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A Ticket to Ride? Not so Fast: Members-Only Collective Bargaining as a Possible State Response to a Judicially Recognized Right to Work

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A Ticket to Free Ride? Not so Fast: Members-Only Collective Bargaining as a Possible State Response to a Judicially Recognized Right to Work

Chris Schmidt*

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE STATUS QUO FOR UNIONS	4
	A. A Brief Look at Organized Labor in the United States	4
	B. The Duty of Fair Representation and Union Security Provisions.....	6
	C. Precedent Supporting Fair-Share Fees.....	8
III.	THE ATTACK ON PUBLIC-SECTOR UNIONS.....	9
	A. The Building Threat to Public-Sector Unions	9
	B. <i>Friedrichs</i>	11
	C. Forecasting the Impact of a Right to Work in the Public Sector	13
IV.	REPLACING THE FAIR-SHARE WITH FAIRNESS	17
	A. Doing Away with Exclusivity and the Duty of Fair Representation	18
	B. The Viability of Members-Only Bargaining.....	19
	C. Is Members-Only Bargaining a Good Idea?.....	23
	i. The Appeal of Members-Only Unions	23
	ii. The Concerns with Members-Only Unions	25
V.	CONCLUSION.....	27

I. INTRODUCTION

The judiciary’s proper role in our democracy is a constant subject of debate among legal academics and citizens alike. When does *interpreting* the law cross the line into *creating* law?

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail will at least know they had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. That is exactly how our system of government is supposed to work. . . . By deciding the question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds.¹

* I would like to sincerely thank Professor Steven Willborn his insight, guidance, and feedback while I wrote this for his Education Law course. I’m also very appreciative to Jackson Louis P.C. for sponsoring the Louis Jackson Memorial National Student Writing Competition in Employment and Labor Law in memory of Louis Jackson, and IIT Chicago-Kent College of Law’s Institute for Law and the Workplace for administering the competition.

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, CJ., dissenting) (citations and internal quotation marks omitted).

When the United States Supreme Court declared same-sex marriage bans unconstitutional on June 26, 2015, Chief Justice Roberts lamented it was an “extraordinary step” that intruded on a matter best left for states and the people, not “five lawyers who happen to hold commissions authorizing them to resolve disputes according to law.”²

When the Court decides the constitutionality of union fair-share provisions for public-sector employees in *Friedrichs v. California Teachers Ass’n*³ in late-June 2016, it may be Justice Kagan criticizing the Court for accepting a “radical request” to create a “right-to-work regime for all government employees . . . and depriv[ing] every state and local government, in the management of their employees and programs, of the tool that many have thought necessary and appropriate to make collective bargaining work.”⁴ An adverse decision in *Friedrichs*⁵ would be the equivalent of passing a national right-to-work law that prohibits collection of fair-share union fees from public-sector employees, a matter historically left up to the states.⁶

² *Id.* at 2611–12. When the Court decided *Obergefell*, it forced thirteen states that had same-sex marriage bans in effect to allow the practice. Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in all 50 States*, NPR (June 26, 2015, 10:05 AM), <http://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages>.

³ No. 13–57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015). Oral arguments are scheduled for Monday, January 11, 2016, with a decision coming no later than Thursday, June 30, 2016, the final day of the Term.

⁴ *Harris v. Quinn*, 134 S. Ct. 2618, 2658 (Kagan, J., dissenting). If a majority of the Justices in *Friedrichs* vote in favor of the petitioners, twenty-five states will become de facto right-to-work states. Victor Joecks, *Unions’ Dirty Little Secret: Workers Can Opt-Out of Membership in All States*, FORBES (Aug. 26, 2015, 3:46 PM), <http://www.forbes.com/sites/realspin/2015/08/26/not-just-in-right-to-work-states-union-workers-can-opt-out-of-membership/>. Obviously it is unclear how the Court will vote in *Friedrichs*—let alone whether Justice Kagan will write a dissenting opinion—but given the majority’s hints and Justice Kagan’s dissent in *Harris*, it seems likely.

⁵ The phrase “adverse decision” is used throughout this Note as shorthand for a union-adverse decision, i.e., a finding for the petitioners that fair-share fees are unconstitutional. It does not reflect the author’s opinion; in fact, the opposite is true. See [Name Omitted for Blind Grading], *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 (2015), 94 NEB. L. REV. 477 (2015).

⁶ See Keith J. Brodie, *Is the Supreme Court Primed to Create “Right-to-Work” for Public Employees Nationwide?*, NAT’L L. REV. (July 9, 2015), <http://www.natlawreview.com/article/supreme-court-primed-to-create-right-to-work-public-employees-nationwide>; cf. 29 U.S.C. § 164(b) (1959) (“Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”).

While *Obergefell* and *Friedrichs* are similar in that they arguably intrude on the democratic process, there is one sizable distinction: *Obergefell* shut down the political process in regards to same-sex marriage, but *Friedrichs* will not completely foreclose the democratic realm at the state level. Instead, closing the debate on agency fees need not close minds for union supporters—it could *open* minds to creative solutions.

This Note suggests one legally permissible legislative response available to pro-union states if *Friedrichs* is decided adversely: eliminate the duty of fair representation and do away with union exclusivity to allow members-only bargaining. Currently, public-sector unions with collective-bargaining power are obligated to receive majority support from the bargaining unit, in which case the union is named the exclusive bargaining agent. In exchange for this exclusivity the union must represent *all* employees—members and non-members alike. While eliminating this historically rooted obligation seems extreme in the context of American labor law, it has merit. Under a members-only system, union dissenters could truly be “non union,” union supporters would no longer subsidize non-members, and unions would be in a position to show their value like never before.

Part II of this Note briefly outlines the role of unions in America, both historically and today, with section II.A tracing the rise and fall of unions as a prominent feature of our labor environment; section II.B describing union security provisions; and section III.C outlining precedent supporting such security arrangements. Part III dissects the pending threat to this status quo, as section III.A attempts to decipher the clues dropped by the Court’s conservative bloc over the past several years; section III.B introduces *Friedrichs*; and section III.C forecasts the impact an adverse decision would have on public-sector unions. Lastly, Part IV presents members-only bargaining as an option available to states leery of a traditional right-to-work

system, with section IV.A describing the model; section IV.B suggesting the model is a viable option given its historical and current use both in the United States and abroad; and section IV.C weighing the pros and cons of members-only collective bargaining in the public sector.

II. THE STATUS QUO FOR UNIONS

The Court's forthcoming *Friedrichs* decision is arguably the headliner in a 2015–2016 Term characterized by many as even more politicized than usual.⁷ This comes as no surprise given the polarizing nature of unions. Compare both ends of the spectrum—labor advocates argue: “It was the labor movement that helped secure so much of what we take for granted today. . . . The cornerstones of the middle-class security all bear the union label.”⁸ Conservatives champion the other side: “Collective bargaining is not a right, it is an expensive entitlement. . . .”⁹ Regardless of these contrasting viewpoints, there can be no dispute unions have been a staple of American labor. This Part looks at how organized labor came to fill the spot it does in the United States, and—perhaps more importantly—how it has stayed there.

A. A Brief Look at Organized Labor in the United States

⁷ David G. Savage, *Why Liberals Fear New Supreme Court Term Could Hurt Abortion Rights and Labor Unions*, L.A. TIMES (Oct. 5, 3:00 AM), <http://www.latimes.com/nation/la-na-supreme-court-new-term-20151005-story.html>. Other politically charged issues on the docket include abortion, redistricting, affirmative action, and religious exemptions to the Affordable Care Act.

⁸ President Barack Obama, Speech at Milwaukee Laborfest (Sept. 1, 2014) (partial transcript available at <https://www.whitehouse.gov/blog/2010/09/06/president-obama-labor-day-fight-americas-workers-continues>); see also Senator John F. Kennedy, Speech in Cadillac Square, Detroit, MI. (Sept. 5, 1960) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=60408>) (“For the labor movement is people. Our unions have brought millions of men and women together, made them members one of another, and given them common tools for common goals. Their goals are goals for all America—and their enemies are the enemies of all progress.”).

⁹ Scott Bauer, *Fierce Response to Walker Plan to Bar Federal Public Unions*, AP (Sept. 14, 2015, 9:18 PM), <http://bigstory.ap.org/article/9608f343fcae476db6f8e89238b2f3c7/ap-exclusive-gops-walker-proposes-vast-union-restrictions>; see also *infra* note 12 (discussing early opposition to public-sector unions from left-wing politicians and unions themselves). The bases for this argument are the purported effects public-sector unions have on local budgets. Cities like Detroit and San José exemplify the extent to which public-sector pension plans strain municipal budgets and, in extreme situations, lead to cities filing for bankruptcy protection. See, e.g., 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/>; 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.

When Congress passed the Wagner Act—known today as the National Labor Relations Act (NLRA)¹⁰—eighty years ago, unionism spread like wildfire within the private sector. By 1953, one-third of American private-sector workers belonged to a union.¹¹ In 1959, Wisconsin became the first state to allow public workers to collectively bargain.¹² This quickly became the norm and other states followed Wisconsin, as did the Federal government.¹³ Union membership continued to grow until its apex in 1979, when 21 million individuals were full-fledged union members.¹⁴ This heavy unionization produced leverage, which led to gains for unionized employees that can still be seen today.¹⁵

At some point, however, things began to change. First, union membership began to decline in the aggregate—in 2014, only 11.1% of workers, or 14.6 million individuals, belonged to a union.¹⁶ The precise causes of this decline are unknown, but likely stem from manufacturers’ decisions to outsource traditional union jobs and anti-organized labor sentiment

¹⁰ 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)).

¹¹ William John Bux & Miranda Tolar, *Houston Janitors and the Evolution of Union Organizing*, 70 TEX. B.J. 426, 426 (2007). This marked the peak in regards to union density.

¹² See James Sherk, Op-Ed., *F.D.R. Warned Us About Public Sector Unions*, N.Y. TIMES (July 23, 2014, 4:19 PM), <http://www.nytimes.com/roomfordebate/2011/02/18/the-first-blow-against-public-employees/fdr-warned-us-about-public-sector-unions>. Interestingly, until Wisconsin’s novel move, almost no one thought unions belonged in the public sector.

“It is impossible to bargain collectively with the government.” That wasn’t Newt Gingrich or Ron Paul, or Ronald Reagan talking. That was George Meany—the former president of the A.F.L.-C.I.O.—in 1955. F.D.R. considered [public-sector unions] “unthinkable and intolerable.” . . . Up through the 1950s, unions widely agreed that collective bargaining had no place in government.

Id. See Ralph K. Winter, Jr. & Harry H. Wellington, *The Limits of Collective Bargaining in the Public Sector*, 78 YALE L. J. 1107 (1969) for the seminal argument against public-sector unionization.

¹³ *Id.*

¹⁴ GERALD MAYER, CONG. RESEARCH SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES 10 (2004).

¹⁵ News Release, Bureau of Labor Statistics, Union Members—2014 (Jan. 23, 2015), *available at* <http://www.bls.gov/news.release/pdf/union2.pdf> (noting union workers make an average of \$10,500 more per year than non-union workers). To be fair, there are other factors that contribute to this disparity—e.g., education levels, type of work, etc.

¹⁶ News Release, Bureau of Labor Statistics, Union Members—2014 (Jan. 23, 2015), *available at* <http://www.bls.gov/news.release/pdf/union2.pdf> [hereinafter BLS Report].

from big business. Second, the prototypical union member changed—in 2009, public-sector union membership surpassed private-sector membership for the first time.¹⁷

Today, teachers comprise some of the largest, strongest unions in the country—the National Education Association has 3.2 million active members¹⁸ and the American Federation of Teachers has over 1.6 million members.¹⁹ Much like what happened in the private sector, however, public-sector unions are now under attack;²⁰ teachers' organizations are in danger of losing members, losing funds, and thus losing power.²¹ But, as discussed in the next section, these unions have both the duty of fair representation and, in non-right-to-work states the right to extract fair-share fees. These principles work together to preserve high membership rates, the union purse, and organizational power—for now.

B. The Duty of Fair Representation and Union Security Provisions

The legal status quo imposes a burdensome obligation on majority unions, but in twenty-five states²² it also provides them with a useful mechanism to cope with its obligation. First, unions have a duty of fair representation given their exclusive status; in practice, this means an elected union must represent *everyone* in the bargaining unit—members and non-members alike.²³ This duty first developed in the private sector as a byproduct of the Railway Labor Act

¹⁷ Steven Greenhouse, *Most U.S. Union Members Are Working for the Government, New Data Shows*, N.Y. TIMES (Jan. 22, 2010), http://www.nytimes.com/2010/01/23/business/23labor.html?_r=0. Private-sector membership has since regained the lead, but it is a virtual deadlock. See BLS Report, *supra* note 16.

¹⁸ *Our Members*, NAT'L ED. ASS'N, <http://www.nea.org/home/1594.htm> (last visited Oct. 7, 2015).

¹⁹ AM. FED. OF TEACHERS, STATE OF THE UNION 2012–2014 19 (2014). In all, teachers, police officers, and firefighters compose roughly one-third of state and local public-sector union members. MILLA SANES & JON SCHMITT, CTR. FOR ECON. & POL'Y RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES (2014). It is worth noting the National Education Association has more experience in right-to-work states than the American Federation of teachers, which is more urban-based. See Andrew J. Rotherham, *Doomsday for Teachers Unions? How a Supreme Court Case Could Cripple Teachers Unions*, US NEWS (July 2, 2015), <http://www.usnews.com/news/the-report/articles/2015/07/02/how-the-supreme-court-could-doom-teachers-unions>.

²⁰ See *infra* notes 40–52.

²¹ See *infra* notes 64–82.

²² See *infra* note 40 and accompanying text.

²³ See Benjamin Sachs & Katherine Fisk, Op-Ed., *Why Should Unions Negotiate for Workers Who Don't Pay Their Fair Share?*, L.A. TIMES (July 9, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-sachs-unions-supreme-court->

(RLA)²⁴ and NLRA’s promotion of exclusive representation.²⁵ But the public sector is not federally regulated, rather “the legal scope of collective bargaining for state and local public-sector workers is the domain of states and, where states allow it, local authorities.”²⁶ Therefore public unions are instead regulated through state statutory schemes, such as Nebraska’s Industrial Relations Act²⁷ and State Employees Collective Bargaining Act,²⁸ which similarly impose the duty of fair representation.

To offset this duty of fair representation, unions are sometimes able to rely on union security provisions. Put generally, these arrangements consist of “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.”²⁹ These provisions condition employment on some level of involvement with unions.

Historically, these arrangements existed on a continuum with varying levels of support required. Most demanding were closed-shop provisions, where the employer hires only union

20140710-story.html (“In every state, workers who want to collectively bargain with an employer must get support from a majority of the workers in a unit When the union gets majority support, it has a legal duty to bargain on behalf of all the workers in the unit, including those who object to the union. . . . This is the so-called rule of exclusive representation, and it applies everywhere in the country.”).

²⁴ See generally 45 U.S.C. §§ 151–165 (1996).

²⁵ Kenneth J. Rose, *The Duty of Fair Representation in Public Sector Collective Bargaining*, 5 J. OF L. & EDUC. 77, 77 (1976). In the private sector, “Although of court origin, the duty of fair representation is a statutory duty inextricably intertwined with the concept of exclusivity.” *Id.*; see also *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) (“While the majority of the craft chooses the bargaining representative, when chosen it represents, as [the RLA] by its terms makes plan, the craft or class, and not the majority. . . . [T]he organization chosen to represent a craft is to represent all its members, the majority as well as the minority”); *Vaca v. Sipes*, 386 U.S. 171 (1966) (citing § 8(b) of the NLRA as the source of a private-sector union’s duty to represent all members within a bargaining unit).

²⁶ SANES & SCHMITT, *supra* note 19, at 3; see also Connye Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 Lab. Law. 183, 183 (1996) (noting the duty of fair representation for private-sector unions comes from the National Labor Relations Act, but “state laws and collective bargaining agreements are the source for implicit duties covering public employee unions”).

²⁷ NEB. REV. STAT. §§ 48-801 *et seq.* (2011).

²⁸ NEB. REV. STAT. §§ 81-1369 *et seq.* (2011).

²⁹ 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). To be clear, these provisions are prevalent in both public- and private-sector unions.

members that pay full dues; these are no longer legal.³⁰ More important today are agency-shop provisions, which require an employee to pay only for his fair share of collective-bargaining costs; whether the employee joins the union is entirely up to him.³¹ Forcing non-members to pay such dues is said to combat the free-rider problem and help unions ensure they have enough money to represent the entire bargaining unit. It is the constitutional validity of these provisions that the Supreme Court will address in *Friedrichs*.

C. Precedent Supporting Fair-Share Provisions

As public-sector unionism grew in the mid-twentieth century, there was pushback about the legality of agency-shop provisions. Starting in the private sector, petitioners claimed the Railway Labor Act's union-shop provision was impermissible in *Railway Employees' Department v. Hanson*.³² While the Nebraska Supreme Court ruled such a provision violated the First Amendment's guaranteed freedom to associate and thus did not preempt the Nebraska Constitution's right-to-work clause,³³ the U.S. Supreme Court upheld the RLA's fair-share provision and thus the RLA preempted the Nebraska Constitution.³⁴ The Court subsequently

³⁰ *Id.* A subcategory of closed-shop provisions are union-shop agreements, where employers may hire non-union members provided the employee joins shortly after gaining employment. *Id.* at 58. These arrangements were made illegal under the Taft-Hartley Act of 1947, see Labor Management Relations Act, ch. 120, § 101, 61 Stat. 136, (1947), now codified at 29 U.S.C. §§ 401 *et seq.*, legislation that also granted states the right to pass right-to-work laws prohibiting union security arrangements altogether.

³¹ See Dau-Schmidt, *supra* note 29, at 58. Thus agency-shop provisions create two classes of workers within a bargaining unit: full members and agency-fee payers. The union represents both classes equally.

³² 351 U.S. 225 (1956).

³³ *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.

³⁴ *Hanson*, 351 U.S. 225. The Court admitted in passing that such fees may “force[] men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought,” but found persuasive the lack of proof any fees were spent for political purposes. *Id.* at 236. Thus the Court analogized these “non-political” dues to compulsory dues for integrated bar associations. *Id.* at 238. This was ironic given the fact the Court did not address the legality of compulsory integrated bar dues until five years later, in *Lathrop v. Donohue*, 367 U.S. 820 (1961). Justice Douglas, the author of *Hanson* who argued for agency fees given their similarity to such bar dues, strongly dissented to the imposition of the fees in *Lathrop*. See *id.* at 884–85 (Douglas, J., dissenting).

clarified *Hanson* in *International Ass’n of Machinists v. Street*, where it held private-sector fair-share fees could only be collected for collective-bargaining purposes, not political ones.³⁵

Not until 1977 did the Supreme Court address whether the uniquely political nature of public-sector collective bargaining prohibited agency-shop agreements, when it ruled such provisions constitutional in *Abood v. Detroit Board of Education*.³⁶ In *Abood*, a group of teachers challenged the teachers’ union’s ability to collect fair-share fees since “collective bargaining in the public sector is ‘inherently political.’”³⁷ While the Court acknowledged the distinction between the public and private sectors, it ultimately upheld such provisions given the desire to maintain labor peace and reduce the risk of free riders.³⁸ Much like in *Street*, the Court attempted to draw a line between chargeable and non-chargeable activities: employees must pay dues “germane to [the union’s] duties as collective-bargaining representative.”³⁹

III. THE ATTACK ON PUBLIC-SECTOR UNIONS

After *Abood*, the general constitutionality of fair-share provisions appeared settled. The decision was not a Teflon shield for agency fees, however. *Abood* did not remove the issue from the democratic realm, as states remained free to curb public-sector collective bargaining through right-to-work laws. Additionally, and more relevant here, *Abood* left ambiguities that have allowed the Court to revisit its holding over the past several years. These legislative and judicial attacks threaten the continued collection of agency fees—and thus the union purse—but it is unclear whether unions fears will materialize, let alone whether it will cause the dastardly impact many anticipate. This Part speculates both as to the likely result and potential impact of *Friedrichs*.

³⁵ *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961).

³⁶ 431 U.S. 209 (1977).

³⁷ *Id.* at 227.

³⁸ *Id.* at 222–23.

³⁹ *Id.* at 235–36.

A. The Building Threat to Public-Sector Unions

Union opponents have been chipping away at union security arrangements for some time. Even before *Abood*, nineteen states already had right-to-work legislation on the books.⁴⁰ Most recently, Indiana, Michigan, and Wisconsin joined the club, bringing the total to twenty-five states that prohibit agency-shop provisions.⁴¹ These developments were especially significant given Michigan's history as a union hotbed⁴² and the drama that accompanied Wisconsin's sweeping reforms.⁴³

This recent legislative push across numerous states coincided with an indication from the Court that it is willing to revisit *Abood*'s vitality. The first sign came in *Knox v. SEIU, Local 1000*, where the Court addressed the procedural requirements for a union to collect fair-share

⁴⁰ *Right-to-Work Resources*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last visited Oct. 14, 2015). Florida was the first to pass such a law in 1943. *Id.* Right-to-work systems create two classes of workers: dues-paying members and non-members. The union is legally obligated to represent both classes equally. Compare this to the employee classes in agency-fee environments, discussed *supra* note 31.

⁴¹ *Id.* Ten of these states have included the right to work on their state constitutions, much like was the case for Nebraska in *Hanson*. Interestingly, individual counties have begun to enter the fray. For example, the Republican-led Kentucky Senate passes a right-to-work bill every year, only for the Democrat-led House to reject it. Lisa Autry, *Kentucky Right-to-Work Battle Shifts to Counties*, NPR (Mar. 18, 2015, 3:24 AM), <http://www.npr.org/2015/03/18/393555453/kentucky-right-to-work-battle-shifts-to-counties>. Tired of this deadlock, Warren County, Kentucky, became the first county to pass a right-to-work ordinance in the country. *Id.* Predicting economic benefits, eleven Kentucky counties quickly followed suit. *Id.*

⁴² Brett Healy & F. Vincent Vernuccio, *Michigan's Right-to-Work Success—And Wisconsin's Opportunity*, WASH. TIMES (Feb. 27, 2015), <http://www.washingtontimes.com/news/2015/feb/27/brett-healy-and-f-vincent-vernuccio-michigans-right/> (“The historical significance of Michigan’s decision is difficult to understate: Michigan is home to America’s manufacturing hub for automobiles and birthplace of the United Auto Workers (UAW).”); see also Jonathan Oosting, *Michigan Union Membership Dropped Significantly in 2014, First Full Year Under Right-to-Work Law*, MLIVE (Jan. 23, 2015, 11:05 AM), http://www.mlive.com/lansing-news/index.ssf/2015/01/michigan_union_membership_down.html (“Michigan dropped out of the top ten states for union membership in 2014. It’s [sic] 14.5 percent rate ranked 11th in the country but was still well above the national average.”).

⁴³ The labor reforms Wisconsin Governor Scott Walker advocated for—and ultimately received—led to mass protests, a recall election, and considerable limitations to collective bargaining. See 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. Government Walker’s aggressive moves against organized labor helped propel him into the 2016 presidential race, although he eventually withdrew his bid for the republican nomination. Jessica Taylor, *Scott Walker Ends Presidential Bid with a Shot at Trump*, NPR (Sept. 21, 2015, 4:55 PM), <http://www.npr.org/sections/itsallpolitics/2015/09/21/442313437/reports-scott-walker-ending-presidential-campaign>.

fees.⁴⁴ Writing for the majority, Justice Alito repeatedly noted that agency-shop provisions impose a “significant impingement” on First Amendment rights.⁴⁵ Dating back to *Abood*, this has been considered justified given the threat of free riders, but Justice Alito noted such arguments are “generally insufficient to overcome First Amendment objections. . . . Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly. . . .”⁴⁶ Concretely, *Knox* imposed heightened procedural requirements for unions to collect dues from nonmembers;⁴⁷ indirectly, *Knox* was a warning shot.

The Court’s distaste for *Abood* became even more apparent in 2014 when the Court declared agency fees unconstitutional for “quasi-public employees” in *Harris v. Quinn*.⁴⁸ Much like *Knox*, *Harris* had a fairly significant impact from a practical perspective,⁴⁹ but perhaps more important was its critique of *Abood*. After declining to extend or otherwise apply *Abood*, Justice Alito and the conservative majority methodically criticized its reasoning and erroneous reliance on *Hanson* and *Street*.⁵⁰ The opinion next knocked the two proffered justifications—labor peace and elimination of free-ridership—finding them insufficient to overcome exacting First Amendment scrutiny.⁵¹ Ultimately, however, the Court settled in the middle; it did not explicitly overrule *Abood*, but perhaps it did so stealthily.⁵²

⁴⁴ 132 S. Ct. 2277, 2285 (2012).

⁴⁵ *Id.* at 2282.

⁴⁶ *Id.* at 2290.

⁴⁷ *Knox* held a union failed to give adequate *Hudson* notice where it collected a special assessment for political purposes without giving nonmembers a chance to opt-out. *See id.* at 2291.

⁴⁸ 134 S. Ct. 2618 (2014).

⁴⁹ *Harris* involved a group of personal assistants’ challenge to agency fees. *Id.* The clear victors were thus personal assistants both in Illinois and across the nation. Other quasi-public employees—e.g., government-funded daycare providers—are also likely winners, although courts will struggle to define who qualifies as a quasi-public employee. Conversely, the obvious losers are unions who can no longer collect dues from nonmembers in these sectors.

⁵⁰ *Id.* at 2631.

⁵¹ *Id.* at 2639–40.

⁵² Commentators have noticed a pattern develop during Chief Justice Roberts’ tenure: while the Court rarely explicitly overturns cases, it lays the foundation in an initial case and then uses it as support to wholly overturn it in

B. Friedrichs

Rebecca Friedrichs, an elementary teacher with twenty-eight years of experience in California public schools, was the first to accept the Court's apparent invitation to revisit *Abood* directly.⁵³ With the help of the Center for Individual Rights, a conservative public interest law firm, Ms. Friedrichs filed suit in the Central District of California, only to concede defeat at the district⁵⁴ and circuit⁵⁵ levels in order to expedite its request for *certiorari*.⁵⁶ On June 30, 2015, the Court granted *certiorari* to hear the challenge brought by Ms. Friedrichs and nine of her peers.⁵⁷

Despite the recent clues from the Court, it is not a foregone conclusion that the Court will overrule *Abood*. First, Justice Kagan penned a persuasive dissent in *Harris* that three of her fellow Justices joined.⁵⁸ Whether maintaining labor peace and curbing free-ridership constitute

a subsequent case. See 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/7MXK-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 phrase "stealth overruling" has been coined to describe this two-step process. See 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, 36 (2011).

⁵³ Emma Brown, *Two Teacher Explain Why They Want to Take Down Their Union*, WASH. POST (Aug. 11, 2015), <https://www.washingtonpost.com/news/education/wp/2015/08/11/two-teachers-explain-why-they-want-to-take-down-their-union/>. Technically, Ms. Friedrichs filed her complaint on April 30, 2013, over a year before *Harris* was decided. See *Petition, Friedrichs v. Cal. Teachers Ass'n*, No. 8:13CV00676, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013). Perhaps it is therefore more accurate to say Ms. Friedrichs responded to *Knox*'s call.

⁵⁴ Order, *Friedrichs*, No. 8:13CV00676, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013).

⁵⁵ *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

⁵⁶ See *Supreme Court to Hear Union Dues Challenge*, CTR. FOR INDIVIDUAL RTS. (June 30, 2015), <https://www.cir-usa.org/cases/friedrichs-v-california-teachers-association-et-al/> ("The speed with which the case moved through the lower courts reflected a deliberate litigation strategy. From the beginning, [the Center for Individual Rights] argued that the lower courts do not have the authority to overturn existing Supreme Court precedent. As a result, we asked the trial court and the Ninth Circuit Court of Appeals to decide against our clients on the basis of the pleadings (without trial or oral argument) so as to send the case on to the Supreme Court as quickly as possible."). The order granting *certiorari* capped an eventful—and left-leaning—week for the Supreme Court, as it had just announced *King v. Burwell*, 135 S. Ct. 2480 (2015) (affirming the Affordable Care Act) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (striking down same-sex marriage bans nationwide).

⁵⁷ 135 S. Ct. 2933 (2015).

⁵⁸ *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (Kagan, J., dissenting). Justices Ginsburg, Breyer, and Sotomayor joined the dissent. Again, the author does not necessarily agree with Justice Kagan and the *Harris* dissent's conclusion—the opposite is true—but it raises valid points.

compelling enough interests is an open question, but it cannot be disputed they are, in fact, valid concerns. Furthermore, the Court requires “special justification” to overturn its precedent given the doctrine of *stare decisis*.⁵⁹ There are a number of considerations the Court uses as guideposts when deciding whether to overturn precedent, and one is the degree of reliance interests at stake.⁶⁰ As Justice Kagan correctly highlighted, “*Abood* is not just any precedent: It is entrenched in a way not many decisions are.”⁶¹ Lastly, Catherine Fisk, a law professor at UC Irvine, suggests Justice Kagan may have an unusual ally in *Friedrichs*—Justice Scalia.⁶² Scalia has written in support of *Abood*, and as the potential swing vote, he may have a difficult time maneuvering away from his previously voiced support.⁶³ That said, it nonetheless appears Justice Alito and his allies are poised to overturn *Abood* and strike down agency-shop provisions in the public sector, effectively creating a right-to-work environment for all government workers.

C. Forecasting the Impact of a Right to Work in the Public Sector

Political and judicial pundits anticipate if the Supreme Court uses *Friedrichs* to strike down fair-share provisions: it would “gut unions’ power,”⁶⁴ could be a “doomsday” scenario for

⁵⁹ *Id.* at 2651.

⁶⁰ *Id.* at 2652.

⁶¹ *Id.* at 2651–52 (“*Abood* has created enormous reliance interests. More than 20 states have enacted statutes authorizing fair-share provisions . . . ‘*Stare decisis* has added force,’ we have held, when overturning a precedent would require ‘States to reexamine [and amend] their statutes.’” (quoting *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202–03 (1991))). As to be expected, the majority glossed over this consideration and focused on other *stare decisis* factors such as the original cases reasoning, errors that have become more apparent over time, and the rule’s workability. *See generally id.* at 2618 (majority opinion).

⁶² David G. Savage, *Supreme Court to Hear California Teacher’s Suit—A “Life or Death” Case for Unions*, L.A. TIMES (June 30, 2015, 7:14 PM), <http://www.latimes.com/nation/la-na-supreme-court-teachers-unions-california-20150630-story.html>.

⁶³ *See, e.g.,* *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring) (“The ‘compelling state interest’ that justifies [fair-share fees] is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of ‘free-riding’ nonmembers; private speech often further the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the ‘free riders’ who are nonunion members of the union’s own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests.”).

⁶⁴ Betsy McCaughey, *Will the Supreme Court Gut Unions’ Power?*, NY POST (Oct. 8, 2015, 8:20 PM), <http://nypost.com/2015/10/08/will-the-supreme-court-gut-unions-power/> (“‘It may well be life or death for unions,’ warns Harvard Law’s Benjamin Sachs.”).

teachers,⁶⁵ and may just mean “the end of public-employee unions.”⁶⁶ But are such bold hypotheses merited, or mere hyperbole? Will the inability to collect fair-share fees cripple public-sector unions and cause them to fade into the background of American labor, or will *Friedrichs* be a mere blip on the radar that forces unions and public employees to reassess how they interact? It is difficult to say, but the answer is probably somewhere in the middle.

There are three reasons to think an adverse decision in *Friedrichs* would not destroy unions. First, calling *Abood* the “birth of the agency shop for public-sector unions”⁶⁷ is probably an exaggeration:

[Before *Abood*] 33 percent of the public sector was unionized (nearly 5 million members), and 40 percent were under contract; in 2014, 36 percent were members, and 39 percent under contract So it seems that having the *Abood* union security protection may have helped the public sector unions keep pace with employment growth and avoid, until recently, setbacks from massive employer attacks. But the effect seems modest. An AFSCME spokesperson emphasized that the union grew to be powerful before fair share; the implication is that they could do it again.⁶⁸

Furthermore, teachers’ unions enjoy bargaining power and strength rivaled by few, if any. The National Education Association (NEA), which is divided into state-sized divisions, has 3.2 million members; the American Federation of Teachers (AFT) represents 1.6 million teachers.⁶⁹ This power enables the teachers’ organizations “to be a union, a professional organization, and a civil rights group,” according to Randy Moody, former president of the

⁶⁵ Rotherham, *supra* note 19.

⁶⁶ Garrett Epps, *The End of Public-Employee Unions?*, THE ATLANTIC (Feb. 20, 2015), <http://www.theatlantic.com/politics/archive/2015/02/the-end-of-public-employee-unions/385690/>.

⁶⁷ 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).

⁶⁸ David Moberg, *Calm Down: SCOTUS’s ‘Friedrichs’ Case Won’t Mean the End of the American Labor Movement*, IN THESE TIMES (July 15, 2015, 3:45 PM), http://inthesetimes.com/working/entry/18204/calm_down_friedrichs_v_california_teachers_association_wont_mean_the_end_o. To push back on back on this point a bit, it is worth noting that *Abood* did not *create* a union right to collect fair-share payments, rather it did not declare them unconstitutional. Thus to say “the union grew powerful before the fair share” is perhaps misleading since public-sector unions grew before *Abood* in a labor environment that allowed fair-share provisions—at least in non-right-to-work states.

⁶⁹ *Our Members*, *supra* note 18; AM. FED. OF TEACHERS, *supra* note 19.

NEA.⁷⁰ The current opt-out regime for union dues allows teachers to withdraw contributions for their union's political arm, but few do so—for example, only 90,000 NEA members—less than three percent—decline to pay full dues.⁷¹ Losing partial fees from 90,000 members nationwide would certainly not destroy union strength.

Lastly, unions will not go quietly into the night, even if *Friedrichs* makes life difficult. A majority of literature discussing a post-agency-fee world focuses on internal efforts already being employed by unions. The NEA and AFT have embarked on massive recruiting drives “to convince workers of unions’ relevance,” and it seems to be working—the AFT reported it has gained 140,000 full members since the beginning of 2014.⁷²

All of that said, to suggest unions have no cause for concern is as inaccurate as saying they are doomed. While teachers’ unions are strong, they are weakening and have been for twenty years. Last year marked the first time since the rise of teachers’ unions in the 1980s that under half of our country’s 5.2 million teachers were represented by unions.⁷³ Experts point to three colliding trends: (1) baby boomers—known for high unionization rates—are retiring; (2)

⁷⁰ Randy Moody, Former President of the NEA, Lecture to Professor Steven Willborn’s Education Law class at the University of Nebraska College of Law (Sept. 15, 2015). A more non-biased characterization of “civil rights group” would be “political activist group,” and a very democratic-leaning one at that. *See also* Steven Brill, *The Teachers’ Unions’ Last Stand*, N.Y. TIMES (May 17, 2010), http://www.nytimes.com/2010/05/23/magazine/23Race-t.html?pagewanted=all&_r=0 (“In the last 30 years, the teachers’ unions have contributed nearly \$57.4 million to federal campaigns, an amount that is about 30 percent higher than any single corporation or other union. And they have typically contributed many times more to state and local candidates. About 95 percent of it has gone to Democrats.”).

⁷¹ Brian Mahoney, *High Court May Deal Unions Serious Blow*, POLITICO (June 30, 2015, 11:29 AM), <http://www.politico.com/story/2015/06/supreme-court-public-sector-unions-fees-119585>; *see also* Lydia DePilllis, *The Supreme Court’s Threat to Gut Unions Is Giving the Labor Movement New Life*, WASH. POST (July 1, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/07/01/the-supreme-courts-threat-to-gut-unions-is-giving-the-labor-movement-new-life/> (“Right now, 91 percent of government workers covered by collective bargaining contracts nationwide are full members.”).

⁷² Dave Jamieson, *Teachers’ Union Girds for Supreme Court Setback, Pledges to Grow Membership*, HUFFINGTON POST (July 13, 2015, 12:59 PM), http://www.huffingtonpost.com/2015/07/13/friedrichs-teachers-union_n_7785364.html; *see also* DePilllis, *supra* note 71 (characterizing *Friedrichs* as a wake-up call to unions).

⁷³ Gregg Toppo & Paul Overberg, *Fewer than Half of Teachers Now Covered by Unions*, USA TODAY (Feb. 10, 2015, 8:34 PM), <http://www.usatoday.com/story/news/nation/2015/02/10/teacher-unions-fewer-half/23195433/>.

school districts are in a hiring boom post-recession; and (3) charter schools are gaining steam and “overwhelmingly hire non-unionized teachers.”⁷⁴

Another dire sign for teachers’ unions are results from states that have recently passed right-to-work legislation. Michigan and Wisconsin—the two states to pass right-to-work legislation most recently—serve as the best examples. In Michigan, the effect is starting to materialize: the first year post-legislation saw only a minimal decrease, but “union membership fell sharply in 2014, the first full year under the state’s new right-to-work law.”⁷⁵ A separate Michigan law also now prohibits school districts from automatically deducting dues from teacher paychecks, and together these reforms are having profound impacts on teachers’ unions.⁷⁶ In 2011, Wisconsin Governor Scott Walker signed Act 10, a controversial anti-union law.⁷⁷ Since then, “[t]he state branch of the National Education Association, once 100,000 strong, has seen its membership drop by a third. The American Federation of Teachers, which organized in the college system, saw a 50 percent decline. The 70,000-person membership in the state employees union has fallen by 70 percent.”⁷⁸ It should be noted that while Michigan and Wisconsin follow the general rule that right-to-work states experience lower unionization rates than agency-fee states, the correlation is not universal.⁷⁹

⁷⁴ *Id.*

⁷⁵ Oosting, *supra* note 42 (“Overall, 14.5 percent of wage and salary workers in Michigan were members of a union in 2014, down from 16.3 percent in 2013 Union membership dropped from approximately 633,000 Michigan workers in 2013 to 585,000 in 2014, even as the total state employment numbers grew. The number of workers represented by a union . . . also declined.”).

⁷⁶ *Id.* Conversely, Maryland used to not allow agency fees, but allowed unions to start doing so in 2011. *See* DePillis, *supra* note 71. The change spurred a double-digit increase in membership among those represented by unions. *Id.* This illustrates the impact of agency fees and membership in states who essentially repeal right-to-work legislation—the suggestion being that membership is correlated with a union’s ability to collect agency fees.

⁷⁷ Robert Samuels, *Walker’s Anti-Union Law Has Labor Reeling in Wisconsin*, WASH. POST (Feb. 22, 2015), https://www.washingtonpost.com/politics/in-wisconsin-walkers-anti-union-law-has-crippled-labor-movement/2015/02/22/1eb3ef82-b6f1-11e4-aa05-1ce812b3fdd2_story.html.

⁷⁸ *Id.*

⁷⁹ Nebraska, a conservative state with a constitutionalized right to work, has an incredibly strong teachers’ union with almost 100% membership. *See* Moody, *supra* note 70; *see also* Michael Hartney, *Would Curbing Public Sector Unions Silence Teachers’ Voices?*, NEWSWEEK (Oct. 9, 2015, 4:30 PM), <http://www.newsweek.com/would>

Ultimately the biggest fear for unions is that an adverse decision would set off a domino effect, much like it did in Wisconsin or Michigan. An adverse decision would be a “symbolic blow, a legal slap in the face”⁸⁰ that essentially gives union members around the country a ticket to free ride. Just because teachers in agency-fee states normally pay the extra amount to become full members does not mean they will not be tempted to fully withdraw when given the option to do so.⁸¹ The opportunity to save a considerable amount of money⁸² and free ride off a union that is obligated to collectively bargain on your behalf is enticing, even for those not politically opposed to public-sector collective bargaining.

IV. REPLACING THE FAIR-SHARE WITH FAIRNESS

Should the first domino fall in *Friedrichs*, states should at least consider a drastic step: taking away the ticket to free ride. One way to do this is for states to get rid of exclusivity and fair representation,⁸³ instead allowing—perhaps even encouraging or requiring⁸⁴—state

curbing-public-sector-unions-silence-teachers-voices-381233 (“Interestingly, in 1995, Indiana eliminated the right of teachers unions to charge agency fees to non-members. Although the state’s major NEA-affiliate (ISTA) did not grow rapidly in the decade that followed agency fee elimination, neither did it see its membership disappear.”); BLS Report, *supra* note 15 (showing 31.6% of federal employees are union members, on par with state public employee membership, despite the federal government being a right-to-work environment).

⁸⁰ Moberg, *supra* note 68.

⁸¹ See, e.g., Mahoney *supra* note 71 (“Losing those 90,000 [non-member, agency-fee payers in California] wouldn’t crush the union. But a decision freeing members from paying dues could tempt many others to leave it.”); Jamieson, *supra* note 72.

⁸² See Op. Ed., *Teachers vs. Union Dues*, WALL ST. J. (May 4, 2014, 7:24 PM), <http://www.wsj.com/articles/teachers-vs-union-dues-1430781887>. In California, where *Friedrichs* began, members of the teachers’ union pay roughly \$1,000 per year in union dues. Those who opt-out of political expenditures pay about \$600. *Id.*

⁸³ Some argue states should allow member-only bargaining, but still preserve the current system if a majority of employees elect a union representative. See, e.g., Catherine Fisk, *Labor at a Crossroads: In Defense of Members-Only Unionism*, THE AM. PROSPECT (Jan. 15, 2015), <http://prospect.org/article/labor-crossroads-defense-members-only-unionism> (“[U]nion opponents will argue that members-only bargaining is the *only* permissible form of union representation and the law should abandon the principle of exclusive representation when a majority chooses a union. Given the lack of experience that unions, employers, and workers have with members-only unionism—at least in the modern context—a permissive and experimental approach is appropriate.”).

⁸⁴ What level of involvement public employers must have with minority unions may well vary from state to state, and is beyond the scope of this Note. Options may include requiring governments to enter agreements with minority unions, simply allowing governments to do so, or anything in-between. Given that this Note applies most to non-right-to-work states, a type of “good faith” requirement to negotiate is most likely to preserve union strength in light of an adverse decision in *Friedrichs*.

employers to collectively bargain with members-only unions on various issues.⁸⁵ The burden of fair representation has been largely offset in non-right-to-work states by allowing unions to collect fair-share fees; if the Court takes away a union’s power to collect such dues then the natural—yet bold—response would seem to be removing the counterbalance by lifting the burden of fair representation. The system of exclusivity and fair representation is so entrenched in America’s labor environment that it is rarely questioned and alternative options are rarely considered, but this Note aims to do just that.

A. Doing Away with Exclusivity and the Duty of Fair Representation

The general premise of this proposal is relatively simple:⁸⁶ A union would only represent its dues-paying members. Dissenting employees “would have a right to be genuinely nonunion: They wouldn’t be subject to the terms of the collective bargaining agreement, they wouldn’t have to interact with their employer through a collective agent, and they wouldn’t be required to pay anything to a union they didn’t vote for.”⁸⁷ Members would not subsidize non-members since unions would bargain only on behalf of those who pay union dues.⁸⁸

To illustrate, imagine a high school math teacher in California.⁸⁹ For any number of reasons, this teacher is opposed to the teachers’ union.⁹⁰ Consider the following three scenarios:

⁸⁵ Collective bargaining is broken into *mandatory* topics of and *permissible* topics of bargaining; these topics vary from state to state. See *Teacher’s Unions and Collective Bargaining: Resolving Conflicts*, THOMSON REUTERS, <http://education.findlaw.com/teachers-rights/teacher-s-unions-and-collective-bargaining-resolving-conflicts.html> (last visited Dec. 10, 2015). Thus states could require, allow, or not permit members-only unions and states to negotiate over certain issues like wages, hours, insurance coverage, or conditions of employment.

⁸⁶ Members-only bargaining for public-sector employees would not be “simple” in practice, as there are many possible nuances, see *supra* notes 83–85, and practical problems without an obvious solution, see *infra* subsection IV.C.2.

⁸⁷ Sachs & Fisk, *supra* note 23.

⁸⁸ See Fisk, *supra* note 83.

⁸⁹ As the source for the *Friedrichs* challenge, California is a right-to-work state that requires non-union members to pay fair-share fees to the teachers’ union.

⁹⁰ The *Friedrichs* challenge is properly focused on dissenters who are concerned with the political undertones of forced union support. There are, however, other reasons a teacher may reasonably be opposed to unions and collective representation—maybe the teacher is new, so paying union dues and massive student loans seems

- (1) The union may exact fair-share payments to cover the teacher's share of collective-bargaining costs, say \$1,000 per year. The union has a duty to represent the teacher even though she is not a full union member. The teacher and school district are thus bound by the collective-bargaining agreement in regards to the terms and conditions of the teacher's employment.
- (2) The teacher is not required to pay her agency fees, and thus could save \$1,000 per year in forced dues. Nonetheless, the union still has a duty to represent the teacher, and the teacher is still bound by whatever contract the union negotiates with the school district.
- (3) The union does not bargain on the teacher's behalf if she declines to pay whatever dues the union charges. The teacher has essentially three options: she could negotiate on her own behalf; she may join a different teachers' union that she finds more appealing; or, if she decides neither of those options are desirable, she is still free to loosen her convictions—and her wallet—and join the majority union and pay required dues.

Of these three options, states and unions commonly employ only the first two at the moment.⁹¹

The first option, allowing agency-fees, is how labor works in a state satisfied with *Abood*;⁹² the second option, disallowing agency-fees, exists in right-to-work states and would be the nationwide result after an adverse decision in *Friedrichs*;⁹³ the third option, doing away with exclusivity and the duty of fair representation, is the general approach presented here. There are nuances about this proposal that could be left to states—the laboratories of democracy⁹⁴—to refine and adjust according to their interests, such as whether to still allow for election-based exclusive unions,⁹⁵ to what extent the government is obligated to bargain with non-majority unions,⁹⁶ and what the permissible topics of collective bargaining are.⁹⁷

B. The Viability of Member-Only Collective Bargaining

impossible on a new-teacher salary; perhaps the teacher is incredibly successful and believes she would be worth more on the open market; the list goes on.

⁹¹ As discussed below, *see infra* section IV.B, some states do allow members-only collective bargaining in the private sector, public sector, or both.

⁹² This is the *Friedrichs* plaintiffs' situation. *See supra* note 82 and accompanying text.

⁹³ *See supra* 40 and accompanying text.

⁹⁴ *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁹⁵ *See supra* note 83 and accompanying text.

⁹⁶ *See supra* note 84 and accompanying text.

⁹⁷ *See supra* note 85 and accompanying text.

Removing the duty of fair representation and eliminating exclusivity may seem ill advised, perhaps even unworkable to those familiar with American labor. But there is evidence—from the United States and abroad, historically and contemporarily—that such a system is in fact viable. The first indication this proposal could work comes from other nations. Indeed, “[T]he overwhelming majority of industrial countries reject exclusive representation, and most of them have much higher union density rates than the United States”⁹⁸ The oft-cited examples for members-only bargaining are New Zealand and Australia,⁹⁹ but the same is true in most European countries.¹⁰⁰ The success of organized labor in these countries demonstrates there are feasible alternatives to our labor system, as unnatural as they may seem. Furthermore, these countries have each added their own unique twist on members-only bargaining,¹⁰¹ thus states could pick and choose what options are most likely to produce the desired results.

Perhaps surprisingly, members-only bargaining has a historical foothold in the American labor environment; the practice was widely accepted in the private sector during the first third of the twentieth century.¹⁰² This practice reached a turning point in 1935, however, when Congress

⁹⁸ James Pope, Peter Kellman & Ed Bruno, *Toward a New Labor Rights Movement*, 4 WORKING USA 8, 26 (2001); see also STAN GREER, NAT’L INST. FOR LABOR RELATIONS RESEARCH, UNION “REPRESENTATION” IS FOISTED ON WORKERS—NOT VICE-VERSA (Feb. 2004) (“At least since the collapse of the Soviet Empire more than a decade ago, members-only bargaining has in fact been by far the predominant form of unionism on the world scene.”); Jake Blumgart, *The U.S. Labor Movement: At a ‘Crossroads,’ or the Gallows?*, IN THESE TIMES (Jan. 21, 2015, 5:06 PM), http://inthesetimes.com/working/entry/17557/the_u.s._labor_movement_at_a_crossroads_or_the_gallows (“Minority unionism is the norm in other nations”).

⁹⁹ See, e.g., Blumgart, *supra* note 98; GREER, *supra* note 98.

¹⁰⁰ See Moberg, *supra* note 68 (“No unions in Europe have the legal security protection US unions have that permits a requirement that all workers either join or pay a fee to a recognized union in their workplace. Yet they have still fared relatively well.”).

¹⁰¹ See, e.g., Alan Bogg & Keith D. Ewing, *Freedom of Association, in Comparative Labor Law* 296, 317 (Matthew W. Finkin & Guy Mundlak ed., 2015) (comparing members-only bargaining in Australia and New Zealand); Clyde Summers, *Comparisons in Labor Law: Sweden and the United States*, 7 BERKELEY J. EMP. & LAB. L. 1, 9–17 (comparing a members-only union’s role as representative in Sweden with an exclusive majority union’s role as representative in the United States).

¹⁰² In 1933, one study shows roughly 6% of companies engaged in bargaining with members-only unions. Moshe Marvit & Leigh Anne Schriever, *Members-Only Unions: Can They Help Revitalize Workplace Democracy?*, CENTURY FOUND. (Oct. 1, 2015), <http://www.tcf.org/blog/detail/members-only-unions-can-they-help-revitalize-workplace-democracy> (citing CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (Cornell Univ. Press 2005)). Labor law expert Charles Morris explains even after

passed the NLRA and the Supreme Court interpreted it in a way that, perhaps erroneously, institutionalized a preference for elected, exclusive unions; thus “the practice of members-only unionism quickly diminished.”¹⁰³ By the time public-sector unions emerged in 1959¹⁰⁴ members-only unions were all but extinct, likely explaining why state legislation uniformly established an exclusive-representative system.

Even more surprisingly, while not widespread, “members-only unions are not a theoretical construct or historical remnant” within the United States.¹⁰⁵ Moshe Marvit and Leigh Anne Schreivner recently analyzed the scope of members-only bargaining and found several interesting patterns.¹⁰⁶ First, most members-only unions exist in southern states where right-to-work laws are more common.¹⁰⁷ This is not surprising, since members-only unions are sometimes the only option in these states given the increased difficulty of obtaining exclusive status as compared to non-right-to-work states. It is worth noting, however, that an adverse decision in *Friedrichs* is unlikely to be the catalyst that pushes other right-to-work states to pass legislation friendly to members-only unions since *Friedrichs* will have no effect in these states;

the NLRA, establishing members-only contracts was how many unions gained enough members to be elected exclusive representative. Charles Morris, *Members-Only Collective Bargaining: Get Ready for an Old Concept with a New Use*, CHARLES J. MORRIS ON LABOR RELATIONS (Aug. 1, 2013), <http://charlesjmorris.blogspot.com/2013/08/members-only-collectivebargaining-get.html>.

¹⁰³ Marvit & Schreivner, *supra* note 102. To be clear, the NLRA does not prohibit members-only unions. See *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 236–37 (1938); see also Fisk, *supra* note 88 (“Nothing in NLRA section 7—which grants employees the rights ‘to self-organization’ and ‘to bargain collectively through representatives of their own choosing’—limits these rights to workplaces where a majority of employees choose one union. Moreover, nothing in section 9 (which provides a mechanism for choosing a union that enjoys the power of exclusive representation) limits the ability of a group to bargain on a members-only basis.”). Rather, members-only unions likely vanished because an employer has no duty to collectively bargain with unelected members-only unions. Compare 29 U.S.C. § 158 (1974) (establishing the “[o]bligation to bargain collectively”), with *Dick’s Sporting Goods*, NLRB Advice Memorandum, Case 6-CA-34821 (June 22, 2006) (declaring it a “well-settled” principle that employers are not obligated to bargain with members-only unions). This lack of duty to bargain with members-only unions is questionable, as “the Board has simply assumed the rule rather than justified it on the basis of statutory analysis or policy.” Fisk, *supra* note 88.

¹⁰⁴ See *supra* notes 12–13.

¹⁰⁵ Marvit & Schreivner, *supra* note 102.

¹⁰⁶ *Id.* Marvit is a fellow of the Century Foundation and previously worked for the National Labor Relations Board. Schreivner also specializes in employment law issues for the Century Foundation. *Experts*, CENTURY FOUND., <http://www.tcf.org/experts> (last visited Dec. 11, 2015).

¹⁰⁷ Marvit & Schreivner, *supra* note 102.

rather *Friedrichs* could spur non-right-to-work states to consider promoting the growth and increasing the strength of members-only unions, therefore bucking this pattern.

Second, while there are private-sector members-only unions,¹⁰⁸ most consist of public-sector workers.¹⁰⁹ In fact, the AFT represents 120,000 employees that belong to unions that provide members-only benefits in Alabama, Arizona, Colorado, Georgia, Louisiana, Mississippi, North Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.¹¹⁰ As Moshe and Schrievner point out this pattern is linked to the fact most members-only unions currently exist in right-to-work states; states opposed to organized labor can more easily limit public-sector collective bargaining rights, so members-only unions are unlikely to accomplish much.¹¹¹

The Texas Workers Alliance represents non-teaching staff (e.g., custodians, secretaries, bus drivers) in San Antonio, Texas, and exemplifies a public-sector members-only union.¹¹² Texas law prohibits public-sector unions from negotiating over wages, hours, or conditions of employment, however, so obtaining a majority is difficult.¹¹³ With no elected representative the door is left open for non-exclusive unions to provide members-only benefits like occupational insurance and legal services.

Nebraska takes a similar approach by allowing members-only benefits, even for exclusive unions. As a right-to-work state, Nebraska public employees can refrain entirely from paying

¹⁰⁸ *See, e.g., id.* United Auto Workers Local 42—consisting of workers at a Volkswagen plant in Chattanooga, Tennessee—made waves in 2014 when it responded to a crushing election defeat by forming a members-only union. *See id.* Marvit and Schrievner performed case studies on other private-sector unions, however, including the Carolina Auto, Aerospace, and Machine Workers Union and UE Local 601 in Grove City, Pennsylvania. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Of these thirteen states, eleven are right-to-work (all but Colorado and West Virginia) and nine (all but Colorado, Virginia, West Virginia, and Wisconsin) could be classified as “southern,” illustrating the patterns discussed *supra*.

¹¹¹ *See also id.* (“Similarly, most members-only unions are public-sector unions, because many states that are inhospitable to labor can easily pass laws that limit collective bargaining rights in the public sector.”).

¹¹² *Id.*

¹¹³ TEX. GOV’T CODE ANN. § 617.002 (West 1993). Without the ability to bargain over these central issues, unions understandably have a hard time convincing the bargaining unit of the union’s value. *See Marvit & Schrievner, supra* note 102.

union dues.¹¹⁴ Should an employee need legal services, however, it may use the labor organization's services only if it reimburses the union.¹¹⁵ Nebraska has therefore modified the duty of fair representation for exclusive representatives by granting the benefit of free legal representation in employment-related grievances or legal actions solely to union members. In this sense union membership serves as an insurance policy of sorts, and is a large reason Nebraska teachers' unions enjoy such high membership.¹¹⁶

Given the success of members-only unions abroad—and, to a lesser extent, within the United States—there is reason to think a system based around non-exclusive unions without the duty of fair representation is viable. Being viable is obviously different than being a good idea, though, so the next section attempts to weigh the most obvious pros and cons of this proposal.

C. Is Members-Only Collective Bargaining a Good Idea?

Fast forward to June 30, 2016. It's the last day of the Supreme Court Term,¹¹⁷ and *Friedrichs* is announced: public-sector unions can no longer collect fair-share payments since doing so violates the First Amendment. Labor supporters in non-right-to-work states are upset, as the decision allows public-sector employees in their states to forego paying fees and instead free ride from dues-paying members. Unions like the NEA demand the state legislature take action. Together, lobbyists and legislators consider overhauling the status quo by getting rid of

¹¹⁴ 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.”).

¹¹⁵ NEB. REV. STAT. § 48-838 (2011).

¹¹⁶ *But see also* Moody, *supra* note 70 (crediting the NSEA's high membership to “culture” rather than members-only benefits).

¹¹⁷ Technically speaking, the Court hands down its decisions as they are completed. Pema Levy, *This Is How the Supreme Court Decides Which Cases to Announce When*, MOTHER JONES (June 24, 2015, 3:30 PM), <http://www.motherjones.com/politics/2015/06/supreme-court-explained-obamacare-gay-marriage>. That said, “We do know that the Supreme Court tends not to do very much on the really big and difficult cases of the [T]erm until the hearings have been completed in late April . . .” *Id.* (quoting Lyle Denniston of SCOTUSblog).

exclusivity and the duty of fair representation. The following is a non-exhaustive analysis of things that should be considered by all involved parties when considering such a proposal.

i. The Appeal of Members-Only Unions

Members-only bargaining would confer some degree of benefit to everyone involved. First, union dissenters would get what they seek: independence. Opponents of organized labor—like Ms. Friedrichs—disagree with the idea of public-sector collective bargaining as a whole.¹¹⁸ A win at the Supreme Court would mean Ms. Friedrichs no longer has to financially support her union, but the fact remains she would be involuntarily involved given the duty of fair representation. The approach proposed here would not only mean she can refrain from paying dues, but also that she would not be covered by any union-negotiated contract. Instead she could enlist any representative she wanted to advocate on her behalf or do so herself. Thus a members-only framework would protect Ms. Friedrichs’ First Amendment rights more than any judicial opinion could; it would put the most separation between her and the union she wants no connection with.

Union supporters also have reason to support this proposal. To begin, it would solve the free-rider problem; members would no longer have to subsidize those who are unwilling to pay for whatever services the union provides since only paying members would receive union benefits. Furthermore, this model is likely to increase union efficiency and its receptiveness to the wishes of its constituency. Albert Hirschman’s “exit, voice, and loyalty” framework¹¹⁹ supports this hypothesis—employees’ voice will become more powerful since unions will be more concerned about exit than ever before. This is so because true exit has never been a real

¹¹⁸ *Friedrichs* involves the petitioners’ objection to compulsory dues, but such objection is based on the political nature of public-sector collective bargaining as a whole.

¹¹⁹ See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). As the name suggests, Hirschman said individuals have three basic options when they are dissatisfied with something: they can leave (exit), they can share their concern in hopes of improvement (voice), with certain factors affecting the cost-benefit analysis of each option (loyalty). *Id.*

threat since it would require union decertification, a rarity.¹²⁰ The result of this lack of exit power resulted in an admitted lack of responsiveness to member voice: “‘I think we took things for granted,’ says Saunders [president of AFSCME]. ‘We stopped communicating with people, because we didn’t feel like we needed to. That was the wrong approach, and we don’t want to fall back into that trap.’”¹²¹

Third, states would improve their bargaining power by allowing government employees to splinter into smaller bargaining units. Politicians often feel compelled to appease unions given their political clout.¹²² State and municipal budgets are tight, however, so concessions often come in the form of pension plans—the “perfect vehicle for procrastination; . . . when pension benefits come due, the people who promised them, thereby buying labor peace and winning elections, are long gone.”¹²³ Unfortunately, citizens pay for this politically motivated and shortsighted plan down the road.¹²⁴

Lastly, unions may even benefit under this proposal in a roundabout way. Exclusivity has been traditionally considered a boon to unions, and rightfully so. But allowing a labor organization to pass along any benefits it gains to only its members allows a union to show its worth and entice reluctant individuals in a new and persuasive manner. Like every decision, a person performs a cost-benefit analysis when deciding whether to join a union. This analysis is not friendly to unions if *Friedrichs* is decided adversely; an individual can receive the major

¹²⁰ See also Russ Brown, *A Deep Secret that Labor Unions Don’t Want You to Know*, FORBES (Aug. 16, 2012, 10:36 AM), <http://www.forbes.com/sites/realspin/2012/08/16/a-deep-secret-that-labor-unions-dont-want-workers-to-know/> (“It is, quite simply, nearly impossible for workers to get rid of a union once it has been certified as their monopoly bargaining representative.”). In right-to-work states, individuals can partially exit by declining to pay fees, but losing individuals is nowhere near the threat to unions that losing its exclusive status is.

¹²¹ DePillis, *supra* note 71; see also Jeremy Gantz, *Let Old Labor Die*, IN THESE TIMES (Nov. 24, 2014), http://inthesetimes.com/article/17347/let_old_labor_die (reviewing Thomas Geoghegan’s book, *Only One Thing Can Save Us: Why Our Country Needs a New Kind of Labor Movement*, which argues the exclusive representation model “alienates Americans who are looking for control rather than solidarity”).

¹²² See *supra* note 70.

¹²³ Op-Ed., George F. Will, *Pension Time Bomb*, WASH. POST (Sept. 11, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/10/AR2008091002726.html>.

¹²⁴ See *supra* note 9 and accompanying text.

benefits without paying the primary cost.¹²⁵ Under a members-only model, however, a person will not receive whatever benefits the union provides unless she pays the cost; this means unions would be free to charge up to the value of the benefits membership provides.¹²⁶

ii. The Concerns with Members-Only Unions

Despite the merits of members-only bargaining, the model would also come with at least three primary drawbacks.¹²⁷ First, overhauling organized labor would create a host of administrative problems. As Justice Kagan noted in her *Harris* dissent¹²⁸ and will likely bring up again in *Friedrichs*, transforming organized labor and uprooting established contracts is not a task to be undertaken lightly. The bulk of this burden would fall on the employer—the state—as employees holding the same position would be under different contracts.¹²⁹ Entities with non-unionized labor manage to juggle this problem, but the sheer size and scope of governments as employers make it different than even the largest corporations. That said, given the fact most teachers are now non-union members¹³⁰ it may be a problem that’s coming regardless of whether

¹²⁵ Since an individual will be subject to the terms of the bargained contract regardless, it’s not really a “benefit” that should enter the equation. Thus the decision ultimately boils down to whether a person is willing to pay the cost of membership—union dues (e.g., \$1,000 per year)—to obtain abstract benefits—the hope dues will pay off in better negotiating results or prevent some sort of moral guilt that may come with free riding.

¹²⁶ Placing financial value on benefits is not always easy since they are often intangible, but consider the following example: a members-only teachers’ union bargains for three additional paid days off (valued at, say, \$200 per day) and a superior health care plan (with a \$500 lower deductible). An economically rational teacher has reason to join the union provided the fees were below the benefits of membership—she should pay up to \$1,099.

¹²⁷ No doubt there are concerns beyond those briefly discussed here. For instance, removal of those opposed to a union’s political activities may prompt the union to engage in the political process even more since there’s no need to limit involvement in an effort to build and preserve broad consensus.

¹²⁸ *Harris v. Quinn*, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) (“[G]overnments and unions across the country have entered into thousands of contracts involving millions of employees in reliance on *Abood*. Reliance interests do not come any stronger.”).

¹²⁹ See also *id.* at 2631 (“[T]he [*Abood*] Court noted, the ‘designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment.’ . . . [E]xclusive representation ‘frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.’” (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220–21 (1977))).

¹³⁰ See *supra* notes 73–74 and accompanying text.

states impose a requirement that government units bargain in good faith with minority unions. Another administrative problem would be the enormous reliance interests it would upset.

Second, the lack of one voice could produce negative externalities, especially in the education context. Teachers are the primary benefactors of NEA and AFT lobbying efforts, but students benefit, too. In addition to seeking items that directly benefit teachers like higher wages and better benefits, teachers' unions also push for things related to educational quality like reducing class sizes.¹³¹ The current system of exclusivity helps unions amass enough bargaining power to effectuate positive change in these areas, and progress may be more difficult without a collective voice demanding improvement. This problem is perhaps mitigated by the fact unions already pool their bargaining power in regards to these collective-good issues, so presumably smaller members-only unions could do the same thing.¹³²

Lastly, perhaps a members-only model simply wouldn't further the primary interests involved in *Abood*, *Harris*, and *Friedrichs*—maybe it wouldn't limit free riders or preserve labor peace.¹³³ Eliminating the duty of fair representation would solve the free-rider problem on the surface. But in light of the administrative difficulty in negotiating numerous contracts for individuals holding the same job, many contracts are prone to become “take-it-or-leave-it” in regards to certain terms. This means gains will be experienced across the board, including by those who didn't pay any union fees. Similarly, unions as a whole could free ride, in a sense. If

¹³¹ See, e.g., *PreK–12 Public Education: Safe and Welcoming Schools*, AFT, <http://www.aft.org/education/safe-and-welcoming-schools> (last visited Dec. 12, 2015) (listing bullying prevention, reducing class sizes, and improving school discipline methods as three primary goals).

¹³² *NEA and AFT: Two Unions, One Voice?*, EDUC. WEEK (July 25, 2014), <http://www.edweek.org/ew/section/multimedia/nea-and-aft-two-unions-one-voice.html> (noting the ways the NEA and AFT aligned their stances in regards to broader educational issues like testing, common core, and teacher licensing). Also worth noting is the unfortunate truth that teachers' unions and student interests are not always aligned. One example of this would be so-called “rubber rooms” in large school districts where tenured teachers are sent if their incapable of being fired and their performance in the classroom is utterly unacceptable. See generally *Rubber Rooms*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/rubber-rooms/> (last visited Jan. 11, 2016).

¹³³ See generally *Harris*, 134 S. Ct. 2618; *Abood*, 431 U.S. 209.

one organization were more willing to sacrifice individual benefits like wages or sick days in exchange for collective goods like class size, then the non-sacrificing union would presumably benefit even though it did not pay the cost. Furthermore, allowing multiple unions to represent the same group of employees does create the risk of union rivalries and dissension within the work force, implicating the interest in labor peace.¹³⁴

V. CONCLUSION

This is a pivotal time for unions and labor advocates. In the coming Term, the Supreme Court will decide *Friedrichs* and re-determine the constitutional validity of fair-share provisions, which allow unions to collect fees from non-members. All indications suggest the Supreme Court will overturn its precedent—*Abood*—ruling these provisions constitute compelled political speech and thus violate the First Amendment. Such a holding would effectively create a national right-to-work law for public-sector employees, an area historically reserved for state decision, and unions would undoubtedly suffer. Pro-union states will not be left without democratic recourse should this prediction come true, however. If unions can no longer collect fair-share fees, then eliminating the duty of fair representation would restore fairness and is a logical step worthy of consideration.

¹³⁴ See *Harris*, 134 S. Ct. at 2631 (“This principle [of exclusivity], the Court explained, ‘prevents inter-union rivalries from creating dissension within the work force’” (quoting *Abood*, 433 U.S. at 221–22)). But if *Friedrichs* is decided adversely the threat of dissension will be present regardless since there will still be two classes of employees: members and non-members, so allowing members-only unions wouldn’t hurt that much, it just may not help.