership (if it were left to be that [without the union's ability to charge fees]) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.”<sup>155</sup> Even if the Harris majority were right about the facts, its argument goes to the magnitude of the compelled subsidy, not its existence. And the Court has never held that compelled payments to unions do not violate the First Amendment just because they are small. Insofar as the Court is willing to treat collective bargaining and germane activities as speech entitled to First Amendment protection, forcing unions to engage in these activities without compensation also implicates the First Amendment, first, by compelling the union to speak on behalf of dissenters and second, by forcing unions to use members' dues to subsidize this speech.

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<sup>154</sup> Additionally, while union members' First Amendment claims parallel unions', possibly the force of members' claims is slightly different. One can imagine a variety of reasons why a person might decide to contribute full membership dues to her union, ranging from inertia to self-interest to politics. In a right to work state, where an individual has a choice between paying nothing and paying full dues – and in a non-right-to-work state where that choice is between an agency fee and full dues – the decision to pay full dues is potentially legally significant. Indeed, to the extent that an individual voluntarily pays full dues in order to support her union's political activities, this payment could be treated as a political expenditure entitled to vigorous First Amendment protection. During oral argument at the Indiana Supreme Court in Sweeney v. Zoeller, a companion case to Sweeney v. Pence, brought by the International Union of Operating Engineers, a local AFL-CIO branch, Justice David proposed a similar argument when he suggested that “members, not the union itself, are having property taken from them. “You are forcing people who still want to pay dues to subsidize those who don't.” See Barb Berggoetz, Right-to-work law: Now in the Hands of Indiana Supreme Court, **Indy Star** (Sept. 4, 2014 7:38 AM), <http://www.indystar.com/story/news/politics/2014/09/04/indiana-supreme-court-hear-right-work-arguments-today/15058763/%20>.

<sup>155</sup> Lehnert, 500 U.S. at 556 (Scalia, J.) (internal punctuation omitted).

In Sweeney v. Pence, the Seventh Circuit entertained and ultimately rejected similar First Amendment arguments raised by a union challenging Indiana’s new right-to-work law on statutory and constitutional grounds.<sup>156</sup> The union argued that Indiana’s right-to-work law was unconstitutional because it enabled “free riders to infringe on union members’ First Amendment free speech rights and . . . allow[ed] free riders to infringe on the right of union membership,” which implicated associational and assembly rights protected under the First Amendment.<sup>157</sup> Recognizing that unions have a First Amendment right to express political and social views, the majority opinion observed that the stronger of the union’s arguments pertained to how right-to-work laws “siphon[ed] valuable Union resources away from the Union’s political activities.”<sup>158</sup> Thus, the majority acknowledged what might be called a diversion theory: because unions rely solely on membership dues, “right-to-work laws effectively tax the First Amendment activities of unions and their members by reducing the amount of money unions have to spend on First Amendment activity.”<sup>159</sup>

However, the majority found this argument “undercut by three long-standing principles”: first, “unions have no constitutional entitlement to the fees of nonmembers”<sup>160</sup>; second, and “more relevantly, the First Amendment protects the right to be free from government abridgement of speech but it does not require the government to assist others in funding the expression of particular ideas, including political ones”<sup>161</sup>; third, and here the majority pointed to Harris, the Supreme Court has both affirmed the First Amendment interests of dissenters and also indicated that “free-rider arguments are generally insufficient to overcome First Amendment objections.”<sup>162</sup> Because the decision not to subsidize a fundamental right does not in itself constitute an infringement of that right, the majority determined that Indiana’s right-to-work law did not abridge the First Amendment and should thus be evaluated under rational basis, which the law easily passed.<sup>163</sup>

Judge Wood, dissenting, asserted that federal law preempts Indiana’s right-to-work law and that the constitutional questions raised by right-to-work laws need not be addressed.<sup>164</sup> Since the majority found no federal preemption, however, Judge Wood suggested that the law’s constitutionality should be evaluated under the Takings Clause of the Fifth Amendment because it compelled one private party (the union) to give property to another private party (the dissenting nonmember) in the form of services that

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<sup>156</sup> Sweeney v. Pence, 767 F.3d 654, 665 (7th Cir. 2014).

<sup>157</sup> *Id.* at 668.

<sup>158</sup> *Id.*

<sup>159</sup> Fisk & Chemerinsky, *supra* note 8, at 1033. We address the diversion theory *infra* in text accompanying note 181.

<sup>160</sup> Sweeney, 767 F.3d at 668 (citing Knox)

<sup>161</sup> *Id.* at 668–69.

<sup>162</sup> *Id.* at 669 (citing Harris)

<sup>163</sup> *Id.* at 669, 671; see also Olney, note 112 at X (discussing the subsidized speech doctrine in relation to labor law)

<sup>164</sup> *Id.* at 671, 680 (Wood, J., dissenting).

cost money.<sup>165</sup> In this respect, Indiana’s right-to-work law functionally mirrored the state laws at issue in the IOLTA cases,<sup>166</sup> which compelled clients to donate money to legal foundations and which the Supreme Court had assessed under the Takings Clause.<sup>167</sup>

Rejecting the majority’s contention that a union’s “seat at the bargaining table” sufficiently compensated the union for having to financially subsidize nonmembers, Judge Wood emphasized the extraordinary costs that exclusivity imposed upon unions and the “asymmetry embedded in this system” whereby a union must represent all workers in a bargaining unit, expending significant financial resources on costly arbitration and grievance processes, while an individual can decide to opt out entirely of providing any financial support to the union.<sup>168</sup> As Judge Wood’s noted, this system generated the kind of “classic ‘free rider’ problem” that exists whenever a collective good is involved.<sup>169</sup> Because Indiana’s law failed to include a solution to the free rider problem, the law implicated “issues of constitutional magnitude,” which Judge Wood likened to “a rule providing that, as a condition of receiving a business license in a city, a company selling gasoline had to give it away to any customer who did not want to pay.”<sup>170</sup>

Our focus in this Article pertains to the First Amendment issues that arise when unions are forced to engage in collective bargaining and other germane activities without just compensation. However, the common ground between our argument and Judge Woods rests with the role that agency fees play in ensuring that competing constitutional rights are mutually respected, which we discuss at greater lengths below.

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<sup>165</sup> In an identical challenge to Indiana’s right-to-work law in state court, the trial court declared the law unconstitutional under the Takings Clause. Sweeney v. Zoeller, No. 45D01–1305–PL–52 (Super. Ct. of Lake Cnty. Sept. 5, 2013). However, this decision was recently reversed by the Indiana Supreme Court. Zoeller v. Sweeney, No. 45S00-1309-PL-596, 2014 WL 5783599 (Ind. Nov. 6, 2014). The Court did not completely reject the argument that the right-to-work law had the effect of a “taking” from the union. Rather, the Court stated that this effect was not the consequence of state law but of the union’s federal obligation to represent all employees in a bargaining unit fairly. Furthermore, the Court suggested that this federal obligation was “optional” insofar as it “occurs only when the union elects to be the exclusive bargaining agent, for which it is justly compensated by the right to bargain exclusively with the employer.” Id. In a concurring opinion, Judge Rucker emphasized that the majority’s holding did not preclude a future as-applied challenge to the law and indicated the need for a more developed factual record demonstrating that the “law operates in such a way as to have actually eliminated or reduced its compensation from dues or “fair share” payments . . . [and] that upon expiration of a valid union security agreement, [a union] was unable to operate in a manner that would allow [it] to charge all of its members for the services the Union provided them. Id. (Rucker, J., concurring). (Whether a union can disclaim its status as exclusive representative in a right-to-work state is, at best, uncertain. One of us has argued that current labor law may allow it, but the National Labor Relations Board currently appears to think otherwise. See Fisk & Sachs, supra note 34 at 866–73.)

<sup>166</sup> See Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003); Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998).

<sup>167</sup> Id. at 674

<sup>168</sup> Id. at 673.

<sup>169</sup> Id.

<sup>170</sup> Id. at 683.

## V. Union Representation in the Post-Harris World

Harris is almost certainly not the last word on constitutional challenges to union representation on the basis of exclusivity and majority rule. One obvious implication of the Court's decision in Harris, as the Justices realized at oral argument, is that if payment of fees to a union is compelled speech in violation of the First Amendment, then appointment of a union to speak on behalf of dissenting employees would equally appear to be compelled speech. While the NRTW lawyer backed away from (though did not disavow) this argument in the Harris oral argument, NRTW has already brought litigation challenging exclusivity under the Railway Labor Act.<sup>171</sup> On the other side, as we have shown, once the First Amendment rights of unions and union members are recognized, an interpretation of the duty of fair representation in a right-to-work state becomes acutely troubling on constitutional grounds because the confluence of exclusivity and the duty of fair representation forces unions to provide free legal services to free riders in right-to-work states. In this light, the law as it existed in non-right-to-work states prior to Harris looks like a reasonable accommodation of the competing First Amendment concerns. The union owes all employees it represents a duty of fair representation, and it can charge all the cost of its representational services, but it cannot charge dissenters for political speech unrelated to its role as exclusive bargaining representative.

### A. Modifying the Duty of Fair Representation in the Right-to-Work Regime

The judicially created duty of fair representation originally emerged to address racial discrimination in employment. In Steele v. Louisville & N.R. Co., the Court recognized that a union's power to serve as an exclusive representative came with a corresponding duty to represent all employees fairly.<sup>172</sup> In a series of cases between 1944 and 1967 when Vaca v. Sipes was decided, the Court continued to develop the substance of this duty.<sup>173</sup> By the time the Court decided Vaca, establishing a union's duty to represent employees in contractual grievance arbitration, the duty of fair representation was described as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law," suggesting

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<sup>171</sup> Serna v. Transp. Workers Union of Am. AFL-CIO, No. 3:2013cv02469 (N.D. Tex., filed June 27, 2013).

<sup>172</sup> Steele involved a group of black fireman who accused their union of amending an existing collective bargaining agreement to exclude them from service, job promotions, and assignments to permanent vacancies. The Court held that the union had a duty to exercise its power as exclusive representatives in a nondiscriminatory manner and inferred this duty from the principle of exclusivity. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 192, 194–97, 207 (1944).

<sup>173</sup> See Bonventre, supra note 5, at 10–11 (surveying the evolution of the duty of fair representation).

that it had matured into a federal common law obligation.<sup>174</sup> However, the duty of fair representation was never intended to force unions to represent nonpaying members for free. It emerged to protect workers, not to undercut unions.

Although the desire to protect workers from arbitrary, discriminatory, or bad faith practices persists, the way that the Court has interpreted this duty, as we have discussed above, raises robust constitutional concerns in the right-to-work context on a few levels. Any union operating in a right-to-work state is still obliged to bargain in good faith on behalf of all employees, including employees who have decided to opt out entirely of paying any union dues. Therefore, in right-to-work states, unions are required by federal labor law, and often by state statute, to negotiate and engage in contract arbitration on behalf of employees who contribute absolutely nothing to the union.<sup>175</sup> And if a governing collective bargaining agreement incorporates statutory rights, then unions also have a duty to represent employees in their statutory claims.<sup>176</sup>

After *Harris*, uncompensated union representation itself implicates the First Amendment because the majority treats things like negotiation over wages as political and therefore as compelled speech. Under the same logic, then, when unions are required to engage in such activities on behalf of nonpayers, this also constitutes compelled speech, only of the union and its members. Secondly, and this is more in keeping with the diversion theory, when unions are forced to use their general treasury funds to subsidize the costs of these services, this drains a union's reserves, directly affecting its abilities to spend on First Amendment activities including, most importantly, political speech.<sup>177</sup>

The Supreme Court analyzes both compelled speech and the regulation of political expenditures using strict scrutiny.<sup>178</sup> However, prior to *Harris* no case other than *Knox* had used strict scrutiny to evaluate a compelled subsidy, and as both Justice Scalia noted in a footnote in *Johanns* and as Robert Post has persuasively in a number articles, compelled subsidies of speech present different (and, in our view, lesser) First

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<sup>174</sup> *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); see also *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 64 (1975) (“[W]e have held, by the very nature of the exclusive bargaining representative's status as representative of all unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit.”).

<sup>175</sup> In *Restoring Equity in Right-to-Work Law*, Professors Fisk and Sachs contend that this “confluence of federal and state rules . . . creates an inequity in U.S. labor law that calls for resolution” and suggest three novel solutions for resolving the resultant inequities. While their focus is statutory, this essay is solely concerned with the constitutional claims that emerge when unions are forced to use union members' dues to subsidize negotiation and contract arbitration. Nonetheless, and as discussed in the conclusion, the solutions they devise are equally amenable to the constitutional quagmire. Fisk & Sachs, supra note 34 at 859.

<sup>176</sup> *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 271 (2009).

<sup>177</sup> See Fisk & Chemerinsky, supra note 8 at 1033.

<sup>178</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010); *Meyer v. Grant*, 486 U.S. 414, 423–24 (1988); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

Amendment issues than compelling actual speech.<sup>179</sup> Assuming the Court were to treat the compelled speech or subsidy effected by the duty of fair representation in the right-to-work context as compelled speech, a right-to-work law would be constitutionally viable only if the government could demonstrate that there was a compelling interest in requiring unions to continue to negotiate and grieve their nonmembers' complaints without receiving just compensation and that this duty was narrowly tailored to effectuate this interest. We believe that the duty of fair representation and exclusive representation do serve a compelling governmental interest but that there is no legitimate governmental interest in requiring a union to do so for free. Rather, it has been settled since the Court rejected a substantive due process attack on the National Labor Relations Act in 1937<sup>180</sup> that the government has an interest in regulating labor relations through a bargaining agent chosen by a majority but empowered to speak on behalf of all, and also that the government has a strong and wholly legitimate interest in enabling unions to charge employees for the services that the union is required by law to provide.

Although there exists a compelling interest in ensuring that all members of a bargaining unit receive adequate and equal representation by their union and in protecting dissenters' First Amendment rights, so, too, is there a compelling interest in protecting the First Amendment rights of unions and union members. The duty of fair representation is narrowly tailored to effectuate these competing interests and, by extension, to effectuate Congress' broader interest in promoting industrial democracy if it allows the union to charge all those whom it represents for the cost of doing so. Even the majority in Sweeney v. Pence suggested that modifying the duty of fair representation in the right-to-work context might be an appropriate solution for protecting a union's First Amendment interests.<sup>181</sup> Indeed, it is hard to imagine why Congress would have pursued exclusivity while at the same time allowing states to statutorily forbid unions from obtaining compensation for their services. Put another way, why would Congress adopt such robust federal legislation, which aimed to stabilize labor relations on a national scale and which "entrusted administration of the labor policy for the Nation to a centralized administrative agency,"<sup>182</sup> while simultaneously ensuring that this statutory scheme could be entirely undone by the states? To the extent that the duty of fair representation in the right-to-work context undermines the very spirit and purpose of the NLRA, we believe that it is both timely and necessary to reconceive the contours of this duty in a context-

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<sup>179</sup> Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2289 (2012); Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 n.8 (2005) (noting that compelled speech "differs substantively from the compelled subsidy analysis"); see also Post, Compelled Subsidization, supra note 77. .

<sup>180</sup> National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937).

<sup>181</sup> Sweeney v. Pence, 767 F.3d 654, 666 (7th Cir. 2014) ("[T]he dissent has not explained why the proper remedy would be to strike down Indiana's right-to-work statute rather than striking down or modifying the federal law imposing on all unions the duty of fair representation, in right-to-work states and non-right-to-work states alike.").

<sup>182</sup> Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 290 (1986) (citing San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 242 (1959)).

specific manner. For example, one can envision a variety of avenues that would offer better protection for all of the implicated interests, from unions being able to charge on a case-by-case basis for representational services<sup>183</sup> to members-only bargaining in right-to-work regimes.<sup>184</sup>

## **B. Fair Share Fees – a Reasonable Compromise?**

As we have explained, language in the majority opinion in Harris suggested that at least Justice Alito thinks Abood should be overruled because the line between political and nonpolitical speech in the public sector setting is too difficult to draw. In his view, government employee pay and working conditions are political issues because they affect Medicaid funding and the state budget. If that is right, not only might he think that all government employment should be strictly on a right-to-work basis but also that public employee bargaining must be on a members-only basis. If it violates a worker's First Amendment right to have the union spend her money to advocate positions in bargaining with which she disagrees, why does it not violate her rights even more strongly to have the union speak on her behalf?

We, on the other hand, have argued that there is no First Amendment incursion when a union collects money to represent employees because the compulsory payment of agency fees is not speech, does not limit a dissenter's speech rights, and rather should be regarded as part of a scheme of economic regulation. (We will leave for another article the task of explaining why exclusive representation is not compelled speech.)

A variety of relatively extreme positions thus have some First Amendment support –

Ours: that all the dues objector cases were wrong and there is no First Amendment problem with contracts requiring all represented employees to pay an amount equal to full union dues and, in the alternative, that right-to-work laws violate the First Amendment rights of unions to the extent they compel unions to provide free representational services to nonpayers.

The current Court's: that some public employment must be on a right-to-work basis.

The National Right to Work Committee's: that all public sector bargaining must be on a right to work basis and, even more radically, that union representation on the basis of exclusivity violates the First Amendment.

Perhaps a compromise is in order.

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<sup>183</sup> See, e.g., *Cone v. Nevada Serv. Employees Union/SEIU Local 1107*, 998 P. 2d. 1178, 1182-83 (Nev. 2000)(holding that a law allowing unions to charge for representational services on a case-by-case individual basis did not offend Nevada's right-to-work regime because exclusivity established a "mutuality of obligation").

<sup>184</sup> See Fisk & Sachs, supra note 34 at 866-73.



In Street, Justice Brennan emphasized that “[t]o attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other.”<sup>185</sup> By forcing unions to spend “other people’s money,” i.e., their full-paying members’ dues that have been specifically earmarked for core political speech and activities, the Court has allowed the First Amendment rights of dissenters to trump the First Amendment rights of unions and members. Yet, this makes little sense. If a fair share provision is premised on the idea that one can delineate between what is and is not political in terms of members’ dues, then why should the financial support that goes to collective bargaining enjoy greater First Amendment protection than the financial support that goes to support a political candidate? That is to say, why should the dues that go to support what the Court itself has framed as less political activities sustain stronger First Amendment claims than the dues that members have willingly contributed for political purposes?<sup>186</sup>

Although agency-fee provisions were originally designed to protect the First Amendment rights of nonmembers, once the First Amendment interests of unions and union members are thrown into the mix, agency-fee provisions acquire even stronger constitutional support. Arguably, they protect three sets of interests simultaneously: nonmembers from having to subsidize the political and ideological pursuits of the union, union members from having to subsidize the political and ideological beliefs of nonmembers, and unions who strive to protect their workers’ interests and can only do so when they are able to fully participate in the political landscape. To this extent, then, and to borrow the language of strict scrutiny, agency fees are narrowly tailored or the least restrictive means of effectuating these competing interests.

## **VI. Conclusion**

Unions are one of a number of organizations that are empowered and required by law to speak on behalf of people and also are one of a number on which regulatory regimes rely to provide services and manage people. They are similarly not unique in using money raised from those whom they represent to speak and act on behalf of those whom they represent. But unions are in a class by themselves in terms of the legal

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<sup>185</sup> Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 773 (1961).

<sup>186</sup> Harris, of course, suggests that the division between political and nonpolitical expenditures is difficult if not impossible to draw in the public sector context. Thus, Harris subverts what we have been referring to as a diversion theory whereby money intended for one type of activity transforms into a subsidy for another type of activity that enjoys less First Amendment protection than the first. However, until Abood is overturned, it is Harris and not Abood that is the anomaly. And regardless, in right-to-work states, public and private sector unions are both forbidden from including agency fees in their collective bargaining agreements, and even the Harris majority recognized that in the private sector, bargaining over wages is not political.

controversy around their status as representatives and, especially, their ability to charge fees for the services they provide. We have argued that the First Amendment controversy about union fees was misguided from the start, and Harris v. Quinn made it substantially worse.

While, in our view, the requirement to pay for legal services is not compelled speech, the Court's entire agency fee jurisprudence, including Harris, insists that it is. If this is the case, however, laws and contracts that require unionized employees to pay for union representational services compel speech of dissenters exactly to the same extent that their prohibition compels speech of unions and their members. Once the First Amendment rights of unions and union members are recognized, agency fee or fair share provisions emerge as a constitutionally sound accommodation of the interests of dissenters, unions, and union members.

Many in the labor community believe that the Supreme Court's assault on agency fees—and unions more generally—suggests that unions must strive to convert agency fee payers into full-paying members. The SEIU and AFL-CIO have been engaged in aggressive and largely successful efforts to do just that. And, as we have argued, unions and union members possess strong First Amendment claims and, we believe, now is the time to begin developing these claims in the context of litigation. Thus, while the Court may have turned its back on labor, we remain hopeful that this might generate positive effects for the movement.