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Preparing to Open Up Shop: How the Supreme Court Set the Stage to Prohibit Public-Sector Agency-Shop Provisions in *Harris v. Quinn*, 134 S. Ct. 2618 (2014)

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Note*

Preparing to Open Up Shop: How the Supreme Court Set the Stage to Prohibit Public-Sector Agency-Shop Provisions in *Harris v. Quinn*, 134 S. Ct. 2618 (2014)

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I. INTRODUCTION

Detroit was once a flourishing American city. With the help of Henry Ford and his revolutionary production techniques, Detroit quickly established itself as the epicenter of the American automobile industry.¹ President Roosevelt later used this industrial might to create what was called an “Arsenal of Democracy” during World War II.² In the 1960s, a new Detroit “factory” emerged; this one geared more towards producing hit music and a sound that defined a culture.³ This blend of blue-collar work ethic and creative genius embodied the American Dream.

Fifty years later, the story is considerably different. Now, Detroit is a “ghost town.”⁴ The city’s once massive population has deteriorated at an alarming rate, with parts of the city now completely abandoned due to rapid population decline.⁵ Growing budget issues led

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1. Brian Palmer, *How Did Detroit Become Motor City?*, SLATE (Feb. 29, 2012, 5:59 PM), http://www.slate.com/articles/news_and_politics/explainer/2012/02/why_are_all_the_big_american_car_companies_based_in_michigan.html, archived at <http://perma.unl.edu/SQ62-VLPD> (explaining Detroit’s natural advantages, such as being the home of Henry Ford, its abundance of iron ore, the accessibility of its shipping routes, and, to a certain extent, luck).
 2. Arthur Herman, Op-Ed., *The Arsenal of Democracy: How Detroit Turned Industrial Might into Military Power During World War II*, THE DETROIT NEWS (Jan. 3, 2013, 1:00 AM), <http://www.detroitnews.com/article/20130103/OPINION01/301030336>, archived at <http://perma.unl.edu/LL3Y-6YH7>.
 3. *A Brief History of Motown Records*, PAN-AFRICAN NEWS WIRE (Dec. 25, 2006), http://panafricannews.blogspot.com/2006/12/brief-history-of-motown-records-born_25.html, archived at <http://perma.unl.edu/ZJ4N-T7CS> (describing Detroit’s development as “Hitsville USA”).
 4. Paul Harris, *How Detroit, the Motor City, Turned into a Ghost Town*, THE GUARDIAN (Oct. 31, 2009, 8:08 PM), <http://www.theguardian.com/world/2009/nov/01/detroit-michigan-economy-recession-unemployment>, archived at <http://perma.unl.edu/37PL-5JHJ>.
 5. See John Reeves, *19 Shocking Facts About Detroit’s Bankruptcy*, USA TODAY (Dec. 3, 2013, 9:20 AM), <http://www.usatoday.com/story/money/personalfinance/2013/12/02/19-facts-about-detroit-bankruptcy/3823355/>, archived at <http://perma.unl.edu/FL5H-7WWX>. In 2012, Detroit’s population was 684,799, down 63% from 1,849,600 in 1950. The ripple effect of this exodus can be seen in the city’s infrastructure, as 40% of streetlights no longer function, half of Detroit’s parks are now closed, and an estimated 78,000 structures have been abandoned. *Id.*

Detroit to file for bankruptcy—the largest municipality to ever do so.⁶ Numerous factors contributed to the collapse: the decline of the American automobile industry, lack of political leadership, social unrest, the list goes on.⁷ Furthermore, like a frightening number of cities, Detroit is also burdened by unfunded pension liabilities that will require leaders and employees to work together to reach a balanced and economically sustainable plan.⁸

Detroit's struggles became a national concern when the United States government issued a massive bailout to save the automobile giants in late 2008.⁹ Public institutions—like Detroit Public Schools—are similarly crippled, but must forge their own path forward without a bailout. That leaves Jack Martin, the Detroit Public Schools' Emergency Manager, with the unenviable task of shedding

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6. *Id.* Although the exact level of debt is unclear, estimates place the figure between \$18 and \$20 billion. Detroit's revenue has dropped 40% since 1962, resulting in a projected negative cash flow of almost \$200 million for the 2014 fiscal year alone. *Id.*
 7. See generally Tom Krisher & Dee-Ann Durbin, *Detroit and Bankruptcy: How a Once-Great American City Endured Decades of Decay*, HUFFINGTON POST (Sept. 17, 2013, 5:12 AM), http://www.huffingtonpost.com/2013/07/18/detroit-and-bankruptcy-decay-how-went-bankrupt-why_n_3620004.html, archived at <http://perma.unl.edu/KV48-3LR9>.
 8. *Id.* Reports indicate \$3.5 billion of the city's debt stems from unfunded pension liability to retired workers. Detroit recently proposed a plan in which pensioners would receive approximately 60% of their scheduled, yet currently unfunded payments. While these cuts would hurt those who rely on publicly-funded pension plans, it is considered by most to be pensioner-friendly and all major civil unions have approved of it. Nathan Bomey, *Detroit's Bankruptcy Battle Begins*, USA TODAY (Aug. 31, 2014, 3:28 PM), <http://www.usatoday.com/story/news/nation/2014/08/31/detroit-bankruptcy-trial-begins/14899547/>, archived at <http://perma.unl.edu/X9LY-VLH4>. The bankruptcy plan was approved by a federal judge in November 2014—an important step on the road to recovery. Nathan Bomey, Matt Helms & Joe Guillen, *Judge OKs Bankruptcy Plan; a "Miraculous" Outcome*, DETROIT FREE PRESS (Nov. 7, 2014, 9:34 PM), <http://www.freep.com/story/news/local/detroit-bankruptcy/2014/11/07/rhodes-bankruptcy-decision/18648093/>, archived at <http://perma.unl.edu/V326-UP5N>. Detroit is not unique in regards to pension-related troubles. See, e.g., Michael A. Fletcher, *In San José, Generous Pensions for City Workers Come at Expense of Nearly All Else*, WASH. POST (Feb. 25, 2014), http://www.washingtonpost.com/business/economy/in-san-jose-generous-pensions-for-city-workers-come-at-expense-of-nearly-all-else/2014/02/25/3526cd28-9be7-11e3-ad71-e03637a299c0_story.html, archived at <http://perma.unl.edu/34Q3-A3B9> (discussing drastic cuts to public services as a result of civil pension plans guaranteeing retired public workers up to 90% of their former salaries, and the political battle that has ensued to curb these negative effects).
 9. David Rodgers & Mike Allen, *Bush Announces \$17.4 Billion Auto Bailout*, POLITICO (Dec. 19, 2008, 8:22 AM), <http://www.politico.com/news/stories/1208/16740.html>, archived at <http://perma.unl.edu/XKJ9-9FHE> (reporting President Bush signed a \$17.4 billion bailout for General Motors and Chrysler in order to avoid a "disorderly bankruptcy").

\$127 million in accumulated debt.¹⁰ The problem stems in part from a decline in student enrollment¹¹ and widespread poverty, but it is the teachers union's ability to impact policy that most complicates matters.¹² While unions are in the midst of a noticeable decline,¹³ teachers' unions remain strong, thanks in part to the Supreme Court's decision in *Abood v. Detroit Board of Education*.¹⁴ Decided in 1977, *Abood* upheld teachers' unions' right to exact "fair-share" payments from non-members—that is, fees for collective-bargaining costs, but not political and ideological union expenditures.¹⁵

In *Harris v. Quinn*,¹⁶ the Supreme Court had the opportunity to re-examine its previous holding and determine whether *Abood's* reasoning withstood renewed scrutiny, or alternatively, whether the precedent was broad enough to encompass quasi-public employees like the state-subsidized home health care aides challenging the compelled union dues. In a 5–4 decision, the majority found the circumstances distinguishable from *Abood* and ruled the fair-share provision unconstitutional.¹⁷ By distinguishing from *Abood*, fair-share provisions remain valid for full-fledged public employees. The decision still gives organized labor reason to worry, however, as Justice Alito and four other Justices methodically criticized the reasoning upon which *Abood* rests.¹⁸

This Note argues the logical criticism provided in *Harris*, the current political environment, and harsh economic realities suggest the Supreme Court will likely adopt a more reasonable rule in the near future.¹⁹ This new rule would require the Supreme Court to defini-

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10. Jennifer Chambers, *Detroit School District Cancels Staff Pay Cut, Larger Class Sizes*, THE DETROIT NEWS (Aug. 26, 2014, 11:38 PM), <http://www.detroitnews.com/story/news/education/2014/08/26/detroit-school-district-cancels-staff-pay-cut-larger-class-sizes/14632141/>, archived at <http://perma.unl.edu/CYH8-TTVK>. Contributing to the district's debt is the \$53 million it pays annual for legacy debt, that is, payments due to retired school employees for pension plans and other benefits. *Id.*
 11. *Id.* ("The district, which once had 300,000 students, has seen enrollment shrink below 50,000.")
 12. *Id.* Martin originally proposed a plan involving pay cuts for teachers and administrators and increased class sizes that would save around \$21 million per year. He changed the plan after significant teacher backlash, thus any proposed resolution remains very much in limbo. *Id.*
 13. See *infra* subsections II.A.2–3.
 14. 431 U.S. 209 (1977).
 15. *Id.* at 236. To be clear, the decision ruled fair-share provisions constitutional for all public employees, not just teachers.
 16. 134 S. Ct. 2618 (2014).
 17. *Id.* at 2638.
 18. *Id.* at 2630–34.
 19. Anti-public-sector unionism sentiment may be gaining prominence, but scholars have long been highlighting the inherent differences between public-and private-sector labor. See, e.g., HARRY H. WELLINGTON & RALPH K. WINTER, JR., THE UNIONS AND THE CITIES: STUDIES OF UNIONISM IN GOVERNMENT (1972) (providing per-

tively overrule *Abood*, and hold that fair-share provisions in the public sector amount to compelled speech and are therefore subject to strict First Amendment scrutiny. As was determined in *Harris* and will be argued here, these arrangements fail such analysis.

Part II of this Note provides an overview of unions, their development, and their current role in American labor. Part II also discusses prior judicial treatment of union security arrangements, particularly fair-share provisions.²⁰ Part III describes the facts in *Harris*, the holding, and the reasoning used by the majority to reach its decision. Justice Kagan's dissenting opinion raises some meritorious points and is also discussed.²¹ Lastly, Part IV posits that the Court should have completely overturned *Abood*, instead of merely distinguishing from it. The majority was correct to criticize *Abood*, and though precedent should typically be respected, there was—and will continue to be—sufficient justification to overturn it here. Nonetheless, *Harris* is already changing organized labor and likely indicates the majority's willingness to remedy *Abood's* flawed rule as early as the 2016 Term.²²

II. BACKGROUND

A. A Brief History of Organized Labor in the United States

The United States sought to take full advantage of the massive economic boom that followed the industrial revolution, and accordingly took a laissez-faire approach to business regulation during the nineteenth and early-twentieth centuries.²³ Big business, Congress, and the courts formed a triumvirate that kept unionism on the outskirts of

haps the seminal argument that public-sector labor is different than private-sector labor); Harry C. Katz, *Is U.S. Public Sector Labor Relations in the Midst of a Transformation?*, 66 INDUS. & LAB. REL. REV. 1031 (2013) (focusing on the political component of public-sector organized labor).

20. See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Ry. Emps. Dep't. v. Hanson*, 351 U.S. 225 (1956).

21. *Harris*, 134 S. Ct. at 2644–58.

22. As will be discussed *infra*, the Supreme Court granted certiorari in *Friedrichs v. California Teachers Ass'n*, No. 13–57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015). The case is virtually identical to *Abood*, and therefore the Court will be forced to affirm or overturn its precedent.

23. Renee L. Powell, Comment, *The State of Unions in America: "Chipping" Away at the Union "Block,"* 23 J. MARSHALL L. REV. 707, 710–11 (1990) ("The Industrial Revolution served as the catalyst to the growth of unions in the United States The government, eager to see the United States become a highly competitive industrialized nation, allowed businesses to carry on virtually unregulated.").

American labor.²⁴ In 1926, unions scored their first sizable victory with passage of the Railway Labor Act (RLA), which allowed rail employees to unionize.²⁵ However, it was not until Congress enacted the Wagner Act, now known as the National Labor Relations Act (NLRA), that unionization truly began to grow.²⁶

1. *Unions Revolutionize American Labor*

Unions burst onto the labor scene almost immediately after the NLRA went into effect.²⁷ In two short decades—from the mid-1930s to the early-1950s—organized labor became a prominent feature of the American labor environment. Fueled first by the Great Depression and later the post-World War II economic boom, union membership density peaked in 1953.²⁸ The rise in population and emergence of public labor unions helped the absolute number of union members grow until 1979, when overall union membership reached its apex at approximately 21 million.²⁹ This strength in numbers helped create

24. *See id.* at 712–13 (discussing business supporters’ use of criminal conspiracy charges, various civil remedies, and questionable application of the Sherman Anti-Trust Act to stifle union activity).

25. Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151–88 (2012)); *see also* Powell, *supra* note 23, at 714 (“Unions finally won the battle, however, with the passage of the [RLA] in 1926. Congress enacted the RLA to establish the rights of railroad employees to form and join unions.”). Congress initially tried to promote unionization by adopting the Clayton Anti-Trust Act to supersede the Sherman Anti-Trust Act and exclude unions from anti-trust claims, but the imprecise language prompted courts to construe the legislation narrowly, thus harming unions and running contrary to legislative intent. *Id.* at 713–14.

26. *See* National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69 (2012)); *see also* Powell, *supra* note 23, at 707 (“With the passage of the [NLRA] in 1935, unions first derived the authority to represent employees in the workplace . . . [T]he passage of the NLRA enabled unions to survive in America.”). The organized labor landscape continued to undergo transformations as Congress’ view of labor unions changed. For instance, in 1947, Congress overrode President Truman’s veto to pass the Taft-Hartley Act as an amendment to the NLRA. The employer-friendly provisions (e.g., prohibitions on closed-shop provisions and limitations on union-shop provisions) led organized labor proponents to refer to it as the “Slave Labor Act.” A. H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 STAN. L. REV. 945, 949 (1986).

27. *See* Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 MINN. L. REV. 1637, 1638 (2014) (“In 1937 alone, U.S. unions grew by 55%, 55% in a single year.”).

28. *Id.* (defining density as the percentage of members in the workforce who belong to a union, meaning the ratio of union to non-union employees has been declining since 1953); *see also* William John Bux & Miranda Tolar, *Houston Janitors and the Evolution of Union Organizing*, 70 TEX. B.J. 426, 426 (2007) (“In 1953, more than one-third of all private sector workers in the United States were union members.”).

29. GERALD MAYER, CONG. RES. SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES 10 (2004), archived at <http://perma.unl.edu/779R-HSGW>; *see also* News

powerful negotiating leverage that can still be seen today, as unionized workers receive roughly \$10,500—or over twenty-five percent—more annually than their non-unionized counterparts on average.³⁰

2. *The Shifting (and Dwindling) Union Landscape*

Since its peak, union membership has been on a steady, but significant decline. The most recent statistics from the Bureau of Labor Statistics reveal that only 11.1% of wage and salary workers, or 14.6 million individuals, currently belong to a union.³¹ Accompanying this general decline is a “revolutionary” transformation of the prototypical union member.³² Historically, unions existed primarily in the private sector, but the roles have drastically reversed. “The percentage of the private-sector workers that [are] union members declined more than five-fold from 37% [in 1960]” to just 6.6% in 2013.³³ Conversely, “the percentage of the public sector work force who [are] union members [has] increased nearly four-fold, from 9.8% in 1960” to 35.7% in 2014.³⁴ Public-sector unionism reached a milestone in 2009 when it

Release, Bureau of Labor Statistics, Union Members—2014 (Jan. 23, 2015), archived at <http://perma.unl.edu/7VJW-34AD> [hereinafter BLS News Release] (“In 1983, the first year for which [reliable union data was] available, the union membership rate was 20.1 percent, and there were 17.7 million union workers.”).

30. See BLS News Release, *supra* note 29. It should be noted there are other factors that help to account for this disparity, including the differences in educational requirements and geographic influences. *Id.*
31. *Id.* This represents nearly a twenty percent drop since 1983 for a net reduction of 3.2 million employees. These numbers are largely unchanged from figures reported in 2012. See also R. Theodore Clark, Jr., *Public Sector Collective Bargaining at the Crossroads*, 44 URB. LAW. 185, 185–86 (2012) (“Between 1960 and 2010, [the percentage of unionized workers] dropped from 28.6% to 11.9%.”).
32. Clark, Jr., *supra* note 31, at 185 (“[T]he single biggest story in labor relations over the past half of a century [is] the emergence of public sector collective bargaining as the most dominant force in the American labor movement. It is not an overstatement to suggest that the transformation of the American labor movement from private sector domination to public sector domination is truly revolutionary.”).
33. *Id.* at 186; BLS News Release, *supra* note 29. There are numerous reasons alleged for this massive decline in the private sector, including the globalization of manufacturing jobs, hostility from American businesses, and unions’ inability to rally service and information-centered employees. Drew DeSilver, *American Unions Membership Declines as Public Support Fluctuates*, PEW RES. CTR. (Feb. 20, 2014), <http://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support/>, archived at <http://perma.unl.edu/MF7Y-TB65>.
34. Clark, Jr., *supra* note 31, at 186; BLS News Release, *supra* note 29. Union membership is densest among local government workers at 40.8%, followed by state government and federal government employees at 30.9% and 26.5%, respectively. *Id.*

surpassed private-sector unions in regards to total membership for the first time.³⁵

3. *Unions Under Attack*

“Faced with growing budget deficits and restive taxpayers, elected officials from Maine to Alabama, Ohio to Arizona, are pushing new legislation to limit the power of labor unions, particularly those representing government workers, in collective bargaining and politics.”³⁶ Perhaps even more surprising than the movement’s broad geographic scope is the bipartisan support it receives from politicians.³⁷

Comparatively, however, Republican leaders have been more willing to publicly and aggressively target unions.³⁸ In 2011, the battle between the Governor of Wisconsin, Scott Walker, and Wisconsin unions gripped the entire nation.³⁹ Governor Walker and the Republican-controlled legislature passed sweeping legislation that severely restricted union power within the state.⁴⁰ Not only does Wisconsin remain a political hotbed,⁴¹ but anti-union Republicans and pro-union Democrats have also engaged in skirmishes around the country over legislation regarding similar issues including wage increases, pen-

35. See Eileen Norcross, *Public Sector Unionism: A Review* 1 (Mercatus Ctr., George Mason Univ., Working Paper No. 11-26, 2011). As of 2014, the proportion was virtually deadlocked, with 7.2 million public-sector union members and 7.4 million private-sector union members. BLS News Release, *supra* note 29.

36. Steven Greenhouse, *Strained States Turning to Laws to Curb Unions*, N.Y. TIMES, Jan. 4, 2011, at A1.

37. *See id.* (“State officials from *both* parties are wrestling with ways to curb the salaries and pensions of government employees, which typically make up a significant percentage of state budgets.” (emphasis added)). For example, in 2011, Democratic Governor Andrew Cuomo called for a salary freeze for New York state employees. *Id.*

38. *See id.*

39. Clark, Jr., *supra* note 31, at 200–02. The legislation sparked massive demonstrations that exceeded 100,000 people at points, and even led to a controversial recall election of Governor Walker. Steve Contorno, Dan Benson & Ben Jones, *Police: Wisconsin Protest Saturday “One of Largest,”* USA TODAY (Feb. 27, 2011, 2:12 PM), http://usatoday30.usatoday.com/news/nation/2011-02-26-wisconsin-saturday-rally_N.htm, archived at <http://perma.unl.edu/KHB6-S7N4>.

40. Clark, Jr., *supra* note 31, at 200–02. Notable provisions in Wisconsin’s Act 10 include union restrictions relating to home health care workers paid by Medicaid (like those at issue in *Harris*), limitations on acceptable bargaining topics, and a total prohibition on fair-share provisions. *Id.* The Wisconsin Supreme Court recently upheld Act 10 after a challenge from labor organizers in *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014).

41. See Byron York, *For GOP, Importance of Scott Walker Race Equals Any Senate Matchup*, WASH. EXAM’R (Sept. 19, 2014, 5:00 AM), <http://www.washingtonexaminer.com/for-gop-importance-of-scott-walker-race-equals-any-senate-matchup/article/2553646>, archived at <http://perma.unl.edu/TX8W-MUP5> (discussing opponents’ efforts to recall Walker, the ensuing legal battle, Walker’s 2014 reelection campaign, and his presidential aspirations).

sions, and unions' ability to strike.⁴² Governor Walker's decision to run for President in the 2016 election pushed the role of public-sector unions further into the limelight,⁴³ but he ultimately withdrew his bid given the crowded Republican field.

B. Unions' Drive to Survive and Judicial Treatment of Union Security Arrangements

1. *Setting Up Shop*

Unions have initiated various self-preservation mechanisms in response to the decline in union membership,⁴⁴ employer-friendly federal legislation,⁴⁵ and recent state legislation.⁴⁶ Union security arrangements are one tool used to help keep unions alive. A security provision is "an agreement between a union and an employer that the employer will require all employees to undertake some specified level of union support as a condition of employment."⁴⁷

Union security arrangements can be visualized on a spectrum, with very restrictive shop agreements on one end and those preserving freedom for employees on the other. Most prohibitive are closed-shop arrangements, where the employer promises to only hire employees who belong to the union and pay full dues.⁴⁸ Slightly less demanding are union-shop agreements, which allow an employer to hire a non-union member so long as the employee joins the union shortly after gaining employment.⁴⁹ More moderate are agency-shop clauses or fair-share provisions, which require employees to pay their proportional share for "chargeable activities,"⁵⁰ but not for ideological ex-

42. See Clark, Jr., *supra* note 31, at 200–11 (detailing eleven states' attempt to curb local fiscal crises through limiting union power in various ways).

43. Gary O'Donoghue, *Could Union-Busting Scott Walker Be the Next President?*, BBC (July 12, 2015), <http://www.bbc.com/news/world-us-canada-32238867>, archived at <http://perma.unl.edu/5HYQ-YKKS>. Many Republican presidential hopefuls threw their name into the ring for 2016, but Scott Walker was seen by many as a conservative poster child with ties to big business that made him a force to be reckoned with, despite his eventual withdrawal. *Id.*

44. See *supra* text accompanying note 31.

45. See *supra* text accompanying note 24.

46. See *supra* text accompanying notes 36–42.

47. Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 57 (1990).

48. *Id.*

49. *Id.* at 58; see also Powell, *supra* note 23, at 721 ("A union shop requires, as a condition of employment, that the employee join the union and that he begin paying dues after working for thirty days.")

50. See *infra* text accompanying note 75.

penditures.⁵¹ Least restrictive are open-shop arrangements, employed by so-called “right-to-work” states, which prohibit making union involvement mandatory or imposing fees, and thus provide workers with an unqualified choice as to whether to contribute to the organization.⁵² It is important to note that every union security agreement except open-shop arrangements imposes some requirement on employees to associate with a union.

2. *Hanson and Street Set the Scene*

In 1955, the United States Supreme Court first analyzed the validity of union security arrangements in *Railway Employees’ Department v. Hanson*.⁵³ In *Hanson*, a group of non-unionized rail workers challenged the validity of the union-shop provision in the RLA that required them to join the union within sixty days.⁵⁴ The petitioners argued the provision was constitutionally impermissible and thus did not preempt the Constitution of the State of Nebraska, which guarantees that “[n]o person shall be denied employment because of . . . refusal to join or affiliate with a labor organization.”⁵⁵ The Nebraska Supreme Court held the provision infringed on federal First and Fifth Amendment rights,⁵⁶ but the United States Supreme Court disagreed and overruled the state court’s decision and declared the union-shop provision constitutional. The RLA therefore preempted the Nebraska’s constitutional amendment granting an unqualified right to work.⁵⁷

51. Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMP. LAB. L. & POL’Y J. 277, 291–92 (2013).

52. James C. Thomas, *Right-to-Work: Settled Law or Unfinished Journey*, 8 LOY. J. PUB. INT. L. 163, 163 (2007). In 2012, Michigan, a state that “has long been a symbol of union might and an incubator for the American labor movement,” became the twenty-fourth state to outlaw any sort of union security arrangement. Monica Davey, *Limits on Unions Pass in Michigan, Once a Mainstay*, N.Y. TIMES, Dec. 12, 2012, at A1.

53. 351 U.S. 225 (1956).

54. *Id.* at 227.

55. *Id.* at 228; see NEB. CONST. art. XV, § 13 (“No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.” (emphasis added)). Today, this would be coined a “right-to-work” clause.

56. *Hanson v. Union Pac. R.R. Co.*, 160 Neb. 669, 71 N.W.2d 526 (1955), *rev’d sub nom. Ry. Emps. Dep’t*, 351 U.S. 225.

57. *Ry. Emps. Dep’t*, 351 U.S. at 238. The Court acknowledged the argument that “the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights.” *Id.* at 236. The Court failed to find any infringement, however, since dues were only being required for bar-

The Supreme Court revisited the validity of the RLA's union-shop provision in 1961 with *International Ass'n of Machinists v. Street*.⁵⁸ Much like *Hanson*, the petitioners were non-union members, but this time they could show their required union fees were used for ideological and political purposes.⁵⁹ The Court found this to be determinative since the RLA did not “[vest] the unions with unlimited power to spend exacted money,” and therefore the employees were entitled to relief.⁶⁰ *Street* clarified *Hanson* in a way favorable to objecting employees, but the Court imposed a heavy burden to obtain a remedy.⁶¹ The majority's holding was admittedly narrow and the opinion addressed First Amendment concerns only in passing.⁶²

3. *Abood Draws the Line*

The Supreme Court's 1977 decision in *Abood v. Detroit Board of Education* may be considered the “birth of the agency shop for public-sector unions.”⁶³ The dispute in *Abood* arose after Michigan enacted legislation that permitted local government employees to unionize. Any appointed union could then impose collective bargaining dues on dissenting non-members.⁶⁴ Teachers in Detroit voted to unionize, and

gaining purposes, and thus “there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.” *Id.* at 238. The irony of this comparison is discussed *infra*, note 100.

58. 367 U.S. 740 (1961).

59. *Id.* at 744–45 (“[T]he money [the petitioner] was thus compelled to pay to hold his job was in substantial part used to finance the campaigns of candidates for federal and states offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed. The Superior Court [of Georgia] found that the allegations were fully proved and entered a judgment and decree enjoining the enforcement . . .”).

60. *Id.* at 768.

61. *Id.* at 774–75 (awarding an injunction and restitution only if the employee identifies the exact expenditures he opposes and can trace his money to the undesirable use, thus placing the onus entirely on the employee and essentially creating a presumption of validity). The Court in *Brotherhood of Railway & S.S. Clerks v. Allen*, 373 U.S. 113 (1963) later dropped the specificity requirement since “[i]t would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects.” *Id.* at 118. Instead, a general complaint against all political expenditures is sufficient. *Id.* Still, the burden remains significant.

62. *Street*, 367 U.S. at 749 (“We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or Fifth Amendments.”). For a more comprehensive analysis of the First Amendment concerns in *Street*, see Justice Black's dissenting opinion. *Id.* at 780–819 (Black, J., dissenting).

63. Deborah Prokopf, Note, *Public Employees at the School of Hard Knox: How the Supreme Court Is Turning Public-Sector Unions into a History Lesson*, 39 WM. MITCHELL L. REV. 1363, 1373 (2013).

64. See MICH. COMP. LAWS § 423.211 (1970). The agreement “[required] every teacher who had not become a Union member within 60 days of hire . . . to pay

the Detroit Federation of Teachers subsequently became the exclusive representative of Detroit teachers. The agreement between the union and the city included an agency-shop provision.⁶⁵ A class of teachers who opposed representation filed suit on constitutional grounds.

The teachers contended that their situation was unique from *Hanson* and *Street* given their status as public employees, and urged the Court to modify its prior analysis under the First and Fourteenth Amendments to reflect the degree to which “collective bargaining in the public sector is inherently ‘political.’”⁶⁶ The Court appeared receptive to this argument and acknowledged the substantial differences when compared to the private market.⁶⁷

Furthermore, the majority noted that requiring an employee “to help finance the union as a collective-bargaining agent might well be thought . . . to interfere in some way with an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.”⁶⁸ However, under *Hanson* and *Street* “such interference as [existed was] constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”⁶⁹ The supposed rationale for such infringement was to maintain labor peace and reduce the risk of free riders,⁷⁰ neither of which the Court considered diminished by the fact the petitioners worked in the public sector.⁷¹

Much like in *Street*, the Court flatly rejected the notion that an employee could be assessed any fee to support political beliefs he opposes.⁷² In so stating, the Court drew the line for fair-share provi-

the Union a service charge equal to the regular dues required of Union members.” *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212 (1977).

65. *Abood*, 431 U.S. at 211–12.

66. *Id.* at 227.

67. *Id.* at 227–28. The Court discussed how “[a] public employer, unlike his private counterpart, is not guided by the profit motive . . . [and therefore] lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases.” Furthermore, “decisionmaking by a public employer is above all a political process . . . [since] the employees have the opportunity to affect the decisions of government on the other side of the bargaining table.” *Id.*

68. *Id.* at 222.

69. *Id.* at 222–23.

70. Free riding is possible since “a union has a duty to represent not only union members, but also members of its bargaining unit,” meaning nonmembers may obtain most or all benefits without joining. Connye Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 LAB. LAW. 183, 183 (1996). State laws and the involved collective-bargaining agreements are the source of a public union’s duty to fairly represent all members of the bargaining unit. *Id.*

71. *Abood*, 431 U.S. at 224.

72. *Id.* at 233–35 (“[F]reedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments The fact that appellants are compelled to make, rather than

sions in the public sector: employees may be compelled to pay for chargeable activities, but are free to refuse any dues “not germane to [the union’s] duties as collective-bargaining representative.”⁷³ The Court declined to further define the tipping point between chargeable and non-chargeable activities given the dearth in the evidentiary record on the issue, but it accurately predicted that there would be “difficult problems in drawing lines,” especially since “the line may be somewhat hazier” in the public sector.⁷⁴

III. *HARRIS V. QUINN*

Despite the occasional difficulties courts have in applying the rule set forth in *Abood*, the public (employees, employers, and unions) understood the case as settling the issue of how to treat fair-share provisions in the public sector.⁷⁵ Less clear, however, was whether the precedent established under *Abood* controlled the gray area between private employees and full-fledged public employees. It is precisely this issue that Pamela Harris and her co-petitioners asked the Supreme Court to resolve in *Harris*, with respect to a fair-share provision affecting home health care workers who were classified as state employees solely for collective-bargaining purposes.⁷⁶

A. Facts and Posture of *Harris v. Quinn*

“Millions of Americans . . . are unable to live in their homes without assistance and are unable to afford the expense of in-home care.”⁷⁷ In an attempt to minimize unnecessary institutionalization, many states have established Medicaid-funded and state-run programs that compensate personal assistants who provide homecare services for individuals in need.⁷⁸ The Illinois Rehabilitation Program seeks to pro-

prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.”).

73. *Id.* at 235–36; see also *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) (“Instead of drawing a line between the private and public sectors, the *Abood* Court drew a line between, on the one hand, a union’s expenditures for collective-bargaining, contract administration, and grievance-adjustment purposes, and, on the other, expenditures for political or ideological purposes.” (citations omitted)).

74. *Abood*, 431 U.S. at 236. In reference to the facts at hand, the Court granted partial injunctive and compensatory relief since the petitioners sufficiently notified the union they opposed political expenditures. *Id.* at 241.

75. While *Abood* was accepted as the law, its line was refined. In *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991), the Court said “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s policy interest in labor peace and avoiding ‘free-riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” *Id.* at 519.

76. *Harris*, 134 S. Ct. at 2623–26.

77. *Id.* at 2623.

78. *Id.* at 2623–24.

vide this in-house care while simultaneously reducing costs for the state.⁷⁹

The Rehabilitation Program creates a unique relationship triangle between the person in need of care (the customer),⁸⁰ the personal assistant, and the Illinois state government. The relevant statutes and regulations expressly state that it is the *customer* who employs and controls the personal assistant,⁸¹ and the procedure for providing care supports this understanding.⁸² “While customers exercise predominant control over their employment relationship with personal assistants, the State, subsidized by the federal Medicaid program, pays the personal assistants’ salaries Other than providing compensation, the State’s role is comparatively small.”⁸³

Determining whether personal assistants are government employees is significant since the Illinois Public Labor Relations Act allows state employees to collectively bargain. Furthermore, the Act specifically includes a fair-share provision when a union is elected to be the exclusive representative of a group.⁸⁴ The Service Employees International Union (SEIU) campaigned to become the exclusive representative for personal assistants in 1985, but the Illinois Labor Relations Board rejected the attempt since Illinois did not have sufficient control over the personal assistants to be considered their employer.⁸⁵

In 2003, Governor Rod Blagojevich superseded the Board’s decision by issuing an executive order that pronounced personal assistants to

79. ILL. ADMIN. CODE tit. 89, § 676.10 (2014).

80. *Id.* § 676.30(b). “Customer” is used to define anyone who receives care through the Rehabilitation Program. *Id.*

81. *Id.* § 676.30(p) (“Personal Assistant or PA—an *individual employed by the customer* to provide varied . . . services.” (emphasis added)). “[The State] *shall not have control or input in the employment relationship between the customer and the personal assistants.*” *Id.* § 676.10(c) (emphasis added).

82. *Harris*, 134 S. Ct. at 2624 (“Other provisions of the law emphasize the customer’s employment status.”). In practice, the customer has broad discretion and is responsible for finding, hiring, and training, evaluating, and if necessary, firing the personal assistant. The personal assistant must also adhere to the Service Plan, which outlines the care the customer receives. These plans are tailored to each individual and the state plays, at most, a minimal role in developing them. It is the customer and physician who must sign off on such plans. *Id.*

83. *Id.* Illinois does set some basic requirements for employment, mandates and aids as needed in annual performance reviews, and suggests possible tasks for personal assistants. *Id.* at 2624–25. It should be noted that although the majority and dissent interpreted the same respective state duties, the dissent argued this constituted far greater control than the majority acknowledged. *See infra* note 117.

84. 5 ILL. COMP. STAT. 315/6 (2013). Any such exclusive collective-bargaining agreement “may include . . . a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours and conditions of employment.” *Id.*

85. *Harris*, 134 S. Ct. at 2625–26.

be state employees solely for collective-bargaining purposes.⁸⁶ The Illinois Legislature quickly codified the order and declared personal assistants state employees “[s]olely for the purposes of [collective bargaining]” and thus allowed “[t]he State [to] engage in collective bargaining with an exclusive representative of . . . personal assistants.”⁸⁷ Personal assistants voted and appointed SEIU Healthcare Illinois & Indiana as the exclusive representative of workers in the Rehabilitation Program.⁸⁸ In 2009, Governor Pat Quinn repeated the steps taken by his predecessor in an attempt to encourage personal assistants in the Disabilities Program to unionize.⁸⁹

A group of eight personal assistants, three from the Rehabilitation Program and five from the Disabilities Program, filed a class suit against Governor Quinn and the involved unions in the Northern District of Illinois. The petitioners sought an injunction against the fair-share provision and a declaratory judgment that the provision in the Illinois Public Labor Relations Act that allowed unions to impose a fair-share fee violated objectors’ First Amendment rights.⁹⁰ The petitioners—several of whom were related to their respective customers, a practice common among personal assistants—opposed the union entirely and did not want to support it in any manner.⁹¹

86. Ill. Exec. Order No. 2003–08 (2003) (“[P]ersonal assistants are not State employees for purposes of eligibility to receive statutorily mandated benefits because the State does not hire, supervise, or terminate personal assistants . . . [but the] State shall recognize a representative designated by a majority of the personal representatives as the exclusive representative of all personal assistants . . .”). Governor Blagojevich asserted such action was necessary to improve the services provided and to receive feedback from the collective voice of personal assistants. *Id.*

87. 20 ILL. COMP. STAT. 2405/3(f) (2012).

88. *Harris*, 134 S. Ct. at 2626. The agreement between the parties included a fair-share provision. In the year prior to *Harris*, SEIU collected over \$3.6 million in fees from the personal assistants. *Id.*

89. See 405 ILL. COMP. STAT. 80/2–1 to 80/2–17 (1990); ILL. ADMIN. CODE 59 §§ 117.100–117.145 (2014); Ill. Exec. Order No. 2009–15 (2009). The Rehabilitation and Disabilities programs followed the same path from a legislative perspective, but employees under the Disabilities Program declined to unionize and therefore appointed no exclusive representative. *Harris*, 134 S. Ct. at 2644 n.30; see also Jacob Huebert, *Harris v. Quinn: A Win for Freedom of Association*, 2014 CATO SUP. CT. REV. 195, 198–99 (2014) (describing a nationwide union strategy to boost union membership by unionizing individuals who receive a government subsidy but are not full-fledged public employees; the strategy first took hold in California in 1999 and soon spread to fourteen other states).

90. *Harris*, 134 S. Ct. at 2626.

91. *Id.* The Court specifically mentioned Susan Watts, a Rehabilitation Program personal assistant who cares for her daughter. Watts’ daughter suffers from quadriplegic cerebral palsy and requires constant care. *Id.* Pamela Harris, the lead petitioner, provides services to her son under the Disabilities Program. Huebert, *supra* note 89, at 200. Harris’ son Joshua has a rare genetic syndrome and the Disabilities Program allows him to stay out of an institution. Shortly after Governor Quinn signed the executive order, union representatives ap-

The district court granted the defendants' motion to dismiss and the Seventh Circuit Court of Appeals affirmed,⁹² but the two courts reached that result in noticeably different ways. The district court paid little mind to who employed the personal assistants, and instead focused on the government interests in promoting labor peace and eliminating free-rider concerns.⁹³ In contrast, the Seventh Circuit classified the personal assistants as joint employees—that is, employed both by Illinois and the customer—and therefore applied *Abood*.⁹⁴ Both courts dismissed the Disability Program assistants' complaints on ripeness grounds since the assistants declined to unionize.⁹⁵

B. The Majority Opinion

In *Harris*, a band of union objectors pushed for a full-scale reversal of *Abood*.⁹⁶ while Governor Quinn and company wanted a marginal extension of the pro-labor precedent.⁹⁷ Instead of granting either party's wish, however, the Supreme Court reached a delicate compromise that favored the personal assistants, but kept *Abood* fully intact. The Supreme Court classified personal assistants as quasi-public employees—unlike schoolteachers or other full-fledged government employees—and thus navigated away from *Abood* to conclude the fair-share provision violated the personal assistants' First Amendment rights.⁹⁸

The Court first noted that *Abood* is “something of an anomaly” since free-rider concerns are typically insufficient to defeat First Amendment concerns.⁹⁹ The majority then launched into a historical analysis of *Abood*'s precedential footing to determine whether to extend its rule to the immediate situation. Accordingly, the opinion first set its sights on *Hanson*.¹⁰⁰ In that case, the Court failed to adequately perceive the First Amendment concerns raised by the RLA's

proached her about pledging support to the unionization effort. Harris refused; she believed the fees would be better spent caring for her son. Harris then rallied the support of other personal assistants participating in the Disabilities Program, and together the personal assistants overwhelmingly voted against unionization. Although the Court focused mostly on the Rehabilitation Program, there is no doubt Harris was a catalyst for challenging the relevant legislation. *Id.*

92. *Harris*, 134 S. Ct. at 2627.

93. *Harris v. Quinn*, No. 10-cv-02477, 2010 WL 4736500, at *5-9 (N.D. Ill. Nov. 12, 2010).

94. *Harris v. Quinn*, 656 F.3d 692, 697-99 (7th Cir. 2011).

95. *Harris*, 134 S. Ct. at 2644 n.30.

96. *Id.* at 2645 (Kagan, J., dissenting).

97. *Id.* at 2627 (majority opinion).

98. *Id.*

99. *Id.* at 2627 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2290 (2012)).

100. *Id.* at 2627-29.

union-shop provision by dismissing the constitutional issue with a single sentence: “On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.”¹⁰¹ The *Harris* majority marveled at the shallow and ironic analysis, particularly since the issue of required dues for an integrated bar had not yet been resolved.¹⁰²

The Court discussed *Street’s* analysis of the RLA’s union-shop agreement and its First Amendment ramifications much more favorably. Unlike *Hanson*, *Street* recognized the involved Constitutional issues were “of the utmost gravity.”¹⁰³ While *Street’s* ultimate conclusion received praise from the Court, its remedy that allows employees to obtain partial refunds of improperly used fees did not because it proved difficult to apply and was thus conceptually unsound.¹⁰⁴

The Court saved its harshest criticism for *Abood*, however, and made its distaste for that decision apparent since “[its] analysis is questionable on several grounds. Some of these [flaws] were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then.”¹⁰⁵ As noted earlier, *Abood* was the first case to involve a union security arrangement in the public sector, but it still “treated the First Amendment issue as largely settled by *Hanson* and *Street*.” The majority stated such reasoning was erroneous since “*Street* was not a constitutional decision at all, and *Hanson* disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few years

101. *Id.* at 2629 (quoting *Ry. Emps. Dep’t. v. Hanson*, 351 U.S. 225, 238 (1956)).

102. *Id.* The Court addressed the issue five years after *Railway Employees’ Department v. Hanson* in *Lathrop v. Donohue*, 367 U.S. 820 (1961). In a 5–4 decision that produced five varying opinions, the Court upheld forced membership of an integrated bar. *Id.* Justice Douglas, author of the *Hanson* opinion, ironically was the strongest dissenter:

Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. I took on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades. Those brigades are not compatible with the First Amendment.

Id. at 884–85 (Douglas, J., dissenting).

103. *Harris*, 134 S. Ct. at 2630 (quoting *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749 (1961)).

104. *Id.* at 2630; *see also Street*, 367 U.S. at 796 (Black, J., dissenting) (“[W]hile the Court’s remedy may prove very lucrative to special masters, accountants, and lawyers, this formula . . . promises little hope for financial recompense to the individual whose First Amendment freedoms have been flagrantly violated.”); *id.* at 814 (Frankfurter, J., dissenting) (suggesting it naïve to think economic and political concerns are separable for union expenditures).

105. *Harris*, 134 S. Ct. at 2632.

later.”¹⁰⁶ Furthermore, the *Abood* Court questionably held that labor peace and elimination of the free-rider concern were sufficient justifications for any First Amendment concern.¹⁰⁷

Despite the Court’s palpable distaste for *Abood*, it did not overrule the decision to hold fair-share provisions in the public sector are unconstitutional or subject to a higher level of scrutiny. Instead, the Court distinguished *Abood* by classifying personal assistants as quasi-public employees since “the State’s authority with respect to these two groups is vastly different.”¹⁰⁸ Whereas with public employees the State establishes qualifications, hires, supervises, and evaluates performance, the customer almost exclusively performs those functions with respect to personal assistants.¹⁰⁹

Since *Abood* did not control, the Court applied the exacting First Amendment scrutiny test discussed two years prior in *Knox*.¹¹⁰ Under that framework, a fair-share provision can only be upheld if it “serve[s] a ‘compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms.’”¹¹¹ The two proffered justifications—labor peace and elimination of free ridership—both fell short of a compelling state interest in the Court’s eyes.¹¹² With respect to labor peace, the Court noted such concerns were marginal since there was no threat of a rival union or challenge to SEIU’s status as exclusive representative, nor was there any common workplace where personal assistants interacted with one another.¹¹³ The Court similarly dismissed the free-rider argument since that rationale is “generally insufficient to overcome First Amendment objections.”¹¹⁴ Since the fair-share provision failed to pass exacting First Amendment scrutiny it was reversed in relevant part, affirmed in part, and remanded.¹¹⁵

106. *Id.* at 2632; *see supra* text accompanying note 101.

107. *Id.* at 2631.

108. *Id.* at 2634.

109. *Id.* The Court also pointed out other distinctions such as the limited benefits provided to personal assistants and the lack of potential vicarious liability on the state for actions by a personal assistant. *Id.*; *see supra* text accompanying notes 80–82.

110. *Id.* at 2639; *see Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277 (2012). *Knox* involved the requisite notice for a union to impose a special assessment on dissenting nonmembers, and the Court issued what many consider to be the first attack on *Abood*. It is worth noting that Justice Alito, author of the majority opinion in *Harris*, also wrote the majority decision in *Knox*. Conventional wisdom thus suggests he will pen the opinion in *Friedrichs*, depending on how the case is decided.

111. *Harris*, 134 S. Ct. at 2939 (quoting *Knox*, 132 S. Ct. at 2289).

112. *Id.* at 2639–40.

113. *Id.* at 2640.

114. *Id.* at 2627 (quoting *Knox*, 132 S. Ct. at 2289).

115. *Id.* at 2644. The Court affirmed the dismissal of the Disabilities Program assistants’ claims since they were not ripe. *Id.* at 2644 n.30.

C. The Dissent

The dissent maintained that the fair-share provision was constitutional.¹¹⁶ According to the dissent, the immediate situation “might serve as a veritable poster child for *Abood*—not, as the majority would have it, some strange extension of that decision.”¹¹⁷ In reaching this conclusion the dissent argued Illinois was a joint-employer, rather than a quasi-employer.¹¹⁸ The distinction is significant since classifying personal assistants as employees of both Illinois and the customer would seemingly bring the case within *Abood*’s reach.¹¹⁹ The dissent also highlighted the individual and state benefits of unionization.¹²⁰ Furthermore, the dissent argued Illinois’ status as an employer gave it “wider constitutional latitude . . . [since] our cases have recognized that the Government has a much freer hand in dealing with its employees than with other citizens.”¹²¹

The dissent argued the provision should be held constitutional, and took issue with the “potshots” the majority took at *Abood*, calling them “gratuitous dicta.”¹²² Nonetheless, the dissent gleaned some relief from the majority’s failure to overrule *Abood*. According to the dissent, this respect to stare decisis was necessary since the majority lacked the special justification needed to overrule a case that serves as “the foundation for not tens or hundreds, but thousands of contracts

116. *Id.* at 2645 (Kagan, J., dissenting). Justices Sotomayor, Breyer, and Ginsburg joined in the dissent.

117. *Id.* at 2648.

118. *Id.* at 2646. The dissent argued Illinois held significantly more power over personal assistants than the majority acknowledged, while the employment aspects favored by the majority should have a lesser impact on classification analysis. *Id.* at 2646–48.

119. The dissent therefore agreed with the reasoning provided by the Seventh Circuit. *See supra* note 93.

120. *Harris*, 134 S. Ct. at 2648 (Kagan, J., dissenting). Wages for personal assistants nearly doubled between unionization and *Harris*. The dissent suggested this served to combat workforce shortages and high turnover, while simultaneously increasing care quality. *Id.*

121. *Id.* at 2653 (citations and internal quotation marks omitted). Precedent supports this broader discretion since the “government must have the ability to decide how to manage its employees in order to best provide services to the public.” *Id.* The dissent was thus responsive to the respondents’ claim to apply the two-step test from *Pickering v. Board of Education of Township High School Dist. 205, Will County*, 391 U.S. 563 (1968). *Harris*, 134 S. Ct. at 2653–54 (Kagan, J., dissenting). The *Pickering* test first states that public employees only have First Amendment rights in regards to matters of public concern. If the involved issue is in fact of public concern, the Court employs a balancing test, weighing the individual’s interest in free speech against the public’s interest in efficient government. *Id.* at 2654. The dissent found the involved provisions in *Abood* and *Harris* appropriate under *Pickering*. *Id.* Though the majority argued *Pickering* did not apply, it still held the provisions would similarly fail under that framework. *Id.* at 2641–43 (majority opinion).

122. *Id.* at 2645 (Kagan, J., dissenting).

between unions and governments across the Nation.”¹²³ In the end, while the dissent was unhappy with the majority’s ruling, it took some comfort that “[s]ave for an unfortunate hiving off of ostensibly ‘partial-public’ employees, *Abood* remains law.”¹²⁴

IV. ANALYSIS

In the days leading up to the Supreme Court issuing its opinion in *Harris*,¹²⁵ labor law experts identified three possible holdings and speculated as to how the Court would rule.¹²⁶ Law professor Benjamin Sachs explained the Court could: (1) affirm the Seventh Circuit’s assertion that *Abood* controls; (2) issue a narrow ruling that distinguishes *Abood* from the partial-public employers in *Harris*; or (3) overturn *Abood* and effectively turn all public-sector employment into a right-to-work environment.¹²⁷ The Court chose the second option, as Justice Alito and the four other members of the conservative bloc constructed a narrow holding—agency-fee provisions are unconstitutional only when imposed on quasi-public employees.

The Court’s approach awarded personal assistants a clear victory, but left right-to-work proponents wanting a broader prohibition and pro-labor advocates disgruntled by the majority’s questionable maneuvering away from *Abood*. Justice Kagan’s dissent persuasively argued *Harris*’ distinction between full- and partial-public employees creates a “perverse result”¹²⁸ since it could simply prompt governments to restructure their employment relationships to assert more control, and such a result “could indeed be ‘perverse.’”¹²⁹ The dissent used this argument to further its claim that *Abood* should control, but it similarly supports the opposite conclusion—the Court should have wholly overturned *Abood*.

Overruling precedent is something the Court does not—and should not—take lightly. *Stare decisis* helps develop the law in a “principled and intelligible fashion,”¹³⁰ but it is “not an inexorable command.”¹³¹

123. *Id.*

124. *Id.* at 2653 (citation omitted).

125. It is interesting to note Justice Alito penned another, more anticipated opinion that was released on the same day as *Harris*. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (addressing the contraception mandate in the Affordable Care Act, commonly referred to as “Obamacare”).

126. Josh Eidelson, *Scalia’s Golden Chance to Kill Unions*, SALON (Jan. 6, 2014, 7:30 AM), http://www.salon.com/2014/01/06/scalias_golden_chance_to_kill_unions/?utm_source=huffpost_politics&utm_medium=referral&utm_campaign=pubex_change_article, archived at <http://perma.unl.edu/EB5L-43N8>.

127. *Id.* Professor Sachs thought the Court was most likely to overturn *Abood*. *Id.*

128. *Harris*, 134 S. Ct. at 2650–51 (Kagan, J., dissenting).

129. Huebert, *supra* note 89, at 218.

130. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

131. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); see also *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“[S]tare decisis embodies an important social policy. It rep-

Indeed, “[P]recedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”¹³² Factors often cited by the Court when deciding whether to overturn precedent include whether the decision was well-reasoned, whether the decision’s flaws have become more apparent over time, and the rule’s workability.¹³³

A. *Abood’s* Line Has Been Exposed as Incorrect, Imaginary, and Unworkable

A majority of the considerations listed above suggest that the Court had, and will continue to have, the “special justification”¹³⁴ necessary to overturn its precedent. *Harris* acknowledged that *Abood* was poorly reasoned;¹³⁵ experience has highlighted its constitutional flaws;¹³⁶ and the rule has proved unworkable.¹³⁷ Together these factors sufficiently tip the scales toward readdressing the constitutionality of fair-share provisions in the public sector, and although the majority seemed to share this perspective it declined to act accordingly.¹³⁸

1. *Precedential Mistakes*

First, *Abood* rests on weak precedential footing. *Harris* clearly recognized this shortcoming in noting “[t]he *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union.”¹³⁹ In reality, both *Hanson* and *Street* engaged in a cursory analysis of the First Amendment concerns, and were much narrower in scope and off point

resents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision”)

132. *Citizens United v. FEC*, 558 U.S. 310, 362 (2010).

133. *Id.* at 362–63. Some other relevant factors look to the antiquity of the precedent and any reliance interests at stake. *Id.*

134. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The Court has repeatedly displayed its willingness to overrule precedent it deems to violate First Amendment concerns in particular. See *Citizens United*, 558 U.S. at 363 (“The Court has not hesitated to overrule decisions offensive to the First Amendment.”).

135. *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (“The *Abood* Court’s analysis is questionable on several grounds.”).

136. *Id.* (“Some of these [flaws] were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then.”).

137. *Id.* at 2633 (“*Abood* does not seem to have anticipated the magnitude of the practical administration problems that would result in attempting to classify public-sector union expenditures as either ‘chargeable’ . . . or nonchargeable.”).

138. See also Huebert, *supra* note 89, at 219 (applying these factors to *Harris*). But see *Harris*, 134 S. Ct. at 2652 (Kagan, J., dissenting) (focusing more on the considerable reliance interests at stake).

139. *Harris*, 134 S. Ct. at 2632 (majority opinion).

than recognized in *Abood*. The author of *Hanson* admitted its reasoning was merely a “narrow exception to be closely confined,”¹⁴⁰ and *Street* relied more on statutory construction principles than constitutional concerns.¹⁴¹ These cases discussed labor peace and the free-rider concern, but for *Abood* to take them as settling the constitutional issue altogether was an aberration and a “First Amendment issue of this importance deserved better treatment.”¹⁴²

2. *Lessons Learned the Hard Way*

Second, the current political and economic climate illustrate *Abood*'s decision to differentiate between chargeable and non-chargeable activities—rather than public and private employees—has proven inadequate and naïve. The unique characteristics of public-sector organized labor make distinguishing between collective-bargaining costs and those with political implications impossible. Collective bargaining and its impact on state and local governments have made it a fiercely political issue and erased any supposed line.

Perhaps the most glaring evidence that public-sector organized labor is inherently political is the partisan divide on the issue. In a recent Gallup poll, 77% of Democrats approved of unions in general, whereas only 32% of Republicans shared that belief.¹⁴³ The same poll revealed overwhelming bipartisan support for right-to-work laws,¹⁴⁴ but nonetheless “[i]t is clear that whether a state has a right-to-work law in place is a reflection of the politics surrounding labor unions, with Democrats showing much greater support for labor unions than Republicans.”¹⁴⁵ A clear majority of Americans also opposed fair-share provisions.¹⁴⁶

These results are hardly surprising given the significant burden public-sector labor unions are placing on local governments. Cities

140. *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting); *see supra* text accompanying note 102.

141. *Harris*, 134 S. Ct. at 2631.

142. *Id.* at 2632.

143. Jeffrey M. Jones, *Americans Approve of Unions but Support “Right to Work:” Union Approval at 53% While 71% Favor Right-to-Work Laws*, GALLUP (Aug. 28, 2014), <http://www.gallup.com/poll/175556/americans-approve-unions-support-right-work.aspx>, archived at <http://perma.unl.edu/55MN-2FWE>. Roughly 47% percent of Independents approved of unions. *Id.* The poll had a sampling error of ± 4 percentage points.

144. *Id.* When asked whether he or she would vote for a law for or against a right-to-work law, 71% of voters said they would support such a law. Only 22% of voters would reject such a law, and 7% had no opinion. *Id.*

145. *Id.*

146. *Id.* “[B]y 64% to 32%, Americans disagree that workers should ‘have to join and pay dues to give the union financial support’ just because ‘all workers share the gains won by the labor union.’” *Id.*

from Detroit¹⁴⁷ to Vallejo (California),¹⁴⁸ Philadelphia¹⁴⁹ to Jefferson, County (Alabama),¹⁵⁰ have witnessed firsthand the dangers of government's "winning" moderate base salaries now in exchange for handsome pensions and benefits later.¹⁵¹ The government's payment procrastination is now posing problems and forcing governments to choose between honoring contracts, cutting jobs, or withdrawing services in order to avoid insolvency.¹⁵² Taking this economic impact into account, how can public-sector collective bargaining not be a "political" or "ideological" issue when 43% of voters name the economy and budget deficit as the top political issue?¹⁵³ In an attempt to be proactive, many states have begun to reexamine their public labor structure.¹⁵⁴ Such efforts have resulted in a politically charged scene that pits organized labor supporters against staunch right-to-work advocates. Maybe collective bargaining was not a hot-button political issue when the Court ruled on *Abood*, but it was when *Harris* was decided and will continue to be for the foreseeable future.

3. *Practical Difficulties*

Lastly, *Abood* has proven unworkable in practice. This conclusion is first evidenced by the administrative problems of classifying union expenditures—an issue the Court has repeatedly struggled with.¹⁵⁵

147. See *supra* notes 4–12 and accompanying text.

148. See George F. Will, Op-Ed., *Pension Time Bomb*, WASH. POST (Sept. 11, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/10/AR2008091002726.html>, archived at <http://perma.unl.edu/6TL7-JMAU>. Vallejo, a city of 120,000 citizens, filed for bankruptcy after the city council voted unanimously to seek bankruptcy protection. Mayor Osby Davis says the public pension crisis makes sense: "If you have a can that's leaking two ounces a minute and you put an ounce a minute in it, it's going to get empty." *Id.*

149. See Kristen Graham & Martha Woodall, *SRC Cancels Teachers' Contract*, PHILA. INQUIRER (Oct. 6, 2014, 9:18 PM), http://www.philly.com/philly/blogs/school_files/SRC-cancels-teachers-contract.html, archived at <http://perma.unl.edu/E4N2-YQM8>. In a drastic move, Philadelphia policymakers unilaterally cancelled teacher contracts after negotiations with the teachers union failed due to budget constraints. *Id.*

150. See Will, *supra* note 148.

151. *Id.* Will notes pensions are the "perfect vehicle for procrastination" since politicians are long gone by the time the payments become due. *Id.*

152. See Fletcher, *supra* note 8 (discussing San José's decline in services despite tax raises since pensions guarantee retired city workers up to 90% of their former salaries).

153. Sarah Dutton et al., *What's the Top Issue for Midterm Election Voters?*, CBS NEWS (Oct. 7, 2014, 6:30 PM), <http://www.cbsnews.com/news/what-is-the-top-issue-for-midterm-election-voters/>, archived at <http://perma.unl.edu/JK89-4QUM>.

154. See *supra* notes 36–42 and accompanying text.

155. *Harris v. Quinn*, 134 S. Ct. 2618, 2633 (2014); see, e.g., *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Locke v. Karass*, 555 U.S. 207 (2009) (all struggling to distinguish between chargeable and non-chargeable union expenses).

The Court has tried and failed to add clarity to this process by requiring chargeable activities to be (1) germane to collective bargaining; (2) justified by the government's vital interest in labor peace and mitigating free ridership; and (3) not significantly adding to the free speech infringement inherent in all agency shop situations.¹⁵⁶ As noted by Justice Scalia, however, "[E]ach one of the three 'prongs' of the test involves a substantial judgment call (What is 'germane'? What is 'justified'? What is a 'significant' additional burden?)." ¹⁵⁷

Furthermore, *Abood* imposes the practical problem of requiring union dissenters to navigate through a cumbersome, and often ineffective, challenge process.¹⁵⁸ Without legal action, the only check on union classifications comes from an auditor who is unqualified to make the legal determination of whether a charge is "germane" or "justified."¹⁵⁹ The onus then almost always falls on the dissenter to challenge such fees, which poses a problem since the necessary litigation is expensive. The Court has come to acknowledge that the current review procedure is "a significant burden for employees to bear to simply avoid having their money taken to subsidize speech with which they disagree,"¹⁶⁰ yet has neglected to take the appropriate remedial measures and overturn *Abood*.

B. Applying Exacting First Amendment Scrutiny to Fair-Share Provisions

In *Harris*, the Court applied strict First Amendment scrutiny once it determined *Abood* did not control partial-public employees.¹⁶¹ This approach almost certainly illustrates how the Court would analyze the question for full-fledged public employees if it came before the Court as a matter of first impression. More importantly, it provides the blueprint for how the Court will likely proceed in a subsequent case should it determine *Abood* is no longer good law. Applying strict scrutiny would be in line with precedent involving compelled speech and mandatory associations¹⁶² since an agency-shop provision requires an

156. *Lehnert*, 500 U.S. at 519.

157. *Id.* at 551 (Scalia, J., dissenting).

158. Huebert, *supra* note 89, at 207. In taking their case to the Supreme Court, the petitioners in *Harris* discovered expenses previously deemed "chargeable" included union contributions to some organizations actively involved in political issues. *Id.*

159. *Harris*, 134 S. Ct. at 2633.

160. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2294 (2012).

161. *Harris*, 134 S. Ct. at 2639 (quoting *Knox*, 132 S. Ct. at 2289) ("[The] provision does not serve a 'compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'").

162. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

objecting employee to “support financially an organization with whose principles and demands he may disagree.”¹⁶³

In order to justify legislation allowing for fair-share provisions under strict First Amendment scrutiny, the government would have to show: (1) a “compelling state interest,” and (2) that the restriction is “narrowly tailored.”¹⁶⁴ It was once understood that such analysis was “strict in theory and fatal in fact,”¹⁶⁵ and while that may not accurately describe contemporary jurisprudence,¹⁶⁶ it would indeed be fatal to a public-sector union’s attempt to extract fees from objecting non-members.

1. *The Lack of Compelling Governmental Interests*

Union supporters have historically cited two interests to justify the imposition of agency-fee provisions: promoting labor peace and limiting free ridership.¹⁶⁷ *Harris* also addressed the petitioner’s argument that the union had been an effective advocate for the personal assistants, members and non-members alike.¹⁶⁸ The Court found each of these interests insufficient to justify agency fees for quasi-public em-

therein.”); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[The] ‘freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.’” (emphasis added)); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“Freedom of association therefore plainly presupposes a freedom not to associate.”); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 n.31 (1977) (“Thomas Jefferson [said] that ‘to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.’”). For further discussion on the development of the compelled speech doctrine, see Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 *FORDHAM URB. L.J.* 1201, 1206–12 (2013).

163. *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 455 (1984).

164. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 800–01 (2006).

165. Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 8 (1972) (discussing the understanding of strict scrutiny in regards to equal protection, but noting the language quickly engulfed strict scrutiny in other areas such as the First Amendment); see Winkler, *supra* note 164, at 805 (“[I]n the hands of the Warren Court, heightened review certainly appeared to be outcome determinative and always fatal. . . . Gunther’s line is not just frequently quoted, it is widely accepted by many as an accurate description of strict scrutiny.”).

166. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (“Strict scrutiny must not be strict in theory, but fatal in fact. But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact.” (citations and internal quotation marks omitted)). Some scholars believe rigid tiered analysis is decreasing. See Winkler, *supra* note 164, at 808–09.

167. See *Harris v. Quinn*, 134 S. Ct. 2618, 2631 (2014).

168. *Id.* at 2640–41.

ployees,¹⁶⁹ and the same reasoning applies to full-fledged public employees.

First, the government's argument that agency fees further their interest in labor peace is misguided. "Labor peace" is a broad term used to describe the desire to avoid conflict between workers and their peers, workers and management, and between rival unions.¹⁷⁰ The majority in *Harris* persuasively dismissed this interest since employees who altogether oppose collective bargaining in the public sector do not want to form a rival union, nor do they challenge a union's status as exclusive representative in any way.¹⁷¹ Instead, they want the right to be free from forced contributions to a labor practice—one with political undertones—that they oppose. The *Abood* Court failed to realize that exclusive representation is not "inextricably linked" to agency-shop fees; exclusive representation can exist without forcing union dissenters to pay any dues.¹⁷² Therefore, while "labor peace [may be] no less important in the public sector" than in the private sector,¹⁷³ it is not threatening in the way union supporters fear.

Second, the fear free riders would destroy the viability of public-sector unions is insufficient to constitute a compelling interest. The free-rider concern stems from a union's obligation to represent *all* employees in a given industry equally, meaning it cannot bargain solely for its contributing members.¹⁷⁴ Accordingly, some argue an employee should be forced to pay for the benefits she receives in order to shoulder her portion of the burden required to obtain the gains. Not only did the Court adhere to precedent by rejecting this argument standing alone,¹⁷⁵ but "tolerance of free riders is one of the hallmarks of a free market system and an inescapable condition in any complex democratic social system."¹⁷⁶

169. *Id.* at 2939–40.

170. See E. Wight Bakke, *How to Promote Labor Peace*, 22 LAB. POL'Y & LAB. REL. 75, 75 (1946) ("Peace in industrial relations is best defined . . . as a state of antagonistic cooperation. Parties with different interests recognize their mutual dependence upon each other, agree to respect the survival needs of the other, while pursuing their own interest, and to adjust their differences by methods which will not destroy but rather improve the opportunities of the other.").

171. *Harris*, 134 S. Ct. at 2640.

172. *Id.*

173. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977).

174. See Harper, *supra* note 70, at 183.

175. See *supra* text accompanying note 114.

176. Clyde W. Summers, Book Review, 16 COMP. LAB. L.J. 262, 268 (1995) (reviewing SHELDON LEADER, *FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY* (1992)). The Court in *Knox* favorably quoted Summers' review in discussing the free-rider argument:

If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assess-

This logic comes into focus if unions are treated as what they essentially are—self-interest groups.¹⁷⁷ Take the Sierra Club, for example: they are one of the largest and most influential interest groups in the country, with 2.4 million active members pledging to support green initiatives like the Clean Water Act,¹⁷⁸ but not everyone who reaps the fruit of their labor is obligated to pay. To combat such free-rider concerns, interest groups like the Sierra Club must appeal to the quest for solidarity, common ideology, and the economic incentives to be gained through membership.¹⁷⁹ The threat of free riders is insufficient for a union to impose dues for other areas of common interest, and the Court has never articulated any reason unions should be treated any differently.¹⁸⁰

Harris acknowledged a third argument made by the government and union, namely that the union had achieved gains in the personal assistants' best interests.¹⁸¹ This conclusory argument is undermined by the fact that measuring satisfaction is subjective and the objectors clearly disapproved of the “progress” made on their behalf. Notwithstanding this point, the Court in *Harris* accepted such gains as accurate and still determined the interest was insufficient.¹⁸² There is no reason to think the interest of “effective advocacy” would garner any more attention if raised in a case involving full-fledged public employees.

2. A More Narrowly Tailored Approach

If the government is successful in showing it has a compelling interest that can be served by an agency-shop provision, it must then demonstrate that its chosen means are narrowly tailored.¹⁸³ This is

ments are not levied on all parents. If an association of university professors has a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.

Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2289–90 (2012) (quoting *Summers*, *supra*, at 268).

177. See Daniel DiSalvo, Manhattan Inst. for Pol'y Res., *Dues and Deep Pockets: Public-Sector Unions' Money Machine*, CIVIC REP., Feb. 2012, at 2, archived at <http://perma.unl.edu/BN6H-2J2D>.

178. SIERRA CLUB: WHO WE ARE, <http://www.sierraclub.org/about> (last visited Oct. 20, 2014), archived at <http://perma.unl.edu/9DCG-9G4K>.

179. See DiSalvo, *supra* note 177, at 2.

180. See Huebert, *supra* note 89, at 220 (“*Harris* has forced public-sector unions to try a new ‘experiment’: persuading people to give them money voluntarily to advance their ideas, just like the rest of us have to.”).

181. *Harris v. Quinn*, 134 S. Ct. 2618, 2640–41 (noting the wage benefits increases, training improvements, and added grievance procedures).

182. *Id.*

183. See Winkler, *supra* note 164, at 800–01.

sometimes rephrased to require the government to pursue the “least restrictive alternative” that is still capable of promoting its interests.¹⁸⁴ The Court has never explicitly analyzed whether the interests proffered by agency-shop supporters are narrowly tailored, but there are indeed options that less severely affect an individual’s First Amendment rights.

One more narrowly tailored approach would be to continue allowing workers to appoint an exclusive union representative, but not allowing that union to deduct agency fees. If this harmed unions such that it was financially undesirable to continue without these payments, then the union could opt not to bid to represent that industry at all. There is proof that this could, and does, work; federal government employees around the country can appoint an exclusive union representative despite operating under an open-shop system,¹⁸⁵ as can public employees in right-to-work states like Nebraska.¹⁸⁶ Any threat to labor peace is therefore mitigated by continuing to allow a majority of employees to appoint an exclusive union representative.¹⁸⁷

Nebraska also employs a less-restrictive method for discouraging free riders. Nebraska law allows an employee to appoint his own representative in any grievance procedure. If he decides to use services provided by the labor organization, however, then he must pay his proportional share.¹⁸⁸ The threat of having to pay for legal representation is considered the driving force behind Nebraska’s high unionization rate for teachers.¹⁸⁹ Modifying the duty of fair representation for bargaining items other than salary therefore appears to be a prom-

184. *Id.*

185. The federal government has operated under an open shop since Congress promulgated the Civil Service Reform Act of 1978. *See* 5 U.S.C. § 7111(a) (2012) (“An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative . . . by a majority of employees in an appropriate unit”); 5 U.S.C. § 7102 (2012) (“Each employee shall have the right to form, join, or assist any labor organization, *or to refrain from such activity*” (emphasis added)).

186. *See* NEB. REV. STAT. § 48-837 (Reissue 2010) (“Public employees shall have the right to form, join, and participate in *or to refrain from forming, joining, or participating* in any employee organization of their own choosing.” (emphasis added)); NEB. REV. STAT. § 48-838 (Reissue 2010) (“[The Commission of Industrial Relations] shall certify the exclusive collective-bargaining agent for employees”).

187. Labor peace may otherwise refer to a government’s desire to keep union members from striking. Admittedly, this is particularly important in the public sector since employees often provide vital services, but states have addressed this concern by adopting broad anti-strike laws. *See, e.g.*, NEB. REV. STAT. § 48-821(1) (Reissue 2010) (“It shall be unlawful for any person to hinder, delay, limit or suspend the continuity or efficiency of any governmental service . . . by lockout, strike, slowdown, or other work stoppage.”).

188. *See* NEB. REV. STAT. § 48-838(4).

189. *See* Malin, *supra* note 51, at 293 (“[E]ven though Nebraska is a right-to-work state, teacher unions enjoy 100% membership because teachers do not want to lose representation if they should need it individually.”).

ising avenue.¹⁹⁰ Because state law and independent collective-bargaining agreements define the scope of a public union's duty of fair representation,¹⁹¹ it follows that state legislatures could effectively tailor the union's duties so as to discourage free riding.

C. What *Harris* Means for the Future

The Court's decision in *Harris* did not have the immediate massive impact on public-sector labor that First Amendment proponents hoped for, unions feared, or academics predicted.¹⁹² However, to say that *Harris* carves out only a small niche that will be narrowly confined is to ignore the truth. Personal assistants in Illinois and elsewhere who do not want to contribute to unions are the clear winners of the decision.¹⁹³ Shortly after the Court's decision, SEIU notified personal assistants in Illinois, Massachusetts, Minnesota, and Connecticut that it would cease collecting forced dues.¹⁹⁴ Conversely, unions like the SEIU will feel the economic impact to the tune of \$10 million per year in Illinois alone.¹⁹⁵

More speculative, but every bit as noteworthy, is the litigation likely to arise as a result of *Harris*. The Court only complicated the analysis of agency-fee provisions by creating a new rule for partial-public employees, and now the lower courts will be faced with two

190. See generally Harper, *supra* note 70 (discussing the general scope of a union's obligation to non-contributing members and the areas in which unions are given wider latitude to stray from totally fair representation).

191. See *id.*

192. See Eidelson, *supra* note 126.

193. Some argue women in particular will benefit since the professions affected are low paying, female dominated professions. See Julie Gunlock & Aloysius Hogan, *Women Victorious in U.S. Supreme Court's Harris v. Quinn*, HUFFINGTON POST WOMEN BLOG (July 15, 2014, 5:59 AM), http://www.huffingtonpost.com/julie-gunlock/women-victorious-in-us-su_b_5584838.html, archived at <http://perma.unl.edu/E4KN-EVFQ>.

194. See News Release, Nat'l Right to Work Legal Def. Found., Inc., Nat. Right to Work Supreme Court Victory Forces SEIU to Abandon Forced Dues Demands in Ill., Minn., & Mass. (Aug. 5, 2014), archived at <http://perma.unl.edu/XD2Q-54CL> [hereinafter Right to Work News Release]; Huebert, *supra* note 89, at 220. At the time of writing, other states facing potential challenges include California, Washington, Oregon, and Vermont. Perry Chiamonte, *Supreme Court Ruling on Union Dues Could Cost SEIU Millions in Payback*, FOX NEWS (July 1, 2014), <http://www.foxnews.com/politics/2014/07/01/harris-v-quinn-ruling-could-force-seiu-to-return-funds-from-due-skim-scaml>, archived at <http://perma.unl.edu/SU-V8-W6EA>.

195. Right to Work News Release, *supra* note 194. It is unclear how many personal assistants will exercise their right not to contribute, but projections suggest SEIU will lose roughly half of its collections (\$20 million) from the 26,000 personal assistants in Illinois. Chiamonte, *supra* note 194. SEIU represents over 2 million employees, 20% of whom are home health aides, and receives a total of roughly \$300 million in fees per year. *Id.*

questions.¹⁹⁶ First, who exactly qualifies as a “partial-” or “quasi-” public employee? Certainly *Harris* applies to more than just personal assistants, but courts must now decide where to draw the line. One example of extending *Harris* to other industries already came to fruition for day care providers in Illinois when SEIU announced they would stop collecting fees from non-members after several providers challenged the dues.¹⁹⁷

The other question awaiting resolution is whether *Harris* will allow class action suits from those covered under *Harris* to recover previously collected dues that have now been ruled unconstitutional. The Michigan Court of Appeals already addressed such a challenge and ruled union dissenters have no such right.¹⁹⁸ Regardless, resolution of this issue will undoubtedly continue to play out across the country, and only time will tell whether other courts will give *Harris* such retroactive effect.¹⁹⁹

Harris therefore has an immediate and tangible impact greater than one might expect given the facially narrow holding, but the real significance may be yet to come—perhaps *Harris* is a sign the Supreme Court will soon overturn *Abood*. While it is true overruling *Abood* would have been the appropriate step in *Harris*,²⁰⁰ the majority’s apparent restraint is consistent with the trend of the Court under Chief Justice Roberts. Paul Smith, who argued before the Supreme Court on behalf of Illinois and SEIU, acknowledged this pattern: “It does seem as if the chief justice [sic] has adopted a practice, in some cases, of voting with a conservative majority but not ruling as broadly as some others want to do A large part of this is avoiding overruling prior cases expressly.”²⁰¹ Indeed, while the Supreme Court has explicitly overruled only a small handful of cases since Roberts took

196. See Huebert, *supra* note 89, at 219 (“So arguably *Harris* does introduce some (more) arbitrariness into the law.”).

197. *Id.* at 219–20.

198. See News Release, Mackinac Ctr. For Pub. Pol’y, SEIU Allowed to Keep Millions in ‘Dues’ Money it Siphoned Away from Medicaid in Stealth Unionization, Court of Appeals Rules (Sept. 22, 2014), archived at <http://perma.unl.edu/MR32-78HW>.

199. See Chiramonte, *supra* note 194.

200. See discussion *infra* sections IV.A–B.

201. Adam Liptak, *Precedents Stand Despite Pressure as Chief Justice Takes Gradual Tack*, N.Y. TIMES, July 15, 2014, at A14; see also Jeffrey Toobin, *The Trap in the Supreme Court’s “Narrow” Decisions*, THE NEW YORKER (June 30, 2014), <http://www.newyorker.com/news/news-desk/the-trap-in-the-supreme-courts-narrow-decisions>, archived at <http://perma.unl.edu/TMXK-YGSC> (“It’s generally a two-step process [for the Roberts Court]: in confronting a politically charged issue, the court first decides a case in a ‘narrow’ way, but then uses that decision as a precedent to move in a more dramatic, conservative direction in a subsequent case.”).

the bench in 2005²⁰² it has engaged in “stealth overruling” at a far higher rate.²⁰³

Speculation that the Supreme Court would revisit *Abood* in the near future materialized in June 2015 when the Supreme Court granted certiorari to hear *Friedrichs v. California Teachers Ass’n*.²⁰⁴ Ten non-union school teachers filed suit to challenge the constitutionality of fair-share provisions in the Central District of California.²⁰⁵ The teachers conceded defeat at the district court and Ninth Circuit²⁰⁶ since *Abood* unquestionably allows public unions to collect dues, so the case made its way to the Supreme Court only twenty-six months after it was filed.

With *Friedrichs*, the Supreme Court will have no choice but to either decisively affirm or overrule *Abood* and the right of public-sector unions to collect bargaining-related fees. It is not a given,²⁰⁷ but *Harris*’ harsh and justified critique of *Abood*, the Court’s recent trend of stealth overruling, and its decision to grant certiorari to hear

202. Charles W. Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 30 (2011) (listing only two cases expressly overruled in Roberts’ first six years as Chief Justice).

203. *Id.* at 36 (“[S]o-called ‘stealth’ overruling [occurs when] precedents are hollowed or curtailed . . .”).

204. No. 13–57095, 2014 WL 10076847 (9th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3653 (U.S. June 30, 2015) (No. 14–915). The Court’s decision to grant certiorari was overshadowed at least somewhat by two major decisions that were issued at the end of the Term. First, the Supreme Court upheld the Affordable Care Act for the second time in *King v. Burwell*, 135 S. Ct. 2480 (2015). Second, the Court granted same-sex couples in all fifty states the right to marry in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

205. Order, *Friedrichs v. Cal. Teachers Ass’n*, No. 8:13CV00676, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013). In California, “non-union teachers still pay ‘forced dues’ of about \$850, or two-thirds the cost of a full union membership. The other third goes to the lobbying arm of the union, which tends to favor Democratic candidates overwhelmingly.” Laura Moser, *Why an Upcoming Supreme Court Case Has Teachers Unions Feeling Very, Very Nervous*, SLATE (July 8, 2015, 3:04 PM), http://www.slate.com/blogs/schooled/2015/07/08/friedrichs_v_california_teachers_association_how_a_supreme_court_case_could.html, archived at <http://perma.unl.edu/63HX-R2A7>.

206. *Friedrichs*, No. 13–57095, 2014 WL 10076847.

207. First, Justice Kagan’s dissent staunchly supported *Abood* and was supported by Justices Ginsburg, Breyer, and Sotomayor. See *Harris v. Quinn*, 134 S. Ct. 2618, 2645 (2014) (Kagan, J., dissenting) (“Our precedent about precedent, fairly understood and applied, makes it impossible for this court to overrule [*Abood*].”). Second, granting certiorari only requires four Justices but obtaining a majority takes five, so it is unclear whether a fifth Justice is willing to overturn precedent. See David G. Savage, *Supreme Court to Hear California Teacher’s Suit—A “Life or Death” Case for Unions*, L.A. TIMES (June 30, 2015), <http://www.latimes.com/nation/la-na-supreme-court-teachers-unions-california-20150630-story.html#page=1>, archived at <http://perma.unl.edu/H3RC-9DXT>. Lastly, though technically unrelated, it is hard to ignore the momentum captured by the more liberal Justices in the 2014–2015 Term. See *supra* note 204 and accompanying text.

Friedrichs all suggest *Abood's* end is near. If the Court does in fact abrogate *Abood*, over seven million public-sector workers could decide for themselves whether to financially support the unions that represent them; unions may well struggle to make ends meet financially; and cities will have a fighting chance to resolve their pension problems and refrain from making impossible-to-keep promises in the future.

V. CONCLUSION

Harris presented an opportunity for the Court to correct its former mishandling of agency-shop agreements in the public sector and the constitutional concerns they present. Rather than do so, however, the Court merely distinguished from *Abood*—all the while criticizing its incorrect logic and misapplication of constitutional principles. As a result of the narrow decision, unions can still compel anti-union public employees to pay a portion of union dues that are germane to collective bargaining. Still, *Harris* landed a significant body blow to agency-shop agreements in the public sector even if it did not land the knockout punch some anticipated.

The Court will revisit *Abood*—and *Harris*, for that matter—within the coming year, and while there can be no question that *stare decisis* is a crucial component of our judicial system, the Court has sufficient justification to overturn precedent when a decision was poorly reasoned, constitutional concerns have become more apparent over time, and the rule continues to present practical difficulties. The majority in *Harris* highlighted *Abood's* considerable shortcomings in respect to each of these factors, and in so doing provided the necessary framework for the Court's coming decision in *Friedrichs*.

The Court also revealed its hand in regards to how it will analyze agency-shop provisions if *Abood* is indeed overruled. *Harris* applied strict First Amendment scrutiny and declared that labor peace and fear of free riders are not compelling enough government interests to justify infringing upon an individual's freedom to associate. Furthermore, although the Court did not explore whether agency-shop provisions are narrowly tailored to achieve any alleged interests, experiments with organized labor in right-to-work states like Nebraska provide examples of less restrictive alternatives. Put simply, there is no reason to think First Amendment analysis would come out any differently for full-fledged public employees than it did for partial-public employees.

Someday *Harris* will likely be remembered as the foundation for the Court's coming decision that fully abandons *Abood* and creates an open-shop environment for all public-sector employment. Hopefully the Court seizes its opportunity next Term with *Friedrichs*, but until then, partial-public employees can enjoy their reclaimed freedom, full-

fledged public employees must continue writing checks to a union they oppose, and unions will continue to fear the day when they are forced to collect from only those who believe in their cause.

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