State of the Labor Union: Please Hold your Applause Until the End

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I. Introduction

For the past several years, the average American worker has been struggling to retain employment and maintain a steady income.¹ Even people who held employment during this tough economic period have suffered from strong economic constraints. With the continued economic downturn, the poverty rate in the United States has grown slightly.² Despite these glaring statistics, income taxes have not declined.³ On top of all of these daunting economic constraints, some industries have forced employees to pay a “fair-share” payment towards a fund to support union activities that they may not agree with or support.

For more than thirty years, public unions have been partially funded with money from employees who do not wish to participate in the union activities. The United States Supreme Court (“Supreme Court”) upheld these fair-share payments in Abood v. Detroit Board of Education, a 1977 decision that held public employees could be compelled to pay their fair-share of union fees, even if they have no desire to be a part of the union.⁴ This controversial reasoning centered on the idea that forcing everyone to pay union dues would prevent the “free-rider” problem.⁵

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⁶ Id. at 221–22.
After the *Aboud* decision, states began to enact statutory provisions that forced fair-share payments in public employment.\(^6\) The *Aboud* decision seemed to have been expanded by the Legislature, and public employees' "fates" were often left in the hands of the legislature and their definition of "public employment."\(^7\) This expansion, however, took a serious hit when the Supreme Court limited the labeling of "public employees" to those who were actually "full-fledged" public employees.\(^8\) This limitation seemed to prevent legislatures from trying to expand the definition of public employees, thereby limiting "state employees" to only traditional employment, such as police officers and teachers. This limitation, set forth in *Harris v. Quinn*,\(^9\) has the potential to completely change American Labor landscape.

The decision of *Harris* has given hope to employees who are forced to make payments to unions whether or not they agree with what the union stands for.\(^10\) By overturning an Illinois law that forced home-aid workers to pay fair-share payments,\(^11\) the Supreme Court breathed new life into public employees' First Amendment protections. This Comment discusses the effect of *Harris* and sheds light on the free-rider problem that is at the center of the fair-share payment controversy. Additionally, this Comment addresses the concerns of the dissent in *Harris* and argues why, and how, the Supreme Court has set the stage for overturning of *Aboud v. Detroit Board of Education*.

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\(^6\) *Fighting to Free Workers' Paychecks from Union Bosses: Advancing the Right to Work*, LABORUNIONREPORT.COM http://laborunionreport.com/2011/01/19/fighting-to-free-workers-paychecks-from-union-bosses-advancing-the-right-to-work/. States that enacted fair-share laws generally call for the payment of fees to any public employee who is represented by a Union.

\(^7\) Statutes define "public employees" as one simply employed by the state. *See, e.g. 71 PA. CONS. STAT. ANN. § 575 (1988). However, as will be shown throughout this note, the Illinois Legislature tried to expand the role of the State, in order to sweep more employees under the guidance of fair-share payments.

\(^8\) Harris v. Quinn, 134 S. Ct. 2618 (2014).

\(^9\) *Id.*

\(^10\) While the *Harris* decision doesn't abolish all fair-share payments, it restricted the Illinois Legislature from labeling employees as public, simply for fair-share payment reasons. *See Harris, 134 S. Ct. at 2644.*

\(^11\) *Id.* at 2644.
Part II of this Comment scrutinizes the *Abood* decision and compares the Court’s reasoning to the reasoning in the *Harris* decision. Part II of the Comment serves as a general overview of both the *Abood* and the *Harris* decisions; it discusses the reasoning behind both opinions and rationalizes why the two cases have different outcomes.

Part III discusses the effects that *Harris* will have on public unions. To examine the effects that *Harris* will have, subpart A describes the current landscape of public unions. Specifically, it discusses the political nature of public unions and analyzes the political contributions from public unions. Subpart B explains the free-rider problem, namely why the free-riders position is undercut when analyzing the problem against other economic theories.

Part IV of this Comment addresses the dissent’s argument in *Harris* that *Abood* cannot be overturned by a future case. To properly scrutinize the dissent’s concern, Part IV engages in an analysis of *stare decisis* and attempts to determine what the current Supreme Court would decide if the opportunity to overturn *Abood* came to the bench. Finally, Part V concludes this Comment.

II. *Harris v. Abood*: An Overview

The debate surrounding fair-share payments made its way to the United States Supreme Court in *Harris v. Quinn*.\(^{12}\) While the case did not receive as much attention as *Burwell v. Hobby Lobby*,\(^{13}\) one commentator believed that the case “could be the sleeper case of the year”\(^{14}\) since there was no circuit split on the issue and it seemed as though the law in the area was

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\(^{12}\)The Supreme Court granted *certiorari* on October 1, 2013. See *Harris v. Quinn*, 134 S. Ct. 48 (2013).

\(^{13}\)On November 26, 2013, the Supreme Court granted *certiorari* for *Burwell v. Hobby Lobby* and consolidated it with Conestoga Wood Specialists v. Sebelius. The case was the center of controversy as it challenged a provision in the Affordable Care Act that required corporations to pay for contraceptives for their employees. See Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013).

Although *Hobby Lobby* overshadowed *Harris* in the public sphere, the *Harris* decision has the potential to have long-term effects that can change the labor union landscape forever.

The plaintiffs in *Harris* were Personal Assistants ("PA’s"), who provided services to either their own family members or other individuals who were suffering from various disabilities. A class action lawsuit was filed in 2010 that sought an injunction to stop the payment of fair-share fees to unions. The lawsuit challenged a relatively new law that deemed PA’s as "public employees," thereby making them subject to union representation and fair-share payments in Illinois. In 2003, when Illinois elected Rod Blagojevich as their Governor, one of his first actions was to issue an executive order, which labeled PA’s as "public employees" under the Public Labor Relations Act (PLRA). The amendment of the PLRA emphasized that PA’s were not public employees for "purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits," but instead only for collective bargaining purposes.

The amendment of the PLRA made the PA’s part of the Service Employees International Union (SEIU), which meant that they were subject to all the benefits and disadvantages that came with having collective bargaining. In the plaintiffs’ view, one such disadvantage was a

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16 The Supreme Court rendered both decisions on June 30, 2014.
17 *Harris*, 134 S. Ct. at 2626.
18 *Id.*
19 *Id.* at 2625.
20 *Id.* at 2626.
21 *Ill. Comp. Stat.*., ch. 5, § 315/6(a), (e), *invalidated by* Harris v. Quinn, 134 S. Ct. 2618 (2014). The PLRA authorizes state employees to join public unions and to collectively bargain. *Id.* The PLRA also had a fair-share provision that allowed for the collection of fees from non-members within that occupation. *Id.* The law called for the discharge of any employee who failed to pay his fair-share as required by law. *Id.*
22 *Harris*, 134 S. Ct. at 2626 (citing *Ill. Comp. Stat.*, ch. 20, § 2405/3(f)).
23 *Id.* at 2625–26.
24 The benefit, as many people see them, is having the opportunity to have representatives negotiate many provisions of your employment. Having this representative allows for the individuals to not be forced to try and negotiate their own working conditions. The disadvantages, as argued throughout the case, were that employees are given no choice of having this representative and were required to pay into the cost or running said union.
violation of the employees’ First Amendment Rights in forceful payment of fees to run an organization that they either did not want to be a part of or support in anyway. It was this disadvantage that led them to file their lawsuit.

Labeled a fair-share payment, the PLRA provided that exclusive representation of employees by a union agent allowed for the union to collect fees associated with the cost of having that agent represent the employees. The fee, that every employee within that sector is required to pay, represents the proportional cost for that union to provide representational services on the employees’ behalf. These representational services encompass a wide range of actions such as collective bargaining, grievance filing, overall support and backing by the union as a whole, and other germane actions that are necessary to the union’s duties. It seemed as though this issue, whether collection of fees violated the First Amendment, was decided the Court in 1977 in Abood, but the majority in Harris distinguished the facts from Abood and said Illinois was attempting to expand Abood past its initial considerations.

The majority in Harris stated that Illinois was attempting to create “quasi-state” employees simply to sweep PA’s in under the PLRA. In the Court’s estimation, the process in which the PA’s were made “public employees” and their actual job duties differed from the plaintiffs in Abood, thus allowing the Court to distinguish the two cases. The dissent, however, thought that the facts in Harris were no different than Abood, and that the majority was essentially

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25Harris, 134 S.Ct. at 2626.
265 ILL. COMP. STAT. 315/6 (West 2013), invalidated by Harris v. Quinn, 134 S. Ct. 2618 (2014).
27Harris, 134 S. Ct. at 2627. (“For this reason, Abood stands out, but the State of Illinois now asks us to sanction what amounts to a very significant expansion of Abood—so that it applies, not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization and the collection of an agency fee.”).
28Id. at 2627.
29Id. at 2634 (“Abood involved full-fledged public employees, but in this case, the status of the personal assistants is much different. The Illinois Legislature has taken pains to specify that personal assistants are public employees for one purpose only: collective bargaining. For all other purposes, Illinois regards the personal assistants as private-sector employees. This approach has important practical consequences.”).
changing First Amendment jurisprudence that many states and legislatures have relied on since the \textit{Abood} decision.\textsuperscript{30} While the reasoning of the Court in \textit{Harris} can be debated, the underlying facts in the two cases are different.\textsuperscript{31}

The litigation in \textit{Abood} stemmed from a 1967 decision by the Michigan Board of Teachers to form a labor union.\textsuperscript{32} After the school board voted, they completed a collective bargaining agreement that required all teachers to either become a union member or pay dues into the union.\textsuperscript{33} In order to enforce the provision, the agreement had a clause that stated any teacher who failed to meet this pay obligation was subject to discharge.\textsuperscript{34}

Before the clause became effective, a number of teachers filed suit in the Michigan state courts.\textsuperscript{35} The court consolidated the suit with another action in which teachers from a different area sought the same cause of action.\textsuperscript{36} The crux of the suit—similar to the cause of action in \textit{Harris}—was that the clause violated the teachers’ First Amendment rights, in that it forced them to pay service fees to a union that they did not agree with.\textsuperscript{37} The Court ultimately held that the “fair-share” payments were valid, as long as they were not used for political purposes.\textsuperscript{38} While the holding upheld the fair-share payments, it also reinforced the idea that the state cannot constitutionally compel public employees to contribute to political activities.\textsuperscript{39}

\textsuperscript{30} \textit{id.} at 2645 (Kagan, J., dissenting).
\textsuperscript{31} \textit{Abood}, 431 U.S. at 209. \textit{Abood} involved “traditional” public employees, as the plaintiffs were public school teachers. \textit{Harris}, on the other hand, involved employees who were not “traditional” because before the amendment of the PLRA, they had never before been thought of as public employees.
\textsuperscript{32} \textit{id.} at 212.
\textsuperscript{33} \textit{id.}
\textsuperscript{34} \textit{id.}
\textsuperscript{35} \textit{id.}
\textsuperscript{36} \textit{id.} at 214.
\textsuperscript{38} \textit{id.} at 235–36.
\textsuperscript{39} \textit{id.} at 234. (“The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.”).
Although none of the justices dissented in *Abood*, Justice Powell filed a concurring opinion that highlighted many of the concerns that came to fruition in the years that followed. Justice Powell agreed that the Court's narrow holding was correct, but wrote separately in fear of what the Court was essentially allowing. Though he agreed employees should not be forced to make political contributions, Justice Powell was apprehensive as to the door that *Abood* left open. Justice Powell believed that the majority did not properly define the limitations to the fees or the distinction between acceptable fees and political fees, which he argued had severe First Amendment implications. Justice Powell believed that the case should have been remanded to the trial court to determine the precise use of each specific amount.

On its face, compelling individuals to pay for their portions of collective bargaining seems fair. In fact, the main argument in both *Harris* and *Abood* for the support of fair-share provisions is a free-rider argument. Essentially, if a person is able to get the benefit of a bargain without having to pay for the service, then the service will not be able to support the services for long. To balance both the First Amendment and the free-rider concerns, *Abood* held that a public

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40 *Id.* at 244 (Powell, J., concurring).
41 *Abood* v. Detroit Bd. Of Ed., 431 U.S. 209, 244 (1977) ("Such a sweeping limitation of First Amendment rights by the Court is not only unnecessary on this record; it is in my view unsupported by either precedent or reason.").
42 *Id.* Justice Powell was joined by Chief Justice Burger and Justice Blackmun and all agreed with the majority that the court was correct in its specific holding that States cannot force employees to contribute to political activities in which they disagreed. *Id.*
43 *Id.* at 255 (Powell, J., concurring) ("I agree with the Court as far as it goes, but I would make it more explicit that compelling a government employee to give financial support to a union in the public sector regardless of the uses to which the union puts the contribution impinges seriously upon interests in free speech and association protected by the First Amendment.").
44 *Id.*
45 *Id.* at 262-64 (Powell, J., concurring).
46 Compare Harris, 134 S. Ct. at 2645 (Kagan, J., dissenting) (*Abood* is of a piece with all those decisions: While protecting an employee's most significant expression, that decision also enables the government to advance its interests in operating effectively—by bargaining, if it so chooses, with a single employee representative and preventing free riding on that union's efforts.) with *Abood*, 431 U.S. at 221–22 ("A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.").
employee couldn’t be compelled to “contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.” 47

The practical execution of separating fees associated with political contributions with acceptable fees that represent fair payments of union representation drew concerns from Justice Powell in Abood. 48 These concerns grew, and they contributed to the Court’s decision in Harris, which stated that the line between public and private employment is becoming increasingly blurred. 49 The Court in Harris did not go so far as to overturn Abood in one sweeping opinion. Instead, the Court stuck to the narrow issue of whether Abood allows the legislature to freely define public employees. In a seemingly calculated scheme, the majority in Harris circumvented the question of whether Abood remains good law, leaving speculation as to whether or not the precedent will remain.

III. Effects of Harris v. Quinn

The decision in Harris caused an outcry from people holding political offices. 50 The decision was labeled as being a “devastating blow” that hurt the labor movement and set low-wage workers back. 51 While it is common that Supreme Court decisions usually entail initial unrest immediately following a decision, the true examination that must be made is whether the unrest and outcry is warranted and if it will last. To figure out the effects that Harris will

47 Abood, 431 U.S. at 235.
48 Id. at 236 (“There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited”).
49 Harris, 134 S. Ct. at 2632 (majority opinion) (“Instead of drawing a line between the private and public sectors, the Abood Court drew a line between, on the one hand, a union’s expenditures for collective-bargaining, contract administration, and grievance-adjustment purposes, and, on the other, expenditures for political or ideological purposes.”) (internal quotations omitted).
actually have on labor unions, it is important to understand the current state of the labor landscape and analyze the crux of the main argument for fair-share payments: the free rider problem.

A. A Portrait of the Current Labor Landscape

The United States is essentially split into two separate jurisdictions: right-to-work states and states with no right-to-work laws. Currently, twenty-four states, including Guam, have right-to-work laws, while the other twenty-six states and territories either have no right-to-work laws or have fair-share provision statutes. Right-to-work states prevent employees from being compelled to contribute to union representation as a condition of employment within that sector, while states without right-to-work laws usually require fair-share payments. As the dissent in Harris pointed out, “[f]or many decades, Americans have debated the pros and cons of right-to-work laws and fair-share requirements. All across the country and continuing to the present day, citizens have engaged in passionate argument about the issue and have made disparate policy choices.”

When the Supreme Court decided Abood in 1977, unions were much more common. While the Department of Labor’s statistics are not specific to the public workforce that Harris

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52 Right to work states are essentially thought to be “republican” or “red” states.
53 Right-to-Work Resources, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (“In states without a right-to-work law, employees may be required to join a labor union if it represents workers at their place of employment.”).
54 NATIONAL CONFERENCE OF STATE LEGISLATURES, supra note 51.
55 Id.
56 Id. (“Under right-to-work laws, states have the authority to determine whether workers can be required to join a labor union to get or keep a job.”).
57 Baker & Roller, supra note 51 (“Non-Right-To-Work” (or forced unionism) state, which allows unions to negotiate contracts with companies that require union dues and/or fees to be paid. If a worker refuses to pay union dues or fees (often referred to as agency fees), or falls behind, the union can demand that the worker be fired from the company. The company, by contract, must comply and fire the worker.”).
58 Harris, 134 S. Ct. at 2658.
59 Department of Labor, BUREAU OF LABOR STATISTICS, Union Members Summary (2014) http://www.bls.gov/news.release/union2.nr0.htm (noting that 20.1% of the American workforce belonged to a union in 1983, while only 11.3% of the American workforce today belongs to a union). Id.
dealt with, they are a representative sample of the amount of American workers who seek union membership. The decline in union membership, both in the private and public workforce, is due to a number of different factors. Much of the decline in labor unions can be attributed to the growing number of right-to-work states, as well as the decisions of some companies to move within those states to avoid unionization. In addition, the union landscape in this country has changed, in part due to the increased spending of labor unions as compared to the donations and fees they collect.

Direct spending by labor unions on lobbying and political organizations is one such factor that has changed the union culture since the Abood decision. While spending in private unionization is much higher than spending by public unions, the increasing involvement public unions take in political organizations makes the practical execution of Abood more difficult. As the Court recognized in Harris, “in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.” This overlap has only increased in recent years.

The Center for Responsive Politics (CRP), a nonpartisan research group that tracks money in United States politics, estimates that organized labor unions, both public and private, contributed over $140 million to political campaigns in 2012 and as of November 2014, over

60Department of Labor, supra note 59. Bureau of Labor statistics also states that only 6.7% of private workforce consisted of Union membership in 2013. Id.
62Tom McGinty and Brody Mullins, Political Spending by Unions Far Exceeds Direct Donations, THE WALL STREET JOURNAL, (July 10, 2012), http://online.wsj.com/articles/SB10001424052702304782404577488584031850026 (“Organized labor spends about four times as much on politics and lobbying as generally thought, according to a Wall Street Journal analysis, a finding that shines a light on an aspect of labor's political activity that has often been overlooked.”).
63Harris, 134 S. Ct. at 2632–33.
$127 million to political campaigns.\textsuperscript{65} The CRP further states that of these funds, 89% go to
democratic campaigns, while only 11% are given to republican campaigns.\textsuperscript{66} Of the $127
million contributed in 2014, approximately $48 million came from the public sector, 92% of
which went to democratic candidates.\textsuperscript{67} The $48 million accounts for 37% of the total
contributions by labor unions to political organizations in 2014, as compared to 1990 and 2000,
when only 26% of the total contributions came from the public sector.\textsuperscript{68} While spending in
general has increased over the past twenty-four years, the contributions of public sector unions
have increased approximately 11%.\textsuperscript{69} This increase is due in part to the increase in public labor
unions, while private labor unions have remained stagnant or have decreased in recent years.\textsuperscript{70}
The problem is that the public union contributions implicate First Amendment concerns that
private union employees would not have.\textsuperscript{71} As the First Amendment could be implicated, a
bright-line distinction between political contribution fees and fees only associated with
representational services of a union become paramount. An inability to separate the fees or a
spillover effect between the two categories has Constitutional underpinnings.

Although \textit{Abood} made it so that public employees can “opt out” of political
contributions,\textsuperscript{72} the proportional increase in funding that is coming from public unions make it
more difficult to determine what portion of the fair-share payments are being used for collective

\textsuperscript{65}Labor: Long Term Contribution Trends, CENTER FOR RESPONSIVE POLITICS,
\textsuperscript{66}Id.
\textsuperscript{67}Public Sector Unions, CENTER FOR RESPONSIVE POLITICS,
\textsuperscript{68}Compare, Public Sector Unions, CENTER FOR RESPONSIVE POLITICS,
\textsuperscript{69}CENTER FOR RESPONSIVE POLITICS, supra note 65.
\textsuperscript{70}See, Department of Labor, supra note 59.
\textsuperscript{71}Absent state action, the Constitution only applies to the government, which prevents liability against private actors.
See Edmondson v. Shearer Lumber Products, 139 Idaho 172, 177 (2003) (stating that absent state action,
constitutional free speech cannot be implicated).
bargaining and what is being used for political gain, even if that political gain is indirectly achieved. If labor unions continue to increase the amount of political contributions, and the vast ways in that they contribute to political organizations, the practical distinction between what the fair-share payments are being used for is not easily defined. This is because, as recognized in *Abood*, public unions have a unique opportunity, as they are able to elect those who will be sitting across from them at the bargaining table. While contributions to a political party or candidates may help strengthen the union’s bargaining power in the future, it comes at the cost of political parties gaining power and having the ability to make other decisions outside that small realm that the public unions have deemed to contribute to union strength. Although public unions cannot label fees as direct contributions to politics, the distinction between their non-political payments and the indirect gains by political organizations is continuing to become distorted.

This blurred line was on display in 2003 in Illinois, when the election of a governor lead to an amendment of the PLRA, which in turn labeled PA’s as public employees. In the 1980’s, the SEIU petitioned the Illinois Labor Relations Board to get representation rights over PA’s. The Labor Relations Board declined to grant the petition on the grounds that “it is clear . . . that [Illinois] does not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned by the [PLRA], their ‘employer’ or,

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73*Id.* at 228–29.

Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table. Whether these representatives accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service. It is surely arguable, however, that permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decision making process than is possessed by employees similarly organized in the private sector.

74*Harris*, 134 S. Ct. at 2625.
at least, their sole employer.”

To change the status of the workers, the unions would need to get help from the government in changing the laws. This help came in the form of the election of Rob Blagojevich as the Governor of Illinois in 2003. The mere fact that a democratic governor changes the laws should not raise any concerns. The concern, however, is that the direct contributions from the SEIU, the union that was given representation rights over PA’s, was a major factor in Governor Blagojevich’s election.

The National Institute on Money in State Politics reported that labor unions were the biggest contributor to Blagojevich over his term. The institute determined that the “Service Employees International Union, which contributed $1.92 million from 2001 to 2008, was the largest overall contributor to Blagojevich. With $931,722 in contributions, it was also the largest contributor to Blagojevich’s re-election campaign in 2006.” Further, some speculated that the funding from the SEIU increased whenever Blagojevich made some pro-union decisions. While the PA’s who chose to opt out of the specific political contributions, did not necessarily directly add to Blagojevich’s campaign, their payments do strengthen the SEIU, which indirectly allows them to contribute.

Even if political funding is theoretically separated from fair-share payments, the money that is being used specifically for collective bargaining costs are being indirectly linked to

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76 Nicole Albertson-Nuanes, Names in the News: Gov. Rod Blagojevich, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS (Dec. 19, 2008) http://classic.followthemoney.org/press/ReportView.phtml?r=377 (“Labor contributed $10.2 million from 2001 to 2008, making it the largest overall sector contributing to Blagojevich. Labor contributed more than one and a half times the amount given by the next largest sector, finance, insurance and real estate, which gave $6 million to Blagojevich during the same period.”).
77 Id.
78 Id.
79 Kris Maher and David Kesmodel, Illinois Scandal Spotlights SEIU’s Use of Political Tactics, THE WALL STREET JOURNAL, (December 20, 2008, 12:01 AM), http://www.wsj.com/articles/SB122973200003022963 (“In one example, the union contributed $200,000 to Mr. Blagojevich on March 3, 2006, according to data compiled by the National Institute on Money in State Politics. Six days later, the governor signed a labor contract covering SEIU home-care workers. Following the contract, membership at SEIU Local 880 in Chicago increased to 45,000 workers from 24,000, according to Labor Department records.”).
political parties. This is accomplished because funding for the union is being taken, even if labeled for collective bargaining, from those who would be fired if they objected to the entire fee. The large presence that labor unions have in today’s political arena makes the indirect fees a more prominent concern.

With possible First Amendment implications, and an increase in political presence, one must question whether the union representation properly represents the individual members of the union. While Abood made it seem that it was possible to adequately represent all people within the labor union if compulsory political fees were taken out of the picture, the ever-growing political contributions can put a damper on this premise. If fair-share payments inevitably spill over into the political arena, those who do not support those political views are not being adequately represented.

Terry Pell, an attorney who, along with Michael Carvin, is representing California teachers who are challenging similar compulsory fair share fees, argue that if labor unions properly represent the majority of all members, then the overturning of Abood should not have a negative effect on the labor unions. Pell argues that those who support labor unions will continue to pay into the unions and support their services. Pell bases this argument on the grounds that when given the choice under right-to-work laws, only a small number of employees

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80 Abraham L. Gitlow, *Ebb and Flow in America’s Trade Unions: The Present Prospect*, 63, LAB. L. J. 2 (2012) (“Despite its weakened condition and loss of collective bargaining muscle, it remains a potent political force. It possesses substantial financial resources, and it expends those resources freely in support of labor-friendly political candidates and office-holders. It is especially active in presidential and congressional campaigns.”).
81 Terry Pell is the President of the Center for Individual Right, an organization that represents the plaintiffs in California Teachers in Friedrichs v. California Teachers Association.
82 Michael Carvin is a partner at Jones Day and, along with Terry Pell, represents plaintiffs in California Teachers in Friedrichs v. California Teachers Association.
85 Id. (“So it might just be the case that a majority of public employees strongly supports their union and would continue to support it if dues became completely optional.”).
actually opt-out of their fair-share payments.\textsuperscript{86} Pell concludes that this fact means that those who believe they benefit from fair-share payments, will want to continue to benefit.\textsuperscript{87} Therefore, if \textit{Abood} were overturned public unions would not be drastically affected, as only those who believe they are not receiving a benefit will opt-out of the fair-share payments.\textsuperscript{88}

In theory, Pell's argument makes some sense: if you truly support something, you will pay for it, while you will not pay from something that you do not support unless you are compelled to. This proposition was also recognized by the majority of the \textit{Harris} Court, which stated that "it may be presumed that a high percentage of these personal assistants became union members and are willingly paying union dues," because a majority vote created the union in the first place.\textsuperscript{89}

Pell's argument, however, is flawed because it gives too much credit to individuals – it ignores the concept that some people will take things without having to bear the costs. In fact, the dissent in \textit{Harris} disregarded the position taken by the majority and Pell, on the ground that there is an inherent economic incentive to free ride in this situation.\textsuperscript{90} As the dissent points out, some studies have shown that not all union members will pay the fees if they do not have to, whether or not they agree with the organization.\textsuperscript{91} In all, the argument fails to reconcile the free-rider problem that is at the crux of the debate between the two sides. Without addressing the free-rider problem, the debate on whether unions will be affected seems unimportant.

\textsuperscript{86}\textit{id.}
\textsuperscript{87}\textit{id.}
\textsuperscript{88}\textit{id.}
\textsuperscript{89}\textit{Harris}, 134 S. Ct. at 2641.
\textsuperscript{90}\textit{id.} at 2657 (Kagan, J., dissenting).
\textsuperscript{91}\textit{id.} (citing R. KARNEY & P. MARESCHAL, LABOR RELATIONS IN THE PUBLIC SECTOR 26 (5th ed. 2014)) ("[T]he largest federal union, the American Federation of Government Employees (AFGE), represented approximately 650,000 bargaining unit members in 2012, but less than half of them were dues-paying members. All told, out of the approximately 1.9 million full-time federal wage system (blue-collar) and General Schedule (white-collar) employees who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues.").
It is evident that labor unions have strong political ties. The question is whether these political aspects of the unions are so strong as to make any separation between political spending and union representation essentially impossible. Further, given the landscape of labor unions and the increasing political spending, the inquiry turns on trying to find a balance between spending, while at the same time curbing the free rider problem that is a basic principal of economics. With the general state of labor unions in mind, it is important to now focus on the central aspect of the debate: free riding.

B. The Free-Riding Dilemma

The free-riding problem is not specific to the labor union debate. The problem has been the center of many entry-level economic courses and continues to be an underlying concern on the part of economists dealing with public goods.92

The free-rider concern was bolstered in the private sector when federal legislation forced unions to adequately represent all employees within that sector, whether or not they were contributing to the union.93 The problem in the public sector, however, is not governed by the same legislation as the private sector. As noted supra, jurisdictions are split on laws governing public union representation. The free-riding argument is central to the disagreements between the differing legislations, prompting the Supreme Court to address this problem and recognize the overlapping concern of First Amendment protections with the free-riding problem on several occasions.94

94 See, e.g., Harris, 134 S. Ct. 2627 (majority opinion) (quoting Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 181 (2007)) ("The primary purpose of such arrangements is to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred."); Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2289 (2012) ("Such free-rider arguments, however, are generally insufficient to overcome First Amendment objections."); Abood, 431 U.S. at 221-22 (1977) ("A union-shop arrangement has been thought to distribute fairly the cost of these activities among those
When presented with the free-rider problem, the Supreme Court generally takes the stance that all workers benefit equally from collective bargaining actions, which justifies any compelled fee.⁹⁵ This theory, however, is only true when looking at the problem through a narrow scope. That is, the theory that collective bargaining is an overall benefit only holds true if each individual values the collective bargaining and would undertake it in an individual cost-benefit analysis. If the majority of individuals do not find the good (i.e., collective bargaining) to be a benefit, and freely chose to not pay for the good, then natural market forces will eliminate the good and, thereby, the free-rider problem. This analysis is true for all aspects of union representation that the fair-share payments are purported to be funding.

In taking the stance that the broader control of unions properly reflects the benefits of the individual, the Supreme Court did not account for public choice theory.⁹⁶ The Supreme Court assumed that labor unions represent and account for the individual members instead of the individual at the top of the organization.⁹⁷ As the leading architect of the theory, James Buchanan, stated, the theory “replaces . . . romantic and illusory . . . notions about the workings of governments [with] . . . notions that embody more skepticism.”⁹⁸

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⁹⁶Public choice theory is the idea that the public does not have a single preference that can truly be reflected by the government. Public Choice Theory, DICTIONARY CENTRAL, http://www.dictionarycentral.com/definition/public-choice-theory.html.
⁹⁷Jane S. Shaw, Public choice theory, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, available at http://www.econlib.org/library/Enc/PublicChoiceTheory.html. (“Public choice economists make the same assumption—that although people acting in the political marketplace have some concern for others, their main motive, whether they are voters, politicians, lobbyists, or bureaucrats, is self-interest.”); see also William F. Shughart II, Public Choice, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS, available at http://www.econlib.org/library/Enc/PublicChoice.html (internal quotations omitted) (“Public choice rejects the construction of organic decision-making units, such as the people, the community, or society. Groups do not make choices; only individuals do. The problem then becomes how to model the ways in which the diverse and often conflicting preferences of self-interested individuals get expressed and collated when decisions are made collectively.”).
⁹⁸Shaw, supra note 97.
Although primarily used by political theorists in the political arena, the underlying propositions of public choice theory can be analogous to labor unions. Members vote to elect an individual or group of people who then in turn "lobby" or "negotiate" on behalf of those constituents. Just as the theory contemplates the realism that political figures work in self-interest, it can be said that those who sit at the top of labor unions are also working in self-interest. While they were elected to speak for the individual, public choice theory tells us that instead they speak for themselves but claim it is for the individual.

In essence, the labor union is not making a decision as a group: it is making a decision as a self-interested individual. While the stated goal could be to represent all employees to achieve better rights and remedies for the workers, at some point the individuals at the top are driven by self-interested means. The individual worker who objects to the means that are being forwarded is being forced to give up individual autonomy in order to keep their employment. If the interests being asserted are not actually to the benefit of the individual, but instead to the benefit of the labor leader, the benefit being derived by the individual is not as clear, making the free rider problem narrower.

Of course, it could be said that all organizations work in this capacity; however, it is impossible for each individual to have a separate voice in a way that can be properly executed. The concern of public choice theory and public labor unions is the practicality that political agendas are being forwarded in some capacity. Whether these agendas are in the form of direct

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99 P.J. Hill, *Public Choice: A Review*, 34 FAITH AND ECON. 1, (1999) available at https://www.gordon.edu/ace/pdf/Hill=F&E34.pdf ("Public Choice is best defined as the application of the rational choice model to non-market decision making. In a more general sense, it has meant the application of economics to political science.").

100 *Conduct Elections*, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/what-we-do/conduct-elections ("Otherwise, a union that receives a majority of the votes cast is certified as the employees’ bargaining representative and entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit. Failure to bargain with the union at this point is an unfair labor practice.").

101 These self-interested means can be shown by the political contributions that have consistently increased over the years of labor unions.
contributions from the union or lobbying for specific politicians, a lone employee cannot object without the possibility of losing their employment. In *Harris*, the majority tried to recognize this fact, by acknowledging the most important difference between private unions and public unions— all actions taken by public unions are directed at the government, while actions taken by private unions can be separately directed at the employer or the government.\(^{102}\) So, while public choice theory may still exist in both private and public unions, when dealing with public unions, public choice theory is bolstered because of the constitutional implications.

While not directly analyzed under the public choice theory, one prominent commentator has rejected the idea that labor unions are similar to financial institutions that look out for their shareholders (individual union members). Abraham Gitlow, a dean and professor of economics at New York University,\(^{103}\) believes that the idea of labor unions as economic institutions is somewhat of a falsehood.\(^{104}\) Gitlow argued that viewing a union as employee advocates is looking at unions in too narrow of a scope.\(^{105}\) While a labor union may be a financial institution in the sense that it is driven by economics, Gitlow believed that labor unions look to protect the union as a whole, rather than protect the individual laborer by making political objectives their main concern.\(^{106}\) If Gitlow is correct, it strengthens the argument that fair-share payments cannot really be separated from indirect political costs—a union is worried about increasing political strength, not necessarily benefiting the individual worker through collective bargaining.

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\(^{102}\) *Harris*, 134 S. Ct. at 2632–33 ("In the private sector, the line is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.").

\(^{103}\) *Id*, supra note 80.

\(^{104}\) *Id*.

\(^{105}\) *Id*.

\(^{106}\) *Id*. ("It is clear that the labor union is primarily a political institution. Its economic rationale embraces a congeries of oftentimes conflicting objectives that, in themselves, demand a high order of politically skilled leadership. And, in pursuing those objectives, the labor leader will rely on naked political power as readily as on controlling the labor supply and collective bargaining.").
This theory then reinforces Buchanan's public choice theory. If the individual workers' benefits are uncertain, as the union acts as a political institution and political leaders are motivated by self-interest, the free-rider concern seems overstated as the asserted benefits are not for the individual worker but instead for the union leader.

Inherent in the theory of free riding is the idea that a person is receiving a benefit or public good without paying the expense to obtain those goods.\textsuperscript{107} In a purely economic scope, an "individual motivated by self-interest has an economic incentive to free ride at the expense of others in the group who attempt to promote self-interest through group behavior."\textsuperscript{108} This theory is not applied in the union fair-share context with as much ease as it would seem. While theoretically a member can opt out of any fair-share fee that contributes to political gain,\textsuperscript{109} as shown above, actually obtaining that in practice is harder than the dissent in \textit{Harris} would admit.\textsuperscript{110} If it is presumed that indirectly related to all fair-share payments are political contributions, the member's turn from being potential free riders that are getting a benefit without paying the costs into forced riders who are paying the cost for something that does not benefit them.\textsuperscript{111}

Embedded in the very idea of the free-riding problem is the suggestion that there is a gaining of some benefit. At its most simple level, an individual is not truly free riding if that

\textsuperscript{108}Id.
\textsuperscript{109}\textit{Abood}, 431 U.S. at 236.
\textsuperscript{110}This point is not to make it seem as though the dissent in \textit{Harris} overlooked this point. In fact, \textit{Harris} dissenters recognized that the majority was concerned with \textit{Abood}'s practical application, but rationalized their argument by stating that \textit{Abood} properly examined these concerns, and cases that followed \textit{Abood} eliminated any hesitation that separating these fees was not workable. \textit{See Harris}, 134 S. Ct. at 2652 (Justice Kagan in dissent) ("Only the idea that \textit{Abood} did not “anticipate” or “foresee” the difficulties of distinguishing between collective bargaining and political activities might be thought different. But in fact, \textit{Abood} predicted precisely those issues.").
\textsuperscript{111}A forced rider is the opposite of a free rider, a person compelled to pay for the benefits of another person. \textit{See} Tyler Cowen, \textit{Public Goods}, \textit{THE CONCISE ENCYCLOPEDIA OF ECONOMICS}, available at http://www.econlib.org/library/Enc/PublicGoods.html ("Government often creates a problem of forced riders by compelling persons to support projects they do not desire.").
person is not deriving a benefit. In a purely “public good” perspective, that idea might not be true. In theory, the “public good” benefits the public as a whole. In regards to public unions, however, a person who does not agree with the core values or benefits that the union is pushing (whether those benefits are collective bargaining or political backing), they are still assumed to be a free rider and forced to pay their fair share payment or resign from employment.

Clearly, this presumption has its own flaws. One can argue that the unions are “goods” that benefit the public as a whole, as the bargaining that is attained by collective action increases wages, which in turn raise the poverty line benefiting society. Although this argument has merit, it comes on the premise that the same actions cannot be accomplished on an individual level allowing the individual to truly contemplate their own cost-benefit threshold. While this Comment is not looking to compare individual bargaining with collective bargaining, it is an assumed position in the unionism debate that individuals cannot bargain to their own benefit.

Can all of these considerations be reconciled? Is it possible to have groups of people in the same industry pursuing their own ideas of benefits without allowing some to avoid the costs that are associated with the work? This Comment is simply trying to show that looking at the free-riding problem in a vacuum skews the issue by accounting for and creating presumptions of what each individual actually values. Further, it is attempting to show that collectively labeling a group of people as free riders might be misstating the problem since there is a potential disconnect between the leaders of the group and the individuals.

One way in which a free-rider problem can be curtailed is by stopping the monopoly that they current hold. As stated by Harvard Economics Professor Richard Freeman, “[m]ost, if not all, unions have monopoly power, which they can use to raise wages above competitive
levels.”\(^{112}\) The argument being: absent competition, unions can arbitrarily set union wages that companies need to comply with. If, however, multiple unions were in the same industry, they could compete with each other, which would incentivize competition and potentially raise wages, while at the same time potentially eliminating one-sided political spheres. Each union would more accurately represent the members of that specific union (although Buchanan may see it differently)\(^{113}\) as people will not contribute unless the fees are going to what they feel actually benefits them.

The above analysis on how to combat and deal with the free-rider problem presented in *Abbood* and *Harris* may just be conjecture – if *Abbood* remains good law, fair-share payments will still be prevalent in many jurisdictions throughout the United States. While it will be argued that *Harris* essentially teed’ up *Abbood* to be overturned in the future,\(^{114}\) for now, it seems as though the actual holding in *Harris* was extremely narrow.\(^{115}\) Simply put, *Harris* only declined to extend *Abbood* to non-full-fledged employees.\(^{116}\) To speculate whether or not *Harris* set *Abbood* up to be overturned, one must examine both of the Supreme Court’s recent decisions and address the *stare decisis* argument made by the dissent in *Harris*.

IV. First Amendment Jurisprudence and the Future of the *Abbood* Precedent

The Supreme Court will not overturn a thirty-five year old precedent with ease. Even those in the *Harris* majority will likely be very cautious in how they overturn precedent, as they do not want to undermine the weight and authority that should be given to *stare decisis*. The idea behind *stare decisis* is simple: conformity in the law provides understanding on how to proceed in


\(^{113}\)See, supra p. 17-8.

\(^{114}\)Part IV of the note will focus on how the majority of the court purposefully didn’t overturn *Abbood*, and instead looked to chip away at the 35 year old precedent for a case that is on all fours.

\(^{115}\)Baker & Roller, supra note 49(“There may be one silver lining for public unions, though. The *Harris v. Quinn* ruling is somewhat narrowly tailored to home caregivers, known as PAs.”).

\(^{116}\)Harris, 134 S. Ct. at 2644.
the future. The Supreme Court has stated that, "[i]ndeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." The Court must look at both "prudential and pragmatic considerations" that overturning the prior law will have on society. Because these considerations are not taken lightly, it is reasonable to believe that the Court will slowly and methodically overturn a case by expanding or contracting portions of the law on which the precedent stands.

In this regard, Harris and decisions before it have been seemingly expanding the First Amendment to give more protections. Even though Abood has been a source of reliance since 1977, expanding the First Amendment could slowly whittle away at that reliance, which would make the case to overturn stronger. Of course, the seemingly expanded First Amendment would only strengthen a case of overturning Abood if it is accepted that fair-share payments are violations of the First Amendment—a proposition that one prominent scholar has refused to accept.

According to Catherine Fisk, the majority in Harris has an inherently flawed reasoning in its analysis, as she believes that there is no First Amendment violation at all. Fisk argues that compulsory fees for union representation are not a form of speech, but instead a form of

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117 See Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 854 (1992) ("With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.")
118 Id.
119 Id.
122 Fisk, supra note 120, at 118.
conduct that is required by law. As Fisk sees it, just like when "a pacifist and death penalty opponent pays taxes" knowing that the money may help finance a war or provide funding to the defense of the death penalty, the collection of fair-share payments by union members does not mean that the union members are promoting the ideas or speech that the union will inevitably make.

The argument that Fisk sets forth has its merits. When people are required to make compulsory payments, it is inevitable that some of those payments will lead to speech activities that do not express the views of the donor. The argument, however, is as inflated as the free-rider problem. While Fisk argues that the "operative part of the transaction is conduct—transfer of funds—not speech," in order for a public union to achieve its goals, it must start by expressing speech. The means which a public union must use to achieve its end-goal is embedded in speech, as collective bargaining and negotiation starts with the election of certain officials. If it is accepted that First Amendment protections are triggered in fair-share payments, then the analysis focuses on the reach of the First Amendment.

A. Expansion of First Amendment Jurisprudence

The current conservative composition of the Supreme Court has seemed to reignite the powers of the First Amendment. In the past several years, the Supreme Court has rendered decisions that have garnered much attention and debate. In many of these cases, conservative

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123 Id. (comparing fair-share payments to the payment of other compulsory fees such a "library fines, taxes, homeowners' association dues, or insurance premiums").
124 Id. at 119.
125 Id. at 118.
126 The Supreme Court is split on Ideological lines with 5 conservative justices and 4 liberal justices.
127 See e.g., Ariane De Vogue, Hobby Lobby Wins Contraceptive Ruling in Supreme Court, ABC NEWS, (June 30, 2014, 10:45 AM), available at http://abcnews.go.com/Politics/hobby-lobby-wins-contraceptive-ruling-supreme-court/story?id=24364311 ("In a deeply divisive case pitting advocates of religious liberty against women's rights groups, the Supreme Court said today that two for profit corporations with sincerely held religious beliefs do not have to provide a full range of contraceptives at no cost to their employees pursuant to the Affordable Care Act."); Bill Mears, Supreme Court eases restrictions on corporate campaign spending, CNN, (January 21, 2010, 2:05 PM),
justices have relied heavily on the First Amendment in writing for the majority of the Court. In reliance on the First Amendment, the conservative majority has at times expanded First Amendment protection. All of these decisions tend to show that, if given the right opportunity with the current nine Justices, the Supreme Court will follow the same pattern and invoke strong First Amendment principals to overturn Abod.

The first of these decisions came in 2010, when a conservative majority expanded the First Amendment to Corporations in the political arena.\textsuperscript{128} In Citizens United v. Federal Election Commission, the majority ruled that corporations were protected under the First Amendment in making political speech before an election.\textsuperscript{129} The liberal dissenters in Citizens United, which consisted of Justice Stevens, Ginsburg, Breyer, and Sotomayor,\textsuperscript{130} felt as though the majority had expanded the First Amendment, and completely ignored precedent.\textsuperscript{131}

A more recent case, in which the same ideological split occurred, was Burwell v. Hobby Lobby.\textsuperscript{132} There, a conservative majority upheld a First Amendment claim against the Affordable Care Act for closely held corporations.\textsuperscript{133} Again the dissent felt as though the majority had abandoned precedent and expanded First Amendment jurisprudence.\textsuperscript{134} The decision in Hobby Lobby was rendered on the same day as Harris, which possibly overshadowed the controversial decision in Harris.

\footnotesize{available at http://www.cnn.com/2010/POLITICS/01/21/campaign.finance.ruling/ (“The Supreme Court has given big business, unions and nonprofits more power to spend freely in federal elections, a major turnaround that threatens a century of government efforts to regulate the power of corporations to bankroll American politics.”).  
\textsuperscript{129}Id. at 363–64.  
\textsuperscript{130}Id. at 393 (Stevens, J., dissenting).  
\textsuperscript{131}Id. at 425 (“The Court has it exactly backwards. It is today’s holding that is the radical departure from what had been settled First Amendment law.”).  
\textsuperscript{132}See generally Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)  
\textsuperscript{133}Id. While this case dealt with the interplay between a Religious Freedom Statute and forced coverage of birth control, the case is in line with the expansion of First Amendment jurisprudence. Id.  
\textsuperscript{134}Hobby Lobby, 134 S. Ct. at 2787 (Ginsburg dissenting). (“The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score.”).}
In a possible attempt to avoid the outrage of overturning multiple precedents on ideological splits in the same term,\textsuperscript{135} the majority in \textit{Harris} did not go as far as overturning \textit{Abood}. Instead, the majority distinguished \textit{Abood},\textsuperscript{136} while at the same time hinting to the reader that \textit{Abood} should be reexamined.\textsuperscript{137} Though not directly saying that the \textit{Abood} decision should be explicitly revisited on First Amendment grounds, the Court stated that \textit{Abood} relied on “questionable foundations,”\textsuperscript{138} and indicated that its post-decision application has highlighted its “strengths and weaknesses.”\textsuperscript{139}

The weaknesses that the majority alluded to seemed to stem around the First Amendment. In an attempt to highlight some of the questionable First Amendment principals, the majority relied heavily on a case that they decided just two years earlier.\textsuperscript{140} In \textit{Knox v. Service International Union}, the Supreme Court recognized that “a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights.”\textsuperscript{141} While the Court declined to revisit whether these cases were correct in recognizing the implications of the First Amendment,\textsuperscript{142} the Court did definitively state that the free-rider argument that is at the center of debate for fair-share payments is “generally insufficient to overcome First Amendment objections.”\textsuperscript{143} While \textit{Knox}

\textsuperscript{135}Both the \textit{Hobby Lobby} and \textit{Harris} decisions were rendered on June 30, 2014.
\textsuperscript{136}\textit{Harris}, 134 S. Ct. at 2639 (“Because \textit{Abood} is not controlling, we must analyze the constitutionality of the payments compelled by Illinois law under generally applicable First Amendment standards.”).
\textsuperscript{137}\textit{Id.} at 2627 (stating that past decisions have recognized \textit{Abood} as “something of an anomaly”).
\textsuperscript{138}\textit{Id.} at 2638.
\textsuperscript{139}\textit{Id.} at 2636.
\textsuperscript{140}Given the current composition of the Supreme Court, the majority can continue to chip away \textit{Abood} precedent and simply cite themselves and their reasoning in subsequent decisions.
\textsuperscript{142}\textit{Id.}
\textsuperscript{143}\textit{Id.}
dealt with the notice standards to union members only paying fair-share payments,\textsuperscript{144} the majority in \textit{Harris} used the \textit{Knox} dictum to its advantage, when it explained that the \textit{Abood} rationale competes with First Amendment principles.\textsuperscript{145}

The expansion of the First Amendment has been recognized in cases that have been decided post \textit{Harris}. In \textit{Bierman v. Dayton}, the District Court of Minnesota recognized \textit{Harris}, but claimed the \textit{Harris} decision did not control whether or not a union can be appointed a representative.\textsuperscript{146} In distinguishing the two questions, the court recognized that \textit{Harris} “solely decided that it was a violation of the First Amendment for a state to require homecare providers to pay fair share or agency fees to a union.”\textsuperscript{147} \textit{Bierman} did not analyze \textit{Harris}, as they felt it was not controlling to the issue before them.\textsuperscript{148} The bigger effect shown by \textit{Bierman}, is whether future cases will continue to try and limit the scope of what \textit{Harris} stood for. If courts begin to be inconsistent with articulating the exact holding of \textit{Harris}, the Supreme Court is more likely able to justify granting certiorari to resolve the dispute.

In the case of fair-share payments, the Supreme Court has recognized that “unions have no constitutional entitlement to nonmember-employees' fees.”\textsuperscript{149} Instead, the Supreme Court views the collection of these fees an “act of legislative grace,”\textsuperscript{150} indicating that the Court is more likely to support First Amendment concerns over these fair-share payments. As the First Amendment raises stronger concerns than collection of fees, one would think that as long as the

\textsuperscript{144}See \textit{Id.} at 2293. (“To respect the limits of the First Amendment, the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out.”).

\textsuperscript{145}\textit{Harris}, 134 S. Ct. at 2639 (“As a result, we explained in \textit{Knox} that an agency-fee provision imposes a significant impingement on First Amendment rights, and this cannot be tolerated unless it passes exacting First Amendment scrutiny.”)(internal quotations and citations omitted).


\textsuperscript{147}\textit{Id.}

\textsuperscript{148}\textit{Id.}


Court can show that the precedent is outdated, it will have no problem applying the First Amendment and overturning Abodd in following cases.

While in theory it seems as though the Court has set itself up to overturn Abodd in a subsequent decision, will the Court actually be able to pull it off? In the eyes of the dissent, “the majority says nothing to the contrary: It does not pretend to have the requisite justifications to overrule Abodd.” For a subsequent decision to follow the majority in Harris and overturn Abodd, challengers will have to take on stare decisis and the dissenter’s positions in Harris.

B. Addressing Stare Decisis: Can the Supreme Court Overturn Old Precedent

In addition to saying that the majority purposefully did not overturn Abodd, the dissent in Harris also clearly laid out the stare decisis argument on why they could not overturn Abodd. In general, stare decisis has four separate elements that the court will look at when seeking to overturn precedent: (1) whether the old law is practically unworkable; (2) reliance on the law; (3) whether the old law is simply remnants of an abandoned doctrine; and (4) changed facts of circumstances in the situation. This is not necessarily a balancing test, but instead a totality-of-the-circumstances test.

Whether or not Abodd is practically unworkable is truly a fact-sensitive analysis. Looking at the practically unworkable element, it must be viewed as whether unions can truly separate the political dues that clearly violate the First Amendment, and instead have their fair-share payments represent only collective bargaining. It cannot be said that the situation that Abodd laid out was practically unworkable on its face. For a court to find that this was practically

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151 Harris, 134 S. Ct. at 2652 (Kagan, J., dissenting).
152 Id. at 2651 (“This Court’s view of stare decisis makes plain why the majority cannot—and did not—overturn Abodd.”).
153 Casey, 505 U.S. at 855.
154 In Casey, the Supreme Court stated that the decision in Roe was not practically unworkable, even though it had garnered much opposition. Casey, 505 U.S. at 855. The Court stated that simply being hard to apply does not mean
unworkable, the situation described in *Aboud* must be completely outside the court’s competence. Although it has been recognized that the application of *Aboud* is hard,\(^{155}\) it does not necessarily follow that being difficult makes it practically unworkable.

The dissenters in *Harris* made it seem as though *Aboud* truly weighed the application problem, making any argument to the contrary untenable.\(^{156}\) However, challengers to *Aboud* could focus their argument in this regard on *Aboud* declining to set the actual dividing line or framework to separate acceptable fees from unacceptable fees.\(^{157}\) To say that this would cause the Court to side with challengers of the law that it is practically unworkable, however, cannot be said for sure. What it will do is continue to poke holes in the arguments against *Aboud*, giving the majority more justifications for overturning it.

The second element, that will be hotly contested, is reliance on the law.\(^{158}\) As the dissent in *Harris* made perfectly clear, *Aboud* created "enormous reliance interest"\(^{159}\) as states have enacted laws that directly follow *Aboud’s* reasoning.\(^{160}\) The Supreme Court has noted that when there is a strong reliance interest, it gives *stare decisis* even more force.\(^{161}\) As the dissent described it, the majority did not take the petitioners’ invitation to overturn *Aboud* in this case.\(^{162}\)

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\(^{155}\)*Aboud*, 431 U.S. at 236 ("There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.").

\(^{156}\) *Harris*, 134 S. Ct. at 2652 (Kagan, J., dissenting) (2014). ("Only the idea that *Aboud* did not “anticipate” or “foresee” the difficulties of distinguishing between collective bargaining and political activities might be thought different. But in fact, *Aboud* predicted precisely those issues.").

\(^{157}\)*Aboud*, 431 U.S. at 23637 ("We have no occasion in this case, however, to try to define such a dividing line. The case comes to us after a judgment on the pleadings, and there is no evidentiary record of any kind. The allegations in the complaints are general ones, and the parties have neither briefed nor argued the question of what specific Union activities in the present context properly fall under the definition of collective bargaining. The lack of factual concreteness and adversary presentation to aid us in approaching the difficult line-drawing questions highlights the importance of avoiding unnecessary decision of constitutional questions.").

\(^{158}\)*Casey*, 505 U.S. at 855.

\(^{159}\)*Harris*, 134 S. Ct. at 2652 (Kagan, J., dissenting).

\(^{160}\)*Id.*


\(^{162}\)*Harris*, 134 S. Ct at 2645 (Kagan, J., dissenting).
While the dissent proclaimed that it was because the majority *could not* overturn *Abood*, others have described this approach as a calculated attempt to avoid outrage, but at the same time, begin to set the stage for the overturning of *Abood* in general. If union memberships and fair share provisions drop, the strong reliance interest that *Abood* created is no longer as strong.

Two commentators, Thomas R. McCarthy and Samuel B. Gedge, claim that *Harris* was a “quiet blockbuster[,]” overlooked “because the Court opted for a middle course rather than the more aggressive steps sought by the parties.” While the dissent proclaimed that “*Abood* remains good law,” both McCarthy and Gedge predict that this seemingly small step would lead to a drastic decline in union membership and eventually be the driving force to overturn *Abood*. If McCarthy and Gedge are correct, reliance on the *Abood* principles will not be as prominent going forward; there cannot be reliance on the law if the trend is going away from the law.

This proclamation, that union membership will surely decline and hurt reliance interest, is not one that short-term analysis can prove or disprove. While there might be a sudden surge in the decline of membership within the specific industry that *Harris* covered, there is a good chance that the decline will be curtailed by the efforts of the unions in maintaining voluntary membership. Because the unions are not just going to go away, the element of reliance interest is extremely difficult to predict.

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163 *Id.*
164 Tom McCarthy and Samuel Gedge, *Harris v. Quinn symposium: A quiet blockbuster?*, SCOTUSBLOG, http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-a-quiet-blockbuster/. Both Thomas McCarthy and Samuel Gedge are attorneys at Wily Rein, whom were counsel for home care workers that filed amici brief in supporting the petitioners in *Harris v. Quinn*.
165 McCarthy & Gedge, *supra* note 164.
166 *Harris*, 134 S. Ct. at 2653 (Kagan, J., dissenting).
167 McCarthy & Gedge, *supra* note 164 (“Though the Court took only a modest step in *Harris*, this step is of great practical impact. Although the dissenters proudly announced that *Abood* remains the law, and public unions no doubt cheered their survival, the decision nonetheless has been described as a devastating blow to public unions.”) (internal quotations omitted).
Immediately following the *Harris* decision, the SEIU released an announcement vowing, "[n]o court case is going to stop us!" The SEIU started a campaign to bring all the pro-union members together and to educate and recruit others who want to contribute and keep the SEIU strong. The SEIU’s response to *Harris* is extremely commendable and will most likely “stop the bleeding” that occurred to public unions. Additionally, a campaign to try and educate members of what their fair-share payments are actually going toward could also prove McCarthy and Gedge wrong. If people within the union actually believe in what the fees are being used for, and they believe that it truly benefits them, the union membership should not decline as much.

Relevant to the reliance inquiry is a consideration of the actions taken as a direct result of the *Harris* decision. Illinois Governor, Bruce Rauner, issued an executive order on February 9, 2015, which exempts all state workers from having to pay their fair-share payments. The order has been hotly contested, and was countered by immediate litigation filed by Illinois Labor Unions. While it is not certain if the executive order will be upheld, the fact that swift action was taken to seemingly expand on the *Harris* decision should not go unnoticed. If the executive order taken by Governor Rauner is upheld, other states could potentially follow, eliminating the need for right-to-work legislation, and cutting against the reliance interest on the *Abood* precedent.

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169*Id.* ("They are trying to divide us and limit our power, but we won’t stop standing together for our families and our consumers.").
All of these considerations show that the reliance interest element will most likely be the turning point of the \textit{stare decisis} argument. If challengers can show that the public unions can thrive without having fair share provisions, or that the trend is turning to disregard \textit{Abood}, then the dissent’s proclamation in \textit{Harris} would be wrong.

While not directly considered by the dissent in \textit{Harris}, the challengers will also have to show that \textit{Abood} is remnants of abandoned doctrine and that there are changed facts or circumstances which allows for its overturning.\footnote{Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 854-55 (1992)} Given the First Amendment considerations, these two elements could be a challenger’s best ammo. Unions have drastically changed over the years since \textit{Abood} was decided.\footnote{See Part III.A., supra.} Unions contribute heavily to political organizations and give a disproportionate amount of money to democratic candidates as opposed to republican candidates.\footnote{See Labor: Long Term Contribution Trends, supra note 63.}

This change in the labor landscape was also recognized and commented on by Albert Gitlow. Gitlow noted that labor unions have power within the “labor movement” even outside of their collective bargaining efforts.\footnote{Gitlow, supra note 80 (“Once again, they serve to emphasize the multi-faceted nature of America’s labor movement; in particular, the importance of political and moral elements that provide energy and direction to it.”).} Gitlow focused on the change in labor unions from post-World War II, when labor unions began to take off in America, to today. While the labor unions were strongly for free trade after World War II,\footnote{Id.} Gitlow noted that recently, labor unions have attempted to restrict free trade in an attempt to counter competition, both domestically and internationally.\footnote{Id.} All of these considerations help shape the argument that there are changed facts and circumstances surrounding labor unions in general.
While the dissent in *Harris* claims that it is clear that the majority could not and did not attempt to overturn *Aboud*, a *stare decisis* review shows that, while today the case might not be able to get overturned, if the Court continues to slowly chip away at the First Amendment, it could have the proper ammo to overturn *Aboud* in years to come.

V. Conclusion

The concept of fair-share payments has been a debate throughout America for many years. Notwithstanding this debate, many people questioned the decision to grant certiorari in *Harris v. Quinn*, as the law seemed pretty settled: fair-share payments do not offend First Amendment principles if the payments are not associated with political contributions. While *Harris* focused more on the expansion of the definition of public employees, the opinion made clear that *Aboud v. Detroit Board of Education* was on all of the Justices’ minds.

Political funding by labor unions has only added to the debate surrounding fair-share payments and the principles of *Aboud*. By spending an increasing amount of money to fund political campaigns or lobby for workers’ rights, the practical separation between collective bargaining fees and political contributions continues to become distorted.

Although the free-riding argument in the biggest opposition to the *Harris* decision, a broader view of the argument seems to fall short of First Amendment concerns. Additionally, the argument is premised on the idea that those who do not pay the fee value the services as benefits. By making these assumptions, labor unions are not subject to market considerations that freely decide the fate of other organizations. If the majority feels that the costs outweigh the benefits, the organization will eventually fail.

While *Harris* did not examine the details of the free-riding argument or the more specific question of whether *Aboud* remains good law, many believe that the decision has invited more
challenges to the thirty-five-year-old precedent. Although it seems that the current Supreme Court has been expanding First Amendment jurisprudence, any challenge will still have to take on *stare decisis* and the concerns of the *Harris* dissent.

One cannot predict with certainty whether *Abood* will be overturned. What is clear, however, is that public unions have gone through drastic changes and now have many opponents. Even if it takes several years to get there, if the Supreme Court grants certiorari on the right case, then fair-share payment may quickly become unconstitutional.