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FRIEDRICHS AND THE MOVE TOWARD PRIVATE ORDERING OF WAGES AND BENEFITS IN THE PUBLIC SECTOR

MARIA O'BRIEN HYLTON*

In its recent Harris v. Quinn opinion, the U.S. Supreme Court (in particular Justice Alito) seemed to welcome a future opportunity to reconsider the 1977 landmark Abood decision in which public sector closed shop employees were not required to join a union but could be subject to fees that cover the costs of “collective bargaining, contract administration, and grievance adjustment purposes.” Supporters of the Abood approach argue that it is a reasonable compromise that prevents non-members from free riding on the union’s efforts (i.e. enjoying the wages and benefits negotiated by the union without sharing the costs incurred). Detractors and the plaintiffs in Friedrichs argue that free riding concerns are insufficient to overcome serious First Amendment objections. The central idea is that all bargaining in the public sector is inherently political. Public sector pays, tenure and benefits (especially expensive retiree health care and pension promises), it is claimed, now profoundly affect the ability of state and local governments to function in many jurisdictions. This article briefly reviews the major claim in Friedrichs—that public sector agency agreements violate the First Amendment--and considers the implications of a decision that, but for Justice Scalia’s unexpected death almost certainly would have overturned Abood. What would this mean for financially strapped state and local governments? To understand what a victory for the Friedrichs plaintiffs would mean, this paper looks at recent data from Wisconsin which dramatically constrained public sector agency agreements a few years ago and has seen public union membership, union revenue and political power plunge as a result. If Friedrichs had overturned Abood during the 2016 term, we would now expect to see national patterns similar to those observed in Wisconsin. In many places around the country a drop in public sector

*I am indebted to attendees of the 5th Annual Employee Benefits Conference in Hartford, CT for valuable comments and feedback and to individuals at AFSCME Council 32 in Wisconsin and Jim Underhill, Director of the Bureau of Compensation and Labor Relations for the State of Wisconsin for helpful conversations and suggestions about how to obtain post Act 10 data. Thanks also to Harrison Kaplan, Tyler Patterson, and Jordan Shelton for top notch research assistance.

union political power would be expected to translate into a climate more supportive of reduced future expenditures on public pensions and health care.

I. INTRODUCTION

Until recently, conventional wisdom suggested that the petitioners in the *Friedrichs*¹ case were likely to prevail on their core claim that payment of agency fees to a public sector union (in this case the California Teachers Association) violated non-union members' First Amendment rights by forcing them to subsidize political speech with which they disagree.² The

¹ The petitioners first filed their suit to end mandatory union dues on April 29, 2013. The case was decided rather fast by the district court on December 5, 2013 because the petitioners requested judgment be entered for the defendant unions. Though the move seems odd, the petitioners believed their case brought up a unique legal issue and that only the Supreme Court possessed the authority to grant the relief they requested. Upon immediate appeal to the Ninth Circuit, the petitioners again requested judgment for the defendants, and, on November 18, 2014, the Ninth Circuit granted a Summary Affirmance of the district court. *Friedrichs* and her co-plaintiffs filed for *certiorari* on January 26, 2015, and the Supreme Court granted *cert* on June 30, 2015. The case was argued on Jan. 11, 2016 before a full Supreme Court; however, the sudden death of Associate Justice Antonin Scalia on February 13, 2016 left only eight justices to decide the case. Justice Scalia, "who hinted strongly during oral arguments in January that he considered mandatory dues unconstitutional, would have likely been a deciding vote." However, on March 29, 2016, the Supreme Court issued a Per Curiam, one-line opinion: "The judgment is affirmed by an equally divided Court." The death of Scalia certainly led to the divided opinion, as the late justice was an all but official fifth vote for the petitioners, and allowed the unions to continue to collect mandatory union dues. Though the plaintiffs petitioned for a rehearing on April 8, 2016, the still short-handed Supreme Court denied the petition on June 28, 2016, leaving the unions the freedom to collect mandatory dues for the foreseeable future. See *Friedrichs v. Cal. Teachers Assoc.*, 578 U. S. ____ (2016); Haley Sweetland Edwards, *How Antonin Scalia's Death Will Help Teachers' Unions*, TIME (Feb. 16, 2016); *Freidrichs v CTA: Case Timeline*, THE CTR. FOR INDIVIDUAL RTS. (July 16, 2016), <https://www.cir-usa.org/cases/friedrichs-v-california-teachers-association-et-al/friedrichs-v-cta-timeline/>.

² Justice Alito's opinions in *Knox v. SEIU Local 1000* and in *Harris v. Quinn* make clear his view that *Abood* was wrongly decided and that agency fee arrangements by non-members amount to state-coerced speech, which cannot withstand the strict scrutiny required under the First Amendment.

Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering “labor peace” [citation omitted]. But it is an anomaly nonetheless. Similarly, requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions. Courts “do not presume acquiescence in the loss of fundamental rights.” [citation omitted] Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union’s political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn’t the default rule comport with the probable preferences of most nonmembers? And isn’t it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues? An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree. But a “[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Knox v. SEIU Local 1000, 132 S. Ct. 2277, 2290 (2012).

In upholding the constitutionality of the Illinois law, the Seventh Circuit relied on this Court’s decision in *Abood supra*, which held that state employees who choose not to join a public-sector union may nevertheless be compelled to pay an agency fee to support union work that is related to the collective-bargaining process. [citation omitted] Two Terms ago, in *Knox* [citation omitted], we pointed out that *Abood* is “something of an anomaly.” [citation omitted] “‘The primary purpose’ of permitting unions to collect fees from nonmembers,” we noted, “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.’” [citations omitted] But “[s]uch free-rider arguments . . . are generally insufficient to overcome First Amendment objections.” [citation omitted] 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.

Supreme Court, following oral argument on January 11, 2016, seemed poised to undo the decades-old compromise embodied in *Abood v. Detroit Board of Education*,³ which allowed non-members to pay an amount less than the full membership fee but sufficient to cover the costs of “collective bargaining, contract administration, and grievance adjustment purposes.”⁴ The startling death of Justice Scalia deprived the Court of the fifth vote

Harris v. Quinn, 134 S. Ct. 2618, 2627 (2014).

³ *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-6 (1977) (holding that the Constitution allows public sector unions to “spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological views,” but restricting these expenditures to employees who do not object to those ideas and were not “coerced” into joining the union by threat of the loss of their position); *See also* *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 448-56 (1984) (holding that public unions could use funds from objecting members forced into union contributions to pay for union conventions, publications, and “*de minimus*” social activities, but not for organizing costs or litigation that is not “directly concerned” with the union and its bargaining function); *see also* *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986) (holding that “the constitutional requirements for [a] [u]nion’s collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending”); *see also* *Knox*, 132 S. Ct. at 2295-6 (stating that public sector unions have a right to express political and social views “without government interference,” but dissenters who chose not to join the union and are required to pay dues have the same right; thus, the Court held, “when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent”); *see also* *Harris*, 134 S. Ct. at 2636, 2638 (limiting “*Abood*’s reach to full-fledged state employees” and refusing to extend it to semi-public employees when the union does not have “the full scope of powers and duties generally available under American Labor law.”).

⁴ *Abood*, 431 U.S. at 232.

needed to overturn *Abood*.⁵ The Court issued a 4-4 split decision on March 29, 2016, which means *Abood* lives on—at least for a while.⁶

⁵ On March 29, 2016, Adam Liptak of The New York Times called the *Friedrichs* decision “the starkest illustration yet of how the sudden death of Antonin Scalia last month has blocked the power of the court’s four remaining conservatives to move the law to the right.” Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4*, N.Y. TIMES, Mar. 29, 2016 (“the starkest illustration yet of how the sudden death of Antonin Scalia last month has blocked the power of the court’s four remaining conservatives to move the law to the right). However, Liptak went further, explaining the broader effects of Scalia’s death on the Court: “His death changed the balance of power in this case, and most likely in many others. The clout of the court’s four-member liberal wing has increased significantly. Its members — Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan — can create deadlocks, as they did Tuesday, and they can sometimes attract the vote of Justice Anthony M. Kennedy for a liberal result.” *Id.*

⁶ See Daniel Hamel & David Louk, *Much Abood About Nothing?*, WHATEVER SOURCE DERIVED (Mar. 29, 2016), <https://medium.com/whatever-source-derived/much-abood-about-nothing-447dbe2758eb#.hd1dp0tcc>. Hamel and Louk lay out the significance of allowing *Abood* to live on, but suggest there may be an alternative for *Abood*’s “agency shops” in a so-called “direct payment alternative.” *Id.* However, they recognize that this alternative would not be feasible in states with a Democratic legislature and a Republican governor, where *Abood* is all that allows unions the power to collect from unwilling participants.

Laws in almost half of U.S. states allow unions and public sector employers to set up so-called “agency shops.” Employees in an agency shop need not join their local union, but the workers who opt not to join the union still must pay a “fair-share” or “agency” fee to cover their pro rata portion of the union’s collective bargaining costs. Starting with the 1977 case *Abood v. Detroit Board of Education*, the Supreme Court has said that agency shop arrangements do not violate the First Amendment rights of public sector employees. The primary question in today’s case, *Friedrichs v. California Teachers Association*, was whether *Abood* remains good law. For now, it does. Today’s 4–4 split means that the lower court’s decision in *Friedrichs* is affirmed, and the lower court (the Ninth Circuit) abided by *Abood*. So agency shops can continue to exist in the 20-odd states that allow them. . . . To be sure, there are some agency shop states in which *Abood*’s fate matters significantly for public sector unions. Prime examples include Illinois and New Jersey—states with Democratic majorities in the legislature but Republicans in the governor’s mansion. If agency shop laws had been struck down and the legislatures in those states had passed bills to implement the direct payment alternative, we think it quite likely that the governors in

This less-than-total membership cost is either a constitutionally impermissible compulsory payment or a reasonable compromise that has served both labor and public sector employers' interests well for many years. At oral argument it certainly appeared there were five votes in favor of the former position and, as one commentator noted, "*Abood* is in plenty of trouble."⁷

This paper is not about the merits of the arguments made in *Friedrichs* nor does it offer a theory of the First Amendment or of collective bargaining in the public sector. There exists a substantial body of work, which attempts to do one or more of these things.⁸ This paper examines the

those states (Bruce Rauner and Chris Christie, respectively) would have exercised their veto power. In states like Hawaii and California, by contrast, the demise of *Abood* likely would have led Democratic lawmakers to pass—and the Democratic governor to sign—legislation implementing the direct payment alternative.

Id.

⁷ Lee H. Adler, *Free Speech, Free Riders and the Fate of the Union Agency Fee*, 27 DLR I-1, Feb. 11, 2016.

The fact that the U.S. Supreme Court granted certiorari in *Friedrichs* after its recent decisions in *Knox* and *Harris* means that *Abood* is in plenty of trouble. The longstanding consensus, which balances an actual but modest infringement on nonmembers' association and speech rights with a union's need to pay for the services it renders to all in a bargaining unit, is in question. . . . th[is] new jurisprudence reflects an active change of focus toward "individual" rights that has an effect of undermining the ability of public employees to accomplish collective objectives. Collective bargaining and union representation require a funding source, and that source must be the employees who receive the benefits of union representation. But *Knox* and *Harris* and the petitioners in *Friedrichs* would make raising those funds as difficult as possible, even when state governments believe it is in their own best interests. This indifference towards state's rights, the distaste shown by Justice Alito and the *Friedrichs* petitioners towards the compromise thinking in *Abood*, and the apparent rush of the Court to consider altering the careful First Amendment balance still alive in *Locke* suggest an exaltation of individual rights over the common weal that is not particularly well-explained.

Id.

⁸ See Jake Wasserman, *Gutting Public Sector Unions: Friedrichs v. California Teachers Association*, 11 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 229 (2016) (discussing a potential constitutional challenge public-sector unions would face in *Friedrichs* that might "lead to their demise;" further discussing the potential for

expected effects of a decision, which was on the verge of overturning *Abood*, and, in particular, the effect of such a change on public sector employee benefits costs and total budgets.

Using data from Wisconsin following that state's enactment of Act 10 (the 2011 Wisconsin Budget Repair Bill),⁹ which largely eliminated collective bargaining for state public employees, I trace the effects on membership in Wisconsin's largest teacher union and on its lobbying efforts and membership levels. Act 10 has been nothing short of catastrophic for Wisconsin's public sector unions.¹⁰ There is every reason to believe that the

Friedrichs to “have a broad impact on public-sector unions’ financial health and political clout, as well as politics more broadly,” should *Abood* have been overruled.); *Id.* at 236-237 (noting that the constitutional arguments *Friedrichs* advanced in her brief were not complicated, calling *Abood* a constitutionally indefensible compromise, a “jurisprudential outlier,” and irreconcilable with [the Supreme] Court’s decision in every related First Amendment context,” further rejecting the notions that employees who opt out of unions are “free-riding” and that this issue is compelling enough to “withstand exacting scrutiny. *Id.* at 234-36. However, the union’s arguments were even simpler, noting that *stare decisis* should result in *Abood* being reaffirmed because it “correctly reflects” the state’s interest in managing labor relations and that the employee’s 1st Amendment “interests against compelled agency fees are ‘certainly not *stronger* than the interest in affirmative expression.’”). *Id.* at 237 (noting, the unions “point[ed] out that ‘strong reliance interests have developed around the agency-shop model,’ and note outlawing agency-shop agreements would ‘overrule the judgments of 23 States plus the District of Columbia’ . . . [and] tens of thousands of collective-bargaining agreements governing public employees would be thrown into disarray.”).

⁹ Assemb. B. 11, 2011-2012 Legis. Spec. Sess. (Wis. 2011).

¹⁰ See, e.g., Steven Greenhouse, *Wisconsin’s Legacy for Unions*, N.Y. TIMES, Feb. 22, 2014.

Three years ago, a labor leader named Marty Beil was one of the loudest opponents of Gov. Scott Walker’s “budget repair bill,” a proposal that brought tens of thousands of protesters out to the Wisconsin State Capitol in Madison in frigid February weather. A gruff-voiced grizzly of a man, Mr. Beil warned that the bill was rigged with booby traps that would cripple the state’s public-sector unions. He gets no satisfaction from being right. Since the law was passed, membership in his union, which represents state employees, has fallen 60 percent; its annual budget has plunged to \$2 million from \$6 million. Mr. Walker’s landmark law — called Act 10 — severely restricted the power of public-employee unions to bargain collectively, and that provision, among others, has given social workers, prison guards, nurses and other public employees little reason to pay dues to a union that can no longer

parties which organized and funded the *Friedrichs* litigation will try again given Justice Alito's near invitation to litigate the constitutionality of *Abood*.¹¹ One would expect that the re-try will take place fairly quickly in the event the next Supreme Court appointee is viewed as sharing Scalia's views.¹²

do much for them. Members of Mr. Beil's group, the Wisconsin State Employees' Union, complain that their take-home pay has fallen more than 10 percent in recent years, a sign of the union's greatly diminished power. "It's had a devastating effect on our union," Mr. Beil, its executive director, said of Act 10. He was sitting in his Madison office, inside the headquarters that his union, hard up for cash, may be forced to sell. The building is underused anyway, as staff reductions have left many offices empty.

Id.

¹¹ In his harsh and unyielding opinion, Justice Alito criticized nearly every facet of the *Abood* decision.

The *Abood* Court's analysis is questionable on several grounds. Some of these were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then. The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union. As we have explained, *Street* was not a constitutional decision at all, and *Hanson* disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few years later. Surely a First Amendment issue of this importance deserved better treatment. . . . *Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either "chargeable" (in *Abood*'s terms, expenditures for "collective-bargaining, contract administration, and grievance-adjustment purposes," (citation omitted) or nonchargeable (*i.e.*, expenditures for political or ideological purposes, (citation omitted)). In the years since *Abood*, the Court has struggled repeatedly with this issue (citations omitted). . . . Finally, a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop.

Harris, 134 S. Ct. at 2632-2634.

¹² See Adam Liptak, *Study Calls Snub of Obama's Supreme Court Pick Unprecedented*, N.Y. TIMES, June 13, 2016 (noting that The Republican Senate is fighting hard to ensure that the next Justice on the Court shares Scalia's view.

It is for this reason that the conditions in Wisconsin post-Act 10 provide a near-perfect laboratory in which to examine what happens when public sector unions can no longer compel even a modest level of support for their activities from members and non-members. What can be observed in Wisconsin is an astonishing drop in public sector union membership levels, and lobbying activity (which I view as a reasonable proxy for political strength). To the extent that public sector union strength accounts for the level of spending on employee benefits—especially pensions and high cost health insurance for active employees and retirees—we should expect to see these costs come down over time in Wisconsin and in any other state that outlaws agency fees. This means that strained state budgets could well be the first beneficiaries of the movement to eliminate agency fees.¹³ This move—toward private ordering of wages and benefits in the public sector and away from the morally hazardous process that currently determines the overall compensation of public employees¹⁴—will have a profound effect on

President Obama’s current nominee, Merrick Garland, has failed to even be given a hearing in the Senate at the time this paper was written); *Id.* (“Senate Republicans say they will not consider any nominee offered by Mr. Obama to replace Justice Antonin Scalia, who died in February. The power to appoint Justice Scalia’s successor, they say, should belong to the next president.”).

¹³ The MacIver Institute, a Wisconsin-based conservative think tank, suggests that Act 10 has been remarkably successful in saving Wisconsin taxpayer dollars and lowering the state funds spent on public sector pensions and benefits:

[Act 10] has saved Wisconsin taxpayers \$5.24 billion, according to a new analysis by the MacIver Institute. The analysis found that Wisconsin saved \$3.36 billion by requiring government employees contribute a reasonable amount to their own retirement. The analysis also estimates local units of governments saved an additional \$404.8 million total by taking common sense steps like opening their employees’ health insurance to competitive bidding. Milwaukee Public Schools saved \$1.3 billion in long-term pension liabilities, and Neenah saved \$97 million in long-term pension liabilities in addition to other savings.

Brett Healy, *Act 10 Saves Wisconsin Taxpayers More Than \$5 Billion Over 5 Years, MacIver Analysis Finds*, MACIVER INST. (Feb. 11, 2016) <http://www.maciverinstitute.com/2016/02/act-10-saves-wisconsin-taxpayers-more-than-5-billion-over-5-years-maciver-analysis-finds/>.

¹⁴ Daniel Disalvo, *The Trouble with Public Sector Unions*, NAT’L AFF. Fall 2010, at 3.

The very nature of many public services — such as policing the streets and putting out fires — gives government a monopoly or near monopoly; striking public employees could therefore hold the public hostage. As long-time *New York Times* labor reporter

public sector budgets and the ability of public unions to seek rents that result in wages and benefits that are relatively generous when compared with the private sector. This process appears to be underway in Wisconsin. When the issue in *Friedrichs* once again comes before the Court¹⁵ the experience in Wisconsin should provide some guidance about what to expect on a national scale.

II. LESSONS FROM WISCONSIN AFTER ACT 10

To understand what a post-*Friedrichs* world might have looked like, it helps to look back at the changes that have taken place in Wisconsin since the passage of Act 10 in 2011. Also known as the Wisconsin Budget Repair Bill, Act 10 was signed into law by then newly-elected Governor Scott Walker.¹⁶ Act 10 largely eliminated collective bargaining for public employees in the state except for law enforcement and fire protection personnel.¹⁷ Act 10 expressly forbid general employees from bargaining

A. H. Raskin wrote in 1968: "The community cannot tolerate the notion that it is defenseless at the hands of organized workers to whom it has entrusted responsibility for essential services." "When it comes to advancing their interests, public-sector unions have significant advantages over traditional unions. For one thing, using the political process, they can exert far greater influence over their members' employers — that is, government — than private-sector unions can. Through their extensive political activity, these government-workers' unions help elect the very politicians who will act as "management" in their contract negotiations — in effect handpicking those who will sit across the bargaining table from them, in a way that workers in a private corporation (like, say, American Airlines or the Washington Post Company) cannot. Such power led Victor Gotbaum, the leader of District Council 37 of the AFSCME in New York City, to brag in 1975: "We have the ability, in a sense, to elect our own boss."

Id. at 6-7, 10.

¹⁵ How fast this happens will be a function of the perceived political orientation of Justice Scalia's replacement.

¹⁶ Assemb. B. 11, 2011-2012 Legis. Spec. Sess. (Wis. 2011).

¹⁷ See Martin H. Mail, *The Legislative Upheaval in Public Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149 (2012) (noting that when the bill was introduced "Senate Democrats fled to Illinois, denying the super-majority quorum needed under state law to consider fiscal legislation. While the Democrats were still out of the state, the Republicans stripped out provisions that they believed required the super quorum and enacted the bill. The controversy

collectively on issues other than base wages;¹⁸ prohibits municipal employers from deducting labor organization dues from paychecks of general employees;¹⁹ imposes annual recertification requirements²⁰ and

produced public demonstrations on a scale Madison had not seen since the Vietnam War. The Dane County Circuit Court enjoined the enactment on the ground that the legislature violated the state's open meeting laws, but in a party-line four to three vote, the Wisconsin Supreme Court reversed, and Act 10 took effect.”).

¹⁸ Wisc. Stat. § 111.70 (4) (mb),

Prohibited subjects of bargaining; general municipal employees. The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following: 1. Any factor or condition of employment except wages, which includes only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions.

Id.

¹⁹ *Id.* at § 111.06 (1) (i).

It shall be an unfair labor practice for an employer individually or in concert with others . . . [t]o deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefore, signed by the employee personally, and terminable by the employee giving to the employer at least 30 days' written notice of the termination. This paragraph applies to the extent permitted under federal law.

Id.

²⁰ *Id.* at § 111.83 (3) (b).

Annually, no later than December 1, the commission shall conduct an election to certify the representative of a collective bargaining unit that contains a general employee. There shall be included on the ballot the names of all labor organizations having an interest in representing the general employees participating in the election. The commission may exclude from the ballot one who, at the time of the election, stands deprived of his or her rights under this subchapter by reason of a prior adjudication of his or her having engaged in an unfair labor practice. The commission shall certify any representative that receives at least 51 percent of the votes of all of the general employees in the collective bargaining unit. If no representative receives at least 51 percent of the votes of all of the general employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general employees shall be nonrepresented.

disallows fair share agreements which require non-represented general employees to make contributions to labor organizations.²¹

A. THE STATE COURT CHALLENGE

In August 2011, unhappy with the new law, two Wisconsin unions—the Madison Teachers, Inc. and Public Employees Local 61²² filed suit in Wisconsin state court against Governor Walker.²³ The unions alleged, *inter*

Notwithstanding s. 111.82, if a representative is decertified under this paragraph, the affected general employees may not be included in a substantially similar collective bargaining unit for 12 months from the date of decertification. The commission's certification of the results of any election is conclusive unless reviewed as provided by s. 111.07 (8).

Id.

²¹ *Id.* at § 111.85 (1) (a)-(b).

(a) No fair-share or maintenance of membership agreement covering public safety employees may become effective unless authorized by a referendum. The commission shall order a referendum whenever it receives a petition supported by proof that at least 30 percent of the public safety employees in a collective bargaining unit desire that a fair-share or maintenance of membership agreement be entered into between the employer and a labor organization. A petition may specify that a referendum is requested on a maintenance of membership agreement only, in which case the ballot shall be limited to that question. (b) For a fair-share agreement to be authorized, at least two-thirds of the eligible public safety employees voting in a referendum shall vote in favor of the agreement. For a maintenance of membership agreement to be authorized, at least a majority of the eligible public safety employees voting in a referendum shall vote in favor of the agreement. In a referendum on a fair-share agreement, if less than two-thirds but more than one-half of the eligible public safety employees vote in favor of the agreement, a maintenance of membership agreement is authorized.

Id.

²² Madison Teachers Inc. is a union representing over 4000 municipal employees of the Madison Metropolitan School District. Local 61 represents approximately 300 City of Milwaukee employees.

²³ See *Madison Teachers Inc. v. Walker*, 851 N.W.2d 337 (2014).

In August 2011, Madison Teachers, Inc. and Public Employees Local 61 sued Governor Walker and the three commissioners of the Wisconsin Employment Relations

alia, that Act 10 violated the constitutional free speech, free association and equal protection rights of the represented employees. The Wisconsin Circuit Court agreed with the unions and invalidated several provisions of Act 10, including those related to collective bargaining. On July 31, 2014 the Wisconsin Supreme Court, in a 5 to 2 decision reversed the lower court ruling and upheld Act 10 in its entirety. The Court's view was that while union members certainly enjoy a constitutional right to free association, that protection does not extend to collective bargaining. Justice Gableman wrote for the majority:

This point is vital and bears repeating: the plaintiff's associational rights are in no way implicated by Act 10's modifications to Wisconsin's collective bargaining framework. At issue in this case is the State's implementation of an exclusive representation system for permitting public employers and public employees to negotiate certain employment terms in good faith . . . Represented municipal employees, non-represented municipal employees, and certified representatives lose no right or ability to associate to engage in constitutionally protected speech because their ability to do so outside the framework of statutory collective bargaining is not impaired. Act 10 merely provides general employees with a statutory mechanism to force their employer to collectively bargain; outside of this narrow context, to which the plaintiffs freely concede public employees have no constitutional right, every avenue for petitioning the government remains available.²⁴

Essentially, the majority in *Walker* adopts the view that constitutional protections of freedom of association are not impaired because

Commission challenging several provisions of Act 10. The plaintiffs alleged, among other things, that four aspects of Act 10—the collective bargaining limitations, the prohibition on payroll deductions of labor organization dues, the prohibition of fair share agreements, and the annual recertification requirements—violate the constitutional associational and equal protection rights of the employees they represent. The plaintiffs also challenged Wis. Stat. § 62.623 (2011-12), a separate provision created by Act 10, which prohibits the City of Milwaukee from paying the employee share of contributions to the City of Milwaukee Employees' Retirement System, alleging it violates the home rule amendment to the Wisconsin Constitution. The plaintiffs argued, in the alternative, that if Wis. Stat. § 62.623 does not violate the home rule amendment, it nevertheless violates the constitutionally protected right of parties to contract with each other.

Id. at 345.

²⁴ *Id.* at 355-365.

Act 10 does not limit the ability of any member to associate outside of the “framework”.²⁵ Fairly predictable responses followed the Wisconsin Supreme Court’s decision.²⁶

B. FEDERAL LITIGATION

The Seventh Circuit has twice had occasion to consider Act 10. In *Wisconsin Education Assoc. Council v. Walker*²⁷ and *Laborers Local 236 v. Walker*,²⁸ the Court considered the payroll deduction provisions and the free

²⁵ *Id.* at 356 (“The defendants are not barring the plaintiffs from joining any advocacy groups, limiting their ability to do so, or otherwise curtailing the ability to join other ‘like-minded’ individuals to associate for the purpose of expressing commonly held views...”).

²⁶ Nick Novak, *Wisconsin Supreme Court Upholds Scott Walker’s Act 10 “in its Entirety”*, MACIVER INST. (Jul. 31, 2014, 11:27 AM), <http://www.maciverinstitute.com/2014/07/wisconsin-supreme-court-upholds-act-10-in-its-entirety/> (“Act 10 has saved Wisconsin taxpayers more than \$3 billion. Today’s ruling is a victory for those hard-working taxpayers”); *See also id.* (“Wisconsin’s proud history of protecting worker’s rights is marred by Walker and Republicans’ dismantling of collective bargaining for our public sector workers. Today’s Supreme Court ruling is extremely disappointing for the teachers, nurses, prison guards, and other professionals who serve the public each day.”).

²⁷ *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013).

Plaintiffs and cross-appellants, representing seven of Wisconsin’s largest public sector unions (the “Unions”), filed suit against defendants-appellants Governor Scott Walker and other state actors, challenging three provisions of the statute—the limitations on collective bargaining, the recertification requirements, and a prohibition on payroll deduction of dues—under the Equal Protection Clause. They also challenged the payroll deduction provision under the First Amendment. The district court invalidated Act 10’s recertification and payroll deduction provisions, but upheld the statute’s limitation on collective bargaining. We now uphold Act 10 in its entirety.

Id. at 642.

²⁸ *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628 (7th Cir. 2014).

This case raises more challenges to the constitutionality of Wisconsin’s Act 10, which we last addressed in [*Wis. Educ. Ass’n Council v. Walker*]. Act 10 made significant changes to Wisconsin public-sector labor law: it prohibited government employers from collectively bargaining with their general employees over anything except base wages, made it more challenging for general-employee unions to obtain certification as exclusive bargaining

association implications of Act 10. The 7th Circuit rejected the argument that the prohibition on payroll deductions violated the First Amendment, reasoning that the unions' previous use of the payroll system was the equivalent of the state subsidizing the unions' speech and that Wisconsin was free to withdraw this subsidy so long as it did so on a viewpoint neutral basis.²⁹

The second case—*Laborers Local 236*—rehashed arguments made unsuccessfully in Wisconsin state court—i.e. that Act 10 impaired union members' right to freedom of association. The argument, which the 7th Circuit rejected, was essentially that Act 10 undermines the ability of labor organizations to continue to function and weakens their association to a devastating extent, thereby depriving members of the right to freedom of association. Judge Flaum wrote for the majority:

[T]he First Amendment does not require the state to maintain policies that allow certain associations to thrive...Act 10 only acts upon the state. The law's changes

agents, and precluded general-employee unions from using automatic payroll deductions and fair-share agreements. The plaintiffs, two public-employee unions and an individual union member, argue that these changes infringe their First Amendment petition and association rights. They also argue that Act 10 denies union members the equal protection of the laws.

Id. at 628.

²⁹ See *Wis. Educ. Ass'n Council*, 705 F.3d at 645.

Act 10's payroll deduction prohibitions do not violate the First Amendment. The Unions offer several different First Amendment theories to rebut the compelling deference of rational basis review required under applicable law. Ultimately, none apply because the Supreme Court has settled the question: use of the state's payroll systems to collect union dues is a state subsidy of speech that requires only viewpoint neutrality. (citations omitted) Admittedly, the Unions do offer some evidence of viewpoint discrimination in the words of then-Senate Majority Leader Scott Fitzgerald suggesting Act 10, by limiting unions' fundraising capacity, would make it more difficult for President Obama to carry Wisconsin in the 2012 presidential election. While Senator Fitzgerald's statement may not reflect the highest of intentions, his sentiments do not invalidate an otherwise constitutional, viewpoint neutral law. Consequently, Act 10's prohibition on payroll dues deduction does not violate the First Amendment.

Id.

prevent public employers from acting in certain ways, or adopting certain procedures, that were once beneficial to Wisconsin public-sector unions and their members. We take the plaintiffs' point that Act 10 will likely have the effect of making things more challenging for general-employee unions . . . But this type of impairment is not one that the Constitution prohibits . . . An organization cannot come up with an associational purpose—even a purpose that involves speech—and then require support from the state in order to realize its goal.³⁰

C. FINANCIAL CONSEQUENCES OF ACT 10

Perhaps the most important consequence of Act 10 has been its debilitating effect on the many public sector unions affected by its terms. The state's largest teachers union, The Wisconsin Education Association (WEAC) had approximately 100,000 members prior to the passage of Act 10.³¹ Since then, membership has dropped by more than 50% to

³⁰ *Labors Local 236 v. Walker*, 749 F.3d 628 (7th Cir. 2014).

In *Smith*, the Supreme Court observed that '[f]ar from taking steps to prohibit or discourage union membership or association, all that [the state] has done in its challenged conduct is simply to ignore the union. That it is free to do.' 441 U.S. at 466, 99 S.Ct. 1826."); The same holds true here. The unions cannot wield the First Amendment to force Wisconsin to engage in a dialogue or continue the state's previous policies. For this reason, none of Act 10's proscriptions—individually or cumulatively—infringe the unions' associational rights.

Id. at 638-639.

³¹ Molly Beck, *WEAC Turns to Local Focus After Massive Membership Loss*, WISC. STATE J., Feb. 22, 2015, http://host.madison.com/wsj/news/local/education/local_schools/weac-turns-to-local-focus-after-massive-membership-loss/article_4e31a55e-575b-598f-bb40-6b8ab1e440c5.html.

Four years after public school teachers lost their guaranteed spot at the bargaining table, Wisconsin's largest teachers union has lost more than half its membership and its spending at the Capitol has all but disappeared. Now, local members of the Wisconsin Education Association Council are turning their efforts toward school board races and reaching out to parents in an effort to eventually regain some influence in Madison. . . . About 40,000 public school employees are represented by WEAC, Dustin Beilke, Region 6 director told the State Journal editorial board last week. WEAC spokeswoman, Christina Brey said it was thousands

approximately 40,000 members as of early 2015. Dues cost approximately \$750.00 per teacher and it appears that many former members have decided not to incur that expense.³²

higher but declined to provide an exact number. Either way, membership is down more than 50 percent from the union's 98,000-member levels before Gov. Scott Walker signed his signature legislation in 2011 that significantly diminished collective bargaining rights for most public employees. WEAC's lobbying dollars have dropped dramatically, too. A decade ago, WEAC spent \$1.5 million on lobbying during the 2005-2006 legislative session, state records show. The next session: \$1.1 million. During the two sessions leading up to the passage of Act 10, WEAC spent \$2.5 million and \$2.3 million, respectively. But during the 2013-14 session, after Walker signed the bill into law, the union spent just \$175,540. It was the first time in at least 10 years that the union was not among the state's top 12 lobbying spenders, according to the Government Accountability Board.

Id.

³² Richard Moore, *Members Chipped in \$23.4 million to WEAC in 2008 Union Dues*, LAKELAND TIMES (July 1, 2011), <http://www.lakelandtimes.com/main.asp?SectionID=9&subsectionID=110&articleID=13387>.

In addition to the \$295.01 in annual dues that full-time teachers shell out to the state unit, full-time professional members pay \$19.99 to the WEAC political action committee for political campaigns and lobbying, as well as local union dues and \$166 to the National Education Association. Contributions to WEAC and the NEA thus cost every full-time teacher \$461 a year, while total dues can swell to more than \$750 a year per teacher. For example, in the Lakeland area, teachers from Lakeland Union High School, MHLT, AV-W, North Lakeland, and Lac du Flambeau chipped in union dues totaling \$191,746 for the 2010-11 year. According to Rich Vought, the superintendent at North Lakeland, teachers pay \$759 per person there, for a total of \$15,180. At AV-W, teachers paid \$40,194.40. For the 2010-11 school year, the local teachers' association at LUHS will pay a total of \$50,611.59 to their union, says district administrator Todd Kleinhans. He said a full-time teacher will pay \$783 while dues for part-time teachers are pro-rated. MHLT teachers will pay a total of \$38,832 in union dues - \$15,120 goes directly to WEAC - while the lump sum annual amount Lac du Flambeau teachers paid in 2010-11 was \$46,928. Union dues are collected from employee paychecks and a monthly check is cut from the district to the local union and sent to the Northern Tier UniServe office in Rhinelander on behalf of the

Financial hardship has translated into reduced political power. According to the state of Wisconsin Government Accountability Board, for each of the three years leading up to Act 10's passage, WEAC was either first or second in total dollars spent lobbying at the state level.³³ From 2009 to 2011 WEAC spent an average of \$1.9 million per year on lobbying. After Act 10, WEAC spent only \$175,540 which meant it was not even in the top twelve of lobbying spenders.³⁴

Why did membership drop so dramatically? Act 10 meant that dues could no longer be automatically withdrawn from member paychecks and non-members were no longer required to make a "fair share" payment. If you did not want to be a union member, you were now free to go it alone and no longer compelled to pay the agency fee. This is precisely the result the *Friedrichs* plaintiffs hoped for on a national scale.

A sample of comments from former WEAC members demonstrates their post-Act 10 thinking:

- "I don't see the point of being in a union anymore. Everyone is on their own island now. If you do a good job, everything will take care of itself. The money I'd spend on dues is way more valuable to buy groceries for my family."³⁵

union, Kleinhans said in an email. Because teachers are paid their salaries over a 12-month period, union dues are sent for any particular school year beginning in September and continuing through August, he added.

Id.

³³ See generally, Wis. Gov't Accountability Bd., 2009-2010 Legislative Session Lobbying Summary Reports (2014), http://www.gab.wi.gov/sites/default/files/publication/68/2009reg_slaesummaryreport_pdf_20437.pdf; Wis. Gov't Accountability Bd., 2011-2012 Legislative Session Lobbying Summary Reports (2014), http://www.gab.wi.gov/sites/default/files/publication/68/2011reg_slaesummaryreport_pdf_16649.pdf.

³⁴ Beck, *supra* note 30, ("Walker spokeswoman Laurel Patrick said Saturday that Act 10 'put the power back in the hands of the people and local governments, saving Wisconsin taxpayers more than \$3 million in the process and allowing public employees the freedom to choose if they want to join a union.'").

³⁵ Robert Samuels, *Walker's Anti-Union Has Labor Reeling in Wisconsin*, THE 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 (statement from 34-year old technology teacher Dan Anliker).

- “[Unions] are just not something I concern myself with...I just look to keep improving my teaching in the best way I can and try to keep my nose out of the other stuff.”³⁶

A few unions were reported to have resorted to home visits designed to get teachers to sign up for dues collection.³⁷ None of these efforts appear to have paid off though. In August 2001, WEAC issued layoff notices to about 40% of its staff.³⁸ This trend has not diminished—the New York Times reports:

³⁶ *Id.* (quoting Sean Karsten, a 32-year-old middle and high school reading instructor).

³⁷ Lindsay Fiori, *Teachers Unions Visit Homes for Dues Option*, THE J. TIMES, July 11, 2011, http://journaltimes.com/news/local/teachers-unions-visit-homes-for-dues-option/article_ff07cf4a-abb0-11e0-bf87-001cc4c03286.html.

Racine County teachers may have union representatives show up on their doorsteps this summer. Area teachers’ unions no longer able to automatically deduct dues from teachers’ paychecks because of the state’s new budget repair law are using a variety of methods including home visits to sign up members to voluntarily pay dues. . . . The unions . . . are using a combination of meetings, emails, phone calls and home visits to get teachers signed up for dues collection, said officials from United Lakewood Educators, which includes the Muskego-Norway School District, and Southern Lakes United Educators, which includes the Burlington, North Cape, Union Grove, Washington-Caldwell, Waterford and Drought districts. Officials from the union representing the 10th district, Yorkville Federation of Teachers, which serves Yorkville Elementary School, could not be reached.

Id.

³⁸ Erin Richards, *Diminished in the Wake of Act 10, 2 Teachers Unions Explore Merger*, J. SENTINEL (Jan. 7, 2014), <http://archive.jsonline.com/news/education/diminished-in-wake-of-act-10-2-teachers-unions-explore-merger-b99174118z1-239150441.html>.

Facing reduced membership, revenue and political power in the wake of 2011 legislation, Wisconsin’s two major state teacher’s unions appear poised to merge into a new organization called Wisconsin Together. The merger would combine the Wisconsin Education Association Council, the state’s largest teacher’s union, and AFT-Wisconsin, a smaller union that includes technical college, higher education and state employees . . . The developments underscore the changing landscape for Wisconsin teachers unions since the passage of Act 10, which limits collective bargaining and makes it more difficult for unions to collect dues. After Act 10, WEAC has lost about a third of its

“[s]ince [Act 10 passed] ... union membership has dropped precipitously. Long a labor stronghold, the state has lost tens of thousands of union members, leaving Wisconsin with a smaller percentage of union members than the national average, new federal figures show. . . . The drop is most pronounced in the public sector: more than half of Wisconsin’s public workers were in unions before Mr. Walker’s cuts took effect. A little more than a quarter of them remain.”³⁹

How and why did this happen in Wisconsin? It helps to understand that in 2011 the state faced a \$3.6 billion dollar deficit that looked to extend into 2012 and 2013 budget years. Wisconsin attempted layoffs and furloughs⁴⁰ but the lingering recession and rising compensation levels for public employees appears to have created an environment toxic to the claims of the public sector unions. While Act 10 protected the status quo for public safety employees,⁴¹ Walker argued persuasively that it was the inflexibility of the state’s public sector unions that created the crisis. Act 10, he asserted,

approximately 98,000 members and AFT-Wisconsin is down to about 6,500 members from its peak of approximately 16,000, leaders of both organizations have reported. . . . Both have downsized staff and expenses.

Id.

³⁹ Monica Davey, *With Fewer Members, a Diminished Political Role for Wisconsin Unions*, N.Y. TIMES (Feb. 27, 2016), http://www.nytimes.com/2016/02/28/us/with-fewer-members-a-diminished-political-role-for-wisconsin-unions.html?_r=0.

⁴⁰ Melanie Trotman, *Public-worker Unions Steel for Budget Fights*, WALL STREET J. (Feb. 14, 2011), <http://www.wsj.com/articles/SB1000142405274870398950457612850231640306>.

Public-sector unions have begun using their clout against efforts to roll back government workers' wages and benefits, cut jobs and curtail contract bargaining rights as political leaders from both parties look for ways to cut spending. Two of the nation's biggest public-sector unions, which together represent about 2.2 million government workers, are facing a backlash against the rising costs of public workers' pay, benefits and pensions. As states and local governments seek to trim costs in a difficult economy, the unions are struggling to defend pay and benefit packages negotiated when times were flush.

Id.

⁴¹ Gesina M. Seiler, *Court Upholds Part of Controversial Wisconsin Collective Bargaining Law*, 21 WIS. EMP. L. LETTER 1 (2012) (included in the category of public safety employees are “police officers, deputy sheriffs, firefighters, state patrol officers and state motor vehicle inspectors.”).

was a way to avoid cutting budgets and popular eliminating programs in the face of public sector union intransigence.⁴²

For example, the Mequon-Thiensville School District near Milwaukee froze teacher salaries for two years thereby saving \$560,000. It saved an additional \$400,000 by requiring higher contributions to healthcare plans. Administrators argue that circumventing the collective bargaining process and the union allowed them to “shift money out of the health plan and back into the classroom. [They]’ve increased programming” as a result.⁴³

It is clear that Walker successfully portrayed the public unions as selfish and intransigent in the face of financial crisis. It is also clear that the consequences of Act 10 have been nothing short of catastrophic for those unions.⁴⁴ Shockingly, between 2011 and 2014, membership of the American Federation of State, County and Municipal Employees (AFSCME) fell from 1000 to 122.⁴⁵ The loss of members and revenue of course meant a loss in political clout as well. The long-term question for Wisconsin and other states that have eliminated agency fees⁴⁶ is whether, in addition to the short-term

⁴² *See id.*

There’s no question that Wisconsin may bar its public employees from engaging in collective bargaining. The only question for the court was whether the state could restrict the rights of general employees while granting full rights to public-safety employees. The law allows such “line drawing” as long as the government can articulate a rational basis for doing so and a suspect class isn’t involved. State officials argued that the law doesn’t limit the bargaining rights of members who perform the most essential functions of maintaining public safety because of concerns over strikes.

Id.

⁴³ Greenhouse, *supra* note 10 (quoting Ted Neitzke, school superintendent in West Bend, Wisconsin). *See id.* (statement of James R. Scott, chairman of the Wisconsin Employment Relations Commission) (“[A]s a result of Act 10, the advantages that labor held have been diminished. . . . It’s fair to say that employers have the upper hand now.”).

⁴⁴ *See generally*, Charles J. Russo, *Collective Bargaining in Public Education: It Was the Best of Times, It Was the Worst of Times*, 291 ED. L. REP. 545 (2013); Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 ABA J. LAB. & EMP. L. 293 (2012); Samuels, *supra* note 35. *See also* Appendix A.

⁴⁵ Greenhouse, *supra* note 10, at 8 (statement from Wisconsin attorney, Lester A. Pines) (“The law . . . is destroying unions with a thousand cuts and making it seem that it’s their fault.”).

⁴⁶ *See* Mike Antonucci, *Teachers Unions at Risk of Losing “Agency Fees”*, 16 EDU. NEXT 22, fig. 1 at 27 (2016), <http://educationnext.org/teachers-unions-risk->

savings the state and its municipalities were able to obtain, a longer term restructuring of wages and benefits will be possible. Benefits are likely to be the primary focus both in Wisconsin and beyond as the compensation gap between private and public employees seems to support a conclusion that it is benefits and not wages that are exceptional in the public sector.

III. ARE PUBLIC SECTOR EMPLOYEES OVERPAID?

Were cities and towns that responded to Act 10 by freezing salaries, cutting benefits and generally holding the line on public employee labor costs after 2011 in fact “right sizing” or were they simply taking advantage of a newly politically vulnerable group of employees? It turns out that figuring out whether or not public employees are overcompensated is trickier than it seems. There is a substantial literature that purports to demonstrate that public school teachers and other public sector workers are overpaid.⁴⁷ Public Sector unions, for their part, have made some attempts to refute this

losing-agency-fees-friedrichs-california/ (providing map of which states allow for agency fees to be collected and which do not).

⁴⁷ See, e.g., Andrew G. Biggs & Jason Richwine, *Assessing the Compensation of public-school teachers*, AM. ENTERPRISE INST. (2011) (“[w]e conclude that public-school teacher salaries are comparable to those paid to similarly skilled private sector workers, but that more generous fringe benefits for public-school teachers, including greater job security, make total compensation 52 percent greater than fair market levels, equivalent to more than \$120 billion overcharged to taxpayers each year.”); Steven Greenhut, *California Faces Death by Pension*, THE AMERICAN SPECTATOR (Oct. 29, 2014 8:00 AM), http://spectator.org/60778_california-faces-death-pension/ (Governor Arnold Schwarzenegger’s chief pension adviser, David Crane, giving testimony in 2010 before the California Senate) (“All of the consequences of rising pension costs fall on the budgets for programs such as higher education, health and human services, parks and recreation and environmental protection that are junior in priority and therefore have their funding reduced whenever more money is needed to pay for pension costs[.]”); Robert C. Pozen, *The Other Debt Bomb in Public Employee Benefits*, THE WALL ST. J., Jan. 15, 2015, <http://www.wsj.com/articles/robert-c-pozen-the-other-debt-bomb-in-public-employee-benefits-1421367030> (noting that New York City has unfunded retiree health care liabilities of \$22,857 per household and recommending that jurisdictions increase disclosure of costs as a mechanism which would encourage voters to consider reform); Mark Casciari & Barbara Borowski, *Rightsizing Public Employee Retirement Benefits: How Have State Courts Resolved the Constitutional Issues?*, 26 BENEFITS. L. J. 22 (2013) (suggesting that states will continue to try and cutback state and local employee benefits as long as they are facing funding shortfalls).

view.⁴⁸ Scholarly work that is not overly politicized seems to provide some support for the Walker view:

After controlling for skill differences and incorporating employer costs for benefits packages, we find that, on average, public sector workers in state government have compensation costs 3-10 percent greater than those for workers in the private sector, while in local government the gap is 10-19 percent. We caution that this finding is somewhat dependent on the chosen sample and specification, that averages can obscure broader differences in distributions, and that a host of worker and job attributes are not available to us in these data. Nonetheless that data suggest that public sector workers, especially local government ones, on average, receive greater remuneration than observably similar private sector workers.⁴⁹

A. A MORAL HAZARD STORY

As I've argued elsewhere,⁵⁰ there is certainly a growing body of evidence which supports the Walker narrative: that when public finances are

⁴⁸ See Nicholas Kristof, *Pay Teachers More*, N.Y. TIMES, Mar. 13, 2011, at WK10 ("A basic educational challenge is not that teachers are raking it in, but that they are underpaid. If we want to compete with other countries, and chip away at poverty across America, then we need to pay teachers more so as to attract better people into the profession. . . . These days, brilliant women become surgeons and investment bankers — and 47 percent of America's kindergarten through 12th-grade teachers come from the bottom one-third of their college classes [as measured by SAT scores]").

⁴⁹ Maury Gittleman & Brooks Pierce, *Compensation for State and Local Government Workers*, 26 J. ECON. PERSPECTIVES 217 (2011) (observing two sets of data) ("[I]n both data sets, the raw wage gap shows public sector workers being paid more. In [one], the raw gap in hourly earnings is about 4 percent; in the [other], hourly wages in government sectors exceed those in the private sector by an average of about 30 percent.").

⁵⁰ See e.g., Maria O'Brien Hylton, *Central Falls Retirees v. Bondholders: Assessing Fear of Contagion in Chapter 9 Proceedings*, 59 WAYNE L. REV. 525 (2013).

If the core problem is . . . a strong tendency to overpromise because of strong forces that encourage morally hazardous behavior, who should bear the cost when a municipality cannot keep the promises it made? Does it matter that municipal creditors are typically either very sophisticated—i.e., bondholders and their

insurers—or possibly less savvy but often intimately involved in a long pattern of reckless spending that has directly contributed to the financial crisis—i.e., public employees and the unions that represent them? . . . Culpability for the mess in Central Falls certainly resides with the political actors who, aided and abetted by public employees, promised benefits far beyond what the poor town could afford. . . . Politicians are well known for their cavalier attitude toward “other people’s money. . . . The guilty role played by public employees and their representatives is by now so well understood that it requires little further explanation. Suffice it to say that the public employee/legislator relationship was beneficial to all concerned save the current and future taxpayer. Can the elected official/lender/public employee axis be broken? The only way forward appears to be some combination of structural changes and increased transparency. A variety of proposals have been advanced in recent years; terminating defined benefit plans and moving employees to defined contribution arrangements similar to the private sector’s 401 (k) vehicle is among the most promising. Modest reforms include requiring public plans to use realistic, market-based rates of return when making assumptions about asset growth that directly impact the size of future liabilities. More radical, but perhaps not unreasonable in extreme situations . . . is the call to simply bar legislators from negotiating with public unions about pensions and/or retiree health benefits.

Id. at 529, 543, 555-557.

See also Maria O’Brien Hylton, *The Case for Public Pension Reform: Early From Kentucky*, 47 CREIGHTON L. REV. 585 (2014).

The first sign that over promising has occurred with pension promises is often the failure of the state, as with Kentucky, to make its required contribution. Why is payment not made as promised? Well, legislators remember that they have a variety of other commitments besides pensions - public education, roads, prisons, public health - to name a few. These generally require immediate spending in order to satisfy the public's demand for services. Pensions, on the other hand, are a future expense which can be delayed. Over time, of course, repeated delay creates a larger and larger shortfall which must one day be made up. But, that long term horizon is not the horizon for the typical politician who hopes/expects to have moved on to bigger and better things by the time the shortfall has mushroomed into a full blown crisis.

Id. at 596-597.

See also Maria O’Brien Hylton, *After Tackett: Incomplete Contracts for Post-Employment Healthcare*, 36 PACE L. REV. 317, 368-369 (2016) (“Numerous state and local government employers have been forced to reckon with the size and scope

tight and tax increases are politically infeasible, the natural cost cutting response one might expect to see is often thwarted by labor agreements which bind local governments to a cost structure that is unsustainable. It is not generally wages but instead the promises made with respect to employee benefits—pension costs and active and retiree health care commitments—that overwhelm states⁵¹ and municipalities alike. The reason for this, like all stories about morally hazardous⁵² behavior, is rooted in the cavalier way in

of benefits that had been promised to public employees - often without much thought to the future cost to taxpayers. Indeed, some states are still trying, very publicly, to come to terms with the cost of post-employment benefits that threaten to crowd out all other spending.”).

⁵¹ See e.g., David W. Chen & Mary Williams Walsh, *New York City Pension System Is Strained by Costs and Politics*, N.Y. TIMES (Aug. 3, 2014), <http://www.nytimes.com/2014/08/04/nyregion/new-york-city-pension-system-is-strained-by-costs-and-politics.html>.

For years, New York City has been dutifully pumping more and more money into its giant pension system for retired city workers. . . . But instead of getting smaller, the city’s pension hole just keeps getting bigger, forcing progressively more significant cutbacks in municipal programs and services every year. Like pension systems everywhere, New York City’s has been strained by a growing retiree population that is living longer, global market conditions and other factors. But a close examination of the system’s problems reveals a more glaring issue: Its investment strategy has failed to keep up with its growing costs, hampered by an antiquated and inefficient governing structure that often permits politics to intrude on decisions. The \$160 billion system is spread across five separate funds, each with its own board of trustees, all making decisions with further input from consultants and even lawmakers in Albany. . . . Like many public systems, New York has promised irrevocable pension benefits to city workers on the thinking that fund investments would grow enough to cover the cost — but they have not. Its response so far has been to take advantage of a recovering local economy and inject a lot more city money into the pension system quickly — an option not available to declining cities like Detroit, which filed for bankruptcy last year, or a tax-averse state like New Jersey, which has been underfunding its pension system for years.

Id.

⁵² See *Definition of ‘Moral Hazard’*, ECON. TIMES (Oct. 7, 2016), <http://economictimes.indiatimes.com/definition/moral-hazard> (the Economic Times defining moral hazard as “[A] situation in which one party gets involved in a risky event knowing that it is protected against the risk and the other party will incur the

which human beings behave when they are tasked with spending other people's money.

The key insight offered by the study of moral hazard is that people treat valuable resources differently—the degree of care exercised depends on the ownership of those resources. When dollars that belong to someone else are being spent the level of care is much lower than what is observed when owned dollars are expended. This phenomenon is easy to observe in almost any insurance context. Homeowners and automobile insurers, for example, routinely require deductibles in order to minimize the likelihood that an insured will simply exercise an unacceptable level of care given the presence of the insurance. The homeowner, for example, who carelessly neglects to put out a cigarette or extinguish a fire in the fireplace or the automobile owner who parks in a dangerous neighborhood and fails to lock her vehicle are much more likely to be careful with their property in the absence of any insurance. Insurance, well aware of this problem, insist on “sharing the loss” by requiring deductibles; health insurers, wary of unnecessary visits to the doctor do the same thing by way of co-pays and other forms of cost sharing.

How is this connected to public sector employee benefits? The story of how so many cities and states have ended up overpaying for employee benefits is fundamentally a story about simple moral hazard too. Elected officials, entrusted by voters to negotiate wages and benefits with public sector employees are especially vulnerable to the moral hazard encountered when considering how to spend taxpayer dollars. Aware that the taxpayer is almost certainly not paying attention to the details⁵³ and eager to keep well organized groups of public employees who both vote and provide support during election campaigns happy, elected officials have, time and again,

cost. It arises when both the parties have incomplete information about each other.”). An example of moral hazard would be a homeowner with full homeowner's insurance choosing not to install a security system because he or she know the insurance company will bear the burden, should a burglary occur. *See id.*

⁵³ Hence the calls by Pozen and others for greater transparency. Since 2003, the Governmental Accounting Standards Board (“GASB”) has been studying government action and suggested that states should be more transparent in their functions, particularly in financial statements. GASB even suggests that derivatives be included in financial statement in order make more transparent what the government is leveraging to accomplish deals and transactions. *See Derivatives: GASB Proposes More Transparency*, USER'S PERSP. (Gov't Accounting Standards Bd. Norwalk, C.T.) May 2006, http://gasb.org/cs/ContentServer?c=GASBContent_C&pagename=GASB%2FGASBContent_C%2FUsersArticlePage&cid=1176156737013.

opted to over promise in the present and let future generations worry about how to pay later. This is unequivocally the subtext from Illinois⁵⁴ to California⁵⁵ and Rhode Island.⁵⁶

⁵⁴ See Hal Dardick, *Illinois Supreme Court ruling forces city to find new fix for 2 pension funds*, CHICAGO TRIBUNE (Mar. 24, 2016, 6:28 PM), <http://www.chicagotribune.com/news/local/politics/ct-chicago-pension-law-ruling-0325-20160323-story.html>.

The Illinois Supreme Court dealt Mayor Rahm Emanuel — and in turn Chicago taxpayers — a big blow on Thursday when it found unconstitutional a law that aimed to shore up two city pension funds by cutting benefits and requiring workers to pay more toward retirement. A group of unions, current workers and retired employees sued in response to the law, noting the 1970 Illinois Constitution states that pension benefits, once granted, ‘shall not be diminished or impaired.’ In a 5-0 ruling, the state’s high court once again agreed with that argument, less than a year after reaching the same conclusion in a separate case covering state pension systems. . . . The new ruling raises further questions about the city’s precarious financial situation. . . . [T]he loss also exacerbates the city’s massive financial problems over the long term — the funding shortfall in the two retirement funds would continue to grow by about \$900 million a year, and taxpayers could end up plugging the gap.

Id.

⁵⁵ See Melody Petersen, *California public workers may be at risk of losing promised pensions*, L.A. TIMES (Mar. 17, 2015), <http://www.latimes.com/business/la-fi-pension-controversy-20150317-story.html>.

As millions of private employees lost their pension benefits in recent years, government workers rested easy, believing that their promised retirements couldn’t be touched. Now the safety of a government pension in California may be fading fast. Feeling the heat is the state’s huge public pension fund, the California Public Employees’ Retirement System, known as CalPERS. The fund spent millions of dollars to defend itself and public employee pensions in the bankruptcy cases of two California cities — only to lose the legal protections that it had spent years building through legislation. The agency’s most significant setback came in Stockton’s bankruptcy case. The judge approved the city’s recovery plan, including maintaining employees’ pensions, but ruled that Stockton could have legally chosen to cut workers’ retirements Part of the problem is that many cities have promised workers pensions that are more generous than those still offered in the private sector. Many government workers retire at 50 or 55 on lifelong payments that can nearly match their salaries

In Wisconsin it really did not matter whether the unions were as intransigent as Walker portrayed them; what was critical is that the public came to believe that when a financial crisis struck, public sector employees were unwilling to face the same reduced circumstances as private sector taxpayers. Job loss, pay cuts, increased health care expenses⁵⁷—painfully

if they were longtime employees. Increasing payments to CalPERS was one reason that Stockton and San Bernardino were forced to file for bankruptcy. . . . CalPERS' efforts to protect itself and workers' retirements began decades ago when it pushed through two state laws with help from the politically powerful unions. The first law said that a city's contract with CalPERS could not be canceled in bankruptcy. The second allowed CalPERS to place a costly lien on a city's property — in essence, a new and far more expensive bill for pensions — if the city left CalPERS and provided retirement benefits through a different fund. The cost of the threatened lien was so steep — in Stockton, CalPERS demanded \$1.6 billion — that no city in bankruptcy has left the fund.

Id.

⁵⁶ See Mary Williams Walsh & Abby Goodnough, *A Small City's Depleted Pension Fund Rattles Rhode Island*, N.Y. TIMES (July 11, 2011), <http://www.nytimes.com/2011/07/12/business/central-falls-ri-faces-bankruptcy-over-pension-promises.html>.

The small city of Central Falls, R.I., appears to be headed for a rare municipal bankruptcy filing, and state officials are rushing to keep its woes from overwhelming the struggling state. The impoverished city, operating under a receiver for a year, has promised \$80 million worth of retirement benefits to 214 police officers and firefighters, far more than it can afford. Those workers' pension fund will probably run out of money in October, giving Central Falls the distinction of becoming the second municipality in the United States to exhaust its pension fund, after Prichard, Ala. . . . Some of the retirees are in their 90s, and Central Falls, like many American cities, has not placed its police and firefighters in Social Security. Many have no other benefits to fall back on.

Id.

⁵⁷ The Cadillac Tax in the Affordable Care Act will begin enforcing a 40% tax of any health plan for the amount of the plan that exceeds \$10,200 (for an individual plan) and \$27,500 (for a family plan) in 2018. This was meant to ensure employees kept the cost of health insurance in mind and did not require employers to dole out too much for high insurance, but it resulted in union resentment, as unions have begun to have the tax leveraged against them in collective bargaining agreements.

experienced by those without the benefit of a union—did not result in union envy but in union resentment. Private sector workers did not wish they could join a public sector union; instead they wished that those who were already members would accept less so that taxes would not have to be increased or services decreased in order to survive the crisis.

The Great Recession which began in 2008 laid bare the huge differences in job protections, health care costs and retirement benefits enjoyed by public and private sector employees.⁵⁸ Private sector employers shed workers rapidly as needed. Meanwhile, the public sector unions seemed impervious to the resentment their generous benefits and job security engendered.⁵⁹ People who collected unemployment benefits⁶⁰ and struggled

See Kate Taylor, *Health Care Law Raises Pressure On Public Unions*, N.Y. TIMES (Aug. 5, 2013), at A1.

⁵⁸ See Michael Cooper, *Government Jobs Have Grown Since Recession*, N.Y. TIMES (Aug. 19, 2009), <http://www.nytimes.com/2009/08/20/us/20states.html>.

While the private sector has shed 6.9 million jobs since the beginning of the recession, state and local governments have expanded their payrolls and added 110,000 jobs The expansion, coming as many states and localities are raising taxes, troubled Tad DeHaven, a budget analyst for the Cato Institute, a libertarian research group in Washington. ‘That is disturbing,’ Mr. DeHaven said. ‘Basically what you have is your producers in society losing their jobs and looking for work, and their tax burden isn’t necessarily going down — and as a matter of fact they are likely to face tax increases going forward — and government growing.’ The disparity between the public and private sector job market is striking in places like Boise, Idaho. Since the recession began, the area’s unemployment rate has more than doubled, to over 10.1 percent in June, as big employers, especially in the technology sector, shed workers. The Boise area lost 20,000 jobs in the year ending in June, the Idaho Labor Department said, and saw real gains only in government, which had an increase of 1,400 jobs, mostly in the public schools.

Id.

⁵⁹ Dave Umhoefer, *Gov. Scott Walker says he asked unions for concessions and they refused*, POLITIFACT (Sept. 16, 2011), <http://www.politifact.com/wisconsin/statements/2011/sep/16/scott-walker/gov-scott-walker-says-he-asked-unions-concessions/> (quoting a campaign fundraising letter written by Scott Walker, dated Sept. 2, 2011) (“I asked the unions to pay into their own health care insurance and they said I was being unreasonable . . . I requested that they contribute toward their own pensions and they screamed it was unfair.”).

⁶⁰ Each state’s unemployment system works slightly differently, but to qualify there are some general requirements most states include. The unemployed worker

to hold onto their homes⁶¹ could simply not be counted on to listen sympathetically to proposals to raise taxes in order to honor promises made to teachers and others whose still—employed status inspired raw envy.

It appears that in Wisconsin and elsewhere public sector unions either couldn't or wouldn't confront the relatively luxurious status of their members. Walker saw an open door and walked through it. The plaintiffs

must be unemployed (not part-time or self-employed), must make a claim and cooperate with their local unemployment office, and must be ready, willing, and able to work. If an unemployed worker meets all the eligibility requirements and follows the guidance of their local unemployment office, they can generally collect pay through federal and state unemployment taxes. *See The Unemployment Benefits System: How it Works and When to Contest a Claim*, BIZFILINGS (May 2, 2016), <http://www.bizfilings.com/toolkit/sbg/office-hr/managing-the-workplace/unemployment-benefits-system-info.aspx>.

⁶¹ Ingrid Gould Ellen & Samuel Dastrup, *Housing and the Great Recession*, RECESSION TRENDS, STAN. CTR. POVERTY AND INEQ. (Oct. 2012).

Since the first quarter of 2006, U.S. households have lost over \$7 trillion in home equity. As a result, CoreLogic estimates that 22 percent of homeowners with mortgages are now “underwater,” or have an outstanding mortgage balance that exceeds the value of their home. . . . Equity losses also appear to have been particularly severe for minority households. A recent study by the Pew Research Center found that median wealth fell by 66 percent from 2005 to 2009 among Hispanic households and 53 percent among Black households, as compared with just 16 percent among White households . . . Reductions in homeownership rates following the housing crash have also been more extreme for minority groups. While all racial and ethnic groups have experienced a decline in homeownership in recent years, the fall has been sharpest for Blacks and Latinos . . . just 44.2 percent of Black households and 47.1 percent of Latino households owned their homes in 2010, down from 46.3 and 49.3 percent respectively in 2006 . . . homeownership rates have also fallen much more sharply for young adults as compared to older adults. This is both because transitions out of homeownership are less likely for older homeowners and because transitions into homeownership have slowed due to the weak labor market, uncertainty about prices, and tightened underwriting. . . . Data from the U.S. Department of Housing and Urban Development show that the estimated number of homeless families in the United States rose by 30 percent to 170,000 from 2007 to 2009, with the average length of stays in shelters rising during the recession as well.

Id. at 2-5.

in *Friedrichs* sensed the same vulnerability and, but for the unexpected change in the composition of the Supreme Court, almost obtained the same result. There is no doubt but that Wisconsin's experience would have been duplicated around the country in states that permit the collection of agency fees. It is certain that membership in public sector unions would have declined rapidly along with revenue and lobbying efforts. States would suddenly discover that public sector employee benefits were slightly more vulnerable at least to future reductions.⁶²

⁶² See, e.g., Amy Monahan, *Understanding the Legal Limits on Public Pension Reform*, AM. ENTERPRISE INST. at 5 (2013) ("Arizona's constitution specifically protects public employee pensions by providing that 'membership in a public retirement system is a contractual relationship that is subject to Article II, §25, and public retirement system benefits shall not be diminished or impaired'"); Amy B. Monahan, *Public Pension Plan Reform, The Legal Framework*, U. of Minn. L. School, Legal Studies Research Paper Series No. 10-13.

A handful of states have rejected a contract-based approach to public pensions in favor of a property-based approach. To the extent that rights in a public pension plan are considered property, they are protected under the Fifth and Fourteenth Amendments to the U.S. Constitution from deprivation without due process of law. In addition, the Fifth Amendment to the U.S. Constitution prohibits the taking of property without just compensation.

Id. at 24.

See also David J. Kahne, *Protecting Pensions And Contract Rights For Public Sector Employees*, STROOCK REPS. (STROOCK & STROOCK & LAVAN LLP) August 4, 2015.

Public sector employees in certain states can use the non-impairment clause to protect their pension rights from unilateral reductions imposed by a state or local government. Under many state constitutions, including New York's, pensions are granted contractual status. Article V § 7 of the New York State Constitution declares that, "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which *shall not be diminished or impaired*." Notably, there is no qualification. Thus, any judicial or legislative action that seeks to impair pension rights is arguably a violation of New York's Non-Impairment Clause. Case law and the legislative history confirms that the purpose of New York's Non-Impairment Clause was "to fix the rights of the employees at the time of commencement of membership in the [pension] system, rather than as previously at retirement." The clause prohibits unilateral action by either the Legislature or the

B. *FRIEDRICHS* AGAIN?

It seems likely that the organizations⁶³ which coordinated and funded the *Friedrichs* litigation will try again. Public school teachers will probably

employer that would diminish or impair the rights employees have gained through their membership in the system.

Id.

Further, states like Illinois have declared benefits such as healthcare for retired state workers to be a “constitutionally protected pension benefit.” *See* Karl Plume, *Illinois high court rules constitution protects health benefits*, REUTERS (July 3, 2014) <http://www.reuters.com/article/usa-illinois-retiree-healthcare-idUSL2N0PE10720140703> (“It’s too soon to say what the implications of this ruling are,” said . . . senior credit officer Ted Hampton. But he added that it ‘casts doubt’ on the pension reform law.”).

⁶³ One such example is the Center for Individual Rights (“CIR”). *See Mission*, CENTER FOR INDIVIDUAL RIGHTS (2016), <https://www.cir-usa.org/mission/> (“The Center for Individual Rights (CIR) is a non-profit public interest law firm dedicated to the defense of individual liberties against the increasingly aggressive and unchecked authority of federal and state governments.”); *Friedrichs v. CTA: Case Timeline*, *supra* note 1. On September 10th and 11th, 2015, there were 25 different *Amicus* Briefs filed in support of the Plaintiff. *See* Docket 14-915, *Friedrichs v. Cal. Teachers Ass’n*, 136 S.Ct. 2545 (2016). One *Amicus Brief*, filed by the Cato Institute, delivered a stinging and unrelenting attack on labor unions’ “opt-out” practices currently in place, requiring people who rejected joining the union, but are forced to pay agency fees, to affirmatively opt-out of particular ideological or political speech. Brief for the Cato Institute As *Amicus Curiae* In Support of Petitioners, *Friedrichs v. Cal. Teachers Ass’n*, 136 S.Ct. 2545 (2016).

For the reasons stated in *Harris v. Quinn*, (citation omitted), the First Amendment does not permit government to compel public employees to associate with a labor union and subsidize its speech on matters of public concern. The Court should therefore overrule its aberrant decision to the contrary in *Abood* . . . the opt-out scheme administered by Respondents is designed to ensnare dissenting teachers who inadvertently fail to register an objection during the prescribed opt-out period, as well as those who subsequently come to oppose the union’s political speech. A teacher, for example, might assume that the California Teachers Association’s political and ideological speech is confined to issues relating to education and public schools and may well be surprised to learn partway through the school year that it engages in advocacy on abortion, immigration reform, and other controversial issues. Yet that teacher is required to subsidize the union’s speech on those matters—with funds deducted from her

remain a fertile group from which to recruit plaintiffs given the ongoing fights around the country over charter schools and the efficacy of public schools.⁶⁴ The speed with which the Court is asked to review *Abood* will certainly depend on the perceived receptivity of Scalia’s replacement to the First Amendment claims made by the *Friedrichs* plaintiffs.⁶⁵ Taxpayers,

paycheck week after week—until the next opportunity to opt out. This is a plain-as-day violation of the “bedrock principle” that “no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.” *Harris*, 134 S. Ct. at 2644. A decision flipping the presumption—from opt out to opt in—would correct this wholesale infringement of First Amendment rights and put labor unions on an equal footing with all other groups that rely on truly voluntary contributions.

Id. at 1-3.

⁶⁴ One principal, Kelian Betlach, at Elmhurst Community Prep in Oakland, California faces the same problem every year:

[A] common one at schools like Elmhurst, where 91 percent of students qualify for free- or reduced-price lunch, a federal measure of poverty, and 33 percent are classified as English language learners. Many of the factors keeping teachers from showing up at schools like his are beyond the control of any single principal. Across the country, an improving economy has pulled teachers and potential teachers away from the profession, creating a growing national shortage. In California . . . competition for qualified teachers is particularly stiff. . . . Chronic underfunding of schools in California means that teaching jobs are not as secure as they once were and, in many parts of the state, a teacher’s salary won’t sustain a middle-class lifestyle. At the same time, a growing number of urban charter schools, focused on the same population as schools like Elmhurst, offer bigger paychecks for young, ambitious teachers willing to tie their salaries to their performance—a particularly fraught issue in California. . . . Finding and keeping teachers who can excel at working in urban schools may seem a Sisyphean task. And yet it is one at which principals like Betlach must succeed, every year, or risk their students’ fragile educational progress.

Lillian Mongeau, *Teachers Wanted: Passion a Must, Patience Required, Pay Negligible: Turnover is highest in the neediest schools, and competition for new educators is getting stiffer*, ATLANTIC (Sept. 9, 2015), <http://www.theatlantic.com/education/archive/2015/09/teachers-wanted-passion-a-must-patience-required-pay-negligible/404371/>.

⁶⁵ The Senate is trying its hardest to ensure that Scalia’s replacement is at least somewhat ideologically close to the late Justice. The Senate has evaded voting, or

legislators and public sector unions everywhere should both anticipate the renewal of this dispute and focus on the core policy questions it raises. Are public sector benefits too generous? Are public employees overpaid in some fundamental sense? If indeed public sector collective bargaining is just a species of lobbying which has resulted in the “capture” of various legislatures around the country,⁶⁶ then legislators and public sector unions might do well to reconsider the cozy relationships they have cultivated. Maybe it is time for legislators not just to be seen negotiating but to actually negotiate with an eye toward financial commitments that are affordable and sustainable.

Act 10 was not so much an endorsement of Scott Walker as a furious rejoinder to the failure of Wisconsin political actors to adequately represent the interests of the people who elected them. Hostility to agency fees is based on a sense that public unions have a disproportionately large voice in public affairs; that they have created and coddled an entrenched and inefficient workforce,⁶⁷ and harmed school aged children, especially those from poor

even holding hearings, on President Obama’s middle-of-the-road nomination, Merrick Garland, for over 100 days at the time of this article’s writing. Though there has been similar backlash and stalling late in other presidents’ final terms, the Garland blockade is unprecedented in length and a shining display of the ideological split the country is facing, as well as the importance of late Justice Scalia’s seat. *See* Ed. Bd., *The Senate’s Confirmation Shutdown*, N.Y. TIMES, June 9, 2016, at A22.

⁶⁶ *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

To achieve either expert or nonpartisan decision making, one must avoid undue industry influence, or ‘capture.’ Unfortunately, as Richard Stewart has observed, “[i]t has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.” . . . one can never hope to avoid all hints of capture. But as with expertise, the question is whether one can achieve *some* insulation from interest group pressure.

Id. at 21-24.

⁶⁷ One example of this is the use of “rubber rooms” where teachers awaiting disciplinary hearings draw full salary and benefits not to work, but to sit and wait. *See* Jennifer Medina, *Deal Reached to Fix Teacher Discipline Process*, N.Y. TIMES (Apr. 16, 2010), at A1 (discussing the supposed removal of “rubber rooms” in NYC and how unions continue impede the disciplinary process by making teachers very difficult to fire). *See generally* WAITING FOR SUPERMAN (Walden Media 2010)

and moderate income families who do not enjoy the luxurious option of private school education.⁶⁸ One cannot help but ask, if public unions are *not* coercing speech, then how to understand the dramatic drop in membership? Why aren't employees supporting an organization that is accurately reflecting its members' positions on a wide range of issues?

Taxpayers are asking what they have to lose if public sector union power is dramatically reduced. Wisconsin has answered that question. In the short run, as salaries are contained or reduced, budget pressure is relieved and dollars can go to services which might otherwise be cut in times of crisis. Public sector unions become less politically important and less able to articulate their views as their staffs shrink. Over the longer term we should expect to see relief for taxpayers as well from onerous benefits commitments—especially those for retiree health care, active employee health care and pensions. As others have suggested, we may see more and more public employees getting their insurance from a state of federal health care exchange.⁶⁹ In the same way the private sector shed many of the obligations⁷⁰ we would expect that state and local governments would

(criticizing the American public school system for how it handles disciplining, reprimanding, and firing tenured teachers).

⁶⁸ Some advocate for charter schools as a “replacement system for the failed urban [school] system.” A solution like this would involve “closing low-performing traditional and charter schools” to only allow schools that are successful educators, as deemed by the local government or educational authority, to continue operating. In addition, these advocates suggest allowing failing public school to be taken over by a charter company if it means the students' quality of education will increase. Under their view, urban students are the most needy students, yet their needs are not close to being met and “well-meaning education reformers” are simply not meeting these students' needs properly. See Emma Brown, *Can traditional school systems be replaced by charters?*, THE WASH. POST (Jan. 30, 2013), https://www.washingtonpost.com/blogs/dc-schools-insider/post/can-traditional-school-systems-be-replaced-by-charters/2013/01/30/e33a013a-6a71-11e2-95b3-272d604a10a3_blog.html.

⁶⁹ See Natalya Shnitser, *Accounting and the ACA: New Choices and Challenges for Public Sector Retiree Health Plans*, 20 EM. RTS. & EMP. POL'Y J. 147 (2016).

⁷⁰ See Susan E. Cancelosi, *VEBAS to the Rescue: Evaluating One Alternative for Public Sector Retiree Health Benefits*, 42 J. MARSHALL L. REV. 879, 880-81 (2009).

When private sector employers realized the impact of FAS 106 on their balance sheets, many chose to terminate retiree health benefits. Others imposed a variety of cost-containment measures. Collectively bargained employers, however, generally could not take such steps. Constrained by their agreements with unions, they

follow. The private ordering that has dominated everywhere but in the unionized public sector should creep into the public sector as union power there declines.

IV. CONCLUSION

Many supporters of pension and health care benefits reform for the public sector were disappointed by the stalemate produced by *Freidrichs* following the death of Justice Scalia. The Court seemed poised to overturn *Abood* and usher in a new era of in which fees for contract administration, grievance adjustment, etc. were forbidden as impermissible interference with employee free speech rights. *Abood* has long been justified on anti-free riding grounds, although no one seriously argued that concerns about free riding were sufficient to overcome interference with the constitutional rights of public employees. The recent experience in Wisconsin provides a window into what a post-*Abood* world will almost certainly look like. It is an environment in which public union power is significantly constrained,

had little flexibility in managing their retiree health expenses. Large, traditional manufacturing companies - with high concentrations of unionized retirees and historically generous benefit packages, but shrinking active workforces and negative economic forecasts - found themselves struggling to remain financially viable in the face of overwhelming liabilities. The public sector today faces similar problems. Because GASB 45 demands that government employers acknowledge the true level of retiree health offers, they risk balance sheet disasters. Most have financed retiree health benefits on a pay-as-you-go basis, with no assets set aside for future expenses. Many are heavily unionized, with little room to shift costs to retirees, much less to terminate benefits. Some have constitutional or statutory guarantees that protect benefit commitments. Although they do not risk liquidation the way private sector employers do, financial insolvency affects state and local governments' ability to raise money to finance public services and projects. Government employers, moreover, depend on the good will of taxpayers. They cannot easily raise taxes or divert funds from other sources. Meanwhile, the current depressed economy translates to severe budget problems for state and local governments across the country. The similarities between the public sector today and the private sector of the early 1990s raise intriguing questions about possible solutions for the public sector.

Id. at 880-881.

membership levels drop and public union political activity decreases. These changes appear to have made unilateral reductions in the cost of public sector employee benefits politically feasible resulting in savings to taxpayers. The *Freidrichs* decision leaves the problem of forced speech by public employees unresolved. As states continue to grapple with rapidly escalating benefits costs in the public sector, one would expect to see another *Freidrichs*-type challenge emerge in the not too distant future.

Appendix A

Public and Private Union Membership Levels
in Wisconsin¹

¹US DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERSHIP HISTORICAL TABLE FOR WISCONSIN 1989-2014, *available at* http://www.bls.gov/regions/midwest/data/unionmembershiphistorical_wisconsin_table.htm; US DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERS 2015, *available at* <http://www.bls.gov/news.release/pdf/union2.pdf>.

Percentage of all U.S. versus all Wisconsin
Employees that are Union Members²

²US DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERSHIP CHARTS 2008-2015, *available at* <http://www.bls.gov/cps/lfcharacteristics.htm#union>.

National Union Membership Rates Public v. Private Sector³

³US DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, UNION AFFILIATION DATA – PRIVATE SECTOR, *available at* http://data.bls.gov/timeseries/LUU0204906600?years_option=all_years; US DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, UNION AFFILIATION DATA – PUBLIC SECTOR, *available at* http://data.bls.gov/timeseries/LUU0204922700?years_option=all_years.

Median Weekly Earnings of Public and Private Union Members v. Non-Union Members⁴

⁴US DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, UNION DATABASE RETRIEVAL TOOL, *available at* <http://www.bls.gov/cps/lfcharacteristics.htm#union>.

Wisconsin Education Association Council
Lobbying Analysis – Pre and Post Act 10⁵

	2009-2010	2011-2012	2013-2014
Dollar Rank	1st	2nd	< 25th
Dollars Spent	\$2,493,485	\$2,349,500	Not listed
Hours Rank	3rd	2nd	< 25th
Hours Spent	12,364	11,415	Not listed

⁵STATE OF WISCONSIN, GOVERNMENT ACCOUNTABILITY BOARD, GOVERNMENT ACCOUNTABILITY REPORT FOR 2009-2010, *available at* http://www.gab.wi.gov/sites/default/files/publication/68/2009reg_slaetoporganizationdollars_pdf_16658.pdf; STATE OF WISCONSIN, GOVERNMENT ACCOUNTABILITY BOARD, GOVERNMENT ACCOUNTABILITY REPORT FOR 2011-2012, *available at* http://www.gab.wi.gov/sites/default/files/publication/68/2011reg_slaetoporganizationdollars_pdf_76233.pdf; STATE OF WISCONSIN, GOVERNMENT ACCOUNTABILITY BOARD, GOVERNMENT ACCOUNTABILITY REPORT FOR 2013-2014, *available at* http://www.gab.wi.gov/sites/default/files/publication/68/slae_top_organization_by_dollars_2013_2014_pdf_18518.pdf.