The New York Times http://nyti.ms/1T7zl0c

The Opinion Pages | CONTRIBUTING OP-ED WRITER

Scalia's Putsch at the Supreme Court

Linda Greenhouse JAN. 21, 2016

IN his vitriolic dissent last June from the Supreme Court's same-sex marriage decision, Justice Antonin Scalia accused the majority of having carried out a "judicial putsch." Justice Scalia should know. He and his four conservative colleagues were then in the process of executing one themselves.

On June 30, four days after handing down the marriage decision, Obergefell v. Hodges, the court announced that it would hear a major challenge to the future of public-employee labor unions. That case, Friedrichs v. California Teachers Association, was argued last week. As was widely reported, the outcome appears foreordained: the court will vote 5 to 4 to overturn a precedent that for 39 years has permitted public-employee unions to charge nonmembers a "fair-share" fee representing the portion of union dues that go to representing all employees in collective bargaining and grievance proceedings. As the exclusive bargaining agent, a union has a legal duty to represent everyone in the unit, whether members or not; the fee addresses the problem of "free riders" and the resentment engendered by those who accept the union's help while letting their fellow workers foot the bill.

The stakes are obviously high for the millions of workers and thousands of contracts covered by these arrangements in the 23 states that now permit them. If the court accepts the argument that the mandatory fees amount to compelled speech in violation of the objecting employees' First Amendment rights, public-employee unions would forfeit hundreds of millions of dollars in dues revenue. New York and 20 other states filed a brief in support of California, which is defending its fair-share system, to argue that these provisions "are important to ensuring a stable collective-bargaining partner with the wherewithal to help devise workplace arrangements that promote labor peace."

I want to focus here, however, not on the implications the Friedrichs case holds for the public workplace, but on what it means for the Supreme Court. Actually, I couldn't express my concern better than Justice Stephen G. Breyer did last week when he questioned Michael A. Carvin, the lawyer for the 10 California teachers who are challenging the state's labor law. Justice Breyer was referring to the compromise at the heart of the 1977 precedent, Abood v. Detroit Board of Education, that Mr. Carvin was asking the court to overrule. The court in that case upheld the constitutionality of the fair-share fee as long as it was limited to the union's collective-bargaining expenses and did not subsidize the union's political or other "nonchargeable" activities.

"What is it, in your mind," Justice Breyer asked Mr. Carvin, "that you can say from the point of view of this court's role in this society in that if — of course, we can overrule a compromise that was worked out over 40 years and has lasted reasonably well ..." The justice ruminated for a moment on his own practice of filing dissenting opinions, and then returned to his point: "You start overruling things, what happens to the country thinking of us as a kind of stability in a world that is tough because it changes a lot?"

Indeed. Exactly seven years ago, in a public-employee labor case from Maine, Justice Breyer wrote an opinion that cited the Abood decision and included this sentence: "The First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment."

The opinion continued: "The court has determined that the First Amendment burdens accompanying the payment requirement are justified by the government's interest in preventing free riding by nonmembers who benefit from the union's collective bargaining activities and in maintaining peaceful labor relations."

The case was Locke v. Karass. The decision was unanimous.

What changed since 2009? How could the court go from unquestioning acceptance of a long-lived precedent to a situation in which all that remains in doubt is whether that same precedent will be overturned in early June or late June? In the answer to that question lie some disturbing observations about the

Roberts court.

It's no secret that in recent years, major segments of the Republican Party have declared open season on public employee unions — selectively, of course. Police unions and correctional officers' unions, which have stood in the way of reform-minded policy initiatives in states and cities across the country, have been exempt as targets. Conservative and Tea Party ire has instead been focused on teachers' unions. It's not an accident that when Mr. Carvin (a leading figure behind the two failed challenges to the Affordable Care Act) and the right-wing foundations supporting his lawsuit set out to recruit plaintiffs, they looked for teachers and not prison guards.

Reading the transcript of last week's argument, I felt as though I had stumbled into the inner sanctum of Wisconsin's union-busting governor, Scott Walker. Both Justice Scalia and Justice Anthony M. Kennedy suggested that when it comes to public employment, there can be no real distinction between a union's workplace activities and its political activities.

"The problem is that everything that is collectively bargained with the government is within the political sphere, almost by definition," Justice Scalia said, addressing Edward C. Dumont, California's solicitor general.

Justice Kennedy elaborated at length: "It's almost axiomatic. When you are dealing with a governmental agency, many critical points are matters of public concern. And is it not true that many teachers strongly, strongly disagree with the union position on teacher tenure, on merit pay, on merit promotion, on classroom size?" He continued: "The term is 'free rider.' The union basically is making these teachers 'compelled riders' for issues on which they strongly disagree."

That's about as unconstrained and revealing a rant as I've heard from the Supreme Court bench. It happens also to be based on some false premises. California labor law does not in fact permit collective bargaining over teacher tenure or standards for termination or budget-driven layoffs. I'm no expert on California labor law; I read it in the union's brief. But the details hardly matter. What matters is the glaring anti-union animus and the obvious fact that if everything a public employee union does is deemed political, the Abood compromise, based on a distinction between collective-bargaining activities and

everything else, necessarily collapses.

And what exactly is it about the California teachers union's activities that the plaintiffs find objectionable? Impossible to say. The initial complaint referred only to their dislike of "many of the union's public policy positions, including positions taken in collective bargaining," but the plaintiffs refused to be more specific or to cooperate with the union in developing an evidentiary record. Instead, the plaintiffs under Mr. Carvin's direction sought to lose the case as quickly as possible, to speed it on its way to the Supreme Court. They asked the Federal District Court to rule against them, which it did, and they then asked the United States Court of Appeals to affirm that negative judgment, which it promptly did in a two-page summary opinion, observing that the outcome was "governed by controlling Supreme Court and Ninth Circuit precedent."

To call this litigation pathway unusual is an understatement. But it was hardly a shot in the dark. In majority opinions in 2012 and again in 2014, Justice Samuel A. Alito Jr. — yes, the same Justice Alito who signed Justice Breyer's opinion back in 2009 — suggested that he was ready and willing to revisit the Abood precedent. In the more recent case, Harris v. Quinn, he called Abood "troubling" and "questionable on several grounds." But neither of those two cases offered a target for a direct hit. The current case was manufactured to serve that role.

If the political atmosphere surrounding public employee unions has changed, so has the court's vision of the role of the First Amendment. The court issued the Citizens United decision, with its embrace of a First Amendment right to unlimited corporate (and union) political spending, a year to the day after Justice Breyer's opinion in the Maine labor case. In the intervening six years, the Roberts court has waved the First Amendment banner ever higher to undermine long-accepted governmental regulatory authority. Not too long ago, it was federalism — states' rights — that seemed to energize conservatives on the Supreme Court. The Abood regime is in fact more than respectful of states' rights: states are enabled but not required to adopt a fair-share fee system, and 22 states have chosen against it. But federalism can't save the unions from the ever more powerful First Amendment.

So what we have here are the majority's policy preferences conveniently clad in First Amendment armor. But even the best armor is vulnerable, and as the court

strides recklessly into a danger zone, I'm left with Justice Breyer's question: What's the country to think?

Follow The New York Times Opinion section on Facebook and Twitter, and sign up for the Opinion Today newsletter.

NATIONAL REVIEW

Will the Supreme Court Correct Government's Encroachment on the First Amendment?

By George Will — January 9, 2016

When the Supreme Court contemplates changing its mind, it must weigh the institutional interest in the law's continuity against evidence that a prior decision has done an injury, even a constitutional injury. The Court took 58 years to begin, with the 1954 school-desegregation decision, undoing its 1896 decision affirming the constitutionality of "separate but equal" public facilities and services. On Monday, oral arguments at the court will indicate whether it is ready to undo 39 years of damage to the First Amendment rights of millions of government employees.

In a 1977 decision that bolstered public-sector unionism, the court affirmed the constitutionality of a Michigan law requiring public-school teachers who are not dues-paying union members to pay "agency" or "fair-share" fees. These supposedly fund the unions' costs in collective bargaining for contracts that cover members and nonmembers alike. Today, public employees in 23 states are covered by such laws. Only 6.6 percent of private-sector employees are unionized, compared with 35.7 percent of government workers.

In Monday's case, ten California teachers are challenging that state's law, under which nonmembers' fees can be as high as 100 percent of members' dues. The National Education Association, of which the California union is an affiliate, gets a portion of nonmembers' fees. The NEA began endorsing presidential candidates in 1976 (it favored Jimmy Carter, who promised to create the Education Department) and always endorses Democrats for president. Government-workers' unions provided much of organized labor's estimated $1.7 billion in political spending in the 2012 cycle. In the 2014 off-year elections, the NEA was the third-largest political spender, almost entirely for Democratic candidates, groups, or causes. In 36 states, from 2000 through 2009, teachers' unions spent more on state

elections than the combined spending of all business associations.

RELATED: Professor Epstein to SCOTUS: Set the Workers Free

Interestingly, the ten California teachers do not stress that they are conscripted into funding such direct, overt, and explicit political activity. Rather, they make the more lethal (to public-sector unions' power) argument that even the use of their fees to fund core union activities such as collective bargaining constitutes a "multihundred-million-dollar regime of compelled" — hence unconstitutional — "political speech."

Unions, the dissident teachers say, bargain about issues that "go to the heart of education policy" — teacher evaluation and tenure, class size, seniority preferences, etc. — as well as quintessentially political matters such as government's proper size, its fiscal policies, and the allocation of scarce public resources.

Private-sector collective bargaining does not influence governmental policymaking. So, long before public-sector collective bargaining began in the 1950s, President Franklin Roosevelt was right to say: "The process of collective bargaining, as usually understood, cannot be transplanted into the public service."

Writing for a court majority in two previous opinions, Justice Samuel Alito foreshadowed Monday's drama by calling the 1977 decision discordant with First Amendment precedents, including the unconstitutionality of compelled ideological advocacy.

The government's interests in "labor peace" and efficient administration may be served by negotiating with a single union. But neither these convenience interests nor the "free rider" problem (nonmembers benefiting from union bargaining without paying for it) justifies abridging fundamental First Amendment rights by coercing ideological speech on matters of political contention. Or compelling unwanted association: The court has held that "freedom of association therefore plainly presupposes a freedom not to associate." Hence government "cannot mandate political speech or association as a condition of public employment." Indeed, speaking of precedents, in 2014 the Court said: "Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment."

The Court's interest in *stare decisis* (Latin, meaning "to stand by a decision") does not dictate dogmatic adherence to all precedents. The teachers note that "the court has never

invoked *stare decisis* to sustain a decision that wrongly *eliminated* a fundamental right." And the court has said (in the 2010 Citizens United decision) that it has "not hesitated to overrule decisions offensive to the First Amendment."

Never in its 225 years has the First Amendment been under so varied and sustained attacks. In academia, it is increasingly considered a dispensable impediment to superior claims of social justice. In the U.S. Senate, 54 Democrats voted to amend it in order to empower the political class to regulate campaign speech about the political class. So, on Monday it would be exhilarating to hear evidence that the court is prepared to correct its contribution to the practice of subordinating First Amendment protections to supposedly superior considerations.

— *George Will is a Pulitzer Prize–winning syndicated columnist.*

The Economist

Unions and the Supreme Court

The justices seem poised to deliver a blow to public-sector unions

Jan 11th 2016, 17:31 by S.M. | WASHINGTON, DC

THE LABOUR movement in America has seen better days. In the 1960s, about a third of American workers were members of unions; today, with right-to-work laws in place in 25 states, the figure hovers at 10%. This spring, when the Supreme Court issues a decision in *Friedrichs v California Teachers Association*, the decline may well accelerate. Rebecca Friedrichs, a public-school teacher in California who left her union because she did not share its priorities, is challenging a rule that says non-members must pay "fair-share fees" to cover the costs of collective bargaining. It violates the First Amendment right to freedom of speech, she and nine other teachers say, to be forced to subsidise an organisation whose politics they reject.

In 1977, the Court ruled in *Abood v Detroit Board of Education* that while unions could not charge non-members for political activities like lobbying for causes or candidates, states could allow unions to collect fees to support negotiations over workplace matters like wages and benefits. In the oral argument on January 11th, Michael Carvin, the teachers' lawyer, questioned this distinction. Negotiating teachers' contracts is an essentially political endeavour, he said, because they involve controversial questions of "public concern". The fair-share or "agency fee" model coerces his clients to espouse an "ideological viewpoint which they oppose" and violates "basic speech and association rights".

The tenor of the hearing suggested that a majority of the justices are keen to abandon *Abood* and

end the mandatory fees—freeing Ms Friedrichs and tens of millions of public-sector workers from the duty of writing cheques to the unions who negotiate on their behalf. Justice Samuel Alito sent strong hints of this willingness in two recent cases, calling *Abood* "something of an anomaly" in 2012. This view earned the apparent endorsement of Justice Anthony Kennedy, who noted that under the current regime teachers who oppose seniority-based salaries nevertheless must fund a union's "public relations campaign to protest merit pay". It "makes no sense", Justice Kennedy complained, to tell teachers who "strongly, strongly disagree with the union position on teacher tenure, on merit pay, on merit promotion, on classroom size" that they must pay to support those positions but are otherwise "free to go out and argue against" them.

The defence of *Abood* by the court's left wing had the ring of a somewhat desperate rear-guard action. Justices Elena Kagan and Sonia Sotomayor told Mr Carvin that states should be free to decide how to manage their relationship with public-sector employees. When the "government acts as employer", Justice Kagan said, "it's not a constitutional problem" for it to use an agency-shop model if it so chooses. Justice Stephen Breyer suggested that the plaintiff's complaint is "pretty far removed from the heart of the First Amendment" since employees "can say what they want" outside the bargaining room. All three suggested that it would be a bad idea to deviate from the court's preference for upholding its own precedents. For Justice Kagan, the disgruntled teachers have a "heavy burden" in "ask[ing] us to overrule a decision" as "there are tens of thousands of contracts with these [agency-fee] provisions" affecting "millions of employees". Justice Breyer wondered "what happens to the country thinking of us as a kind of stability" if the court votes to "overrule a compromise that was worked out over 40 years".

That point may have been designed to appeal to Chief Justice John Roberts, who, according to Elizabeth Wydra of the Constitutional Accountability Centre "cares about the public's perception of the court and does not want it to be seen as an institution easily swayed by changing political winds". But if Mr Roberts is to be the fifth vote to save agency fees, he masked that well. Allocations to public education always compete with other budget areas such as "public housing [and] welfare benefits", he said. "It's all money."

What would happen if agency fees disappear? The unions, along with a host of agency-shop states, including California, argue that their membership rolls would thin and finances would wither. The lawyer for California, Edward Dumont, warned that "if they are given a choice", many teachers would prefer to have unions bargain for higher wages "for free, rather than to pay for it". Forcing a public-sector union to be an exclusive bargaining unit without giving it the ability to collect fees from non-members poses "a classic collective action problem", he said. It's "important...from the employer's point of view, that that representative be adequately funded and stably funded, so that they can work with us."

Justice Antonin Scalia, usually no friend of liberal causes, made this point about free-riding in a 1991 opinion. But at the hearing on January 11th, he seemed sanguine about the effect of the fees drying up. "I can agree that dealing with just one union makes everybody's life easier", Justice Scalia said to Mr Dumont. But "[w]hy do you think that the union would not survive without these fees?" Other unions with similar constraints, he observed, "seem to survive; indeed, they prosper".

theguardian

Unions brace for supreme court case that could be a heavy blow to liberals

Justices prepare to hear arguments in of case of California teacher and co-plaintiffs who say 'tyranny' of unions violates their rights through forced dues

Jana Kasperkevic in New York

Saturday 9 January 2016 09.28 EST

Last year the US supreme court handed major victories to liberal Americans, legalising gay marriage and throwing out a challenge to Barack Obama's landmark healthcare reforms. But 2016 may be less kind. On Monday the justices will begin to hear a case that labor leaders argue could "bankrupt" public sector unions and geld one of the most powerful forces in politics.

Rebecca Friedrichs, who has taught elementary school children for close to 30 years, mostly in the Savanna school district in Anaheim, California, is the lead plaintiff in a case she says is being brought against the "tyranny" of union dues.

"We are required, as a condition of employment, to financially support teachers unions and their political agendas," Friedrichs wrote in an editorial for the Orange County Register.

"Americans of all political preferences would rise up against such tyranny if their rights were squelched by corporations, yet teachers unions have been legally trampling the free-speech rights of teachers throughout our nation for decades through forced dues used to fund their one-sided political agendas."

If her case is successful, it would sharply limit the power of public employee unions, which have charged "fair share" fees to non-union members when the union negotiates their contracts.

A win would cost unions millions of dollars in revenue, and be a heavy blow to a major backer of the Democrat party.

Altogether 10 California teachers are suing their union so that they do not have to pay any dues. If the court rules in favor of the plaintiff in Friedrichs v California Teachers Association (CTA), California would essentially become the latest, and largest, "right to work" state for public sector employees - meaning union membership would not be a requirement.

Powerful, rightwing anti-union forces have lined up to back the case. The teachers, who are

represented by the Center for Individual Rights, a conservative organization with links to billionaire conservatives the Koch brothers, argue that the money they pay to the CTA is used for political purposes that do not represent their interest and often go against what they believe. The union argues that the educators, who pay only a portion of the full dues as a "fair share", are only paying the union for the costs of bargaining and negotiations.

But the CTA is no political lightweight either. The union is one of the biggest players in state politics and one of the biggest spenders when it comes to political contributions in the California.

From 2000 to 2009, the CTA spent about $211.9m on campaign contributions. According to the Los Angeles Times, in the following three years the union spent another $40m, including $4.7m to elected Jerry Brown as governor. And then in 2014, the union spent about $7m to re-elect Tom Torlakson as the state superintendent of public instruction.

According to the union, only a fraction of its funds is dedicated to political contributions. The rest is spent on its defending its members and negotiating a contract through collective bargaining.

The teachers suing the CTA over dues argue that any work done by the union, even collective bargaining, is political.

To Erica Jones, who is an active member in the CTA, being a teacher itself is political.

"The union, of course, does political action, but our job in itself as educators is in a political field. I don't even know why you wouldn't want that voice, that political voice," she explained. "Education is on every politician's platform. It's about either changing or reforming education. You are constantly being talked at and talked to, so if you are not in that discussion when you are an expert then why wouldn't you want that voice to be heard."

Friedrichs and her co-plaintiffs believe they deserve a choice about whether they want to belong to a union or not.

"In our view, paying fees to a union should not be a prerequisite for teaching in a public school. No one in the US should be forced to give money to a private organization he or she disagrees with fundamentally. Teachers deserve a choice," Harlan Elrich, one of the plaintiffs, wrote in a Wall Street Journal op-ed this month.

The teachers in my family disagree about the union. Some support it and others don't. But everyone agrees that each of us should have the right to decide whether to join. So I'm not against the union; I'm against the state forcing me to pay union fees against my will.

The CTA declined to "speculate" about how many members it might lose if the supreme court rules in favor of Friedrichs.

"CTA works to engage all educators in the union and has over 91% membership," Becky Zoglman, CTA's associate executive director, told the Guardian. "We'll continue to do that outreach regardless of the Friedrichs decision."

But the experience of 25 states where right-to-work laws are already on the books show that union membership rates do indeed decline over the long term after the laws are introduced.

As of August of last year, there were 325,000 educator members of CTA and about 28,000 fee payers. The 2015 dues for CTA were $644. Those who wanted to pay just a fair-share portion of the dues were issued a rebate of $230. That means they still paid a total of $414.

CTA is not the only union that could be affected by the ruling. Other public-sector unions - like those for nurses and firefighters - could also be affected.

In 2014, 28% of California's 169,765 state government workers were paying "fair share dues". A ruling against unions could lead to these workers having to pay no fees at all.

"The intended effect is to essentially bankrupt public sector unions, including many nurse unions," said Jean Ross, co-president of National Nurses United in June when the supreme court first announced that it would hear the case. A ruling in favor of Friedrichs and her co-plaintiffs would essentially make California a right-to-work state for public sector employees. "Right-to-work means lower pay, higher poverty rates, and much greater income disparity. That's the same reason why groups like supporters of Friedrichs v CTA have targeted states like California that have avoided such anti-worker laws."

A change could cost public sector workers more than their union dues. Public employees in right-to-work states earn $1,000 less than those living in "fair-share" states, according to Jeffrey Keefe, professor emeritus at the school of labor and management at Rutgers University.

"In states where unions cannot collect fair-share fees, the employees they represent earn lower wages and compensation, regardless of whether they are union members or not," he said. "Public sector unions exist primarily for collective bargaining and their capacity to bargain effectively on behalf of public-sector employees is closely linked to their ability to collect fair-share fees and maintain high levels of union membership. Free-riding undermines their ability to fulfill these duties."

Employees who benefit from the union's negotiations but do not want to pay dues are often referred to as freeloaders by the dues-paying members of the union.

"Fair-share has been ruled on by the supreme court before and it's really the best way to have a compromise. Ultimately as an educator, you are benefiting from your union, you are benefiting from bargaining and negotiations, so to be able to take the benefit but not actually help pull your own weight, I think that's a tad ... misguided," said Jones, who has been a teacher for 11 years and active member of the CTA for more than seven years.

A ruling in favor of Friedrichs "would be really devastating" she told the Guardian.

"Devastating in the way that we are trying to improve public education and I feel like we have this distraction and it's taking away from that conversation. We are really not talking about students. We are still focused on this misguided conversation."

Topics

US unions US supreme court

the guardian

Supreme court justices put on defensive in overturning 1977 teachers' union case

Scalia and other conservatives pressed to justify overturning Abood v Detroit Board of Education, which upheld requirement that teachers pay union fees

Steven Greenhouse

Tuesday 12 January 2016 12.51 EST

In Monday's oral arguments at the US supreme court, US solicitor general Donald B Verrilli Jr sought to put the court's five conservative members on the spot. Verrilli did this in a closely watched case in which 10 California teachers assert that being forced to pay union fees violates their first amendment rights.

Backing the teachers' union in the case, Verrilli pressed the court's conservative members to justify their apparent move toward overturning a unanimous 1977 supreme court decision, Abood v Detroit Board of Education, that upheld a requirement that public school teachers pay union fees, even when they opt out of joining the union. Underlining the gravity of overturning a decades-old ruling, Verrilli said: "We're talking about overruling a precedent of 40 years' standing. There needs to be a showing of changed circumstances."

Labor unions grew alarmed last June when the court agreed to hear the case, Friedrichs v California Teachers Association, fearing that the justices would hobble public-sector unions by barring any requirement that government employees pay fees to the unions that represent them. In states that give public-employee unions a right to bargain, but prohibit these fees (known as fair share fees or agency fees), 34% of teachers opt out of paying such fees. Since public-sector unions are one of the Democratic party's most generous backers, many Democrats fear their party will be weakened if the justices bar fair-share fees.

Verrilli may well have been aiming his comments on the need to show "changed circumstances" to Justice Antonin Scalia. Though a leader of the court's conservative wing, Scalia was considered a potential swing vote in Friedrichs, who might back the union's position. In 1991, Scalia delivered a robust defense of fair-share fees, writing: "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them ... where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost."

In Abood, Justice Potter Stewart, an Eisenhower appointee, wrote of "the great responsibilities" that unions have representing workers, duties that "often entail expenditure of much time and money", including the "services of lawyers, expert negotiators, economists,

and a research staff". Stewart concluded that it was fair and not a first amendment violation to require government employees to pay fees to the unions that represent them. In Abood, the court also ruled that government employees can't be required to pay union fees that are spent on political matters, as opposed to collective bargaining.

On Monday, Scalia seemed to have significantly changed his tune since 1991, although he didn't explain why or point to any changed circumstances. From the start that day, he showed hostility to fair-share fees, asserting that every issue that public-sector unions bargain about is essentially political - and workers shouldn't be forced to pay union fees over "political" matters.

"Everything that is collectively bargained is within the political sphere, almost by definition," Scalia said. "Should the government pay higher wages or lesser wages? Should it promote teachers on the basis of seniority?"

In one changed circumstance since the 1977 Abood ruling, the court's conservative majority showed little concern about the "great responsibilities" and significant expenditures unions face in bargaining for workers, even those who opt out of joining.

In recent years, Justice Samuel Alito has led a not-so-quiet campaign to chip away at Abood and get the court to rule that requiring public employees to pay union fees violates first amendment free speech rights. On Monday, not just Scalia, but Chief Justice John Roberts and Justice Anthony Kennedy lent support to Alito's position. (Justice Clarence Thomas remained silent.)

Scalia, echoed by Roberts, said government employee unions could survive and be effective even if workers were no longer required to pay agency fees. Indeed, Roberts argued that if unions do a good job, they should be able to convince the great majority of workers to continue paying union fees.

But Edward Dumont, California's solicitor general, warned the justices of a "free rider" problem. Even if workers think having a union is "very advantageous", Dumont said, "if they are given a choice, they would prefer to have it for free, rather than to pay for it."

Verrilli said that before fair-share requirements were established, union officials often demonized management and whipped up workers against their employer, to persuade more workers to join and pay union fees. David Frederick, the lawyer for the California Teachers Association, argued that requiring all workers to pay union fees fosters labor peace and stability "by making a shared sacrifice for the purposes of working together to establish a coherent position with their employer".

But Scalia scorned that view, saying: "You say that, but it doesn't mean anything to me."

It was hard to read Scalia's mind as to why he has apparently abandoned his position in favor of fair-share fees. Is it part of the Republicans' growing disaffection with labor unions over the past quarter century? Has Scalia been pulled along by Alito in his crusade against agency fees? Or does Scalia want to help ensure that the conservative majority delivers another powerful

ruling to advance Republican political interests, much like Bush v Gore, Citizens United as well as the Voting Rights Act and voter ID cases?

Considering Scalia's newfound hostility toward fair-share fees, many court observers were convinced a majority of the court would rule them unconstitutional - in essence creating a nationwide "right to work" law for government employees. Perhaps making things worse for labor, Justice Kennedy signaled on Monday that he thought it might also be a first amendment violation for states to require private-sector workers to pay agency fees. That could open the door to a follow-up lawsuit that could be devastating to labor - one that sought to bar agency fees in the 25 non-right to work states that allow such fees in private-sector unionized workplaces.

More analysis

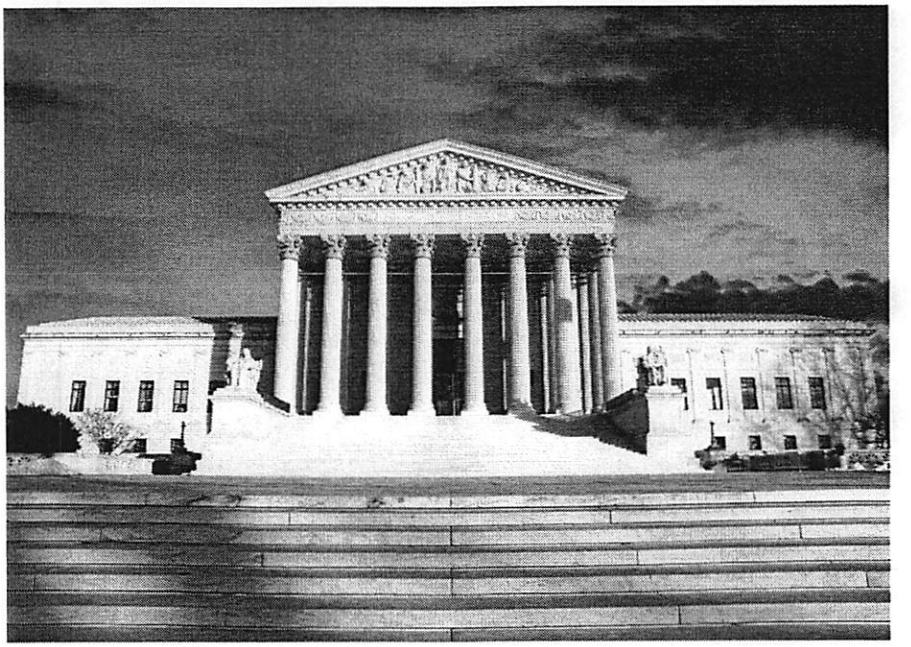
Topics

US unions US supreme court California US education Democrats

What Would Happen if the Court Kneecapped the Unions?

We're about to find out.

By Dahlia Lithwick



Ordinarily you might think that overruling a 40-year-old precedent—around which thousands of union contracts are organized, and upon which half of the states have come to rely—would be a heavy lift for a court that prizes humility and restraint. Nah.

Image by trekandshoot/Thinkstock

As is often the case with the most transparently partisan appeals argued at the Supreme Court, Monday's session on *Friedrichs v. California Teachers Association*—a case challenging the fair-share fees public-sector unions require nonmembers to pay in exchange for collective-bargaining benefits—makes most sense if you simply take your head off and refasten it again, upside down. In this world, embraced in full by the court's right wing Monday, money always equals speech; unions won't suffer at all for losing millions of dollars or much of their membership; precedent is only binding if you *luuurve* it; and the crushing harm caused by paying fees to an entity espousing messages with which you disagree far outweighs the harm arising from dismantling the nation's public-sector unions. And anyhow—how can we know how bad it would be to kneecap public-sector unions until we try it? Hey! Let's find out!

DAHLIA LITHWICK

Dahlia Lithwick writes about the courts and the law for *Slate*, and hosts the podcast Amicus.

California and 22 other largely blue states require that public employees who are all represented by unions can choose not to join those unions but must nevertheless pay a "fair-share" or "agency" fee, which is directed toward the union's collective-bargaining activities. Because these unions are the exclusive bargaining representative for all employees—whether they join the union or not—they must bargain for *all* employees, not just members. Nonmembers may still opt out of any fees associated with the union's overtly ideological and political activities. Although this arrangement implicates some speech of the nonmembers, the Supreme Court determined in a landmark 1977 case called ***Abood v. Detroit Board of Education*** that this arrangement is constitutional. By asking nonmembers to contribute fees only for collective bargaining, the court sought to discourage free riders and to ensure "labor peace."

Abood has been good law for the intervening four decades, although in 2014, in ***Harris v. Quinn***, the five conservatives on the Supreme Court flirted with overruling it, and then in the opinion invited a challenge that would allow them to do away with the fees rule once and for all. The Center for Individual Rights, funded by a host of right-wing sorts, including the Koch brothers, hustled to produce that lawsuit and put it on the fast track.

The plaintiffs contend that, when it comes to public-sector unions, *all* speech is political and ideological.

The plaintiffs in this challenge are a third-grade teacher, Rebecca Friedrichs, and nine other California teachers who've opted out of the state's teachers union, but still have to pay fees that go toward collective bargaining. They claim that this violates their First Amendment rights because it compels nonmembers to subsidize messages with which they disagree. They contend that the collective bargaining-politics distinction drawn in *Abood* to separate nonpolitical speech from ideological speech is false, since when it comes to public-sector unions, *all* speech is political and ideological.

Ordinarily you might think that overruling a 40-year-old precedent—around which thousands of union contracts are organized, and upon which half of the states have come to rely—would be a heavy lift for a court that prizes humility and restraint. Nah. This is an easy lift for Michael Carvin, who represents the teachers, and for the court's five conservatives.

Justice Stephen Breyer cautions Carvin that this has been the labor rule for decades: "But it was 40 yearsago. I mean, maybe *Marbury v. Madison* was wrong." Breyer adds that overruling that precedent "would certainly affect the bar. It would certainly affect at least student fees at universities. It would require overruling a host of other cases ... And you start overruling things, what happens to the country thinking of us as a kind of stability in a world that is tough because it changes a lot?"

Elena Kagan tries to get Carvin to address the real-world fallout from doing away with the agency fees rule: "This is a case in which there are tens of thousands of contracts with these provisions. Thosecontracts affect maybe as high as10 million employees."

Later Justice Anthony Kennedy returns to this theme: "What about the answer to Justice Kagan's questions about the perhaps thousands of contracts? Would they suddenly be endangered? Would they all be void?"

Carvin assures him, without explaining how, that "These contracts will operate precisely the same, the day after *Abood* is off the books." Later he will similarly promise that nothing bad will happen without the agency fees: "The federal government doesn't allowagency fees. And only a third of the members are union members, and yet, that—that union survives. ... So the notion that anything could happenadversely here simply doesn't square with things."

The Atlantic

Why Some States Want Strong Public-Sector Unions

Having a powerful partner on the other side of the bargaining table can make for happier workplaces and better public services.

An estimated 15,000 teachers, parents, and other supporters encircle City Hall in New York during a mass rally in support of an ongoing teachers' strike in 1968.

AP

CHARLOTTE GARDEN | JAN 17, 2016 | BUSINESS

As argument commenced at the Supreme Court last Monday, most eyes were on

Justice Antonin Scalia. While still the Court's conservative paterfamilias, union supporters were looking to Scalia as a potential swing vote in their favor in the case, *Friedrichs v. California Teachers Association*. He had endorsed *Abood*, the precedent now under scrutiny, in a 1991 case, and strongly defended state and municipal employers' right to limit employee speech in other contexts. However, as his questioning began, union supporters lost hope.

Scalia seemed skeptical of public-sector employers' interests in a strong union representing workers, implying that a state would be equally well off bargaining with a weak union with fewer resources. He told the solicitor general of California that he understood "the need of the state to have an efficient system for dealing with its employees," but questioned whether "the union would not survive without" agency fees, the payments that are at issue in the case. Later, Chief Justice Roberts echoed this view, asking for proof that "the unions are going to collapse" without agency fees. Counsel for Friedrichs put a finer point on it, arguing that "if anything, [public employers] don't want" effective unions, "because nobody wants a strong bargaining partner that's going to drive up public expenditures."

In some ways, Scalia's question was a (very) small victory for the unions. At least the conservative justice saw a state interest in allowing public workers to be represented by a union, and in ensuring the union's minimal survival—though maybe no more than that.

Yet, Scalia's implication missed an important fact: Many states want effective and well-resourced unions, even though those unions will be on the other side of the bargaining table. That much is apparent from California's robust defense of its collective-bargaining law in *Friedrichs*, as well as the amicus briefs filed by 21 states and the District of Columbia and a list of cities, counties, elected officials, and school districts in support of California and the California Teachers Association. (I was one of the co-authors of an amicus brief on behalf of Labor

Law and Labor Relations Professors in support of the state and union parties in this case.)

And there's further proof in how many individual states have chosen to manage their employees through collective bargaining: States are not locked into a one-size-fits-all labor-relations model. If a state views unions as unhelpful partners, they are free to eliminate or curtail public-sector bargaining. Despite this, most states allow at least some public workers to bargain collectively. As a result, today about 35 percent of public-sector workers are union members. Furthermore, nearly half of states require or permit agency fees.

But what do states and other public employers gain from the existence of strong unions? During the *Friedrichs* argument, the solicitor general of California explained that his state's collective-bargaining statute—which not only requires represented workers to pay agency fees, but also structures union representation in myriad other ways—was passed in response to "a long history in California in the '50s and 1960s of labor unrest." California was not alone in this regard—many states first authorized public-sector bargaining in response to a wave of hugely disruptive strikes that took place in the 1960s and '70s. These strikes closed schools, stopped garbage pickup, ground public transit to a halt, and even left cities without the protection of firefighters and police. But implementing collective bargaining proved an effective antidote, and subsequent research has confirmed that collective bargaining curtails strikes and other disruptions in the public sector.

When public unions fight for measures that help workers do their jobs safely and effectively, the public

benefits too.

This result may seem counterintuitive; one might assume that eliminating public-employee unions would correspondingly eliminate public employees' collective action. But this view misses what public unions can accomplish for their members: collecting and voicing workers' priorities, pursuing them in bargaining, and enforcing the resulting contract. Not only do public employees value the improvements in wages and working conditions that unions win, but the opportunity to bargain itself makes workers more likely to buy into their employers' missions and stay at their jobs. And, worker stability and voice are in turn linked to productivity gains, undermining Friedrichs's counsel's assumption that a strong union drives up spending. Even more important, when public unions fight for measures that help workers do their jobs safely and effectively—such as when firefighters bargain for better safety equipment or nurses bargain for lower staff-to-patient ratios—the public benefits too.

But employers are less likely to realize these benefits when a union with inadequate resources sits across the table. A union operating on a shoestring will have a difficult time being an effective conduit for the voices of the workers it represents. A union that cannot hire a qualified actuary will struggle to assess employee benefits proposals during bargaining, leaving employees without incentives to remain at their posts. A union that cannot hire lawyers to enforce a contract will quickly render its protections illusory.

The benefits of strong unions are all the more evident where innovative states and cities have prioritized collaborative labor-management relations. For example, some school districts have begun partnering with teachers' unions to improve teacher mentoring and evaluation—one of the most fraught subjects in public employment today. Strong unions make these programs more likely to succeed by promoting teacher buy-in, channeling constructive feedback, and

providing a backstop for teachers who fear that their jobs might be placed at risk if a program initially proves unsuccessful or unpopular.

Finally, agency fees allow unions to take the long view. As the U.S. solicitor general put it during argument, unions that must convince workers to choose to pay for representation that they will receive no matter what may resort to "trying to convince employees that they need the union because otherwise management is going to do them harm." A similar concern led the state of Maryland to favor agency fees—a government report reasoned that making public unions reliant on voluntary dues might lead them to conclude they "must process every grievance, placate every member, fight for every little cause, in order to hold its membership." But a strong union "can tell off a member just as well and sometimes better than management can."

Will the Court see any wisdom in this argument? Based on the questions from the five more conservative justices, it seems doubtful. There's an irony in this: The members of the Court evincing the most hostility to public-sector agency fees are also the strongest advocates for federalism, and especially for giving states a free hand in structuring their public-sector labor relations. Instead, the Court stands poised to unilaterally impose a nationwide "right to work" regime on the public sector, the culmination of decades of conservative advocacy and litigation. But if the Court strikes down agency fees, it is not just unions that will be harmed—governments and citizens who rely on public services will be as well.

Are Polls Less Relevant Than Ever?

Our advice: Take everything with a grain of salt.

ABOUT THE AUTHOR

CHARLOTTE GARDEN is an associate professor at Seattle University School of Law and the litigation director of the Korematsu Center for Law and Equality.

JAN 15, 2016 @ 03:00 PM **3,110** VIEWS

Free Riders, The First Amendment, And The 'Friedrichs' Case

George Leef
CONTRIBUTOR

I write on the damage big government does, especially to education.

FOLLOW ON FORBES (82)

The Californ Teache Associ is an 800-pound gorilla that can survive withou the dues of teache who