PUBLIC SECTOR UNIONS, THE FIRST AMENDMENT, AND THE COSTS OF COLLECTIVE BARGAINING

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Labor laws in twenty-two states permit government employers to compel all employees to pay "fair share fees" to support a union's collective bargaining activities, even if the union advocates policies to which some workers are ideologically opposed. Thousands of collective bargaining agreements include provisions to this effect, and hundreds of thousands of objecting workers are forced to pay such fees each year.

At its core, this practice implicates a significant tension between two important principles: the First Amendment's objective of protecting individuals from compelled support of unwanted messages, and labor law's concern with fostering the collective benefits of worker representation. When confronted with a challenge to fair share fees nearly forty years ago in Abood v. Detroit Board of Education*, the Supreme Court held that labor law takes precedence, such that the First Amendment intrusions produced by fair share fees are constitutionally justified. Twice in the past four years, however, the Supreme Court has indicated that it is poised to reverse course and strike down fair share fee clauses under the First Amendment, overruling* Abood *in the process. And on the last day of the 2014 Term, the Court granted certiorari in a case presenting just that opportunity.*

In this Article, I challenge the conventional wisdom that public sector union financing implicates an inevitable trade-off between First Amendment principles and labor law's core objectives. There is a simple alternative to the fair share fee union financing model that would permit public employers to pursue their broad interests in effective workplace representation without sacrificing the individual expressive interests of objecting employees: In lieu of fair share fee clauses, government employers can negotiate provisions under which they reimburse a union for its collective bargaining costs directly. Such an approach would free objecting workers of the compulsion to support an objectionable message and ensure that unions have the financial security they need to zealously represent worker interests. Moreover, the government can implement this alternative in a cost-neutral fashion, reducing future wage raises or gratuitous benefits to offset the added costs of union reimbursement.

But this government-payer alternative is not just a theoretical solution to what has been widely understood as an intractable debate—it has doctrinal significance, too. For once identified, the government-payer workaround becomes part of the constitutional analysis itself. That is to say, under First Amendment doctrine, the govern-

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ment's ability to reimburse a union for its bargaining costs directly is a less restrictive alternative that renders fair share fees unconstitutional by comparison.

This Article explores the theoretical and doctrinal consequences of the government-payer alternative to fair share fees. In doing so, it proposes an answer to a long-standing puzzle in the Court's First Amendment jurisprudence regarding the proper standard of scrutiny for compelled fees—a puzzle that the Supreme Court has explicitly recognized yet left unresolved. The Article concludes by offering a few observations concerning the impact of the government-payer alternative for the future of public sector labor unions and the First Amendment more broadly.

INTRODUCTION

Thomas Jefferson famously wrote that for government "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[1] Over the ensuing nearly two-and-a-half centuries, federal, state, and local governments have largely respected Jefferson's observation. Rare are the instances when individuals are forced to give financial support directly to an organization advancing objectionable messages.[2] For good reason; from a theoretical perspective, to pressure individuals to lend such support can be thought to work two distinctive, yet significant harms. In one direction, compelled payments would trench on individuals' expressive freedom and personal conscience, forcing them to support causes against their deeply held views.[3] In another direction, forced financial support for certain messages would distort the quantum and flow of information among members of the polity, unduly influencing and hampering public debate.[4] A central element of compelled subsidy theory, in other words, is the principle of protecting individual expressive choice from government interference.

Nonetheless, a prominent departure from Jefferson's rule exists in the context of modern-day public sector labor law. Government employers in numerous states require workers (willing and unwilling alike) to pay "fair share fees" to a public sector union, even if the union advocates positions with which some workers disagree.[5] The purpose of this labor law practice is to ensure sufficient financial sup-

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[1] IRVING BRANT, JAMES MADISON: THE NATIONALIST 1780–1787 354 (1948).

[2] *See, e.g.*, Clyde W. Summers, Book Review, 16 COMP. LAB. L.J. 262, 268 (1995) (reviewing SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY (1992)) ("If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assessments are not levied on all parents. If an association of university professors has as a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.").

[3] *See infra* notes 49–50 and accompanying text (discussing how compelled fees may be thought to encroach upon either freedom of speech or freedom of thought).

[4] *See infra* note 51 and accompanying text (describing the public political discourse theory of the harm from compelled fees).

[5] *See infra* notes 68–69 and accompanying text (presenting data on the prevalence of fair share fees).

port for unions in pursuit of the collective benefits that effective workplace representation can produce, both for public sector workers and the quality and efficiency of public services writ large.[6] Phrased succinctly, the organizing principle of public sector representation—and the concomitant purpose of fair share fees—is to "improve[ ] democratic outcomes and government administration by giving workers a voice in the outcome."[7]

So conceived, fair share fee arrangements implicate a stark and irreducible tension between two important principles: the First Amendment's aim of protecting individuals from the "sinful and tyrannical" practice of compelled subsidies for objectionable causes, and labor law's goal of facilitating the efficient provision of quality public services by ensuring that workers' voices are heard at the bargaining table. In a phrase, the First Amendment and public sector labor law are at war—and fair share fees are the battleground.

The Supreme Court declared labor law the victor in the 1977 case of *Abood v. Detroit Board of Education*, holding that the First Amendment harm suffered by public employees as the result of fair share fee arrangements is "constitutionally justified by . . . the important contribution of the union shop" to labor relations.[8] This ruling was not without its critics.[9] But the sweeping effect of *Abood* has been beyond debate, as the case opened the door for public sector unions and government entities throughout the nation to enter into thousands of fair share agreements requiring all employees in a given bargaining unit to share the costs of the union's bargaining activities.[10]

Yet at the end of the 2014–15 Term, the Supreme Court granted certiorari in a case presenting anew the question whether fair share fees violate the First Amendment, *Friedrichs v. California Teachers Association*.[11] Unfortunately for labor proponents, the writing

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[6] *See infra* Section I.B (discussing the collective benefits of fair share fees).

[7] Kenneth G. Dau-Schmidt & Mohammad Khan, *Undermining or Promoting Democratic Government? An Economic and Empirical Analysis of the Two Views of Public Sector Collective Bargaining in American Law*, 14 NEV. L.J. 414, 415 (2014).

[8] 431 U.S. 209, 222 (1977).

[9] Most notably, Justice Powell wrote separately in *Abood* to argue that the majority had imposed a "sweeping limitation of First Amendment rights" that was "unsupported by either precedent or reason." *Id.* at 245 (Powell, J., concurring in the judgment). For additional contemporary criticism of the *Abood* decision, see Daniel R. Levinson, *After* Abood*: Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 AM. U. L. REV. 1 (1977).

[10] Harris v. Quinn, 134 S. Ct. 2618, 2645 (2014) (Kagan, J., dissenting) (recognizing that *Abood* has served as "the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the Nation").

[11] Petition for a Writ of Certiorari at i, Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (Jan. 26, 2015) (No. 14-915), 2015 WL 393856, at *i (listing the first question presented as

appears to be on the wall—and it does not look good.[12] Not only do the petitioners in *Friedrichs* expressly ask that *Abood* be overruled,[13] but the Court has twice signaled its interest in doing so in just the past four years. In the 2012 case of *Knox v. SEIU, Local 1000*, a five-Justice majority observed in the course of striking down a union's special mid-year fee assessment that, "[b]y authorizing a union to collect fees from nonmembers . . . our prior decisions," including *Abood*, "approach, if they do not cross, the limit of what the First Amendment can tolerate."[14] And just two years later, in *Harris v. Quinn*,[15] the same five conservative Justices voted to strike down the State of Illinois's requirement that a group of home health care workers pay fair share fees to cover the collective bargaining costs of a union they did not wish to support.[16] The *Harris* majority did so without passing formally on *Abood*'s vitality, instead distinguishing *Abood* away on the ground that it did not apply to the objecting health workers at issue because they were "joint" employees of the state and their individual patients—not "full-fledged public employees" like the teachers in

"[w]hether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), should be overruled and public-sector 'agency shop' arrangements invalidated under the First Amendment").

12 The tragic passing of Justice Scalia on February 13, 2016, more than a month after oral argument in *Friedrichs*, brought about the likelihood of an armistice in the conflict between labor and First Amendment law. Justice Scalia was the likely swing vote in the case—he had previously written in defense of fair share fees, only to express skepticism during oral argument in *Friedrichs*. *Compare infra* note 218 and accompanying text (discussing Justice Scalia's defense of fair share fees in Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)), *with* Transcript of Oral Argument at 76, Friedrichs v. Cal. Teachers Ass'n (2016) (No. 14-915) (Scalia, J.) ("But the problem is that [a government employer] is not the same as a private employer, that what is bargained for is, in all cases, a matter of public interest. And that changes the . . . situation in a way that . . . may require a change of the rule."). As a consequence, Justice Scalia's absence now leaves the Court at a probable 4–4 deadlock, with the result that the case will likely be set for reargument after a ninth Justice is appointed. *See also* Tom Goldstein, *Tie Votes Will Lead to Reargument, Not Affirmance*, SCOTUSBLOG (Feb. 14, 2016, 3:14 PM), http://www.scotusblog.com/2016/02/tie-votes-will-lead-to-reargument-not-affirmance/ ("There is historical precedent for this circumstance that points to the Court ordering the cases reargued once a new Justice is confirmed" rather than affirming the decision below by an equally-divided Court). Without knowing the identity of Justice Scalia's successor (and, as a potential precondition, the identity of the President of the United States who will nominate her or him), the ultimate outcome of *Friedrichs* after reargument is difficult to predict with any degree of confidence. This Article takes no position on any of these eventualities.

13 Petition for a Writ of Certiorari, *supra* note 11, at i.

14 132 S. Ct. 2277, 2291 (2012).

15 134 S. Ct. 2618 (2014).

16 *Id.* at 2644. As explained further, *infra* notes 120–21 and accompanying text, a "fair share fee" agreement is a clause in a collective bargaining agreement requiring all employees in a bargaining unit to pay, as a condition of employment, their proportional share of the union's collective bargaining and grievance procedure costs, but not the costs of the union's political advocacy. *E.g.*, 5 ILL. COMP. STAT. 315/3(g) (West 2013) (defining fair share fee agreement under Illinois law).

Abood.[17] But the *Harris* majority nevertheless saw fit to offer a lengthy critique of *Abood*, describing seven reasons why *Abood*'s analysis was "questionable."[18] Included among those reasons were certain "practical administrative problems" that had "become more evident and troubling in the years since [*Abood*]"[19]—a not-so-subtle allusion to the "unworkability" factor in the Court's *stare decisis* framework for overruling precedent.[20]

That the *Harris* majority appeared to tee up *Abood* for its eventual downfall was not lost on the dissent, which castigated the majority for "taking potshots at *Abood*"[21] and responded by offering a lengthy first-principles defense of the decision.[22] And though the four liberal Justices were quick to point out that the *Harris* majority had stopped short of actually overruling *Abood*,[23] that saving grace may be short-lived in view of the Court's decision to grant certiorari in *Friedrichs*.

Recognizing this distinct possibility, the left's reaction to the grant in *Friedrichs* was severe. One writer observed that by granting *Friedrichs*, the Court "holds in its hands the power to ruinously damage U.S. public sector unions. Indeed, it holds in its hands the power to eviscerate them, destroy them."[24] Another outlet described the case as an "existential threat to unions."[25] Yet another writer warned that *Friedrichs* "poses a mortal threat to the cause of collective bargaining for public employees, amid signals that a conservative majority is poised to fire the lethal shot."[26] To turn another phrase: Although labor law's objectives triumphed over the First Amendment

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[17] 134 S. Ct. at 2627, 2638 (quoting Harris v. Quinn, 656 F.3d 692, 698 (7th Cir. 2011)).

[18] *Id.* at 2632–34.

[19] *Id.* at 2632–33.

[20] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are unworkable or badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944))).

[21] 134 S. Ct. at 2645 (Kagan, J., dissenting).

[22] *Id.* at 2653–58.

[23] *Id.* at 2645 (recognizing that the majority opinion "ignores the petitioners' invitation to depart from principles of *stare decisis*" and overrule *Abood*).

[24] David Macaray, *The Irony Would Be Overwhelming*, HUFFINGTON POST (July 5, 2015), http://www.huffingtonpost.com/david-macaray/the-irony-would-be-overwh_b_7732228.html.

[25] Moshe Marvit, *Why a New Supreme Court Case Is an Existential Threat to Unions*, TALKING POINTS MEMO (July 1, 2015), http://talkingpointsmemo.com/cafe/supreme-court-threat-to-sector-unions.

[26] Michael Hiltzik, *A Dire Threat to Public Employees from the Supreme Court*, L.A. TIMES (July 1, 2015), http://www.latimes.com/business/hiltzik/la-fi-mh-a-dire-threat-to-public-employees-20150701-column.html.

nearly forty years ago in *Abood*, the Supreme Court may be on the verge of declaring a coup d'état.[27]

My core argument in this Article is that the academy, pro- and anti-labor groups, and the Supreme Court itself have been mistaken to conceive of the battle over public sector union financing as an all-or-nothing fight between labor law and First Amendment principles, for a reason that has gone largely unnoticed in the public debate and legal scholarship: A work-around to fair share fees is available that would reconcile the two.[28] The work-around is actually quite simple—instead of requiring willing and unwilling workers to share the costs of public sector collective bargaining, government employers can reimburse their union counterparts for bargaining expenses *directly*, while negotiating modestly lower future employee wage raises to offset the additional costs.[29] By removing the public employee middle-person from the equation and internalizing the costs of collective bargaining, the government can achieve its interests (and public workers' interests) in effective worker representation through a direct reimbursement regime that is economically indistinguishable from the existing compelled-fee regime; public sector unions can continue to enjoy sufficient resources to advocate on behalf of workers; and no dissenting employee will face the choice between paying a fee to support speech with which she disagrees and losing her job. Requiring public

[27] *But see supra* note 12 (suggesting that the outcome of *Friedrichs* is now uncertain pending the appointment of Justice Scalia's successor).

[28] I say largely unnoticed because during the editing process for this Article, Daniel J. Hemel and David S. Louk independently suggested the government-payer alternative to fair share fees in a persuasive essay, which focuses on the political economy surrounding the choice by government employers whether to internalize the costs of collective bargaining in the event *Abood* is overruled. Daniel Hemel & David Louk, *Is* Abood *Irrelevant?*, 82 U. CHI. L. REV. DIALOGUE 227 (2015). Then, during oral argument in *Friedrichs*, Justice Sotomayor inquired whether a government employer could fund a union's bargaining activities directly. *See* Transcript of Oral Argument at 23, Friedrichs v. Cal. Teachers Ass'n (2016) (No. 14-915), ("Ah, but that's the question, isn't it? Would it be illegal for the government . . . to fund the union?"); *id.* at 25 ("Even if [government employers excised agency fee clauses from bargaining agreements], could they then decide to fund the union?").

[29] As explained below, *infra* Section V.A, it is vital that the government negotiate these incrementally reduced wage raises *prospectively*, so as to avoid cutting *existing* salary levels to which employees are entitled under a current contract or statute. Such infringement upon an employee's existing property interests would amount to a compelled subsidy no less than the current fair share fee system. By contrast, government employees do not possess a general entitlement or property right to a particular level of *future* pay raises. *See, e.g.*, Brown v. United States, 631 F. Supp. 954, 958 (D.D.C. 1986) (finding no property interest where plaintiff failed to demonstrate that "a legitimate entitlement" to a "pay raise was created by a statute, regulation or contract"), *aff'd*, 810 F.2d 307 (D.C. Cir. 1987); Estes v. Tuscaloosa Cnty., 696 F.2d 898, 901 (11th Cir. 1983) (finding no property interest in a future pay raise in the absence of statute, contract, or other understanding creating such entitlement).

employers to pay for union bargaining costs directly would thus just as effectively ensure labor law's concern for the collective benefits of collective bargaining, without running afoul of the First Amendment's concern for individual worker expressive freedoms.

The Article builds out this argument in six parts. Parts I and II lay out the basic nature of the problem. Part I begins by describing the competing values at stake, identifying the serious First Amendment burdens imposed by fair share fees and the significant labor law values that would be sacrificed were such fees forbidden. Part II explores how we arrived at this impasse. It turns out that public employers did not deliberately select the fair share fee model as the best approach for accommodating worker speech interests while financing union bargaining activities. The present-day public sector fair share fee regime emerged instead as the incidental result of the way public sector unions developed by analogy to their private sector counterparts (where such fee arrangements were typical) and the Supreme Court's mistaken holding that private sector compelled fee arrangements trigger the First Amendment (but do not violate it). Put another way, fair share fee clauses do not reconcile competing First Amendment and labor law values because reconciliation was never their objective to begin with.

Part III offers an alternative. It explains in practical terms how existing fair share fee clauses may be replaced by provisions requiring government employers to reimburse unions directly for their bargaining expenses—and how doing so would provide a way out of the First Amendment and labor law puzzle, eliminating the harms experienced by objecting workers while preserving the vitality of public sector unions.

Part IV pivots from the theoretical to the doctrinal, considering the significant legal consequences of the proposed direct government-payer alternative. This alternative is, I submit, more than a better-in-theory approach for public employers to consider in their quest to reconcile objecting workers' expressive freedoms with the collective benefits of worker representation. Under the First Amendment's well-established least restrictive alternative requirement,[30] the government-payer workaround is actually a less restrictive means for attaining the government's labor peace interests that renders the fair

[30] *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 351, 372–73 (1976) (plurality opinion) (finding unconstitutional a sheriff's practice of terminating employees who refused, among other things, to make financial contributions to a preferred political party because the sheriff had available less restrictive means for ensuring worker efficiency).

share fee approach unconstitutional by comparison.[31] Thus, even as the government-payer approach provides public employers and unions a workable alternative for preserving the goals of public sector labor law in the face of a seemingly inevitable adverse ruling in *Friedrichs*, that very alternative also provides labor opponents a persuasive argument for striking down fair share fees.

Part IV begins this analysis by discerning a solution to one of the enduring puzzles left unanswered by *Abood*, *Harris*, and the Court's public sector union jurisprudence writ large: What standard of First Amendment scrutiny applies to challenges to compelled union subsidies? As others have recognized, *Abood* itself was notably vague on the matter.[32] And *Harris* only added to the confusion by first discussing the test for commercial speech, which the majority mistakenly described as requiring strict scrutiny[33]—only to disavow and then apply the commercial speech test, anyhow[34]—even as it declined to announce the proper test at all.[35] I argue in Part IV that the *Harris* majority arrived at the right strict scrutiny test, but for the wrong reason: Although unrecognized in *Harris*, a challenge to compelled union fees is most closely analogous to the claim at issue in the Court's political patronage cases, a line of First Amendment decisions that applies strict scrutiny when government employers attempt to force nonpolicymaking employees to pay fees in support of, or to oth-

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[31] I use the phrase "labor peace" as a shorthand for the government's overarching interest in increasing workplace morale and efficiency—and thus the quality of public services—by providing employees with a representative voice in negotiations concerning workplace polices and terms and conditions of employment. I offer a more thorough description of this interest in Section IV.B.1.a.

[32] *See* Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 858 (1989) (describing the rationale used in *Abood* as filled with "considerable ambiguity"); Kari Thoe, Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities*, 82 MINN. L. REV. 1425, 1455 (1998) ("[T]here has been some confusion over what standard of review *Abood* and its progeny require."); *see also* Smith v. Regents of Univ. of Cal., 844 P.2d 500, 522–23 (Cal. 1993) (Arabian, J., dissenting) (observing that *Abood* did not "address[] directly the constitutional standard to be applied").

[33] *See* Harris v. Quinn, 134 S. Ct. 2618, 2639 (2014) (quoting Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2289 (2012)) (discussing the "commercial-speech standard," which the Court describes as requiring "a compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms") (alterations in original).

[34] *See id.* (citing *Knox*, which struck down a fee procedure under the commercial speech standard employed in United States v. United Foods, Inc., 533 U.S. 405 (2001), before disavowing that standard because "the union speech in question in this case does much more than [propose a commercial transaction]"); *id*. (holding that "[f]or present purposes . . . no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot even satisfy the [commercial subsidy] test").

[35] *Id*.

erwise affiliate with, a particular political party.[36] Part IV then applies this test to fair share fees, explaining why they are not the least restrictive means for attaining the government's labor peace interests in light of its ability to pay for the costs of public sector bargaining directly.

Part V evaluates two major objections to the direct-reimbursement alternative—that it does not actually lessen the First Amendment harm to public workers, and that it does not permit the government to achieve its labor peace interests effectively. Finally, Part VI concludes by considering a few implications of the government-payer alternative, both for the future of public sector labor unions specifically and for other public policy debates where government faces the choice between internalizing the costs of a social good and passing those costs on to affected individuals in potential tension with their First Amendment interests. As it turns out, the union fee setting is not the only circumstance where the choice of *who pays*—the affected parties directly, or all taxpayers mediated through general tax receipts—may have an impact on our intuitions regarding the expressive burdens of a particular program. From the Affordable Care Act's contraceptive mandate, to the individual health insurance mandate, to the heated debate over federal funding for Planned Parenthood,[37] each of these programs entails a government choice as to who should pay that may be almost as important as deciding whether to pursue the substantive policy objective in the first place. How government ought to think about this choice in light of its First Amendment implications is a matter worthy of further inquiry, and I sketch out two sets of questions that might be assayed moving forward.

I
Competing First Amendment and Labor Law Principles

This section describes the values at stake in the debate over public sector union financing, beginning with the First Amendment burdens suffered by objecting workers before turning to the collective benefits that fair share fees produce for willing workers and public services. I then discuss how fair share fees place these values in stark conflict.

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[36] *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 75–76 (1990) (applying strict scrutiny test to a political patronage case); Branti v. Finkel, 445 U.S. 507, 515–16 (1980) (same); Elrod v. Burns, 427 U.S. 347, 362 (1976) (same).

[37] *See infra* notes 312–17 and accompanying text (discussing debate over Planned Parenthood funding).

A. The Expressive Burdens of Fair Share Fees

Although the disagreement between opponents and defenders of public sector fair share fees may be fierce,[38] one important element of the debate is largely without dispute: Fair share fees impose a substantial First Amendment burden on objecting workers. Even *Abood* did not take issue with this conclusion, recognizing that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."[39] Nor was this concession a superficial one; the Court went on to spend several more lines explaining the meaningful ways in which public workers' First Amendment interests could be infringed by compelled fee arrangements.[40]

Abood's recognition of the serious burdens imposed by fair share fees remains salient today. Consider a few examples of public workers who may oppose the policies championed by their union and who may therefore wish to refrain from paying fees to support the union's advocacy:

A young teacher works at a public school facing budget shortfalls that will likely lead to staff reductions. The teachers' union proposes that the school lay off teachers on a "last in, first out" basis.[41] Because

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[38] For example, consider the intense debate engendered by Michigan lawmakers' decision to enact a right-to-work law in 2012. *See* Tami Luhby, *Michigan Bills Weakening Union Power Signed into Law*, CNN MONEY (Dec. 11, 2012), http://money.cnn.com/2012/12/11/news/economy/michigan-right-to-work-vote (describing protests in response to Michigan right-to-work measures). As is widely noted, the "right to work" label used by labor opponents to describe state laws that forbid compulsory union membership and fees is something of a misnomer; such laws are instead more aptly described as preserving the right of employees not to pay union dues. *See* E. EDWARD HERMAN, COLLECTIVE BARGAINING AND LABOR RELATIONS 65 (4th ed. 1998) (discussing nature of right-to-work laws).

[39] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977).

[40] *Id.* ("An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas . . . , or to refrain from doing so, as he sees fit.").

[41] *See* Dan Goldhaber & Roddy Theobald, *Managing the Teacher Workforce: The Consequences of "Last In, First Out" Personnel Policies*, EDUC. NEXT, Fall 2011, at 80, http://educationnext.org/managing-the-teacher-workforce/ (noting that "the 75 largest school districts in the nation use seniority as a factor in layoff decisions, and seniority is the sole factor determining the order of layoffs in more than 70 percent of these districts").

such a rule will make it likely that the teacher will lose her job—and, in the teacher's view, harm the school's students given that some recently hired teachers are higher-performing than their veteran colleagues[42]—she objects to the union and refuses to pay fees to support its bargaining activities.

A veteran police officer worries about the city's budget crisis and the consequences for her grandchildren's schools and other public services. Because she is near retirement, she supports a proposal to cut pensions for younger employees, but that would grandfather in workers with more years of experience. The police union vigorously opposes the proposal,[43] however, and so the officer wishes to stop paying fees to support the union's advocacy efforts.

Long after a public employee is convicted of sexual abuse of a minor and sentenced to a ten-year prison term, the public sector union continues to represent the employee in a lawsuit against the employer.[44] Another employee opposes the union's decision to continue representing the convicted child abuser, and objects to being forced to share the costs of that representation.

A midcareer professional leaves her job in the private sector to become a teacher in a low-income community. After a few years, the teacher is recognized as an outstanding educator by parents, administrators, and student achievement data. However, the teacher is paid less than peers with more experience under the seniority-based salary schedule negotiated by the teachers' union.[45] The teacher would prefer the school to adopt a merit-based pay system, and the district agrees.[46] In addition to raising her salary significantly, the teacher believes a merit pay system would enable the school to recruit more

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[42] *See id.* ("[T]he most-senior teachers may not be the most effective teachers.").

[43] *See, e.g.*, Tonya Alanez, *Hollywood Pension Election Tuesday Pits Unions Against City Officials*, SUN-SENTINEL (Sept. 10, 2011), http://articles.sun-sentinel.com/2011-09-10/news/fl-hollywood-pension-referendum-20110910_1_pension-payout-municipal-pensions-retirement-ages (describing police union opposition to pension cuts and increases in retirement age).

[44] *See*, *e.g.*, Education Action Group, *Wisconsin Union Continues to Defend Teacher Convicted of Molesting Student*, BREITBART.COM (May 16, 2012), http://www.breitbart.com/big-government/2012/05/16/wisconsin-union-continues-to-defend-teacher-convicted-of-molesting-student/ (describing continued union support for convicted employee).

[45] *See, e.g.*, Tentative Agreement: 2015–2017 Successor Contract: Miami-Dade County Public Schools, M-DCPS Salary Proposal #1 (Revised) 4 (Aug. 21, 2015), http://www.dadeschools.net/employees/labor_union/UTD/UTD_2015-2017_TA.pdf (proposing that a fourth year teacher will earn $42,512, while a teacher in her twentieth year will earn $57,350).

[46] *See, e.g.*, David Seifman, *Mike: Teachers See 'Merit' in Pay Plan*, N.Y. POST (Jan. 21, 2012, 5:00 AM), http://nypost.com/2012/01/21/mike-teachers-see-merit-in-pay-plan/ (noting Mayor Bloomberg's support for a merit pay plan, but opposition from the United Federation of Teachers).

high-performing teachers to the benefit of the student body.[47] However, the union opposes merit pay and devotes much of its bargaining to defeating the district's merit pay plan.[48] In light of her disagreement with the union on this fundamental issue, the teacher wants to stop paying fees.

It is not hard to appreciate the individual worker's desire in each of the above examples to avoid paying fees in support of the union's advocacy efforts. Conceptually, scholars have offered varied accounts of the precise nature of the harm suffered—as an encroachment upon the individual's freedom of speech[49] or freedom of thought,[50] or the broader polity's interest in unencumbered discourse.[51] What seems clear under any account is that forcing a public worker to pay fees to support objectionable positions espoused by a union works a significant expressive injury.[52] Put simply, the government's action thrusts upon the public employee a difficult choice: Pay fees to support an objectionable position espoused by the union, or refuse to pay those fees and lose one's job.[53]

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[47] *See* Dana Goldstein, *What Happens When Great Teachers Get $20,000 to Work in Low-Income Schools?*, SLATE (Nov. 25, 2013, 8:15 AM), http://www.slate.com/articles/double_x/doublex/2013/11/talent_transfer_initiative_a_new_education_experiment_finds_that_merit_pay.html (discussing potential benefits of a merit pay plan for teachers).

[48] *See, e.g.*, Liz Goodwin, *Teachers' Union President Calls Merit Pay Naive and Short-Sighted*, LOOKOUT (Sept. 26, 2011, 3:59 PM), http://news.yahoo.com/blogs/lookout/teachers-union-president-calls-merit-pay-naive-short-195909041.html (describing union response to merit pay plan).

[49] *See, e.g.*, Robert Post, *Compelled Subsidization of Speech:* Johanns v Livestock Marketing Association, 2005 SUP. CT. REV. 195, 215 (2005) (arguing that "[t]he First Amendment interest in not being compelled to subsidize particular speech derives from the First Amendment interest in not being compelled to express that particular speech").

[50] *See, e.g.*, Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 854 (2005) (arguing that the best justification for a doctrine against compelled speech is the "threat" it poses "to freedom of thought and the autonomous agent's control over her mind" as well as the "virtue of sincerity").

[51] *See, e.g.*, Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1091 (2005) ("[I]f there is a First Amendment right against compelled subsidization, it is grounded not in the liberty interests of dissenting individuals, but in compelled subsidization's potential harm to public political discourse.").

[52] From a doctrinal perspective, the First Amendment injury suffered by objecting workers can be described either as a harm to the First Amendment right to free speech or the First Amendment right to freedom of association. *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 & n.31 (1977) (noting free speech implications of compelled fees), *with id.* at 222 (recognizing that compelled fees "might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas"). Because the exact nature of the injury does not affect my analysis, I refer to the First Amendment harm from fair share fees generically, without differentiating between associational and speech components.

[53] Although the penalty for refusing to pay fair share fees is technically the loss of a government benefit (i.e., one's public sector job) that the government may not be required

B. The Collective Benefits of Fair Share Fees

On the other side of the debate lies the considerable benefits that many government employers and employees agree are generated by effective public sector unionization, of which fair share fees are an integral component. The connection between fair share fees and these benefits entails three logical steps.

At step one is the overarching view that providing public workers with a democratic voice in their workplaces will make workers more fulfilled and workplaces more productive. One aspect of this view is the recognition that giving workers a seat at the bargaining table regarding workplace policies and practices that may be the source of employee frustrations creates an "exit-voice trade-off" under which workers have an alternative to leaving their jobs (with resulting inefficiencies for their employers).[54] Indeed, the "voice" alternative is one that directly increases public sector efficiency because employees often have "useful knowledge of the foibles of the" employer's existing practices.[55] Treating public workers as shareholders with a stake—and say—in the outcome of their places of employment thus increases the likelihood that workers will channel their frustrations into productive desires to improve the quality of services rather than destructive antipathy (or exit). Empirical evidence supports this point; employee organization has been found to reduce employee turnover, search, and training costs and generally to increase workplace productivity.[56]

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to confer in the first place, the doctrine of unconstitutional conditions has long provided that the "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

[54] *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 94 (1984) (describing this trade-off).

[55] Kenneth G. Dau-Schmidt & Arthur R. Traynor, *Regulating Unions and Collective Bargaining*, *in* 2 ENCYCLOPEDIA OF LAW AND ECONOMICS: LABOR AND EMPLOYMENT LAW AND ECONOMICS 96, 109 (Kenneth G. Dau-Schmidt et al., eds. 2009).

[56] *See id.* (noting that "[i]t is uncontroversial that employee organization reduces turnover, search and retraining costs" in the U.S. and that "two-thirds of the studies of the effect of employee organization on productivity found positive effects"); *see also* Randall W. Eberts & Joe A. Stone, *Teachers Unions and the Productivity of Public Schools*, 40 INDUS. & LAB. REL. REV. 354, 354 (1987) (finding that, holding resources constant, unionized school districts are seven percent more productive for average students in terms of student achievement, though non-unionized districts may be more productive for students performing significantly above or below grade level). *But see* Cassandra M. D. Hart & Aaron J. Sojourner, *Unionization and Productivity: Evidence from Charter Schools* 1 (Inst. Study Lab. Discussion Paper, No. 7887, 2014), http://ssrn.com/abstract=2381139 (arguing that "aside from a one-year dip in achievement associated with the unionization process itself, unionization does not affect student achievement").

Step two in the connection between these benefits and fair share fees is the common sense observation that, from the public worker's viewpoint, an inadequately resourced bargaining representative with little power to actually influence employer decision making is little better than no representative at all. Underscoring this view, studies have shown that workers in right-to-work states (where unions are able to support the costs of bargaining from voluntary worker contributions only) experience lower wages and fewer benefits such as employer-sponsored health insurance and retirement savings.[57] Seen in this light, when faced with a choice between exit and voice channeled through a significantly weakened bargaining representative, a frustrated public employee may well choose "exit," thereby causing inefficiencies to the government employer.

Step three brings the point home for fair share fees. In the absence of a rule requiring *all* employees in a particular bargaining unit to share the costs of collective representation, the union's task of raising money to support bargaining activities would fall victim to a collective action problem: Individual workers would find it economically attractive to opt out of paying union fees, while free riding on the payments made by their co-workers.[58] This "free rider" problem arises as a product of two other concepts in American labor law: exclusive representation and the duty of fair representation. Under the practice of exclusive representation, the union selected by the majority of employees in a given unit constitutes the sole representative for bargaining and grievance activities.[59] The duty of fair representation in turn moderates the concern that a union designated as the exclusive representative might favor some employees and discriminate against others (such as those who supported a competing union or who prefer no union at all). The duty of fair representation thus requires a union to "exercise fairly the power conferred upon it in behalf of all those

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[57] ELISE GOULD & WILL KIMBALL, "RIGHT TO WORK" STATES STILL HAVE LOWER WAGES, ECON. POLICY INST. (2015), http://www.epi.org/publication/right-to-work-states-have-lower-wages/.

[58] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221–22 (1977) (describing the free rider problem in the context of union participation).

[59] *See, e.g.*, 29 U.S.C. § 159(a) (2012) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit."); Deborah A. Schmedemann, *Of Meetings and Mailboxes: The First Amendment and Exclusive Representation in Public Sector Labor Relations*, 72 VA. L. REV. 91, 92–93 (1986) ("The union selected by the majority of the employees in a given unit represents all employees, both those who voted for the union and those who did not. . . . As exclusive representative, the union often has control over certain workplace communications between employees and management.").

for whom it acts, without hostile discrimination against them."[60] Together, exclusive representation and the duty of fair representation create the incentive for employees to free ride on dues paid by others since they would be entitled to precisely the same union benefits without paying their own.

The significance of the free rider problem is as supported in evidence as it is in economic theory.[61] In the federal workforce, for example, where fair share fee agreements are not allowed, "[m]any federal employees are, indeed, free riders. . . . [T]he largest federal union, the American Federation of Government Employees (AFGE), represented approximately 650,000 bargaining unit members in 2012, but *less than half of them* were dues-paying members."[62] Indeed, "out of the approximately 1.9 million full-time federal" workers who are "represented by a collective bargaining contract, only one-third actually belong to the union and pay dues."[63] Fair share fee arrangements are aimed at thwarting this collective action problem, protecting unions from having to finance critical collective bargaining activities on a shoestring budget.

C. The Inevitable Tension in Fair Share Fees

With the two competing sets of values laid out, it is clear how fair share fees fail to respect both ends. Where permitted, fair share fees encroach upon workers' expressive interests by compelling them to financially support messages and positions to which they are opposed. Yet where such fees are not permitted, the free rider problem leads to the emasculation of union voice and a barrier to labor law's goals of meaningful employee voice and efficient public services.

Onlookers have long understood how fair share fees present an internal inconsistency between these two values. As one commentator wrote shortly after *Abood* was decided, "[t]he Court's willingness to defer to the legislative judgment on [fair share fees] clearly reflects judicial endorsement of a national labor policy for the public sector," yet that same endorsement does not "adequately serve[] the individual interests of employees who do not identify with the economic

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[60] Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944); *see generally* Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 130–52 (1992) (describing the duty of fair representation as interpreted and applied by the Supreme Court).

[61] As to theory, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 84–87 (1965) (describing the collective action problem).

[62] RICHARD C. KEARNEY & PATRICE M. MARESCHAL, LABOR RELATIONS IN THE PUBLIC SECTOR 26 (5th ed. 2014) (emphasis added).

[63] *Id*.

or political objectives of their unions."[64] *Abood* itself recognized the inherent conflict that fair share fees pose between First Amendment and labor law interests, noting that the fee requirement "counteracts the incentive that employees might otherwise have to become 'free riders,'" to the "benefits of union representation," even as it "has an impact on their First Amendment interests."[65] And as pro-labor commentators have argued more recently, the elimination of fair share fees may threaten public sector unionism as we know it, undermining the gains that unions have achieved for workers and public services more generally.[66] The two sides to the fair share fee debate may not agree on much, but they apparently agree on what is at stake—*either* public employers can respect the expressive interests of objecting workers by allowing them to opt out of fair share fees, *or* they can preserve the goals of collective representation by counteracting the free rider problem, but they can't do both.

It is interesting to note that public perceptions of how this debate should be resolved have shifted over time. Since the era of *Abood*, public opinion appears to be trending against labor in favor of a growing solicitude for the plight of objecting workers. In 1957, poll respondents were closely divided on whether "all workers should have to join and pay dues to give the union financial support," with forty-four percent taking the pro-compelled fee position and forty-one percent disagreeing. By 2014, however, public sentiment had swung markedly, with opponents of such arrangements out-numbering proponents two-to-one (sixty-four percent to thirty-two percent).[67]

Yet, even still, fair share fee clauses continue to apply to hundreds of thousands of potentially objecting public workers[68] today in twenty-two states and the District of Columbia.[69] All of this raises the

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[64] *See* Levinson, *supra* note 9, at 29.

[65] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977).

[66] *See supra* notes 24–26 (describing reactions from labor proponents to the grant of certiorari in *Friedrichs*).

[67] *Labor Unions Poll*, GALLUP, http://www.gallup.com/poll/12751/labor-unions.aspx (last visited Feb. 22, 2016).

[68] Precise data on how many employees are subject to compelled fair share fee clauses is difficult to come by, but one recent report states that 130,920 public workers paid "agency fees," or payments in lieu of dues under a binding union security clause, to the American Federation of State, County and Municipal Employees in 2013; 88,378 paid such fees to the National Education Association, and nearly a quarter million paid such fees to the Service Employees International Union (although many of those workers are in the private sector). Jason Hart, *Unions Take Forced Dues from More than 250,000 Public Workers*, WATCHDOG.ORG (Oct. 2, 2014), http://watchdog.org/174293/unions-take-dues/. Additional public employees paid agency fees to unions such as the American Federation of Teachers, but such data is not publicly reported.

[69] *See, e.g.*, ALASKA STAT. § 23.40.110(b) (2014); CAL. GOV'T CODE §§ 3502.5, 3513(k), 3515, 3515.7, 3546, 3583.5 (West 2010); CONN. GEN. STAT. ANN. § 5-280 (West 2007); DEL.

question of how we arrived here in the first place. If fair share fee arrangements implicate a severe tension between First Amendment and labor law principles, how did so many public employers come to prioritize the latter over the former? That is, did employers believe the fair share fee approach adequately protected First Amendment values, or was there perhaps some other reasoned explanation or historical account to explain why government employers invited (or failed to avoid) the First Amendment harms associated with compelled union fees? I turn to that now.

II
The Failure of Fair Share Fees to Reconcile Labor Law and First Amendment Values

I argue in this Part that the prevalence of public sector fair share fee clauses is the product of historical happenstance, not considered judgment by public employers as to the best institutional design for simultaneously accommodating labor law's concern with the benefits of collective representation and the competing First Amendment interests of objecting workers. More specifically, public sector fair share fees are the incidental outgrowth of two historical developments: the fact that public sector unions arose in the aftermath of, and were structured largely by analogy to, private sector unions; and the mistaken belief expressed by the Supreme Court that compelled fee clauses in contracts between private employers and their union counterparts implicate, but do not violate, the First Amendment. In view of this path-dependent trajectory, the answer to the question of why so many public employers settled on the practice of fair share fees as a way of reconciling the labor law and the First Amendment is to reject the question's premise: Employers were not consciously trying to reconcile the two at all.

Code Ann. tit. 19, § 1319 (2013); D.C. Code § 1-617.07 (2001); Haw. Rev. Stat. § 89-4 (2012); 5 Ill. Comp. Stat. 315/6(e) (West 2013), 115 Ill. Comp. Stat. 5/11 (West 2013); Me. Rev. Stat. Ann. tit. 26, § 629 (2007); Md. Code Ann., State Pers. & Pens. § 3-502 (LexisNexis 2015); Mass. Gen. Laws Ann. ch. 150E, § 2 (West 2013); Minn. Stat. Ann. § 179A.06 (West 2006); Mo. Ann. Stat. § 105.520 (West 2015); Mont. Code Ann. § 39-31-204 (2015); N.H. Rev. Stat. Ann. §§ 273-A:1, :3 (LexisNexis 2008); N.J. Stat. Ann. § 34:13A-5.5 (West 2011); N.M. Stat. Ann. § 10-7E-4 (LexisNexis 2004); N.Y. Civ. Serv. Law § 208(3) (McKinney 2011); Ohio Rev. Code Ann. § 4117.09(C) (West 2007); Or. Rev. Stat. § 243.672(c) (2015); 43 Pa. Stat. and Cons. Stat. Ann. § 1102.3 (West 2009); 6A R.I. Gen. Laws § 36-11-2 (2011); Vt. Stat. Ann. tit. 3, § 962 & tit. 16, § 1982 (2010); Wash. Rev. Code Ann. §§ 41.59.100, 80.100, 47.64.160 (West 2013).

A. Public Sector Union / Private Sector Union Equivalence

To understand the reasons behind, and origins of, the public sector's use of fair share fee clauses as a method for financing union activities, one must begin with the history and structure of unionism in the private sector.[70] That is because public sector unionism was, by and large, the late-emerging sibling of its private sector counterpart.[71] Whereas private sector unions secured the right to organize and bargain collectively under federal law in the 1926 Railway Labor Act (RLA) and the 1935 National Labor Relations Act (NLRA)—leading to a peak private sector union density of nearly thirty-five percent in the 1950s[72]—public sector workers throughout the country generally had no right to organize or bargain collectively at all until the 1960s.[73] Indeed, it was not until 1959 that Wisconsin became the first state to pass legislation guaranteeing public sector workers the right to organize and bargain collectively.[74] Federal employee bargaining rights were secured in 1962 when President Kennedy issued Executive Order 10,988, and a majority of states followed suit over the next decade and a half.[75] By 1970, membership in public sector unions had grown to more than four million.[76]

What accounts for the turnaround experienced by public sector unions in the 1960s and 70s? One important reason was the advocacy strategy employed by labor proponents,[77] which hammered home the proposition that public employee unions were indistinguishable from their private sector counterparts. In seeking to persuade elected officials and voters that public employees deserved the right to bargain collectively no less than their counterparts in private workshops, labor proponents' core argument was to equate the plight of public workers

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[70] *See, e.g.*, Russell A. Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 897–98 (1968) (noting reliance by state public sector relations commissions on the NLRA when making recommendations regarding public employment labor relations legislation).

[71] *See generally* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962 (2004) (explaining the historical context of the emergence of public sector unions in the 1960s and 1970s).

[72] *Id.* at 158.

[73] *See id.* at 193 ("[I]n the 1960s government workers and their allies dismantled significant portions of the legal edifice that had held back public sector labor.").

[74] *Id.* at 158–59.

[75] Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962); *see also* A.L. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. INDUS. & COM. L. REV. 993, 993 n.5 (1976) (listing twenty-nine states that had recognized public sector collective bargaining rights by 1976).

[76] SLATER, *supra* note 71, at 193.

[77] For an excellent comprehensive discussion of the causes of public sector labor's emergence in the 1960s, see generally *id.*

and their peers in the private sector who had already enjoyed the right to organize for decades. As one professor of industrial relations argued in 1957, public workers were "entitled to rights similar to those enjoyed by the rest of the working population."[78] A petition to the governor signed by Wisconsin workers in the same era likewise argued that "public employees should have the same right to organize and negotiate . . . as our fellow workers in private industry."[79] By 1962, this view had gone so far as to become a campaign slogan, with Wisconsin gubernatorial candidate John Reynolds stating before the 1962 election (which he would eventually win) that he supported the objective of "provid[ing] collective bargaining rights for municipal employees similar to that provided to employees in private industry."[80]

As a corollary to the private sector equivalency argument for recognizing public sector collective bargaining rights, labor proponents also contended that many of the arrangements that were appropriate for structuring private sector labor relations were equally appropriate for public sector unions.[81] Thus, the states that enacted public sector bargaining laws in the 1960s adopted the same core organizational principle that had guided private sector labor relations for decades under the RLA and NLRA: the notion of "exclusive representation" by the single "union or organization selected by the majority of employees in a defined bargaining unit."[82] So, too, did states adopt

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[78] Harry H. Rains, *Collective Bargaining in Public Employment*, 8 LAB. L.J. 548, 550 (1957); *see also, e.g.*, Rollin Bennett Posey, *Employee Organization in the United States Public Service*, 17 PUB. PERSONNEL REV. 238, 241 (1956) ("[T]he essence of unionism in the public service—*as in private employment*—is the endeavor to improve wages and hours and working conditions." (emphasis added)); Harry T. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 932 (1973) (recognizing the growing trend in the States towards applying "private sector principles to guide the development of labor relations in the public sector"); N.J. PUBLIC & SCHOOL EMPLOYEES' GRIEVANCE PROCEDURE STUDY COMMISSION: FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 15 (1968) ("As experience in private employment suggests, stable negotiating relationships will benefit both public employees and the general public.").

[79] SLATER, *supra* note 71, at 172.

[80] *Id.* at 190.

[81] *See supra* note 78 (noting how public sector unions are similar to their private sector counterparts); *see also* N.Y. GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 20 (1966) (noting that public employee labor relations could be modeled on "the methods developed since 1935 in the private sector").

[82] Smith, *supra* note 70, at 897. *Compare, e.g.*, 29 U.S.C. § 159(a) (2012) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . ."), *with* 5 ILL. COMP. STAT. 315/6 (West 2013) ("A labor organization designated . . . by a public employer as the representative of the majority of public employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining.").

the private sector NLRA approach of defining the basic contours of labor-management relations by enumerating certain unfair labor practices that employers and their union counterparts should avoid.[83]

And what of the money question—the manner in which public sector unions' bargaining activities were to be funded? Here as well, union advocates pitched the same notion of public sector / private sector union equivalency. As one contemporary argued, the concept that workers should be required to pay for union costs as a condition of employment was "fundamentally the same issue" in "the public sector . . . as in the private sector . . . . No special dimension results from the fact that a union represents public rather than private employees."[84]

In practical terms, this meant that the costs of public sector unions would be borne by workers, willing and unwilling alike. For in the private sector, unions had long bargained for "union security clauses" in their collective bargaining agreements, or provisions under which employers agree to require all employees to pay some level of union support as a condition of employment.[85] Indeed, the initial version of the NLRA, the Wagner Act of 1935[86] permitted private sector unions to bargain for the most extreme form of union security: the "closed shop," which forbade employers even to hire a non-member of the union. The closed shop was eliminated twelve years later in the Taft-Hartley Act.[87] But Taft-Hartley still permitted "union shop" security agreements restricting employment to workers who would *eventually* join the union,[88] with membership loosely defined to

[83] *See* Smith, *supra* note 70, at 897 (noting that the state committees in charge of proposing public sector labor laws "agreed that public sector labor legislation should include a prescribed set of public employer obligations toward employees and employee unions modeled after the . . . [NLRA]," and that "a set of complementary obligations [should] be imposed on labor organizations and employees").

[84] HARRY H. WELLINGTON & RALPH K. WINTER, JR., THE UNIONS AND THE CITIES 95–96 (1971); *see also* SLATER, *supra* note 71, at 172 (describing how the AFSCME lobbied Wisconsin lawmakers to support a public sector bargaining law by "appealing to notions of rights now well established in the private sector").

[85] *See* Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51, 57–58 (1990) (describing types of union security clauses).

[86] National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, § 8(3), 49 Stat. 449 (1935). The National Labor Relations Act governs most private sector labor relations in the United States. The chief exception is for railway employees, who are governed by the Railway Labor Act, ch. 166, 49 Stat. 1189 (1936). Unlike the NLRA, the Railway Labor Act has never condoned closed shop agreements. *See* Comms. Workers v. Beck, 487 U.S. 735, 753 (1988) (discussing the Railway Labor Act's adoption of an open shop system); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 751–53 (1961) (same).

[87] Labor Management Relations (Taft-Hartley) Act, ch. 120, § 7, 61 Stat. 136, 140 (1947) (codified at 29 U.S.C. § 157 (2012)).

[88] 29 U.S.C. § 158(a)(3) (2012).

encompass essentially just the payment of fees.[89] As a result, the common form of private sector union security at the dawn of the public sector union era required all employees to share the costs of the union's collective bargaining activities (even if not formal membership).[90]

To be sure, this was not the norm in all states; one of the most significant provisions of the 1947 Taft-Hartley Act allowed states to decide whether to prohibit union security agreements in the private sector altogether,[91] effectively delegating to states the choice whether to adopt a right-to-work regime. Twenty-four states have exercised that option to date,[92] and many of those states have taken the same negative view of union security in the *public* sector,[93] effectively requiring unions to survive on the basis of voluntary member contributions. But the other states have made the competing policy judgment that the benefits produced by public sector unionization are significant enough to justify contract provisions aimed at ensuring the

[89] *See* NLRB v. Gen. Motors, 373 U.S. 734, 742 (1963) (stating that when § 8(a)(3) describes eventual union "membership" as a permissible condition of employment, it really means "'[m]embership' . . . whittled down to its financial core"). Thus, because "membership" in a union under the NLRA boils down to whether the employee has paid dues, the "union shop" system is often equated with another form of union security known as the "agency shop," which requires employees to pay dues but does not require them to join or affiliate in any other way. *See* HERMAN, *supra* note 38, at 122 (defining "agency shop" and "union shop" agreements); Levinson, *supra* note 9, at 3 n.4 (same).

[90] *See* Dau-Schmidt, *supra* note 85, at 53 (noting that, as of 1988, "over ninety percent of collective bargaining agreements" in non-right-to-work states "covering over six million workers, include[d] union security agreements").

[91] Labor Management Relations (Taft-Hartley) Act, ch. 120, § 14(b), 61 Stat. 136, 151 (1947) (codified at 29 U.S.C. § 164(b) (2012)). Section 164(b), which is phrased as an exception to the NLRA's general rule of state law preemption, places the NLRA in notable contradistinction against the Railway Labor Act, which has a union shop provision that does preempt contrary state law. At last count, twenty-four states have adopted right-to-work statutes thereby exempting themselves from the NLRA's union shop system. The federal government also prohibits compulsory union fee arrangements. *See* 5 U.S.C. § 7102 (2012) (providing that federal employees "shall have the right to form, join, or assist any labor organization, *or to refrain from any such activity*, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right" (emphasis added)); 39 U.S.C. § 1209(c) (2012) (providing the same for postal workers).

[92] *See Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., http://www.nrtw.org/rtws.htm (last updated Feb. 12, 2016) (identifying Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming as right-to-work states).

[93] *See* Brief for the States of New York, et al. as Amici Curiae in Support of Respondents at 7–8 & App., Harris v. Quinn, 134 S. Ct. 2618 (2014) (noting that of the forty-one states that authorize collective bargaining for public employees, twenty-two have enacted statutes authorizing government employers to agree to fair share fee clauses, while nineteen have not).

unions' financial vitality.[94] In these states, the upshot is that by the time lawmakers were designing their public sector labor relations and attendant union-financing systems in the 1960s and 1970s, there was already a well-established private sector union norm of requiring willing and unwilling employees alike to shoulder the costs of collective bargaining as a condition of employment. And public sector union proponents were quick to endorse that norm in the government workplace. As one commentator wrote, "the need for union security is as great in the public sector as it is in the private sector" because, "[i]n both areas, labor peace is furthered by reducing tensions among employees and between unions and management."[95]

In sum, in first deciding how they would finance the costs of collective bargaining, government employers did not engage in debates over whether the fair share fee model was superior to alternative methods in terms of reconciling the objectives of effective worker representation and protecting workers from compelled subsidies. The adoption of fair share fee agreements instead has its genesis in the simple fact that the same practice was already in use in the private sector model. Although the former did not follow from the latter as a matter of logical necessity—one can imagine pro-union public employers utilizing a different method for financing union activities than their private employer counterparts—the two went hand-in-hand because advocates of public sector unionization in the 1960s and 70s mustered forceful arguments about the equivalency of private and public workers to justify their cause. Given the rapid success that these arguments achieved in such a short timeframe,[96] it was perhaps unsurprising that by 1969, a large portion of public sector union contracts contained some form of union security, modeled (just as the notion of public sector unionism itself) after the private sector.[97] The

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[94] *See, e.g.*, HOUSE OF REPRESENTATIVES OF THE STATE OF MICHIGAN, JOURNAL OF THE HOUSE, S. 28, at 598 (1973) (Rep. Bradley), quoted in Zwerdling, *supra* note 75, at 1009 n.104 ("[I]f a public employer and a union representing its employees so negotiate, they can require an agency shop or service fee exactly the same . . . as the dues which the union requires of its own members. . . . This bill will contribute to fairness and stability of labor relations in the public sector . . . .").

[95] Zwerdling, *supra* note 75, at 1013; *see also* Patricia N. Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 189 (1975) ("Moreover, the same reasons that justify legislation authorizing agreements between unions and private employers for the discharge of employees who fail to contribute at least some money to the support of their bargaining agent apply equally well where a government employer is involved.").

[96] *See supra* notes 75–77 and accompanying text (discussing growth of public sector unions in the 1960s and 70s).

[97] *See* Michael S. Wolly, *Union Security and the Nonunion Public Employee: Harmony or Conflict?*, 21 CATH. U. L. REV. 615, 615 (1972) (noting that forty-three percent of one public sector union's 700 contracts included some form of union security).

practice remains common today. By one recent estimate, counting across three unions that publicly report their number of objecting fee payers (the AFSCME, NEA, and SEIU), more than 250,000 objecting public workers were forced to pay fair share fees in 2013.[98]

B. The Supreme Court's Mistaken Analysis in First Amendment Challenges to Private Sector Union Security

The notion that the costs incurred by public sector unions should be paid for via the same financial arrangements utilized in the private sector might have given government employers some pause. After all, it is one thing for a *private* employer to condition a worker's continued employment on the worker's support for a particular message. Such conditions are, for better or worse, altogether ordinary: Consider the fates of Lynne Gobbell, an Alabama woman who was fired from her job at a housing insulation company for driving to work with a bumper sticker supporting John Kerry;[99] Chris Kluwe, a punter for the Minnesota Vikings who alleges he was fired for advocating on behalf of the rights of same-sex couples;[100] and Michael Italie, a sewing-machine operator who was fired for expressing views supportive of the Socialist party.[101] Because the protections of the First Amendment are not triggered in the absence of state action,[102] private employers may compel their workers to take or not take certain positions that would be dubious if compelled by the government.[103] Public employers might have therefore been more worried than their private sector counterparts about the First Amendment implications of

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98 *See supra* note 68 (providing data on frequency of fair share fee payments).

99 Timothy Noah, *Bumper Sticker Insubordination*, SLATE (Sept. 14, 2004), http://www.slate.com/articles/news_and_politics/chatterbox/2004/09/bumper_sticker_insubordination.html.

100 Chris Kluwe, *I Was an NFL Player Until I Was Fired by Two Cowards and a Bigot*, DEADSPIN (Jan. 2, 2014), http://deadspin.com/i-was-an-nfl-player-until-i-was-fired-by-two-cowards-an-1493208214.

101 Timothy Noah, *Can Your Boss Fire You for Your Political Beliefs?*, SLATE (July 1, 2002), http://www.slate.com/articles/news_and_politics/chatterbox/2002/07/can_your_boss_fire_you_for_your_political_beliefs.html.

102 *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) (explaining that the "right of freedom of thought protected by the First Amendment" is one against "against state action").

103 Compare the private employee examples, *supra* notes 99–101, with, for example, *Fire Fighters Ass'n v. Barry*, 742 F. Supp. 1182, 1185 (D.D.C. 1990) (finding that firefighters who displayed bumper stickers criticizing their jobs as a "joke" were protected from punishment for such speech under the First Amendment). *See also* Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006, 1009 (Miss. 2004) (finding that a state judge's letter to a newspaper expressing anti-gay comments is speech protected under the First Amendment, such that the judge may not be punished on that basis).

forcing workers to subsidize the costs of union speech and advocacy with which those workers disagree.

Yet any pressure on government employers to consider alternatives to public sector union security was alleviated by a pair of Supreme Court decisions issued in 1956 and 1961, just as calls for public sector labor rights were gaining traction. Both cases, *Railway Employees Department v. Hanson*[104] and *International Association of Machinists v. Street*,[105] involved First Amendment challenges by employees against *private sector* railroad unions that had negotiated union shop agreements with employers under the Railway Labor Act.[106] In *Hanson*, a group of objecting railroad employees argued that the union shop "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights."[107] The Court disagreed, explaining in cursory fashion that "[o]n the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."[108]

The difficulty with this reasoning is that there is a major difference between the private sector union security agreement at issue in *Hanson* and a state law compelling lawyers to join state bar associations: The latter involves state action, whereas the former does not. That is, while state laws directly compelling individuals to enter into unwilling associations (and make undesired financial payments) trigger the First Amendment, a private sector union security clause is simply a contractual provision voluntarily agreed to by a private

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104 351 U.S. 225 (1956).

105 367 U.S. 740 (1961).

106 The Railway Labor Act added a union shop provision in 1951, four years after the Taft-Hartley Act did so in the context of the NLRA. *See* Railway Labor Act, ch. 1120, § 2(a), 64 Stat. 1238, 1238 (codified as amended at 45 U.S.C. § 152 (1952)) (permitting employers to require union membership within sixty days of employment); Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 101, § 8(a)(3), 61 Stat. 136, 140–41 (1947) (codified as amended at U.S.C. § 158(a)(3) (2012)) (permitting employers to require union membership within thirty days of employment).

107 351 U.S. at 236.

108 *Id*. at 238. As Justice Alito's opinion for the Court in *Harris* noted, this was an odd rationale to rely on because the Court had yet to consider the constitutionality of integrated bars. *See* Harris v. Quinn, 134 S. Ct. 2618, 2629 (2014) (noting that the constitutionality of integrated bars was "hardly a foregone conclusion"). When the Court did eventually review such arrangements five years after *Hanson*, the case provoked a strong dissent from Justice Douglas—the author of *Hanson* itself. Lathrop v. Donohue, 367 U.S. 820, 877 (1961) (Douglas, J., dissenting).

employer and a private union;[109] the Railway Labor Act *permits* such agreements but nowhere compels them.[110]

The Court held in *Hanson* that state action existed nonetheless because the Railway Labor Act's provision authorizing union shop agreements preempted contrary state law.[111] But as Professors Fisk and Chemerinsky have convincingly explained, this argument is "specious" because "[i]n no other situation has federal statutory preemption of state regulation of private sector employment relationships created the state action necessary to give employees First Amendment protections from employer discipline."[112] Indeed, "[i]f federal preemption of state laws regulating employment contracts renders enforcement of the affected provisions of the employment agreement state action, then the Court's entire jurisprudence under the Federal Arbitration Act preempting state regulation of arbitration agreements in employment contracts also renders such agreements state action."[113] And if that is true, then a private employer that fires an employee for refusing to agree to an arbitration clause in her employment contract would be deemed to have engaged in state action sufficient to justify the employee bringing a First Amendment claim.[114] Reflecting the degree to which such logic is out of step with the Court's modern jurisprudence, one commentator has noted that "the Court's conception of state action has since [*Hanson*] narrowed . . . . The Court now requires substantial grants of government authority or direct government coercion in promoting the activity in question to elevate a private party's actions to state action,"[115] coercion and state involvement that were simply not present in *Hanson*.

The Court did not back away from its state action holding in *Street*, decided five years later. In that case, dissenting railroad

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[109] Such private parties can surely agree by contract to limit (or compel) speech and association without implicating the First Amendment in ways that the state cannot. As Justice Powell noted in his concurring opinion in *Abood*, "[u]nder the First Amendment the government may authorize private parties to enter into voluntary agreements whose terms it could not adopt as its own." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 250 (1977) (Powell, J., concurring in the judgment).

[110] *See* 45 U.S.C. § 152 (2012) ("[Any carrier and labor organization] shall be permitted . . . to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment . . . all employees shall become members of the labor organization representing their craft or class . . . .").

[111] 351 U.S. at 232 & n.4.

[112] Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023, 1037–38 (2013).

[113] *Id.* at 1038 n.60.

[114] *See supra* note 113 and accompanying text (arguing that enforcement of arbitration clauses in employment contracts would constitute state action under the theory adopted in *Hanson*).

[115] Dau-Schmidt, *supra* note 85, at 111.

employees alleged that the union dues they had been forced to pay were used not only for the costs of bargaining (as in *Hanson*), but also "to finance the campaigns of candidates for federal and state offices whom [they] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed."[116] As a result, the Court remarked, the record in *Street* raised "constitutional questions" of the "utmost gravity" that had been reserved in *Hanson*—an implicit agreement with *Hanson*'s state action ruling.[117] That assumption was not without dispute; Justice Frankfurter dissented from this implied state action theory, arguing that "[t]here is not a trace of compulsion involved—no exercise of restriction by Congress on the freedom of the carriers and the unions."[118]

In the end, the *Street* Court avoided any First Amendment questions by construing the Railway Labor Act's statutory text to "deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[119] And in doing so, the Court established by default the "fair share fee" union security agreement, under which employers may require dissenting employees to pay an amount of fees equal to their share of the expenses incurred by the union during "the negotiation [and] administration of collective agreements" and "in the adjustment of grievances and disputes,"[120] but may not charge dissenting employees for any share of expenses on overtly political causes or campaigns.[121] Subsequent Supreme Court decisions extended this fair share fee regime to the rest of the private sector under the NLRA (*Communications Workers of America v. Beck*)[122] as well as to the entire public sector (*Abood*);[123] the former as a matter of statutory construction and the latter as a First

116 Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 744 (1961).

117 *Id*. at 749.

118 *Id.* at 807 (Frankfurter, J., dissenting).

119 *Id.* at 768–69.

120 *Id.* at 768.

121 *Id.*

122 Commc'n Workers of Am. v. Beck, 487 U.S. 735, 762 (1988).

123 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977) (finding compelled fair share fees permissible where used by unions for "collective-bargaining, contract administration, and grievance-adjustment purposes").

Amendment rule.[124] Such fair share fee agreements are now the default form of union security in the public sector.[125]

For present purposes, though, the key takeaway is that the Supreme Court's rulings in *Hanson* and *Street* relieved public employers of pressure to consider alternative means for financing union collective bargaining costs that might respect objecting worker expressive interests and the objectives of collective bargaining at the same time. Instead, public employers were free to rely on *Hanson* and *Street* to predict that, if private sector union security clauses trigger the First Amendment but are constitutionally justified, then there is no reason why public sector clauses should fare any differently. As expressed by a Harvard Law Review Note published just months after *Street* was decided, any "distinction" between the public and private employment contexts "seems insufficient . . . to overcome the government's interest in encouraging union responsibility, stabilizing its labor relations, and improving employee morale," the very labor law interests that had carried the day in *Hanson*.[126]

The belief by public employers that *Hanson* and *Street* had already resolved this issue in their favor was vindicated in *Abood*. The *Abood* Court started its analysis from the proposition that the two private sector union fee cases, *Hanson* and *Street*, "on their face go far toward resolving the issue."[127] In fact, the Court characterized the very question before it as whether the challengers could advance sufficient "reasons why those decisions should not control decision of the present case."[128] And in the Court's view, neither the heightened state action involved in the public employment context nor the more overtly political nature of bargaining in the public sector were suffi-

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[124] An elaborate body of case law has also emerged to help courts determine the proper boundaries (and remedies) for when a union has traversed the line from a chargeable fair share expenditure to a non-chargeable political one. *See, e.g.*, Locke v. Karass, 555 U.S. 207, 221 (2009) (holding that national litigation expenses are chargeable so long as subject matter would have been chargeable in a local litigation); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 524 (1991) (holding that pro rata share of costs of otherwise chargeable activities associated with state and national union affiliates were chargeable); Chi. Teachers Union v. Hudson, 475 U.S. 292, 310–11 (1986) (finding inadequate union's procedure for reviewing employee objections to fair share fee deductions); Ellis v. Bhd. of Ry. Clerks, 466 U.S. 435, 448–53 (1984) (holding that costs of a union convention, social activities, and publication were chargeable but costs of non-bargaining or grievance litigation were not).

[125] *See* HERMAN, *supra* note 38, at 350 ("The form of union security typically found in the public sector is the fair-share provision.").

[126] Note, *Labor Relations in the Public Service*, 75 HARV. L. REV. 391, 403 (1961).

[127] 431 U.S. at 217; *see also id.* at 226 ("[T]hose two decisions of this Court appear to require validation of the agency-shop agreement before us.").

[128] *Id.* at 226.

cient to distinguish public and private sector fair share fees.[129] The Court therefore found the outcome of the First Amendment challenge in *Abood* to be a *fait accompli* because "the judgment clearly [and already] made in *Hanson* and *Street* is that such interference [with employee First Amendment rights] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[130]

To summarize, the historical development of public sector fair share fees does not reflect a considered analysis by public employers regarding how best to square the competing interests of objecting workers with the benefits of collective representation. Instead, public employers simply adopted the same union financing model that was common in private sector workshops under the reasonable belief (in the aftermath of *Hanson* and *Street*) that this model was consistent with the First Amendment. Public sector fair share fees are, in other words, logically contingent—neither true nor false by necessity. And that observation suggests that there may be benefits to thinking afresh about ways in which government employers may achieve their labor law objectives without burdening employee First Amendment interests. The next section proposes such an alternative.

III
The Government-Payer Alternative

Freed from the historical contingencies that led to the existing model of compelled financial support for public sector unions—and aware of the irreducible tension between that model and objecting workers' First Amendment freedoms—government employers might have employed different practices to reconcile the competing values of meaningful worker representation and concern for individual

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[129] *Id.* at 226–32.

[130] *Id.* at 222. It is hard to oversell the significance of *Hanson*'s mistaken holding that the First Amendment is implicated to begin with by a private sector employer's decision to agree to a union security clause. In the absence of that ruling (and *Street*'s implied state action conclusion as well), then the question posed in *Abood* would have been decided on a clean slate. That fact, in turn, would have changed the entire analytical approach undertaken in *Abood*. For rather than deeming the case already controlled by *Hanson* and *Street*, the closest analogy in the Court's precedent would have been *Elrod v. Burns*, a decision that *struck down* compelled fees and association in the context of a public employer that sought to condition employment on support for a particular political party. Elrod v. Burns, 427 U.S. 347, 359–60 (1976) (plurality opinion); *see also infra* Section IV.A.2 (discussing whether strict scrutiny or *Pickering* balancing is the proper test to apply). Government employers attuned to the outcome in that similar context might well have concluded that similar compulsion is likewise impermissible in the public sector union context.

expressive choice. For example, from an institutional design perspective, government employers could have adopted *non*union interventions such as informal surveys, focus groups, and committee meetings involving workers and management in which employee viewpoints are voluntarily collected for consideration in setting workplace policies moving forward.[131] Alternatively, a state might have preferred to create a more formal nonunion infrastructure, perhaps in the form of an independent governmental agency tasked with identifying and advocating public employee interests regarding wages, hours, and other policies affecting employment.

Each of these alternatives provokes one to think about the question of *who should pay* for the costs of worker representation. Typically, when a government entity pursues an objective that it believes will benefit the efficiency of its own operations and the quality of public services writ large, the presumption is that the government will pay for that objective out of general tax revenues.[132] Thus, just as states do not charge special exactions upon particular workers to offset the costs of occupational safety and health agencies, instead funding those costs out of general treasury funds, in neither of the hypothetical alternatives would it be natural for a public employer to try to charge the costs of informal surveys, meet and confer sessions, or independent governmental agency bargaining activities to public workers.

Once a government employer chooses to contract out the task of worker representation to a third-party—and permits its *employees* to choose that party by popular vote, as is the case in the typical public sector union[133]—it becomes more sensible for the government to consider passing the costs of representation on to employees, insofar as the government employer and employees may both stand to benefit (although that would also be true of nonunion models too). But the key point from the government employer's perspective is that the choice between paying for the costs of worker representation directly and passing those costs on to employees may actually reduce to eco-

131 Although not commonplace, there are examples of such informal interventions in public workplaces focused often on a particular issue such as workplace safety. For instance, as part of the Oregon Safe Employment Act of 1990, the State of Oregon required all public employers with more than ten employees to "establish and administer a safety committee or hold safety meetings" for the purpose of addressing employee concerns specifically with respect to workplace safety. OR. REV. STAT. § 654.176 (2013).

132 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014) (noting that the government could have paid for contraceptive coverage directly in order to achieve its interests in women's health).

133 *See, e.g.*, 5 ILL. COMP. STAT. 315/9 (2013) (providing for election of a public sector union by a majority of workers in a bargaining unit).

nomic formalism. After all, any dollar the employee is forced to spend to subsidize the union's bargaining activities is a dollar the union can negotiate back for the worker in the form of higher wages, just the same as any dollar that the employer spends under a direct reimbursement regime can be recouped by a corresponding offset to employee wages.[134] And if that is right, then no matter the structural choice that a government employer makes—from internalizing worker representation functions through informal nonunion surveys, to a governmental agency tasked with worker advocacy, to something approaching the existing system where workers select a third-party bargaining representative—the question of *who should pay* for the actual costs of representation is actually a fairly insignificant one given that the money always comes, in the end, from the public employer.

To see how this is so, consider what would happen if a present-day public employer were to replace its fair share fee agreement for financing the costs of collective bargaining with a direct government-payer clause. Starting with the basics of how fair share fees operate in real life, the standard practice is for a union to send out an annual notice[135] informing employees how much it intends to charge in dues in the upcoming year.[136] Included in the notice is an estimate as to what percentage of those dues will be spent on chargeable activities, or conduct germane to the union's collective bargaining activities.[137] Employees are then given an amount of time to object to the payment of the non-germane political activities; any objectors are charged only the percentage corresponding to the chargeable activities (i.e., a fair share of the overall fees). Pursuant to most union contracts, those amounts are then automatically deducted from each employee's paychecks—a practice known as "dues checkoff."[138] The fair share fee

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[134] I consider below, *infra* Section V.B, the question whether a government reimbursement regime poses other problems not presented by a fair share fee regime, for example whether a union paid directly by the government will be less zealous in advocating worker interests than a union paid by way of a government-compelled fair share fee clause.

[135] The notice is known as a "*Hudson* notice" after the Supreme Court's decision in *Chicago Teachers Union v. Hudson*, which established the basic requirements for protecting the ability of dissenting employees to object to non-chargeable political fees. 475 U.S. 292, 304–07 (1986) (describing deficiencies in the procedural protections afforded to dissenting employees under a Chicago Teachers Union bargaining agreement).

[136] *See, e.g.*, Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2285 (2012) (describing the use of a *Hudson* notice).

[137] *See id.* (providing an example where 56.35% of fees were estimated to be spent on chargeable expenses).

[138] *E.g.*, 5 ILL. COMP. STAT. 315/6(e) (2013) (providing that the fair share fee is "deducted by the employer from the earnings of the nonmember employees and paid to the employee organization" directly); *see also* Levinson, *supra* note 9, at 3 n.4 (describing "dues checkoff" procedures); Michael S. Wolly, Comment, *Union Security and the Nonunion Public Employee: Harmony or Conflict*, 21 CATH. U. L. REV. 615, 615 n.3, 618

amounts are generally not large; public sector unions frequently charge somewhere in the neighborhood of one percent of an employee's wages.[139]

To put a more concrete face on the problem, imagine a government employer that pays its employees an average of $50,000 per year.[140] Assume that the union estimates its annual fair share fees to be equal to one percent of employee wages, or $500 per employee per year on average. Under the terms of a standard fair share fee agreement, each employee would pay the union that $500 over the course of the year, with proportional amounts of that total deducted from each paycheck. So if our hypothetical bargaining unit has 1000 employees, the union will ultimately receive the total amount of money it has budgeted for germane activities—$500,000 ($500 multiplied by each of the 1000 workers)—as the sum of the biweekly deductions from employee paychecks.

How might the government employer pay for the bargaining costs incurred by its union counterpart, thereby fulfilling its interest in labor peace without forcing any objecting employee to choose between paying the $500 in annual fair share fees and losing her job? The government employer can just renegotiate its collective bargaining agreement so that it will reimburse the union for its chargeable bargaining costs ($500,000 in our hypothetical) out of general treasury funds directly, rather than doing so *in*directly by deducting $500 from each employee's paycheck—a move that would free objecting employees from the compulsion of making objectionable financial contributions to their unions.

If the direct reimbursement workaround were to stop there, the objection might be raised that the proposed solution is rather costly for the government, since it would force the employer in our hypothetical to take on an additional expenditure in the amount of $500,000. But this is where the other piece of the puzzle comes into play: The government employer can simply reduce gratuitous benefits

(1972) (same). Note, however, that an employee's participation in dues checkoff is voluntary; the employee is free to remit fair share fees to the employer through some other system of the employee's choosing. *See In re* WKYC-TV, Inc., 359 N.L.R.B. No. 30, at *8 (2012) ("[A]n employee's participation in dues checkoff is entirely voluntary; 'employees cannot be required to authorize dues checkoff as a condition of employment,' even where a contract contains a union-security agreement." (quoting Bluegrass Satellite, Inc., 349 N.L.R.B. 866, 867 (2007))).

139 *See, e.g.*, *Knox*, 132 S. Ct. at 2285 (providing an example of monthly dues set at one percent).

140 As in any workforce, some of our hypothetical employees make more than $50,000 and some make less, but for the sake of simplicity, I assume that the average annual salary is $50,000.

or future employee wages by a proportional amount to offset the added cost that it ends up paying to reimburse the union. To illustrate, the government employer in our hypothetical could pay $500,000 to the union to reimburse it for its bargaining activities, while offsetting that new expenditure by making corresponding cuts to gratuitous benefits to which the employer's 1000 employees have no claim of entitlement—perhaps by cancelling the annual holiday party, paying a contractor to clean employee offices biweekly rather than weekly (or asking employees to clean after themselves), lowering the thermostat during winter months, purchasing less costly phone service, and so on.[141] Were the government to do so, all parties would attain their desired ends: The objecting employee would not be compelled to pay the union for its bargaining activities, and the government would realize its interest in having an adequately funded union counterpart with whom to negotiate (without any net impact on the government's operating budget).

Alternatively, the government employer could recoup the costs of reimbursing the union for its bargaining activities by negotiating marginally lower *future* wage rates, to go into effect after the expiration of the existing collective bargaining agreement.[142] Thus, for example, if average wages are increasing in the relevant sector by three percent, the government could negotiate a prospective pay raise beginning in the first year at two percent (but growing at the same three percent in subsequent years), using the initial difference to offset the union's bargaining costs. Using the running hypothetical, instead of raising the average salary of its 1000 employees to $51,500 (i.e., a three percent market raise over the prior year), the government employer could raise average salaries to $51,000 (i.e., a two percent raise) in the first year while using the difference to reimburse the union for the annual cost of its bargaining activities ($500,000, or $500 multiplied by 1000 employees). In this scenario, too, the government would achieve its

[141] Although these employee benefits may seem trivial in isolation, they do add up when aggregated—and could be enough to offset the relatively minor cost of union bargaining activities (which, as mentioned, are often on the order of just one percent of employee wages). One expert has indicated that individual agencies, local governments, and state governments can save "roughly 5 percent of total operating spending" through cost-cutting measures that include elimination of waste in "government-wide functions that affect all departments." Eric Schnurer, *The Secret to Cutting Government Waste: Savings by a Thousand Cuts*, THE ATLANTIC (July 2, 2013), http://www.theatlantic.com/politics/archive/2013/07/the-secret-to-cutting-government-waste-savings-by-a-thousand-cuts/277458/.

[142] That the salary reduction should occur as part of reduced *future* wage raises (in which employees have no legal entitlement) is essential for reasons explained below. *Infra* note 270 and accompanying text.

interests with no additional costs and employees would not be compelled to turn over any money to support a cause to which they object.

From the viewpoint of public employers and their union counterparts, then, there is no necessary financial difference between a system that pays for the union's costs of collective bargaining directly from the government employer's general treasury funds and a system that instead channels those funds through employee paychecks. Changing the payment system would therefore not disrupt government employers' labor law objective of pursuing the collective productivity benefits of worker representation. But from the viewpoint of a dissenting worker, the change wrought by the government-payer approach is significant: It is the difference between having no financial affiliation with an organization and message to which she objects and being required to direct a portion of one's paycheck to that same end every pay period. The government-payer alternative reveals, in other words, that the all-or-nothing fight between labor law and the First Amendment over public sector union financing is unnecessary: There is a way to realize both sets of objectives.

IV
The Constitutional Consequences of the Government-Payer Alternative

The government-payer alternative is not merely a theoretical solution to union financing that accommodates competing labor law and First Amendment principles. Instead, once the government-payer workaround is identified, the workaround actually becomes part of the constitutional analysis itself under the familiar rule that restrictions on First Amendment expressive rights must be the least restrictive means for achieving a compelling interest.[143] And as this Part explains, the direct reimbursement solution has real doctrinal bite: It is a less restrictive alternative that renders existing fair share fee arrangements unconstitutional by comparison. If public employers wish to ensure the financial security of their union counterparts, in other words, First Amendment doctrine requires that they do so using the direct government-payer approach. For this reason, the government-payer alternative is something of a double-edged sword for labor proponents. It affords them an alternative path to financial security for public sector unions in the event of an adverse ruling in

[143] *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 363 (1976) (plurality opinion) (observing that infringements on First Amendment speech and association are impermissible unless they "further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end").

Friedrichs, but it also provides objecting workers a potent legal argument against fair share fees.

This Part explains this conclusion in two sub-sections. First, it begins by discerning the proper standard for reviewing First Amendment challenges to compelled union fees. Given that *Abood* considered a First Amendment claim against public sector union fees all the way back in 1977, one might think that the standard of review for such claims would be by now well-established. But as the majority opinion in *Harris v. Quinn* makes clear, there continues to be analytical uncertainty over the proper First Amendment scrutiny.[144] Second, after resolving that the proper standard of review is strict scrutiny, I apply that test to fair share fee arrangements.

A. Identifying the Proper Test

This sub-part begins with a brief review of the vague and inconsistent ways in which the Supreme Court has reviewed challenges to union fees in prior cases. It then argues that union fee challenges ought to be reviewed under the same rule that applies to challenges to political patronage practices, where a government employer threatens to fire an employee who does not affiliate with or subsidize the political party of the employer's choosing. The Court has found such conditions to be impermissible unless they "further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end."[145]

1. Uncertainty in the Court's Prior Union Fee Cases

The Court's initial attempt to evaluate the First Amendment implications of a union security agreement came in *Railway Employees' Department v. Hanson*.[146] As noted above, the case involved objections by dissenting railroad workers against a private sector fee agreement.[147] After concluding that the Federal Railway Labor Act's preemption provision provided the necessary state action

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144 Harris v. Quinn, 134 S. Ct. 2618, 2639 (2014) (conceding that the commercial speech standard employed in *Knox* may have been "too permissive," but reasoning that "[f]or present purposes . . . no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the test used in *Knox*").

145 *Elrod*, 427 U.S. at 363 (plurality opinion); *see also* Rutan v. Republican Party of Ill., 497 U.S. 62, 69 (1990) ("[T]he government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests.").

146 351 U.S. 225 (1956).

147 *See supra* notes 107–08 and accompanying text (discussing *Hanson*).

to implicate the First Amendment,[148] the Court dispensed with the employees' First Amendment claim in a cursory sentence without pinpointing a particular standard of scrutiny.[149]

Nearly twenty years later, in *Abood*, the Court considered a First Amendment challenge to compelled union fees in the context of a public sector union.[150] As is by now familiar, the Court ultimately upheld the union security clause at issue to the extent the union used the fees for activities bearing a nexus to its role as the teachers' exclusive bargaining representative, a category that included "collective bargaining, contract administration, and grievance adjustment."[151] By contrast, the Court held that the First Amendment forbade the union to charge objecting employees fees for "the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative."[152]

How *Abood* reached these twin conclusions, however, remains a puzzle.[153] Just as in *Hanson*, the *Abood* Court did not identify a specific standard of scrutiny for reviewing the First Amendment claim at bar. The Court did not address, for example, whether the government was required to adduce a "compelling" or merely a "legitimate" interest to justify the infringement that compelled fees worked upon dissenting employees' speech and associational rights.[154] Critically, neither did the Court explicate a means-end test for determining whether compelled fees were sufficiently tailored to achieving those governmental interests.[155] The complete absence of doctrinal struc-

[148] For the reasons explained earlier, *supra* notes 112–18 and accompanying text, this holding was highly debatable.

[149] *See Hanson*, 351 U.S. at 238 ("On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."). As noted above, *supra* Section II.B, a First Amendment union fees challenge was also advanced in *Street*, but the Court had no occasion to consider the proper standard of First Amendment scrutiny in that case, instead avoiding the constitutional issue through a narrowing construction of the relevant statute. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 768–69 (1961).

[150] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 212 (1977) (describing the teachers' challenge to union shops).

[151] *Id.* at 225–26.

[152] *Id.* at 235.

[153] Various commentators have expressed this sentiment. *See supra* note 32 (listing articles raising questions as to the rationale used in *Abood*).

[154] *See* David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1015 (1982) (describing the lack of "rigorous scrutiny" in the *Abood* decision).

[155] Malin, *supra* note 32, at 861 ("The Court's application of *Abood* . . . was not consistent with the narrow tailoring required of an infringement on a fundamental constitutional right.").

ture in the majority opinion was not lost on Justice Powell, who wrote in his separate opinion that "[t]he Court's failure to apply . . . established First Amendment standards . . . is difficult to explain in light of its concession that disassociation with a union's activities is entitled to full First Amendment protection."[156]

The next wave of union fee cases to reach the Court concerned how to distinguish between chargeable and non-chargeable activities and the proper remedies for transgressions of that line.[157] The academy has thoroughly debated the ins and outs of those decisions,[158] but the important point to note for present purposes is that the Court did not engage in serious discussion regarding the proper standard of scrutiny for assessing union fee arrangements until its 2012 decision in *Knox v. SEIU, Local 1000*.[159]

The narrow question presented in *Knox* was whether a particular procedure used by a California public sector union for assessing special fees intended for political purposes comported with the First Amendment.[160] In the course of answering that question in the negative, the Court offered a new account for the proper scrutiny to be applied to government-compelled funding of groups such as public sector unions. Specifically, the *Knox* Court reviewed the union fee challenge before it under the commercial speech standard used in a case called *United States v. United Foods*,[161] which *Knox* described as encompassing the following test: "[T]here must be a comprehensive regulatory scheme involving a 'mandated association' among those who are required to pay . . . . Such situations are exceedingly rare because . . . mandatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved

156 *Abood*, 431 U.S. at 260 n.14 (Powell, J., concurring in the judgment).

157 *See supra* note 124 (listing cases considering the line between chargeable and non-chargeable activities).

158 *E.g.*, Malin, *supra* note 32, at 861–63 (criticizing the Supreme Court's "inconsistent standards" for determining the chargeability of various union expenditures); Klass, *supra* note 51 at 1094–96 (critiquing the test announced by the Supreme Court in *Lehnert* for distinguishing between chargeable and non-chargeable expenditures).

159 132 S. Ct. 2277, 2291 (2012) (rejecting the balancing test employed by the Ninth Circuit and applying a careful tailoring requirement derived from *Hudson*). The Court did appear to apply a kind of heightened scrutiny in one decision during that interim period. *See* Chi. Teachers Union v. Hudson, 475 U.S. 292, 303 & n.11 (1986) (holding that although the government's labor peace interest was "strong enough" to support an agency shop agreement, the specific procedures used by the union for considering employee objections to the use of those fees must be "carefully tailored to minimize the infringement" on the employees' First Amendment interests).

160 *Knox*, 132 S. Ct. at 2284.

161 533 U.S. 405 (2001).

through means significantly less restrictive of associational freedoms.' "[162]

The Court took up its next union fee case just two years later, in *Harris v. Quinn*. Given that *Harris* arose so soon after *Knox*, one might have expected the Court to apply the same commercial speech standard used in *Knox* to review the propriety of the fair share fees charged against Illinois's home health care workers. That expectation might have been doubly grounded given that the author of *Harris*, Justice Alito, had also written *Knox* (and given that the same five Justices joined both opinions). Instead, the *Harris* majority made a vague reference to "generally applicable First Amendment standards"[163] before disavowing *Knox*'s commercial speech analysis on the ground that "it is apparent that the speech compelled in this case [mandatory fair share fees] is not commercial speech."[164] That was so, the Court explained, because "[o]ur precedents define commercial speech as 'speech that does no more than propose a commercial transaction,' . . . and the union speech in question in this case does much more than that. As a consequence, it is arguable that the [commercial speech] standard is too permissive."[165]

Having recanted *Knox*'s reliance on the commercial speech standard, it might have been sensible to expect the *Harris* Court to clear the air by announcing the *correct* standard for reviewing union fee challenges moving forward. But the Court did not do that. Instead, the Court declined to settle the issue and—in a second about-face all in the space of a single page—reverted back to the very commercial speech standard it had just rejected: "For present purposes, however, no fine parsing of levels of First Amendment scrutiny is needed because the agency-fee provision here cannot satisfy even the [commercial speech] test used in *Knox*."[166]

To complicate matters further, in the very next sentence, the *Harris* majority issued what may be the most confounding statement in the opinion. In explicating the arguably "too permissive" commercial speech standard that it would apply in lieu of settling the correct test, the Court did not quote the accepted formulation of that standard—an intermediate scrutiny-type analysis that asks whether the government has a "substantial interest" and whether the regulation at

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[162] 132 S. Ct. at 2289 (quoting *United Foods, Inc.*, 533 U.S. at 414 and Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

[163] Harris v. Quinn, 134 S. Ct. 2618, 2639 (2014).

[164] *Id.*

[165] *Id.* (citations omitted).

[166] *Id*.

issue is "in proportion to that interest."[167] Instead, the *Harris* majority characterized the commercial speech standard in terms redolent of *strict* scrutiny: The government must adduce a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms."[168]

It is difficult to know what to make of this language. The best inference one can draw is that the *Harris* Court simply made a mistake in characterizing the standard of review it sought to apply and attributing the source for that standard. That is, the Court did not review the challenged fair share fee agreement under the "arguabl[y] . . . too permissive" commercial speech test at all,[169] but rather under the same strict scrutiny that it has applied by default in numerous other First Amendment contexts.[170] And the *Harris* majority did not derive the governing standard from commercial speech cases, but rather from *Roberts v. United States Jaycees*—the case on which its recitation of strict scrutiny was ultimately predicated in a nested quoting parenthetical.[171] This conclusion is bolstered by

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167 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980); *see also id.* at 562–63 (noting that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

168 *Harris*, 134 S. Ct. at 2639 (alterations in original) (quoting Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2289 (2012) (quoting in turn Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984))). As noted below, *infra* notes 256–57 and accompanying text, there is a formal distinction between the less restrictive means prong articulated in *Harris* and in other formulations of strict scrutiny. Whereas the Court often requires the government's chosen approach to be the *least* restrictive alternative, *see, e.g.*, Elrod v. Burns, 427 U.S. 347, 363 (1976) (holding that the government must employ the "means that is least restrictive of freedom of belief and association"), in *Harris*, the Court suggested that the government's chosen approach would be upheld absent a "significantly less restrictive" alternative. *Harris* may thus suggest a less onerous standard, under which the government has greater freedom to use means that encroach upon First Amendment rights: It may employ an approach that infringes on such rights even if there is some way of achieving the government's interest without that infringement, so long as the less-intrusive approach is only *somewhat* less so. As I argue below, *infra* Section V.A, that approach is difficult to justify, given that in such circumstances the additional infringement produced by the government's approach is entirely unnecessary. Still, even if one were to apply the *Harris* "significantly less restrictive" formulation in the union fee case, that test would be plainly satisfied by the government-payer alternative, which is not merely "significantly" less restrictive of the First Amendment interests of objecting workers, but *entirely* so: Under the government-payer alternative, no such worker will have to pay any fee to any union against her will. *See infra* Section V.A.

169 *Harris*, 134 S. Ct. at 2639.

170 *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1269 (2007) (noting that strict scrutiny provides " 'the baseline rule' under the First Amendment for assessing laws that regulate speech on the basis of content" (quoting Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 800 (1996) (Kennedy, J., concurring in part and dissenting in part)).

171 *See Harris*, 134 S. Ct. at 2639 (holding that the fee provision at issue "does not serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less

the fact that *Roberts*, which involved a challenge by the United States Jaycees to a Minnesota anti-sex discrimination law that required the organization to admit female members, was famously *not* a commercial speech case. That was the major point of contention between the *Roberts* majority (which viewed the organization at issue as an expressive association entitled to strict scrutiny)[172] and Justice O'Connor's solo concurrence (which viewed the association as commercial in nature and thus subject to less stringent review).[173] *Harris* thus conflated the two standards by claiming to apply the more lenient commercial speech test while *actually* using the more exacting strict scrutiny test used in *Roberts*.

2. *What Is the Proper Test?*

Because *Harris* declined to "pars[e]" the proper "level[ ] of First Amendment scrutiny" for challenges to compelled union fees,[174] the correct standard of review remains an open question. As a doctrinal matter, two potential tests emerge from a review of Supreme Court cases in the relevant context of infringements on public employee First Amendment freedoms by the government in its capacity as employer: strict scrutiny and *Pickering* balancing—a standard proposed by Justice Kagan's dissent in *Harris*. This sub-section describes these two approaches before arguing that strict scrutiny is the more appropriate test as a doctrinal and conceptual matter.

The Supreme Court has reviewed some public employee challenges to infringements on their First Amendment freedoms under strict scrutiny, most notably in a line of cases involving attempts by government employers to compel employees to subsidize and affiliate with certain political parties.[175] Although unrecognized by the *Harris*

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restrictive of associational freedoms'" (alterations in original) (quoting *Knox*, 132 S. Ct. at 2289 (quoting in turn *Roberts*, 468 U.S. at 623))).

172 *See Roberts*, 468 U.S. at 618, 622–23 (holding that the regulation impinged on the Jaycees' freedom of expressive association and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms").

173 *See id.* at 634, 638–40 (O'Connor, J., concurring) (arguing that "there is only minimal constitutional protection of the freedom of commercial association," (emphasis omitted) and that contrary to the majority's holding, the Jaycees was a commercial association, not an expressive one).

174 *Harris*, 134 S. Ct. at 2639.

175 The Court also applied strict scrutiny in the context of a government employer's interference with freedom of speech and association in *Shelton v. Tucker*, where the Court struck down a state law requiring public school teachers to file an annual affidavit listing every organization to which she had belonged or contributed within the past five years. 364 U.S. 479, 490 (1960). In doing so, the Court explained that the state could not pursue its ends through "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the

majority, it is this line of political patronage cases that affords the best analogue for applying strict scrutiny to compelled fair share fee challenges.[176]

The critical political patronage case is *Elrod v. Burns*, which involved First Amendment claims brought by various employees of the Cook County, Illinois Sheriff's Office (all of whom were Republicans) against the newly-elected Democratic Sheriff after he discharged each of them "solely because they did not support and were not members of the Democratic Party."[177] Significantly, the nature of the forced affiliation at issue in *Elrod*, just like the forced affiliation in the union fee cases, included a compelled financial contribution[178] in that the employees in *Elrod* were required to "contribute a portion of their wages to the [Democratic] Party."[179]

The *Elrod* Court held that these dismissals violated the First Amendment's guarantee of free speech and association.[180] Justice Brennan's plurality opinion began by noting that, because patronage practices burden First Amendment interests, the challenged patronage dismissals could not "be justified upon a mere showing of a legitimate state interest"—the interest must instead be "of vital importance."[181] Especially significant for present purposes, the plurality went on to announce a less restrictive alternative requirement: "[I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is *least restrictive* of freedom of belief and association in achieving that end."[182] Applying this standard, the *Elrod* plurality ruled that although the government had

light of less drastic means for achieving the same basic purpose." *Id.* at 488 (citation omitted). Professor Fallon has argued that *Shelton v. Tucker* was one of the first cases to use the language akin to the modern strict scrutiny formulation. Fallon, *supra* note 170, at 1280 n.71.

176 Although lost in more recent opinions, the kinship between the union fee and political patronage cases was first recognized by Justice Powell in his separate opinion in *Abood*, which observed that "in public employment, 'a significant impairment of First Amendment rights must survive exacting scrutiny.'" Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 (1977) (Powell, J., concurring in the judgment) (quoting Elrod v. Burns, 427 U.S. 347, 362 (1976) (plurality opinion)).

177 *Elrod*, 427 U.S. at 351 (Brennan, J., joined by White & Marshall, J.J.) (plurality opinion).

178 *Id.* at 355.

179 *Id*.

180 *See id*. at 373 (plurality opinion); *id.* at 374 (Stewart, J., concurring, joined by Blackmun, J.); *see also id.* at 369–70 (plurality opinion) (noting that patronage dismissals are an "impediment to the *associational* and *speech* freedoms which are essential to a meaningful system of democratic government" (emphasis added)).

181 *Id.* at 362.

182 *Id.* at 363 (emphasis added).

identified sufficiently important interests in efficient operation of its workforce and preserving the democratic process, patronage dismissals are unconstitutional because they are not the least restrictive means for achieving those interests.[183] And while *Elrod* was technically a three-Justice plurality opinion, a majority of the Court later reaffirmed *Elrod*'s strict scrutiny standard in both *Branti v. Finkel* and *Rutan v. Republican Party of Illinois*.[184]

The second possible approach is the one advanced by Justice Kagan's dissent in *Harris*: *Pickering* interest balancing, a test that governs claims by individual public employees alleging that their employer has punished them in retaliation for expression protected under the First Amendment.[185] *Pickering* itself involved a claim by a public school teacher seeking reinstatement after he had been fired by the school board for writing a letter to a newspaper editor criticizing the board for its handling of the school budget.[186] As the *Pickering* test has evolved over time, the Court engages in a two-step inquiry, asking first whether the employee's speech was "on a matter of public concern"[187] or private concern. Only if the speech was on a matter of public concern may the employee proceed to the next step, wherein the court must "balance . . . the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[188]

It might appear that one difference between *Pickering* balancing and strict scrutiny is that the former does not include a narrow tai-

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[183] *Id.* at 364–73 (holding that officials can pursue efficiency interests through the less restrictive means of terminating employees for poor performance and applying patronage practices to a narrower class of policymaking employees, and that the patronage system is not the least restrictive means for advancing the democratic process because patronage actually hinders the function of democracy).

[184] *See* Branti v. Finkel, 445 U.S. 507, 515–16 (1980) (holding that the government must "demonstrate 'an overriding interest,' 'of vital importance,' requiring that a person's private beliefs conform to those of the hiring authority" (citations omitted) (quoting *Elrod*, 427 U.S. at 362, 368)); Rutan v. Republican Party of Ill., 497 U.S. 62, 69 (1990) (describing *Elrod*'s holding as striking down patronage dismissals because they "are not the least restrictive means for fostering those interests"); *id.* at 70 n.4 (disputing the argument raised in Justice Scalia's dissent that *Elrod* and similar cases actually applied a "less-than-strict scrutiny" standard).

[185] *See* Harris v. Quinn, 134 S. Ct. 2618, 2654 (2014) (Kagan, J., dissenting) (arguing that "*Abood* is of a piece with" decisions applying *Pickering* balancing to claims of First Amendment retaliation by public workers; "indeed, [*Abood*'s] core analysis mirrors *Pickering*'s").

[186] Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968).

[187] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[188] *Id.* at 417 (quoting *Pickering*, 391 U.S. at 568).

loring or least restrictive alternative requirement.[189] While some courts and judges have suggested this distinction,[190] the better understanding is that *Pickering* balancing includes an *implicit* tailoring requirement. In fact, even the *Harris* dissent did not dispute this point. In response to the majority's argument that the government could achieve its interests equally well through the less restrictive means of having only willing employees foot the bill for union activities,[191] Justice Kagan did not contend that *Pickering* imposes no tailoring requirement. Instead, she argued (quite persuasively) that the majority's proposed alternative would be ineffectual.[192]

The best proof that the *Pickering* balancing standard includes an implied tailoring requirement, however, can be found in *Pickering* and its progeny. In all of the cases where the Court has reached the balancing step, the Court has investigated whether the employee's speech *actually* caused a disruption in the workplace, thereby justifying the government's desire to punish. The Court has never accepted at mere face-value a government's claim of punishment-warranting disruption

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189 The Supreme Court has not always been clear about the relationship between the "narrow tailoring" and "least restrictive alternative" tests. At times, the Court has used the two interchangeably, on the understanding that a chosen governmental action cannot be narrowly tailored if there exists some less restrictive approach to achieve the same ends. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) ("The term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, . . . the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used."). I accordingly use the terms interchangeably for sake of simplicity, although I acknowledge that the Court has at times also suggested that narrow tailoring is actually a more relaxed standard of review. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.").

190 *See, e.g.*, Siefert v. Alexander, 608 F.3d 974, 985 (7th Cir. 2010) ("Under the *Pickering* approach, narrow tailoring is not the requirement . . . . Instead the state's interest must be weighed against the employee's interest in speaking."); Nat'l Treasury Emps. Union v. United States, 3 F.3d 1555, 1566 (D.C. Cir. 1993) (Silberman, J., dissenting from denial of reh'g en banc) (expressing disagreement with a narrow tailoring requirement in the government employee speech context and explaining that "the government is not required to shoulder the same degree of enforcement costs when regulating its workplace that it must when private speech is involved").

191 *See* Harris v. Quinn, 134 S. Ct. 2618, 2641 (2014) ("The agency-fee provision cannot be sustained unless the cited benefits . . . could not have been achieved" through the less restrictive means of having the union "depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made.").

192 *See id.* at 2657 (Kagan, J., dissenting) (arguing that unless "the majority think[s] that public employees are immune from basic principles of economics . . . , the majority can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its functions").

or subjected such a claim to a deferential rational relationship test.[193] That approach implicitly suggests a least restrictive alternative requirement, for if the employee's speech does not interfere with workplace operations in the first place, then the government punishment is impermissible due to the presence of an obvious less restrictive means for achieving its otherwise sufficient efficiency interest: no punishment at all. Consider, moreover, the implications of a rule in which no tailoring is required: The government could, in the pursuit of abstract workplace efficiency, punish an employee for speech that the government concedes caused no disruption at all. That cannot be right; if the government can achieve its claimed interests equally effectively through an alternative course of action that does not encroach upon individual rights, then it has no justification for taking the rights-intrusive approach.[194]

Accordingly, both *Pickering* balancing (implicitly) and *Elrod* strict scrutiny (explicitly) encompass the requirement that a government employer may not pursue its interest in workplace efficiency in a manner that infringes upon employee First Amendment rights if a less restrictive means for attaining that same interest is available. And if that is correct, then it would in one sense not matter for purposes of my argument which test is found to govern union fee challenges because the government-payer alternative should render fair share fee clauses impermissible under either test. However, because stopping here would leave unexamined the Court's inconsistent pronounce-

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[193] *See*, *e.g.*, Rankin v. McPherson, 483 U.S. 378, 389 (1987) (ruling for employee in First Amendment retaliation case where employer "testified that the possibility of interference with the functions of the [employer's] office had *not* been a consideration in his discharge of [the employee] and that he did not even inquire whether the remark had disrupted the work of the office"); *Pickering*, 391 U.S. at 572–73 (holding that the employee's speech was not "shown . . . to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally," such that punishment was not justified); *see also* Nichols v. Dancer, 657 F.3d 929, 931 (9th Cir. 2011) ("Because the District produced no evidence that Nichols's association with her boss actually disrupted the office or her performance, or reasonably threatened to cause future disruption, the District has failed to show that its interests in workplace efficiency outweigh Nichols's First Amendment interests."); Powell v. Gallentine, 992 F.2d 1088, 1091 (10th Cir. 1993) ("To prevail in the *Pickering* balancing, defendants must show 'evidence of an actual disruption of [the government employer's] services resulting from the speech at issue.'" (quoting Melton v. City of Oklahoma, 879 F.2d 706, 716 (10th Cir. 1989))).

[194] Or as Judge Williams of the D.C. Circuit has persuasively explained in the context of *Pickering*'s balancing test itself, "if the burdens caused by a restriction on speech are substantially greater than is appropriate to achieve the government's legitimate end, . . . it is hard to see what interest justifies the excess burdens. . . . [T]he generalized *Pickering* balance and the 'narrow tailoring' test seem unlikely to yield different results." Nat'l Treasury Emps. Union v. United States, 3 F.3d 1555, 1558–59 (D.C. Cir. 1993) (Williams, J., concurring in denial of reh'g en banc).

ments as to the proper standard of scrutiny in this area, I continue on to the question whether *Pickering* balancing or *Elrod* strict scrutiny affords the proper test as a conceptual matter.

In my view, the reason strict scrutiny is the more apt standard for reviewing challenges to union fees reduces substantially to the age-old debate between rules and standards.[195] To explain, the chief difference between strict scrutiny and *Pickering* balancing is not inherently substantive,[196] but rather methodological: Strict scrutiny is a form of categorization that cabins judicial discretion at the cost of case-by-case flexibility; *Pickering* balancing gives up limits on judicial discretion in exchange for the flexibility gained by permitting *ad hoc*, fact-bound inquiry into the parties' respective interests.[197] Thus, in strict scrutiny, the Court has pre-fixed (in rule-like fashion) the weight to be attached to the individual's interest: It is set at a high value, such that the only kind of government interest that will be found sufficient to justify burdening the individual's right is a "compelling" one. Under this rule, the court's discretion is limited: It merely has to decide if the government's interest is compelling—if it is, then there is no need to weigh that interest against the individual's interest because the government interest triumphs as a matter of course. In *Pickering* balancing, by contrast, the court (in standard-like fashion) treats the strength of the individual's First Amendment interest in her expression as a flexible matter that will vary from case-to-case depending on the content and context of her speech. Courts engaging in *Pickering* balancing accord-

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[195] The literature on the debate between rules and standards is considerable and beyond summary in this Article. However, for a helpful general account of the comparative advantages of rules and standards, see generally Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992).

[196] Some courts and commentators have taken the contrary view that *Pickering* is designed to be a less speech-protective standard than strict scrutiny. *See, e.g.*, Akers v. McGinnis, 352 F.3d 1030, 1037 (6th Cir. 2003) (characterizing *Pickering* balancing as a "form of intermediate scrutiny" (quoting Montgomery v. Carr, 101 F.3d 1117, 1129 n.7 (6th Cir. 1996))); Scott D. Wiener, *Same-Sex Intimate and Expressive Association: The* Pickering *Balancing Test or Strict Scrutiny?*, 31 HARV. C.R.-C.L. L. REV. 561, 580–81 (1996) (describing *Pickering* balancing as "a lower level of scrutiny than strict scrutiny, . . . perhaps best analogized to intermediate scrutiny"). But this argument is contradicted by the Court's repeated recognition in the *Pickering* line of cases that "[s]peech by citizens on matters of public concern lies at the heart of the First Amendment," a fact that "remains true when speech concerns information related to or learned through public employment." Lane v. Franks, 134 S. Ct. 2369, 2377 (2014); *see also, e.g.*, Connick v. Myers, 461 U.S. 138, 145 (1983) (observing that when public employees speak on matters of public concern, their speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection") (internal quotation marks omitted).

[197] *See* Sullivan, *supra* note 195, at 59–60 (recognizing the distinction between "categorizing," which includes use of strict scrutiny, and "balancing" as a "version of the rules/standards distinction" in which "[c]ategorization corresponds to rules" and "balancing to standards").

ingly engage in much more fact-bound review of the circumstances underlying the employee's speech and the government's reasons for retaliating.[198]

So, should challenges to union fees be reviewed under a rule or a standard? One way to decide is to distinguish between categories of claims that are largely homogenous with respect to the nature of the competing individual and government interests, and categories of heterogeneous claims where individual and the government interests are more likely to differ from case to case.[199] Claims of the former nature are better suited to rule-based adjudication because there is little profit to be gained from allowing judicial flexibility to investigate particular interests in each case. Thus, for example, in the category of political patronage claims, all non-policymaking employee plaintiffs share at root the same interest: a desire to avoid being compelled to support or associate with the "in" political party. Different plaintiffs may have different job duties—a postal worker's day-to-day tasks will differ from those of a deputy sheriff—but these differences make, as a general matter, little difference with respect to the individual employee's interest in avoiding the compelled association. By contrast, for types of claims where individual and government interests are highly fact-dependent and thus vary greatly from one case to the next, there is greater value to an interest-balancing standard. This is true, for instance, of the many diverse claims of First Amendment retaliation that are brought under the aegis of the *Pickering* balancing standard, where it is difficult to make accurate judgments about the weight of an individual's speech interest and the government's efficiency interest without knowing the content, form, and context of the specific speech at issue.[200]

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198 *See supra* note 193 (collecting court cases applying *Pickering*).

199 *Cf.* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500–02 (1975) (arguing that balancing and categorization tests are not "mutually exclusive approaches to the various problems that arise under the first amendment [sic]," and instead should be "employed in tandem" depending on the type of claim at issue).

200 One response to the dichotomy I have set forth between homogeneous and heterogeneous categories of claims would be to argue that much of the work is done at the level of generalization: Characterizing a category at a broad level of generality will make the category seem heterogeneous and thus more apt to balancing; a narrower level of generality will more likely yield the opposite effect. That is fair so far as it goes, but the solution is not to dispense with the dichotomy altogether, but rather to describe categories of claims at the narrowest level of generality at which identifying homogenous categories would still be meaningful. Thus, "all First Amendment claims by public employees" states the nature of individual interests too broadly, as it can be sensibly broken down further into claims of compelled association (a homogeneous category that is large enough to be useful to courts) and claims of retaliation based on protected speech. *Compare, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976) (First Amendment challenge by public employees against

Challenges to union fees are more akin to a homogeneous set of cases—indeed, they fit within the same general category as the political patronage cases, a category that includes all government employer attempts to force employees to support an expressive organization to which the employee objects. Specific cases within that category are not likely to differ greatly with respect to the intensity of the individual and government interests. As to the individual's interest, an objecting employee who disagrees with the union's position on pension reform is not materially dissimilar from one who objects to her union's position on teacher merit pay or another who objects to unionization altogether; in all cases, the employee's interest is to refrain from supporting an objectionable political message. And the government's interest is likewise similar across cases—a desire to ensure that the organization has sufficient resources (where one person's objection to paying causes the same modest financial harm as the next person's). Imposing a categorical rule like strict scrutiny accordingly cabins judicial discretion without producing much in the way of arbitrariness at the border. As a conceptual matter, then, challenges to compelled union fees are better reviewed under *Elrod* strict scrutiny than *Pickering* interest balancing.

B. Applying the Proper Test

This section begins with the compelling interest prong of strict scrutiny, asking whether the government possesses sufficiently important interests in supporting a public sector union to justify intrusions upon the First Amendment rights of its workers. After concluding that the government possesses a significant enough interest in labor peace, it explains why compelling dissenting employees to pay for a union's bargaining activities is insufficiently tailored to that interest in light of the government's ability to reimburse a union out of general treasury funds.

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compelled support for political parties), *with* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (First Amendment challenge by public employer punished for writing letter to newspaper). But it is difficult to break down "claims of retaliation based on protected speech" into further, discernible homogeneous categories that are big enough to serve as useful shortcuts for courts. Put another way, if (as is true of all First Amendment retaliation claims) a broad category of claims premised on the same legal theory must be broken down so much that each individual case essentially becomes a category of its own, the category is irreducibly heterogeneous and more suitable for a case-by-case balancing approach.

1. Compelling Interest

Abood cited two government interests to justify the practice of requiring dissenting employees to pay union fair share fees: the "desirability of labor peace" and the "risk of free riders."[201] As I discuss below, the labor peace interest actually comprises two distinct but related concepts, which, taken together, should be deemed sufficiently vital to justify an intrusion upon employee First Amendment rights (subject to the tailoring analysis). The free rider interest, on the other hand, is an illegitimate one that cannot be used alone to defend the First Amendment harms occasioned by fair share fees.

a. Labor Peace

With respect to the government's interest in labor peace, the *Abood* Court reasoned that the designation of a single exclusive representative with a duty to bargain fairly on behalf of all employees would pretermit "[t]he confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement."[202] So described, *Abood*'s labor peace rationale encompasses the government's interest in having a single union to negotiate with as the exclusive bargaining representative of all employees—as distinguished from a world in which the government would face competing demands from multiple unions. As *Abood* explained:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions.[203]

It is difficult to quarrel with a government employer's belief that it is more efficient to negotiate with one union than two (or three or four). Not only might multiple unions provoke rivalries among employees, but different contract terms among the various unions could greatly complicate the task of managing a large number of employees and incentivize those unions and employees who are subject to less favorable terms to demand renegotiations. In light of the deference that the Court has given to the government when it claims

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[201] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).
[202] *Id.*
[203] *Id.* at 220–21.

that it possesses a compelling interest in its role as an employer,[204] the labor peace interest is easily sufficient to justify an intrusion on First Amendment rights, thus necessitating an inquiry into whether there exists less restrictive means for achieving that end.[205]

Abood's articulation of the labor peace interest was, however, insufficiently reasoned. For if the desire to avoid conflicting demands between multiple unions were the full extent of the government's labor peace interest, then there would seem to be an obvious less restrictive alternative to achieve that end even before one considers the government-payer alternative: have no union (and thus no conflicting demands) at all. Thus, the government must demonstrate not simply a compelling interest in having fewer than two competing unions with which to negotiate, but also a sufficient interest in having *more than zero*.

Fortunately for government employers, this is a burden they are able to satisfy. That is because the government has a vital interest in another dimension of labor peace: its interest in improving employee satisfaction and workplace productivity—the very labor law objective that encourages public employers to foster democratic participation of workers in collective bargaining in the first place. Thus, whereas the concept of labor peace described in *Abood* entails a governmental preference of negotiating with one union rather than two or more, labor peace can also describe a governmental desire of having a public sector union to negotiate with as opposed to having *no union at all*. Under this view, labor peace is more likely to prevail in public sector workforces when individual employees feel satisfied that they have a voice in setting their wages and benefits, as well as in the general policies that apply to their workplaces—all of which are furthered by the presence of a union bargaining representative.[206] As the federal government characterized this interest in its *amicus* brief in *Harris*, "[p]roviding a mechanism for employees to speak with one voice at the bargaining table [is] important to a government entity's effective and efficient fulfillment of its responsibilities to the public" because doing so enables the employer to "improve the quality and reliability of employee performance" by "assur[ing] employees that their interests will be forcefully represented, improving workforce morale and

[204] *See, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 598 (2008) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." (quoting Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion))).

[205] *See infra* Section IV.B.2 (discussing least restrictive means requirement).

[206] *See supra* Section I.B (discussing benefits of unions).

making a government job more attractive to the most talented citizens."[207] Combined with its interest in avoiding competing demands from multiple unions, this governmental interest in ensuring that workers can have their views actively represented by a union, thereby improving workplace morale, is sufficiently compelling to survive strict scrutiny.[208]

b. Avoiding Free Riders

The other government interest commonly identified in support of compelled public sector union fees is the risk of free riders. *Abood* characterized that interest as follows:

> A union-shop arrangement has been thought to distribute fairly the cost of [collective bargaining] activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.[209]

Abood's reliance on this free rider rationale is remarkable—a fact the Court recognized in *Knox*, which referred to the free rider justification as "an anomaly."[210] For to accept the free rider concern as a legitimate government interest (to say nothing of a vital interest), one must find it unobjectionable for the government to judge for its employees what kind of speech and advocacy at the collective bargaining table will accrue to their benefit—rather than allowing the employees to make that judgment themselves. That is, the premise of the free rider rationale is the government's hypothesis that, whatever contract terms the government and union agree upon, those terms will invariably constitute "benefits of union representation that necessarily accrue to all employees"[211]—such that it is permissible to force all employees to pay a share of the union's costs.

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[207] Brief for the United States as Amicus Curiae Supporting Respondents at 23, Harris v. Quinn, 134 S. Ct. 2618 (2014) (No. 11-681).

[208] This is especially so in light of the deference that courts have traditionally given to government employers when it comes to claiming efficient and effective workplace management as an important interest for purposes of justifying alleged constitutional intrusions. *See Harris*, 134 S. Ct. at 2653 (Kagan, J., dissenting) ("[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated in the public workplace." (internal quotation marks omitted)); Elrod v. Burns, 427 U.S. 347, 372 (1976) (plurality opinion) (noting that "there is a vital need for government efficiency and effectiveness" in government operations).

[209] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221–22 (1977). *See also supra* Section I.B (describing the free rider problem).

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

[211] *Abood*, 431 U.S. at 222.

This proposition is challengeable factually, raises considerable tension with foundational First Amendment precedents, and would justify other government-mandated associations that would seem dubious under generally accepted First Amendment norms. As a statement of descriptive fact, the "benefits of union representation" do not "necessarily accrue to all employees."[212] Both common sense and empirical data bear this out.[213] As a matter of common sense, when a union negotiates over wage policies and terms of employment, it must make inevitable trade-offs that will advance the interests of some workers to the detriment of others. For example, should wages be paid on the basis of seniority or performance? Choosing the former will harm high-performing yet relatively less experienced employees; choosing the latter will harm more senior employees who do not perform as well on the chosen evaluation metrics. Should full-time and part-time workers receive the same base level of health insurance and benefits, or should full-time workers receive benefit packages of a higher level at the expense of part-time workers? Again, common sense dictates that whichever policy the union advances at the bargaining table, one group of employees will be comparatively displeased. To add an empirical underscore to the point, one recent study showed that young public school teachers were far more likely than their more experienced counterparts to be fired as the result of budget shortages due to union-negotiated "last in, first out" personnel policies.[214] Surely *Abood* was wrong to argue that the teachers fired as a result of such union-negotiated policies "necessarily" obtained the "benefits of [the] union['s] representation"[215] such as would make them "free riders" for refusing to support the union whose speech at the bargaining table ultimately contributed to the loss of their jobs.

Abood's supposition about the invariable benefits of collective bargaining is also in strong tension with a value that lies at the heart of the First Amendment. Justice Brennan described that principle in his opinion for the Court in *Riley v. National Federation of the Blind of North Carolina*: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to

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212 *See* Summers, *supra* note 2, at 267 (recognizing that not all employees benefit from a collective bargaining agreement).

213 *See supra* Section I.A (listing examples of situations where a public employee does not necessarily benefit from the positions taken by her bargaining representative).

214 Goldhaber & Theobald, *supra* note 41, at 81 (finding that teachers with two or fewer years of experience, or two or fewer years of seniority in a district, account for sixty and eighty percent of layoffs in the study sample, respectively).

215 *Abood*, 431 U.S. at 222.

say and how to say it."[216] In other words, even if a public employer were somehow correct in believing that collective bargaining inures to the benefit of all employees, that is beside the point—the employees have the superseding right to choose what to believe, what to say, and what organizations to affiliate with (and not affiliate with) in furtherance of their desired ends. Or as the Court expressed the point in *United Foods*, the First Amendment rule is that "the speaker . . . , not the government, assess[es] the value of the information presented."[217]

Indeed, there are few notions more adverse to individual expressive choice and freedom than the idea that government may go around forcing citizens to make financial payments to associations that espouse messages the government thinks are beneficial for all. Yet that is the free rider precept that *Abood* relies on. If it is accepted, what is to stop a government entity from arguing that all of its employees would benefit from the economic policies advocated by the U.S. Chamber of Commerce, such that all employees must as a condition of employment pay annual fees to support the Chamber's advocacy? Or what if Congress, laboring under the view that all women will benefit from the positions espoused by the National Organization of Women (NOW), were to pass a law requiring all women to pay dues to support that organization's activities? The First Amendment prevents those ends by prohibiting the government from imposing its judgments upon individual citizens in the first place.

One counter-argument bears consideration. In her dissent in *Harris*, Justice Kagan argues that the free rider interest carries special weight in the union context because of the union's duty to fairly represent all workers, regardless of whether they pay their share of fees. Quoting Justice Scalia's concurring opinion in *Lehnert v. Ferris Faculty Ass'n*, Justice Kagan argues that unlike with other interest groups: "What is distinctive . . . about the 'free riders' in unions . . . is that . . . the law *requires* the union to carry [them]—indeed, requires the union to go *out of its way* to benefit [them], even at the expense of its other interests."[218]

The problem with this argument is visible once it is pressed to its logical extent. The upshot of Justice Kagan's (and Justice Scalia's) argument is that the government may justify forcing individuals to pay

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[216] 487 U.S. 781, 790–91 (1988). The same principle naturally extends to associations: The First Amendment presupposes that individuals—not the government—know the causes and organizations with which it is in their best interest to affiliate.

[217] United States v. United Foods, Inc., 533 U.S. 405, 411 (2001).

[218] Harris v. Quinn, 134 S. Ct. 2618, 2657 (2014) (Kagan, J., dissenting) (ellipsis and alterations in original) (quoting Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part)).

fees to its preferred organizations by reference to an (ordinarily impermissible) interest in avoiding free riders if the government has *also* passed a law requiring the recipient organization to represent the interests of a broader class of individuals. But beyond encouraging the government to compel *more* interaction among potentially unwilling associations and persons, not less, this principle poses no real limit on the power of a government bent on imposing untoward mandatory assessments. All the government must do is pass two laws instead of one. For example, imagine that Congress, believing that it possesses a compelling interest in fostering women's rights, passes a law requiring the NOW to advocate fairly on behalf of the interests of all American women, regardless of whether they join the organization.[219] Under the rationale offered by Justices Scalia and Kagan, the passage of such a law would enable Congress to enact an additional measure requiring all American women to pay fees to support NOW, given that NOW is, akin to a union, "compel[led] . . . to represent—and represent fairly—every" woman.[220]

In any event, to the extent the duty of fair representation is the culprit that Justices Scalia and Kagan believe justifies the harsh medicine of a mandatory fee in the union context, the clear alternative is to dispense with *both* the duty of fair representation and compelled fees, not the First Amendment's core protection against government-imposed beliefs and associations. Many Western European nations organize their labor relations in just this fashion, whereby a collective bargaining agreement covers only union members—non-members are not entitled to its benefits (and unions are accordingly freed from the duty of representing non-members).[221] The essential point for now,

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[219] NOW might object to the imposition of a duty of fair representation under the principles established in cases such as *Boy Scouts v. Dale*, 530 U.S. 640 (2000), which govern an association's right to control its membership. *See id.* at 656 (holding that state law requirement for the Boy Scouts to reinstate gay scoutmaster violated the Boy Scouts's First Amendment right of expressive association). But assume for the purposes of this hypothetical that NOW is willing to go along with the government-imposed duty of fair representation both because it wishes to receive the additional revenue that would result from the corresponding mandatory fees imposed by the law and because it believes that its preferred policies are already supported by a majority of women anyhow, which will allow it to continue with its existing mission notwithstanding the duty to represent some women who disagree with its message. *Cf.* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (1944) (noting that the duty of fair representation does not prevent a union from "making contracts which may have unfavorable effects on some of the members of the craft represented").

[220] *Harris*, 134 S. Ct. at 2656 (Kagan, J., dissenting).

[221] *See* Summers, *supra* note 2, at 266 (discussing other nations' approaches to collective bargaining); *see also* Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 866–74 (2014) (proposing adoption of a members-only bargaining regime in right-to-work states).

though, is that the desire to make dissenting and willing employees alike shoulder a fair share of the union's costs is not a legitimate government interest. If fair share fees are to survive, then, they must be shown to be the least restrictive means for furthering the government's sufficiently vital interests in labor peace.[222]

2. *Least Restrictive Alternative*

Can a government employer achieve its goal of negotiating with a single union representative—thereby avoiding the conflicting demands of rival unions and giving employees an effective voice with which to speak on workplace issues—through any means less restrictive of free speech and association than compelling dissenting employees to pay fair share fees? Yes. As discussed above,[223] the government can simply reimburse the union directly out of general treasury funds, ensuring the union's financial stability and eliminating any compulsion on the part of anti-union workers. To see why this constitutes a viable less restrictive alternative, it is helpful to begin with a brief review of the Supreme Court's analysis of a similar government-payer alternative proposed in *Burwell v. Hobby Lobby*.

a. *Hobby Lobby*

The issue in *Hobby Lobby* was whether the Religious Freedom Restoration Act (RFRA) permitted the federal government to require closely-held for-profit corporations to provide health insurance coverage for certain methods of contraception that violated the religious beliefs of the companies' owners.[224] Under RFRA, the federal government may not impose a substantial burden on a person's religious exercise unless the burden constitutes the least restrictive

[222] There is another account of the government's free ridership interest, although it ultimately doubles down on the labor peace rationale. Under that argument, a fair share fee regime is actually necessary to ensure labor peace because allowing objecting members to opt-out will lead to a collective action problem under which no union can incent not opting out of paying fees. *See* Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2290 (2012) (noting that the "free-rider argument . . . for compelling nonmembers to pay a portion of union dues" has been found to be "justified by the interest in furthering labor peace") (internal quotation marks omitted)). To the extent the validity of the free ridership interest is premised on the labor peace interest, however, it will be insufficient to save a fair share fee system if there are less restrictive means to achieve labor peace. Moreover, as I note below, *see infra* note 253, even if one were to find the free rider interest independently compelling, the government could achieve that interest equally effectively through the less restrictive means of paying for the union's costs directly and negotiating correspondingly reduced future wage raises, thereby spreading the costs of bargaining fairly and evenly.

[223] *See supra* Part III (detailing the government-payer alternative).

[224] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

means for furthering a compelling governmental interest.[225] *Hobby Lobby* thus presented three sub-issues that had confounded the lower courts in the course of applying RFRA to the contraceptive mandate: first, whether the corporations were "persons" entitled to protection of their religious exercise within the meaning of RFRA;[226] second, whether the contraceptive mandate amounted to a "substantia[l] burden" on the corporations' exercise of religion;[227] and third, assuming an affirmative answer to the first two questions, whether the contraceptive mandate was nonetheless permissible as the "least restrictive means" of furthering a "compelling governmental interest."[228]

The third of these questions is the one of consequence for present purposes. As to the first two, it is sufficient to say that the Court answered them in the affirmative, holding that closely-held for-profit corporations do constitute "persons" entitled to bring a RFRA claim and that the contraceptive mandate substantially burdened the religious exercise of the corporations at issue.[229] A bit more unpacking is necessary to appreciate the Court's reasoning with respect to the third question.

In defending the contraceptive mandate as the least restrictive means for furthering a compelling interest, the government argued that the mandate served a number of compelling interests, including ensuring employee access to comprehensive health insurance, protecting public health, and assuring equal access for women to health care services.[230] The *Hobby Lobby* Court assumed arguendo that these interests were sufficiently important to satisfy RFRA's compelling interest test,[231] resting the full weight of its analysis on RFRA's tailoring prong.[232] Specifically, the Court held that the government failed to show that "it lacks . . . means of achieving its desired goal

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225 42 U.S.C. § 2000bb-1 (2012). RFRA accordingly reinstates the strict scrutiny analysis that the Supreme Court had originally established under *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), but then recanted in *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990). *See* 42 U.S.C. § 2000bb(a)(4), (b)(1) (2012) (stating RFRA's purpose).

226 *See* 42 U.S.C. § 2000bb-1(a) (2012) ("Government shall not substantially burden a *person*'s exercise of religion even if the burden results from a rule of general applicability." (emphasis added)).

227 *See id*. (same).

228 42 U.S.C. § 2000bb-1(b)(2) (2012).

229 *Hobby Lobby*, 134 S. Ct. at 2769, 2775.

230 *Id.,* at 2779–80.

231 *See id.* at 2780 (assuming compelling governmental interest in guaranteeing cost-free access to the contraceptive methods at issue). *But see* Richard A. Epstein, *The Defeat of the Contraceptive Mandate in* Hobby Lobby*: Right Results, Wrong Reasons*, 2013–14 CATO INST. SUP. CT. REV. 35, 38, 50–58 (2014) (arguing that the government lacked a compelling interest in the contraceptive mandate).

232 *See Hobby Lobby*, 134 S. Ct. at 2780 (resting analysis on the tailoring prong).

without imposing a substantial burden on the exercise of religion by the objecting parties in these cases."[233] And one alternative means in particular was found to undermine the mandate: "The most straightforward way of [achieving the government's interests in contraceptive coverage] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[234]

In explaining why this alternative was sufficient to defeat the contraceptive mandate, the Court observed that the government-payer option would be both "less restrictive of the plaintiffs' religious liberty,"[235] and that "HHS has not shown . . . that this is not a viable alternative." To the latter point, the Court noted that HHS had provided no estimate of how much it would cost to provide access to the contraceptives at issue or how many employees would be affected in the first place; nor had HHS averred an inability to produce such figures.[236] In the absence of any proof to the contrary, the Court concluded that it was "likely" that "the cost of providing the forms of contraceptives at issue in these cases . . . would be minor when compared with the overall cost of ACA."[237]

Writing on behalf of the four liberal justices in dissent, Justice Ginsburg found the majority's government-payer alternative unpersuasive:

> [W]here is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the govern-

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233 *Id*. at 2780.

234 *Id.*

235 *Id.*

236 *Id*. at 2780–81.

237 *Id.* at 2781. The *Hobby Lobby* majority suggested a second alternative for attaining the government's interests that would be less restrictive of religious liberty: The government could extend to the closely-held for-profit corporations the same accommodation that it had already extended to nonprofit religious organizations. *Id.* at 2782. Under that accommodation, employers could certify their religious objection to the contraception at issue with the result that the employer's health insurance issuer would take on the costs of the contraception. *Id.* Just four days after *Hobby Lobby* was issued, however, the Court entered an emergency order temporarily enjoining that accommodation, too, under RFRA. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014). That injunction, coupled with the high standard of review (the Court will grant such relief only where "the legal rights at issue are indisputably clear," *id*. at 2808 (Sotomayor, J., dissenting)), strongly suggests that the sole alternative doing the work in *Hobby Lobby*'s less restrictive means analysis was the "let the government pay" alternative.

> ment to provide the money or benefit to which the employer has a religion-based objection?[238]

Justice Ginsburg's argument carries intuitive force.[239] In the absence of limits on the government-payer alternative, no government action that burdens an individual's constitutional rights by requiring her to pay for objectionable activity will ever pass muster because the government could always fix the individual's First Amendment injury by taking on the costs itself. Indeed, the *Hobby Lobby* majority implicitly accepts this point when it reaffirms the Court's ruling in *United States v. Lee*,[240] a case that rejected a Free Exercise claim brought by an Amish employer against the payment of social security taxes.[241] Even though the government could have theoretically achieved its interest in providing social security benefits through the less restrictive means of shouldering itself the costs to which the Amish employer objected, the *Hobby Lobby* majority recognized that this was not a feasible alternative because "allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos" and prevent the tax system from functioning at all.[242]

What seems to drive the analysis in *Hobby Lobby*, then, is not the notion that the government can *always* achieve its ends through the less restrictive means of digging into its own pockets to foot the objectionable bill itself, no matter how high the cost, but rather that the federal government had not adduced sufficient evidence in the particular context of the contraceptive mandate that the costs of providing coverage directly would be excessive. What was left was an inference that while providing contraceptive coverage directly would surely lead to *some* additional costs for the government, those costs would likely be "minor," especially "when compared with the overall cost of [the] ACA."[243]

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238 *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) (footnote omitted) (citations omitted).

239 Although I am sympathetic to Justice Ginsburg's concern that the absence of an articulable limiting principle renders the *Hobby Lobby* majority's reliance on the government-payer alternative for providing contraceptive coverage questionable, it is beyond the purview of this article to weigh in on that issue definitively. I instead argue that even if *Hobby Lobby* was wrong to hold that the government-payer alternative was an available option notwithstanding the substantial additional costs the government would encounter, *Hobby Lobby*, 134 S. Ct. at 2780 ("The most straightforward way [to achieve the government interest without substantially burdening religion] would be for the Government to assume the cost of providing the four contraceptives at issue . . . ."), the result in the union fee context should be different because, unlike in *Hobby Lobby*, the government employer can attain its interests in a cost-neutral way.

240 455 U.S. 252 (1982).

241 *Id.* at 261.

242 *Hobby Lobby*, 134 S. Ct. at 2784.

243 *Id.* at 2781.

The lesson from *Hobby Lobby* is this: When a government entity trenches upon an individual's rights in a manner that triggers a least restrictive means inquiry, the ability of the government to achieve its compelling interest directly through the expenditure of its own funds will render the existing program unconstitutional unless the government can demonstrate that the government-payer alternative would prove unduly costly or burdensome.[244] Just how excessive those burdens must be remains quite open to debate, but what seems clear is that the government may be required to take on an amount of additional costs that is relatively minor in comparison to the overarching enterprise in which it is engaged.

b. Applying the Government-Payer Alternative to Fair Share Fees

If the government-payer alternative was viable in the context of *Hobby Lobby*—where HHS would have to pay for contraceptive coverage for untold numbers of workers employed by religiously owned for-profit corporations—then the union fees context presents a much simpler case.[245] This is because the government can reimburse the

[244] It is well-established that the government may be required to take on at least some modest additional cost under a least restrictive means inquiry, not only by *Hobby Lobby* itself, but in other cases and statutes. *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-3(c) (2012) (providing that the least restrictive alternative test "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise"); *Hobby Lobby*, 134 S. Ct. at 2781 ("If . . . providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal."); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 800 (1988) (holding that state law requiring professional fundraisers to disclose the percentage they charge for fundraising failed the least restrictive means inquiry because the state could publish disclosure forms itself or more vigorously enforce anti-fraud laws—both of which would require additional state expenditures).

[245] To be sure, the government-payer alternative relied upon in *Hobby Lobby* was in the context of a statutory claim under RFRA, and not a First Amendment free speech or association claim. But it is difficult to imagine why the source of the right would change the nature of the corresponding least restrictive alternative test. After all, the crux of that test is the same in both contexts: whether the government's chosen means is the "least restrictive" of the relevant rights. *See* 42 U.S.C. § 2000bb-1(b)(2) (2012) (defining least restrictive means requirement under RFRA); Elrod v. Burns, 427 U.S. 347, 363 (1976) (plurality opinion) (defining least restrictive means requirement for compelled association). And the Supreme Court has indicated that the nature of the inquiry does not differ depending on the free speech or religious liberty context. *See* Sherbert v. Verner, 374 U.S. 398, 406–07 (1963) (holding that intrusion upon free exercise would only be justified if the government could "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights" but citing four free speech cases in support of that proposition).

union for its bargaining activities (thus achieving its desired interests in labor peace) without incurring any additional costs at all.

As described above, the key initial move in the government-payer alternative is for the public employer to do directly what it currently does indirectly: pay for the costs of collective bargaining.[246] Thus, rather than paying employees a set level of wages and then deducting fair share fees from those wages as a condition of employment, the public employer can reimburse the union for its collective bargaining expenses out of general treasury funds. Doing so would free objecting workers of the compulsion to support or affiliate with the organization to which they object, curing any First Amendment infringement.[247]

One might pause the hypothetical right here, without any further restructuring of the government employer's finances, and ask whether the just-described alternative would render compelled fair share fees unconstitutional even if the government takes on the additional costs without a corresponding reduction to employee salaries. Under the analysis offered in *Hobby Lobby*, the answer is likely yes. Recall that the critical inquiry in *Hobby Lobby*'s evaluation of the government-payer alternative was whether the "cost of providing the forms of contraceptives at issue . . . would be minor when compared with the overall cost" of the Affordable Care Act,[248] the statute that triggered the government's interest in women's health in the first place (by authorizing the Department of Health and Human Services to enact the contraceptive mandate).

The parallel inquiry in the union fee case would ask whether the cost of reimbursing the union's germane bargaining costs would be "minor when compared with the overall cost of" the public employer-employee relationship, which is the relationship that gives rise to the public employer's interest in preserving labor peace.[249] As just described, that cost is generally quite minor, amounting to a small percentage of the total wages paid by the government (a percentage that is even smaller when viewed in the context of the entire package of health insurance, retirement, and work place benefits that the employer provides to the employee).[250] So there is reason to think

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246 *See supra* Part III (describing the government-payer alternative).

247 *See infra* Section V.A (discussing the less restrictive nature of direct reimbursement alternative).

248 *Hobby Lobby*, 134 S. Ct. at 2781.

249 *See id.* (stating that the cost of providing the contested forms of contraception would be "minor when compared with the overall cost of ACA").

250 *See supra* note 139 and accompanying text (noting that the fair share fee charged in *Knox* was just one percent of employee wages). Note that the government-payer alternative might be even less costly if the employer and union were to agree to a provision

that even if requiring the public employer to reimburse the union for its bargaining activities would result in some additional costs for the government, those costs would be too minor to justify fair share fees' intrusion upon First Amendment rights.

But a court need not even engage in this line-drawing exercise because the government employer possesses means that make the case much easier: It can recoup the additional costs of union reimbursements by making offsetting reductions to gratuitous benefits or future wage raises.[251] As described earlier,[252] either approach would permit the government employer to shoulder the costs of public sector bargaining in a budget-neutral fashion—a far less onerous burden on the government than, for example, constructing an entirely new federal program with the obligation to pay for contraceptive services for thousands of women. And if *Hobby Lobby* teaches that the latter burden is not so cumbersome as to render the government-payer alternative unviable for purposes of a least restrictive means analysis, then having the government pay directly for union bargaining costs is an *a fortiori* case.[253]

In short, by eliminating the compelled fee, the government-payer alternative eliminates any claim to a First Amendment injury because dissenting employees are no longer forced to support or associate with the union and its advocacy through any financial contribution at all.[254] What is special about the government-payer alternative in the public sector union fees context, then, is that the government is in one sense

requiring the government only to pay for those union costs to which dissenting employees object. That is, rather than reimbursing the union for *all* of its bargaining costs, the government could pay for only the share of costs that objecting employees decline to pay, with willing employees paying the rest. Just how much money such a provision would save is difficult to predict, however, given that the government's express promise to cover the costs incurred by the union for each employee who opts out would create an additional incentive for even ardent pro-union employees to decline to pay themselves. A union's decision to grant voting rights in union affairs only to voluntary fee-paying members might counteract the free rider incentives somewhat.

[251] As I discuss below, *see infra* Section V.A, it is essential that the benefits cuts and future wage reductions occur in a fashion that does not deprive workers of their vested property interests. Otherwise, the offsetting cuts would constitute compelled subsidies from the worker to the union no less than a forced deduction from one's paycheck.

[252] *See supra* Part III (describing the government-payer alternative).

[253] The outcome of the narrow tailoring analysis does not depend on one's rejection of the free rider rationale as a sufficiently vital government interest. This is because the government can also accomplish its goal of eliminating the harms produced by free riders—namely, avoiding a situation where willing employees pay a disproportionate share of the union costs and ensuring the financial health of the unions—through the less restrictive means of paying directly for the union's bargaining activities.

[254] Even if one were to apply *Pickering* balancing, the result would be the same because the government's interest in compelling union subsidies would be negligible given that it can achieve its labor peace interest without encroaching on individual freedoms at all.

already paying the union its bargaining costs in the present-day fair share fee system; it is just doing so by way of public employees as a middle person, forcing such employees to turn over a portion of their government paychecks to the union. In this unique circumstance, the government-payer alternative merely entails removing the employee middle persons from the equation and asking the government pay for the challenged activity directly.

V
Objections to the Government-Payer Alternative

Two primary objections might be levied against the government-payer alternative. First, it may be argued that the First Amendment interests of objecting employees are burdened just as much by the alternative as the fair share fee system it would replace, such that the alternative is not really "less restrictive" in the first place.[255] Second, perhaps the government-payer approach is lacking in some respect that would prevent it from being as effective a means for the government employer to pursue its labor peace interest. If so, then the workaround might be an "alternative" only in an illusory sense, and thus arguably insufficient to preclude the government from using its preferred fair share fee approach. This Part takes up both arguments, prefacing each with a discussion of principles underlying less restrictive means analysis.

A. Is the Government-Payer Alternative Less Restrictive than Fair Share Fees?

The first principle of less restrictive means analysis is that in order to place the challenged governmental action in constitutional jeopardy, a suggested alternative must actually be less restrictive of constitutional rights than the approach it would replace. It goes without saying, in other words, that if a proposed alternative is actually *more* (or equally) burdensome of protected rights, perhaps by infringing upon the same individuals' rights just in different ways, then the alternative should not be found to defeat the government's chosen course.

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[255] Intriguingly, one can imagine the identity of the party advancing this objection switching based on when in the sequencing of events it is made. During litigation challenging fair share fees, it would be pro-labor government employers who might object to the government-payer alternative insofar as they would prefer to preserve the current system of union financing. But if the Supreme Court strikes down fair share fees and public employers renegotiate their bargaining agreements to include direct reimbursement provisions, it might be anti-union employees who argue that such provisions still infringe their First Amendment freedoms.

A perhaps more difficult question involves just *how much* less restrictive an alternative must be to qualify; is it enough if the proposed alternative is only somewhat less restrictive (perhaps by freeing affected individuals from some, but not all, of the constitutional intrusion), or must the proposed alternative be *significantly* less restrictive? The Supreme Court has given inconsistent formulations, at times demanding simply that the challenged action be the "least" restrictive means,[256] thereby suggesting that even a minimally less restrictive means must be adopted over the challenged action, while at other times upholding challenged conduct so long as there are not "significantly less" restrictive alternatives for attaining the government's interests.[257]

It is difficult to accept the rule that a proposed alternative must be *significantly* less restrictive before it can cast doubt on the challenged government action. Such a rule would permit the government to justify its infringement on a challenger's constitutional rights by arguing that, even though the challenger has identified an alternative that would diminish her injury, the government ought to be allowed to persist in its current course because the unnecessary burdens it imposes on individuals' rights are only somewhat greater than the less restrictive alternative. Beyond being difficult to administer (just how much unnecessary infringement on protected rights is *de minimis* enough to be deemed permissible?), such an argument would essentially permit the government to encroach upon rights for no discernible purpose, other than the mere convenience of persisting with the current, more intrusive (yet no-more-effective) course—a convenience that could be asserted in any case.

With these principles in mind, we can now consider the argument that the government-payer alternative is no less restrictive of First Amendment rights than the fair share fee system it seeks to replace.

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256 *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 363 (1976) (plurality opinion) (analyzing the constitutionality of political patronage dismissals).

257 *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (analyzing the constitutionality of compelling an association to accept female members). This is a theoretical debate that also extends beyond our borders; the Canadian Supreme Court, for example, has suggested the more permissive approach of granting governmental actors the discretion to utilize more rights-restrictive methods even in the face of effective alternatives. *See* R. v. Keegstra, [1990] 3 S.C.R. 697, 784–85 (Can.) ("In assessing the proportionality of a legislative enactment to a valid governmental objective," the government should not be forced "to rely upon only the mode of intervention least intrusive of a Charter right or freedom." Instead, "the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objectives in ways that alternative responses could not, and is in all other respects proportionate to a valid . . . aim.").

More specifically, an objecting employee[258] might argue that the change in the government's accounting practices (from deducting union fees out of employee wages to paying that same amount directly to the union while making corresponding benefit or future wage cuts) is immaterial from the perspective of the First Amendment. The difference between the compelled fair share fee regime and the government-payer alternative is, the argument would go, mere economic formalism: In both cases, the net effect is that money (or an equivalent benefit) that would otherwise be in the employee's pocket is instead given to the union to which she objects.

In one sense, this objection is correct—although the objection is not insurmountable. To understand why, one must begin by acknowledging a threshold inquiry that is implicit in the First Amendment compelled subsidy doctrine: whether the money that the individual (or entity) is being forced to contribute is in fact money that can be characterized as the individual's (or entity's) property. For it is only when an individual is compelled to turn over her own property to support the speech activities of an objectionable organization that the concerns underpinning compelled subsidy theory are implicated, including the harm forced payments work on the individual's expressive autonomy and personal belief, as well as the distortion of public debate.[259] In each of the compelled subsidy cases to reach the Court so far,[260] the money at issue has been so obviously the property of the individual or entity forced to pay it that the issue has not received any attention.[261] The fair share fee cases are no different, as there is really

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[258] As noted, *supra* note 255, this argument could also be made by a government-employer defendant in an effort to preserve fair share fees by attacking the government-payer alternative as no less restrictive than fair share fees.

[259] *See supra* notes 49–51 (describing theoretical underpinnings of compelled subsidy theory).

[260] *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405 (2001) (no objection that mushroom grower was forced to pay money that was its own property to subsidize generic advertising); Keller v. State Bar of Cal., 496 U.S. 1 (1990) (no dispute that compulsory state bar dues were property of objecting attorneys).

[261] Of course, one could certainly construct a hypothetical where a compelled subsidy claim would be rejected on the ground that the compelled payment at issue is not the property of the challenger, such that the challenger is not actually being forced to support or subsidize objectionable speech at all. For example, imagine a state law requiring auto thieves (the type who sell their stolen cars to chop shops) to disgorge their ill-gotten profits, creating a fund for such profits, and paying money out of that fund to organizations such as Mothers Against Drunk Driving. Would an auto thief be able to sue on the First Amendment ground that the law forces him to support an ideological organization with which he may disagree? Certainly not, for the simple threshold reason that the money at issue was stolen—and stolen items are axiomatically not property belonging to the thief, with the result that the thief has not been compelled to support, in a legally cognizable way, any objectionable cause at all. *See* United States v. Cent. Nat'l Bank of Cleveland, 429

no dispute that the objecting employees are being compelled to furnish money out of wages to which they have a legitimate property interest.[262]

To be sure, this conclusion itself implicates yet another threshold question—the question of what constitutes protected "property" for purposes of deciding whether an individual has been compelled to subsidize speech to which he objects. That issue is well beyond the scope of this article, but fortunately (from the perspective of simplicity) there can be little serious debate that an employee has a protected property interest in the wages she receives for work, no matter how "property" is defined.[263] In any event, for sake of ease, I use here the positivist definition of constitutionally protected "property" interests established in *Board of Regents of State Colleges v. Roth*, which asks whether the individual has "a legitimate claim of entitlement" to the alleged property interest under state law.[264]

Under that definition, the First Amendment should be understood to forbid any attempt by a government employer to offset the costs of reimbursing a union for its bargaining activities that would involve the employer depriving its employees of money (or property) to which she has a "legitimate claim of entitlement."[265] This standard yields no surprises when applied to the existing fair share fee system: A government employee clearly has a legitimate claim of entitlement to the wages that the government has paid her, and so fair share fees infringe upon her First Amendment rights.[266] Critically, that same standard would also forbid a government employer to reimburse a union using funds the employer obtains by unilaterally cutting the *current* level of employee wages in violation of an existing collective bar-

F.2d 5, 7 (8th Cir. 1970) (recognizing the "common law tenet that a thief possesses no ownership rights in property which he has purloined").

[262] *See* Gilpin v. Am. Fed'n of State, Cty. & Mun. Emps., 643 F. Supp. 733, 737 (C.D. Ill. 1986) (recognizing that "the deduction of 'fair share' fees impinges on recognized liberty and property interests to which the strictures of the Fourteenth Amendment's due process clause apply").

[263] *See generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 955–90 (2000) (describing the definitions of constitutional "property" that the Supreme Court has explicated: a positivist definition that looks to state law for a legitimate claim of entitlement; a hybrid definition that looks to state law for a legitimate claim of entitlement but also requires that the state must have "cause" to encroach upon the property interest; and a definition that inquires whether the purported property owner enjoys the right to exclude others).

[264] 408 U.S. 564, 577 (1972).

[265] *Id.*

[266] *See Gilpin*, 643 F. Supp. at 737 (stating that deductions of fair share fees impinge on recognized liberty and property interests).

gaining agreement or employment contract.[267] Such an action would be no less restrictive of First Amendment rights because in both cases, the employee possesses a "legitimate claim of entitlement" to a set wage level with which the government has interfered.[268] The upshot, then, is that the government's ability to effectuate the government-payer alternative is bounded by an important limitation: The government may not recoup the costs of its reimbursements to the union through means that would deprive employees of a protected property interest any more than compelling the employees to contribute a portion of their wages to the union in the first instance.

But the flipside of this limitation is that the government *may* recoup the costs of union bargaining activities through other means that do *not* interfere with any employees' property interests. Critically, both of the alternatives identified above[269] satisfy this test: It would not interfere with an employee's property interests for the government to cut gratuitous employee benefits such as turning down the thermostat or putting limits on employee phone usage (assuming, of course, that such benefits are not guaranteed to employees under an existing contract or statute); nor would it infringe on an employee's property interest for the government to negotiate a slightly lower than market level *future* pay raise. The latter point is critical, as case law confirms that government employees do not enjoy a protected property interest in a future pay raise if no "legitimate claim of entitlement" to such a "pay raise was created by a statute, regulation or

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267 *See* Eguia v. Tompkins, 756 F.2d 1130, 1138 (5th Cir. 1985) ("There can be no doubt that the plaintiff's interest in his salary . . . is a property interest protected by the Constitution.").

268 This is true, at least, under existing doctrine. But query whether, as a conceptual matter, a longer-term view of the relationship between the public employer and its employees might actually suggest that the employer should be free to renegotiate even *existing* salary levels to offset the costs of reimbursing the union's bargaining activities. After all, if it would not have violated the First Amendment for an employer to negotiate a contract on day one of the employer's existence granting employees a set salary level and then remitting *additional* treasury funds to a union to offset its bargaining costs, why is it that the identical economic arrangement violates the First Amendment simply because, at some prior point in time, the government had channeled its reimbursement of the union's bargaining costs through the employees' paychecks? It is only by accepting existing salary levels as the relevant baseline, in other words, that a constitutional violation can be recognized—but that choice of baselines is "inevitably . . . arbitrary." *See* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1314 (2002) (highlighting the arbitrariness of isolating particular, discrete transactions from the background relationship between government and citizens for purposes of evaluating constitutional harm); *see also id.* at 1378–79 (describing baseline and framing problems inherent in constitutional analysis).

269 *See supra* Part III and Section IV.B.2.b (describing the government-payer alternative).

contract."[270] As a consequence, any government employer can achieve its labor peace interests in negotiating with a single union counterpart through a simple, less restrictive, and cost-neutral alternative: It can reimburse the union directly while negotiating future wage raises in a reduced amount that would offset those reimbursements.

To test this theory, consider the nature of the First Amendment injury experienced by dissenting employees who are forced to pay fair share fees. When a dissenting employee is compelled to pay a fee to a union, the employee's freedoms of speech and association are implicated—speech, because she is forced to support financially the union's messages at the collective bargaining table and to express a message of support for the union through the financial contribution itself,[271] and association, because the very act of giving money to the union affiliates the employee with the union.[272] When the government (rather than an employee) foots the union's bill, however, these injuries never arise. An employee who is under no compulsion to make a payment to a union is obviously not forced to support the union or its speech; nor is such an employee required to affiliate with the union through any kind of financial contribution.[273] In fact, because it is the

[270] Brown v. United States, 631 F. Supp. 954, 958 (D.D.C. 1986), *aff'd*, 810 F.2d 307 (D.C. Cir. 1987); *see also, e.g.*, Estes v. Tuscaloosa Cty., 696 F.2d 898, 901 (11th Cir. 1983) (finding no property interest in pay raise in the absence of a statute, rule, or other understanding creating such entitlement); *cf.* Needleman v. Bohlen, 457 F. Supp. 942, 945–46 (D. Mass. 1978) (holding that a plaintiff teacher had "an expectancy" that a pay raise "would not be withheld" under the "terms of the Collective Bargaining Agreement" then in force).

[271] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) ("[C]ontributing to an organization for the purpose of spreading a political message is protected by the First Amendment," and "[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."); *see also* Buckley v. Valeo, 424 U.S. 1, 21 (1976) ("A contribution serves as a general expression of support for the candidate and his views . . . .").

[272] *See Abood*, 431 U.S. at 222 ("To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."); *see also Buckley*, 424 U.S. at 22 (observing that limitations of contributions to political candidates "also impinge on protected associational freedoms").

[273] In fact, when the government chooses to reimburse the union for its bargaining activities directly, the anti-union employee finds herself in the same position as any other citizen who has no affiliation with the union yet objects on policy grounds to the government's decision to expend public funds in the union's support. But as the Supreme Court has long held, such citizens lack general taxpayer standing to challenge these government actions, for their objections constitute non-justiciable generalized grievances properly brought through the democratic political process. *See* United States v. Richardson, 418 U.S. 166, 174 (1974) ("[A] taxpayer may not employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." (quoting Flast v. Cohen, 392 U.S. 83, 114

government employer who pays for the union's bargaining activities, an argument might be made that the payment constitutes government speech, such that no First Amendment claim arises at all.[274] And so long as the government employer recoups the costs of paying for union activities through means that do not encroach upon its employees' protected property interests, the government achieves its interests in a cost-neutral manner that does not force employees to indirectly subsidize the union's speech.

In all events, the point is that it will not do for an objecting employee to assert that the government-payer alternative occasions First Amendment harm no different from a compelled union fee regime.[275] The government-payer alternative is instead an entirely less-restrictive approach to furthering labor peace; it does not merely limit the First Amendment intrusions produced by fair share fees by some modest amount, it eliminates them altogether.[276]

(1969) (Stewart, J., concurring) (internal quotation marks omitted)); Massachusetts v. Mellon, 262 U.S. 447, 488–89 (1923) (rejecting taxpayer standing).

[274] *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies."); *id.* at 235 ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."). That said, a strong argument could be made that the messages advocated by a public sector union receiving government funds are controlled by private actors (i.e., the employee members who vote on union affairs), not the government, such that the speech remains private speech regardless of its funding source. *Cf.* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 560–61 (2005) (holding that the Department of Agriculture promotional advertising campaign for beef was government speech where "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government").

[275] A dissenting employee might claim a different kind of injury altogether, namely that she is still forced to associate with the designated union in the sense that the union is an exclusive representative with the authority to negotiate on the employee's behalf. The Supreme Court rejected this argument in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 289–90 (1984), holding that exclusive representation does not violate the First Amendment because dissenting workers are still "free to form whatever advocacy groups they like." Yet even if *Knight* were wrong, any First Amendment injury would not stem from any reimbursement that the government might make to a union for its bargaining efforts, but rather from the exclusive representation provision contained in many state labor laws—a provision that would exist regardless of the choice between a fair share fee and direct reimbursement regime. *See supra* notes 59–60 (discussing exclusive representation provisions). As a result, the government cannot defend the fair share fee regime on the ground that the government-payer alternative fails to rectify the harms wrought by exclusive representation, since the same would be true of fair share fees.

[276] For this reason, even if one were to adopt a view of the less restrictive means test that would permit the government to continue with its existing approach unless a proposed alternative is *significantly* less restrictive of individual rights, see, for example, Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (finding that infringements "may be justified by

B. Is the Government-Payer Alternative as Effective as Fair Share Fees?

A finding that a proposed alternative is in fact less restrictive of individual rights does not end the analysis. After all, if the proposed alternative would not enable the government to achieve its claimed interests, the option is not actually an "alternative" in a way that matters to the government (or at least, it is no better an alternative than the choice the government always has of doing nothing). A second principle of less restrictive means analysis is accordingly that the proposed alternative must permit the government to achieve its compelling interest *effectively*.

Yet a question of degree arises here, too: Just *how effective* must the proposed alternative actually be to put the challenged governmental conduct in jeopardy? John Hart Ely has argued that a rule of *equivalent* effectiveness would "go a long way toward eviscerating the first amendment," since "in virtually every case involving real legislation, a more perfect fit involves some added cost."[277] In other words, there will very rarely be alternatives that are equally as effective as the government's preferred course, with the result that a rule requiring equally-as-effective alternatives would strike down only a government actor's "gratuitous inhibition[s] of expression."[278] Conversely, Ely notes, a rule requiring the government to adopt alternatives that are only *somewhat* as effective at achieving the government's ends might go too far in the other direction, enshrining a "constitutional right symbolically to break any law . . . so long as its purposes can be fairly well served, as of course they almost always can, by alternative means."[279] The Court has not been explicit as between these two formulations, sometimes requiring that the alternative be "at least as effective" as the challenged governmental action,[280] and at other times requiring a general finding of efficacy without explicit comparison to the government's chosen course.[281]

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regulations adopted to serve compelling state interests . . . that cannot be achieved through means *significantly* less restrictive of associational freedoms" (emphasis added)), that test would be satisfied by the government-payer workaround anyhow.

277 Ely, *supra* note 199, at 1485, 1487.

278 *Id.* at 1487; *see also* Fallon, *supra* note 170, at 1331 ("Typically if not invariably, however, any alternative that is less restrictive in theory is also likely to be less effective in fact.").

279 Ely, *supra* note 199, at 1488.

280 *See* Reno v. ACLU, 521 U.S. 844, 874 (1997) (holding that a ban on adult speech is "unacceptable if less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve" (emphasis added)).

281 *See* Ashcroft v. ACLU, 542 U.S. 656, 666 (2004) ("[T]he court should ask whether the challenged regulation is the least restrictive means among available, *effective* alternatives." (emphasis added)).

A sensible middle-ground might be to recognize the two different situations for what they are. That is, if a proposed less restrictive alternative really is equally effective as the government action it seeks to replace, then that is the end of the matter; the government must adopt the alternative means instead.[282] But if the proposed alternative is actually *less* effective—which is to say that it requires the government to sacrifice its claimed interest to some degree—then the government should be free to utilize its preferred means if the benefits to doing so outweigh the extent to which the proposed alternative is less restrictive of individual rights.[283]

This tees up the second argument that labor proponents might raise to stave off a ruling that the government-payer workaround is a less restrictive alternative—that the workaround is not as *effective* a means for achieving the government's interest in labor peace as fair share fees. To this point, one specific objection comes to mind: concern that direct reimbursements from the government may pressure public sector unions into advocating less zealously on behalf of public workers.[284] A number of states have adopted laws reflecting this gen-

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[282] *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.").

[283] I acknowledge that this leaves open the significant theoretical question of *how much* less restrictive the proposed alternative must be to justify forcing the government to sacrifice its preferred, more effective approach to pursuing its desired ends. Scholars have debated this issue at some length, with many suggesting that the proper inquiry is ultimately one of proportionality, a common approach in foreign countries that, broadly speaking, asks "whether an infringement of rights is proportionate to the desired objective." Fallon, *supra* note 170, at 1296; *see also* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 687–96 (2005) (describing generalized principles of proportionality review, common across developed nations). That said, while some constitutional dilemmas may reduce ultimately to a comparison between the importance of the government's desired objective and its costs in terms of individual rights, this Part argues that a weighing is unnecessary in the context of union fees because the government-payer alternative is both absolutely less restrictive of First Amendment freedoms (i.e., it eliminates any First Amendment burdens on objecting workers) and enables public employers to achieve their interests in labor peace *equally* effectively as a fair share fee system.

[284] *See generally* HERMAN, *supra* note 38, at 71–72, 361–62 (discussing union independence); Abigail Evans, Note, *Cooperation or Co-Optation: When Does a Union Become Employer-Dominated Under Section 8(a)(2) of the National Labor Relations Act?*, 100 COLUM. L. REV. 1022, 1025–30, 1033 (2000) (discussing the historic practice by some anti-union employers of forming "company union[s]," which "served to lull employees into thinking they had a voice in workplace governance when in fact, all meaningful decisions and actions of the group were controlled by management"). The California Solicitor General touched on this concern during the oral argument in *Friedrichs*, explaining that "the company union concern . . . is why it's very important that we not fund [the union] directly, and that we not be perceived as controlling the speech of [the union] representative." Transcript of Oral Argument at 40, Friedrichs v. Cal. Teachers Ass'n (2016) (No. 14-915).

eral concern, modeled after the NLRA's approach to private sector bargaining.[285] The Illinois Public Labor Relations Act, for example, makes it an unfair labor practice for an employer to "dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it."[286] As one commentator has explained, the NLRA's prohibitions "safeguards the union's integrity as the bargaining agent, insuring that it will be free to act solely in the interest of its principals, the unit-member employees, in the [bargaining] process."[287]

A government employer might thus seek to defend a fair share fee requirement by arguing that the government-payer alternative would jeopardize its important interest in ensuring union independence and zealous advocacy.[288] To unpack this a bit further, the gov-

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[285] *See* 29 U.S.C. § 158(a)(2) (2012) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."). The NLRA also has a provision making it a crime for an employer to "pay, lend, or deliver . . . any money or other thing of value" to a bargaining representative, though like the NLRA more generally, that prohibition does not apply to government entities. 29 U.S.C. § 186(a) (2012); *see also id.* § 152 (defining "employer" not to include the United States or any State or political subdivision thereof). The Supreme Court recently granted certiorari to resolve a dispute over the application of this provision to various cooperative agreements between employers and unions, only to dismiss the case as improvidently granted. Unite Here Local 355 v. Mulhall, 134 S. Ct. 594, 594 (2013).

[286] 5 ILL. COMP. STAT. ANN. 315/10(a)(1) (West 2013); *see also, e.g.*, CAL. GOV'T CODE § 3519(d) (West 2010) (similar); WASH. REV. CODE ANN. § 41.59.140(1)(b) (West 2012) (similar).

[287] Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 518–19 (1986). There has been some debate in the literature regarding the net value of such prohibitions, which codify an adversarial and perhaps outdated model of labor relations. *See* HERMAN, *supra* note 38, at 70–72 (noting how laws proscribing employer interference with and support for unions may actually prevent valuable cooperation between unions and employers); *see also* NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 547 n.12 (6th Cir. 1984) ("Whatever value a *per se* prohibition on employer support of unions may have had in early cases . . . a rigid rule, requiring a 'purely adversarial model of labor relations,' . . . runs contrary to more recent trends . . . ." (quoting Hertzka & Knowles v. NLRB, 503 F.2d 625, 631 (9th Cir. 1974)); Evans, *supra* note 284, at 1053 nn.161–63 (collecting commentary on repeal and reform proposals for NLRA § 8(a)(2)). For purposes of argument, though, this Article assumes that the state has at least a legitimate interest in preserving an adversarial relationship between public sector unions and government employers.

[288] To be clear, the argument could *not* be that the government-payer alternative is ineffective simply because the government employer at issue may be forbidden to contribute financial support to a union by state law. A state may not render inviable a less restrictive alternative simply by enacting legislation that would make the alternative illegal; were it otherwise, the First Amendment's least restrictive means test would be nugatory. For example, allowing the government to legislate away a less restrictive alternative would permit the federal government in *Hobby Lobby* to justify readopting the contraceptive mandate if it passed a new law forbidding any federal agency from providing contraceptive coverage directly to employees of religiously owned for-profit corporations. Thus, even to

ernment employer may worry that, by giving the union so much—that is, by directly guaranteeing the union's financial security—the government-payer alternative will create a principal-agent problem under which the union becomes responsive primarily to its employer financier, and not to its worker constituents, thereby jeopardizing labor peace.

This is a serious concern, although there are three meaningful responses. First, it may be noted that a direct reimbursement provision would not constitute a unique instance in which a public employer offers a benefit of appreciable financial significance to its union counterpart. Employers make decisions at the collective bargaining table that inure to the benefit of unions all the time. For example, employers routinely enter into voluntary recognition agreements with unions, which have the critical effect of increasing a union's chance of being recognized in the first place (while also saving considerable financial costs that the union would otherwise expend proceeding through costly certification procedures), perhaps the most important juncture in a public sector union's quest for existence and survival.[289] Employers also frequently permit union members to use workspace and time for union activities—another form of support with financial value.[290] And employers turn over lists of employee contact information, enabling unions to organize and seek certification more easily.[291] These cooperative practices are routinely upheld by courts,[292] and few would contend that they unfairly undermine a union's ability to negotiate dispassionately in the best interests of its employees. The same should be true for a duly-negotiated provision in

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the extent a state's labor law may deem the government-payer alternative an unfair labor practice, *cf.* Lansing Sch. Dist. v. Lansing Educational Assistants MEA/NEA, 21 MPER ¶ 21, 2008 WL 8567842 (2008) (deeming proposal for public employer to pay employee fair share fees as a fringe benefit an unfair labor practice under Michigan law), that in and of itself would not render the alternative unavailable so long as the state could achieve its interest in union independence through some other means.

289 *See, e.g.*, MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 466 (1999) (noting longstanding policy of promoting voluntary recognition agreements); *cf.* NLRB v. Gissel Packing Co., 395 U.S. 575, 595–98 (1969) (obtaining "signed authorization cards from a majority of the employees" is sufficient to obligate an employer to recognize a union). *See generally* Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 378–82 (2007) (discussing growth of private sector union recognition agreements).

290 *See* NLRB v. Waterman S.S. Corp., 309 U.S. 206, 225–26 (1940) (recognizing that an employer may permit union officials to access the employer's property so long as it does so on a nondiscriminatory basis).

291 *See* Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239–40 (1966) (requiring an employer to turn over names and addresses of all eligible voters in a union election); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969) (plurality opinion) (upholding substance of *Excelsior* rule).

292 *See supra* notes 289–91 (collecting cases upholding cooperative practices).

a collective bargaining agreement through which the government reimburses a union for its legitimately-incurred bargaining costs.[293] Any other rule would prevent employers and unions from cooperating in peaceful pursuit of employee and management best interests, a result that would run counter to the whole purpose of state and federal labor law.[294]

Second, one need not accept an analogy between direct reimbursement provisions and voluntary recognition, workspace, and employee list provisions to see that the government-payer alternative poses no special risk to union independence. That is because the closest analogy for a direct reimbursement provision is to the fair share fee clause itself. This, after all, is the relevant comparator; the least restrictive alternative inquiry asks whether the proposed alternative is as effective *as the government action it seeks to replace*.[295] And here, the vital point is that a provision through which the government employer agrees to finance the union through direct reimbursement is no more threatening to union independence than a provision through which the government guarantees the same financial security through compelled fair share fees. Put another way, a union faces no greater incentive to soft-pedal its bargaining efforts out of the fear that the public employer may retaliate by eliminating a direct reimbursement provision from a future bargaining agreement than it would out of fear that the employer may retaliate by eliminating a fair share fee clause. In either case, the government has the identical power to get back at an overzealous union by eliminating the provision that secures

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[293] Indeed, a number of judicial decisions construing what it means to "dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it," 29 U.S.C. § 158(a)(2) (2012), support the conclusion that the government-payer alternative would ordinarily constitute permissible cooperation between employer and union, at least absent unusual markers of employer dominance. *See, e.g.*, Chi. Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 167 (7th Cir. 1955) (holding, with respect to § 8(a)(2) of the NLRA, that "[a] line must be drawn . . . between [impermissible financial] support and cooperation. Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their bargaining representative in carrying out their independent intention"); State *ex rel.* Graham v. Northshore Sch. Dist. No. 417, 662 P.2d 38, 45 (Wash. 1983) (holding that "the general meaning of contribute is to give or grant something without obligation to do so. Such is not the case before us as the agreements were reached by arm's length bargaining" and thus declining to find it an unfair labor practice for the state to allow employees to use time at work for union purposes).

[294] *See, e.g.*, NLRB v. Am. Nat'l Ins., 343 U.S. 395, 401–02 (1952) (noting that the NLRA was "designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers").

[295] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997) (recognizing that a statute will be deemed "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve").

the union's financial security from the next version of the bargaining agreement, leaving the union to survive on fees paid by willing employees alone. Yet the risk of such retaliation has hardly caused labor proponents to decry existing fair share fee clauses as granting government employers too much power over union bargaining incentives, and the same should be true of a direct reimbursement regime.

Third, and perhaps most convincingly, a direct reimbursement regime poses no greater an agency problem than the fair share fee system it would replace because in both cases the ultimate power over the union's affairs lies in the hands of the union's *members*, not the employer. Under either regime, the employer's potential ability to threaten retaliation against an overzealous union by requiring it to function on the basis of voluntary payments is less threatening than the workers' ability to eliminate the union's existence altogether. After all, as a simple matter of institutional design it is the *workers*, not the government employer, who choose how to vote on union policies and union officers,[296] and whether to decertify a union that is no longer adequately representing their needs.[297] Faced with a choice between zealously advocating employee interests (at the risk of losing a union security clause in a future contract) and soft-pedaling negotiations with the employer (at the risk of angering the very employees who have the power to take away the union's status as the certified representative), a rational union would reasonably prefer the former course. Likewise, so long as it is union members (those workers who elect to pay the union's nonchargeable political expenses even under the direct reimbursement regime) who continue to vote on the amounts of annual union budgets that the government agrees to reimburse, there is no greater a threat of the government pressuring the union to ask for lower funding amounts than exists under the present fair share fee system. Thus, as long as workers retain the power to make such vital decisions over the fate of their union, no special

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[296] *See* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 314–16 (5th ed. 2013) (discussing processes through which many unions elect local, regional, and national officers); Michael J. Goldberg, *Democracy in the Private Sector: The Rights of Shareholders and Union Members*, 17 U. PA. J. BUS. L. 393, 405–07 (2015) (same); *cf.* 29 U.S.C. § 411(a)(1) (2012) (federal provision guaranteeing covered workers the right to "nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws").

[297] *See, e.g.*, CAL. GOV'T CODE § 3520.5 (West 2010) ("[E]mployee organizations formally recognized as exclusive representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees . . . ."); 5 ILL. COMP. STAT. ANN. 315/9(d) (West 2013) (stating that a majority of employees may vote to "revoke the certification of the public employee organizations as exclusive bargaining representatives").

agency problem is posed by a government employer's choice to guarantee the union's financial security by a direct reimbursement provision rather than by enforcing fair share fee clauses.

None of this is to say that a government employer could *never* commit an unfair labor practice by paying money to a union in ostensible support for its collective bargaining expenses. One might imagine cases where, for example, a government entity wishes to overpay its union counterpart in exchange for an under-the-table promise to soft-pedal negotiations on a future collective bargaining agreement. Such a practice would surely trigger the government's interest in preserving the integrity of union bargaining and constitute an unfair labor practice under the terms of many state laws.[298] One could also imagine a government employer seeking to interfere with union independence in the other direction by trying to meddle in the reimbursement amount requested by the union in a given year, subtly pressuring a union to accept a lower amount.

But there are ways to prevent such improper interference that stop well short of an absolute bar on all arms-length government reimbursements for reasonably incurred bargaining costs. The simplest approach would be for the government to agree to a contract provision stating that the amount of money to be paid to the union each year for bargaining expenses is to be set by the *union membership* in much the same way as union budgets (and thus fair share fees) are set under many existing public sector union bylaws—either through direct member referenda or through approval by elected representatives on behalf of the broader membership.[299] Under both approaches, the union's annual budget for bargaining costs, grievance procedures, and other chargeable expenses is ultimately set by the workers themselves, who have an incentive to approve an amount that will enable the union to advocate zealously without being so high as to lead to unbearably costly union dues. Under a direct reimbursement system, the union membership (those workers who elect to pay dues for the union's nonchargeable political expenses) would still have an

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[298] *See supra* notes 285–86 and accompanying text (collecting relevant statutes).

[299] For an example of union bylaws using the membership referendum approach to annual budget amounts, see AFSCME Local 688 Bylaws § 4.I.A, http://www.local668.org/index.cfm?action=article&articleID=BB2E47AF-6183-4479-B196-5BD0EF8B0244 (follow "Bylaws" hyperlink) (last visited Feb. 22, 2015) ("The Executive Board shall review and approve or amend the [annual] budget before it is submitted to the Membership for adoption."). For an example of a union that vests budget approval in the hands of elected union representatives, see Constitution and By-Laws of the Chicago Teachers Union, art. VI, § 2(g) (last amended 2009), http://www.ctunet.com/grievances/CONSTITUTION-and-BYLAWS-11-12-10.pdf?1294855346 (requiring House of Delegates—a group of union representatives elected by the union membership—to approve annual budgets).

incentive to strike a reasonable balance, since every additional dollar they approve in reimbursable bargaining expenses is in theory a dollar the government may wish to recover from future employee wages. And while it is conceivable that union members in a direct reimbursement system may perceive a more attenuated connection between annual budgets and ultimate wage levels than members in a fair share fee system, such that the membership may be less willing to check annual budget amounts, a union and employer could counteract this concern by negotiating annual caps on the amount budgets are permitted to increase each year based on prior year growth levels.[300]

The end result is that government employers possess an equally effective alternative to compelling objecting employees to pay fair share fees: They can reimburse union bargaining costs directly while leaving decisions over union policies, officials, and decertification in the hands of workers, thereby preserving union independence no less than in a fair share fee system. That alternative is entirely less restrictive of employee freedoms and poses no greater obstacle to labor peace than the fair share fee it would replace.[301] As a consequence, a compelled fair share fee provision is not the "means that is least restrictive of freedom of belief and association in achieving"[302] the government's interest in labor peace, and so such provisions should be held to violate the First Amendment.

VI
Implications of the Government-Payer Alternative

A decision by the Supreme Court holding public sector fair share fees unconstitutional on the ground that the government-payer alternative is a less restrictive alternative would have important implica-

300 The government employer could also consider neutral third-party audits of how much a union has encountered in legitimate bargaining, grievance, and contract administration costs. Under such a system, a union that requests reimbursement for nonchargeable expenses (such as political costs) or that seeks to grieve or arbitrate clearly meritless cases and issues (on the theory that the government will pay for such procedures anyways) could have its decisions vetted *both* by members who have the incentive to keep expenses in check (lest the government reduce future wages in lieu of burgeoning union expenses) and by a neutral third-party specifically tasked with ensuring the integrity of union reimbursement requests.

301 Even if one were inclined to conclude that the direct reimbursement approach is marginally less effective than a fair share fee approach because of concerns that the former would interfere more meaningfully with union independence, any slight decrease in efficacy would be more than outweighed by the benefits produced by the government-payer alternative's complete elimination of the First Amendment burden on objecting workers. *See supra* note 283 and accompanying text (discussing proportionality inquiry).

302 Elrod v. Burns, 427 U.S. 347, 363 (1976) (plurality opinion).

tions for public sector labor relations. It would also raise interesting questions with respect to other policy settings where the government faces a similar choice between localizing the costs of a potentially objectionable social good on affected individuals and paying for the good directly through general tax receipts. I touch briefly on two implications—and two follow-on questions—here.

As to implications, first and most obviously, public sector unions would initially find it more difficult to raise the funds they need to pay for basic bargaining, grievance, and contract administration costs. In the absence of fair share fee clauses, the new default in public sector bargaining agreements would be a right-to-work system under which all employees may decline to pay any fees to the union for any reason. As the *Harris* dissent notes, the likely outcome of this regime (as evidenced by the experience in the federal government's workforce) would be reduced financial support for unions.[303] That reduced support on a unit-by-unit basis could, in turn, well weaken the power of labor unions nationally, with concomitant effects on electoral outcomes given the traditionally Democratic leanings demonstrated by unions.[304]

Second, and in notable contradistinction to the first point, a decision overruling *Abood* would not spell the inevitable end of public sector unions. That is because the very government-payer alternative that renders compelled fair share fees constitutionally impermissible can provide a means for government employers and their union counterparts to achieve their mutual interests. Thus, government employers and unions could reinstate the current set of affairs by replacing fair share fee clauses with newly negotiated provisions in which the government reimburses the union directly for its legitimately incurred bargaining costs. As discussed above,[305] such clauses would not work any economic loss to any stakeholder in the labor relationship—government entities could offset the bargaining costs through proportional reductions to employee wages; employees would

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[303] *See* Harris v. Quinn, 134 S. Ct. 2618, 2657 n.7 (2014) (Kagan, J., dissenting) ("All told, out of the approximately 1.9 million full-time federal wage system (blue-collar) and General Schedule (white-collar) employees who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues." (quoting RICHARD C. KEARNEY & PATRICE M. MARESCHAL, LABOR RELATIONS IN THE PUBLIC SECTOR 26 (5th ed. 2014))).

[304] *See* Frank Newport, et al., *Democrats Lead Ranks of Both Union and State Workers*, GALLUP (Mar. 24, 2011), http://www.gallup.com/poll/146786/Democrats-Lead-Ranks-Union-State-Workers.aspx ("Union members, whether they work for the government or the private sector, are more likely than nonunion workers to be Democrats than Republicans.").

[305] *See supra* Part III (explaining the economic equivalence of the government-payer alternative).

be in the same economic position as they would have been under a fair share regime (only without the compulsion to support a union); and unions would continue to receive resources to pay for germane bargaining expenditures.

To be sure, the political reality is that only government employers in the 22 blue states where union security agreements are already permitted would be likely to respond by negotiating such direct reimbursement provisions; states and localities operating under a right-to-work regime would for self-evident political reasons be no more likely to agree to direct government reimbursement than fair share fee clauses themselves. But that is nothing more than the status quo: If one assumes that the states that currently authorize fair share fees do so because they believe public sector unionization produces benefits for workers and society writ large, there is reason to think those same states will want to continue supporting public sector unions through direct government reimbursements even after fair share fees are struck down. And just as importantly, voters in these jurisdictions are unlikely to perceive any difference between fair share and direct reimbursement clauses that might lead them to oppose the latter, since both arrangements have the same budgetary implications. Still, I must acknowledge that a decision overruling *Abood* could make a difference to the extent some states may currently have fair share fees not because there is popular support for them, but rather because of inertia or status quo bias. In such states, flipping the default regime from one that permits fair share fees to one that forbids them may be enough to stop union proponents in some localities from negotiating government reimbursement provisions.[306]

There is one sense in which widespread adoption of the government-payer alternative might actually increase the prevalence of public sector unionization. As it currently stands, there exists some (perhaps unknown) number of pro-union localities nested within right-to-work states.[307] Such localities are forbidden by state law to compel objecting public employees to pay fair share fees. But if the practice of government entities reimbursing union expenses directly becomes more common across the country, pro-union localities

[306] For an excellent discussion of the economic and political factors that might weigh in the decision-making process facing these government employers, see generally Hemel & Louk, *supra* note 28.

[307] One need look no further for an example than to metropolitan Milwaukee, which was staunchly pro-labor during the statewide debate over Wisconsin's right-to-work law. *See* Craig Gilbert, *Democratic, Republican Voters Worlds Apart In Divided Wisconsin*, J. SENTINEL (May 3, 2014), http://www.jsonline.com/news/statepolitics/democratic-republican-voters-worlds-apart-in-divided-wisconsin-b99249564z1-255883361.html (discussing stark political divide between urban and suburban Milwaukee).

located in right-to-work states may also find themselves able to negotiate direct reimbursement provisions with their own public sector union counterparts.[308]

As to further questions raised, a first line of inquiries involves ascertaining the contours of a rule that a government's ability to internalize the costs of a disputed program makes it constitutionally suspect for the government to compel individual financial support for the program directly. The Supreme Court has considered (and reached varied outcomes regarding) other compelled subsidy challenges in the diverse contexts of compelled state bar dues, student activity fees, and agricultural marketing orders,[309] yet one thing that is true of all of these policy settings is that the government *could* have paid for the challenged program out of general tax receipts, thereby eliminating the compulsion on individuals to support an objectionable message in the first place. How should governments think about—and how should courts decide—whether the government-payer alternative should be used in lieu of passing on the costs of the expressive program to the affected individuals in these contexts, too? The answer may be easiest in cases like the union fee setting, where government can internalize the costs in a revenue-neutral manner. But as exemplified by *Burwell v. Hobby Lobby*—a case holding under the Religious Freedom Restoration Act's least restrictive means requirement that the federal government had the less restrictive alternative of funding contraceptive coverage out of tax revenues, notwithstanding the additional costs of doing so[310]—a broad conception of the government-payer alternative might lead to the conclusion that *any* decision to localize objectionable program costs on individuals is constitutionally infirm.

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308 To be sure, such provisions would be subject to state law. A state that does not want local government employers to enter into direct reimbursement agreements with unions could simply pass a law proscribing such arrangements. Alternatively, a state might argue that direct reimbursement is already forbidden under state unfair labor practice prohibitions against interference with, and contribution to, a union. *See supra* notes 285–86 and accompanying text (discussing state public sector unfair labor practice statutes).

309 *See* United States v. United Foods, Inc., 533 U.S. 403, 415–16 (2001) (striking down requirement for mushroom producers to pay a compelled subsidy to support mushroom advertising); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000) ("The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral."); Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) (holding that a state bar may compel attorneys to pay dues to offset expenses "necessarily or reasonably incurred for the purpose of regulating the legal profession," but not for political or ideological advocacy).

310 *See supra* Section IV.B.2.a (discussing *Hobby Lobby*).

Perhaps a line could be drawn in situations where the government would have to encounter truly significant new costs (and thus choose between raising taxes and cutting other programs) such as to make the direct-payment alternative politically nonviable. But there is something odd about a rule that treats the political infeasibility of an alternative as a reason to stick with an existing rights-infringing approach. Indeed, allowing a government entity to defend a challenged practice by arguing that a proposed less restrictive alternative is politically impractical (whether because the alternative is unpopular for program-specific reasons, or because it would involve raising taxes) might lead to a normatively unattractive outcome: Such a rule could empower recalcitrant government actors to insulate their actions from constitutional challenge through the simple expedient of refusing to consider less restrictive approaches.[311] To use a debate that has recently captured the attention of the media and mainstream public, imagine that Congress had decided to fund Planned Parenthood's provision of women's health services not through general tax receipts, but by requiring certain affected individuals (perhaps all women of potential child-bearing age) to pay a compelled monthly or annual fee to Planned Parenthood directly on pain of some civil penalty. Such a decision would raise First Amendment alarm bells (not just for reasons of religious exercise, but also compelled speech and association insofar as Planned Parenthood spends a meaningful sum of its budgets on lobbying activities[312]), with one sensible line of attack being that Congress could have just paid for those services itself out of general tax revenues. But what if then-prevailing political conditions would have rendered a bill creating a federal budget item for funding Planned Parenthood services a nonstarter? Could it be that such political infeasibility shields the hypothetical Planned

311 Consider, for example, the case of *Holt v. Hobbs*, 135 S. Ct. 853 (2015), where the Supreme Court struck down an Alabama prison policy that forbade Muslims to wear beards longer than a quarter inch. The Court ruled that there were less restrictive means for the State to pursue its interests in preventing the smuggling of contraband into prisons, such as combing prisoner beards. But if the State were permitted to argue that a beard-combing policy was politically infeasible and therefore not a sufficient alternative (perhaps because of the additional administrative costs of such a policy, or even for reasons of outright religious animus), the result would be to defang the least restrictive means requirement and insulate otherwise suspect policies simply for the reason that elected officials prefer a rights-infringing approach over other equally effective means.

312 *See Influence & Lobbying: Planned Parenthood*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/clientsum.php?id=D000000591 (last visited Feb. 22, 2015) (noting that Planned Parenthood has spent more than $1.2 million in lobbying expenditures in 2015).

Parenthood compelled subsidy from attack on least restrictive alternative grounds?[313]

A second line of questions is related to (and in a sense precedes) the first. Why is it so much better for government to internalize the costs of an objectionable social program in the first place? There is some common ground that doing so reduces or eliminates the expressive harms of a compelled subsidy,[314] but in one sense internalizing the costs of a program might be thought to *widen* the scope of possible objections, since the net effect of the government-payer alternative is to free a discrete group of the objectionable obligation and pass it on to the taxpaying public writ large. Of course, modern standing doctrine would prevent individual taxpayers from objecting to government support of particular messages as a procedural matter,[315] but that may not be an entirely satisfying substantive answer to a taxpayer who believes that her First Amendment expressive interests are equally infringed when she is forced to pay money to support the advocacy activities of a union or Planned Parenthood, whether her

313 To complicate matters still further, if one agrees that the political difficulty involved in enacting a federal funding bill to pay for the costs of an objectionable social program is *not* a sufficient reason to disclaim the government-payer alternative as a less restrictive means, what does this portend for situations (unlike the Planned Parenthood hypothetical) where government actually *has* chosen to force the costs of some activity with an expressive component on individuals? For instance, the much-debated individual health insurance mandate requires persons to purchase health insurance policies, and in doing so to fund at least in some marginal part the speech activities of health insurance companies that engage in considerable lobbying and advocacy. *Cf.* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 803 (2012) (observing that shareholder assets are used to support the speech activities of corporations and that shareholders generally enjoy no opt-out mechanism). A government-funded, single-payer health care system is a theoretical alternative to such a system of compelled subsidies, but there is little chance of its enactment under current political conditions. Might it nonetheless present a less restrictive means, rendering the compelled subsidy approach unconstitutional on First Amendment grounds by comparison? To be sure, one way out of the dilemma would be to distinguish the health insurance mandate from other compelled subsidies on the ground that the transaction is predominantly commercial as opposed to ideological or political in nature; one's insurance premiums are used primarily to pay for health care services, not lobbying or political speech (unlike, arguably, a public sector union engaged in policy debates with the government employer). But this may be fairly characterized as a difference of degree: Just what percent of an individual's compelled payment must be used to subsidize objectionable speech before the individual has a cognizable First Amendment claim?

314 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014) (finding the government-payer alternative less restrictive in the RFRA context); Post, *supra* note 49, at 225 (arguing that "government requirements that persons contribute to the state" do not "compromise First Amendment values" even though such "compulsions might well compromise those values in the context of contributions to a private person").

315 Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007) ("It has long been established . . . that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government.").

contribution is compelled separately in a direct payment or bundled together and distributed through the medium of some government accounting department.[316] True, the individual's association with any particular organization is attenuated in the latter situation given that the objectionable program likely forms a small portion of the government's overall outlays, but it is awfully difficult to formulate a rule of First Amendment harm tied to a certain size numerator in the overall outlays of the initial government recipient.[317]

The Supreme Court has suggested that what makes the harm of government-compelled support for objectionable messages through the public fisc tolerable may be the backstop of democratic accountability.[318] But we do not usually think of an individual's ability to try and convince fifty-one percent of voters that her expressive interests are worth protecting as a sufficient justification for imposing First Amendment burdens on the individual in the first place.[319] Scholars have offered alternative theories to distinguish between compelled subsidies in the form of general tax revenues and direct contributions to private speakers, but these accounts are subject to reasonable

316 *See* Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 369 (2011) ("From the taxpayer's perspective, the only difference is in who does the speaking—a private association selected by the government or the government itself. Either way, the harm to conscience seems to be the same.").

317 Two stylized hypotheticals may help to illustrate the point. In case one, imagine Congress decides to compel all federal peace officers to pay an annual fee to the NRA on the ground that the NRA's activities promote public safety. Imagine also that the NRA promises to use no more than twenty-five percent of this funding stream on political advocacy (promising to use the remaining funds on, for example, gun training and safety classes). In case two, imagine a local government that decides to spend thirty percent of its annual budget to fund a right-to-life advocacy campaign, contracting to turn over those local tax receipts to the National Right to Life Committee to take out billboards, pass out leaflets, and otherwise pressure local citizens into choosing life. A rule that treats the First Amendment harm suffered by one who must support an objectionable cause through their tax dollars as *per se* less than the harm suffered when one is forced to support an organization directly would view the government pro-life campaign as less problematic, even though the proportion of each individual's compelled financial payment that is used for objectionable speech is *greater* than in the direct NRA subsidy example.

318 *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.").

319 *See* Schwartzman, *supra* note 316, at 370 ("[I]t is not clear why the democratic process should be trusted to correct infringements on the freedom of conscience (or the value of personal autonomy) in cases of government speech, any more than in compelled support for private speech."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1147 (1991) (observing that many view the First Amendment as protecting "fundamentally minority rights—rights of paradigmatically unpopular individuals or groups to speak out against a hostile and repressive majority").

debate as well.[320] In short, while our First Amendment intuitions may respond more fondly to a compelled subsidy of private speech when it is funded through the general tax receipts than when it is funded through direct, compelled subsidies from individuals, the precise reasons for those intuitions could well benefit from additional examination.

In the end, identifying the limits of the government-payer alternative as applicable to other contexts and exploring the theoretical underpinnings of government's power to tax individuals and spend the receipts on objectionable messages goes beyond the scope of this article. My limited aspiration for the time being is that asking these questions may help point toward worthwhile lines of further inquiry to be examined moving forward. As the debate over who should pay for various social programs becomes more commonplace in light of recent contentious policy enactments (such as the contraceptive and individual health insurance mandates), it may well be that these questions will take on increasing salience in future legislative and judicial discussions.

Conclusion

There is an old saying popular among mediators: One knows one has facilitated a good deal when both sides leave the table unhappy. The law, of course, does not always conform to this principle; in many cases the neutral application of a constitutional rule yields a winner-take-all result. In the context of First Amendment challenges to public sector fair share fees, however, the proper analysis suggests a middle ground outcome: The direct government-reimbursement alternative

[320] Dean Post has argued that compelled taxpayer support for government speech is non-problematic for the same reason that the First Amendment would not be offended by restrictions on donations to the state: Such restrictions would not "compromise the ability of persons to participate in public discourse." *See* Post, *supra* note 49, at 225. But this argument starts from the debatable premise that citizens do not have a First Amendment interest in supporting views espoused by particular governmental entities. Would the First Amendment really have nothing to say about, for example, a federal law forbidding individuals to make voluntary donations to support the expressive activities or public service advertising campaigns undertaken by local or state governments? *Cf.* Shushannah Walshe, *Gov. Christie Faces Yet Another Controversy Over Sandy Ads*, ABC News (Jan. 13, 2014), http://abcnews.go.com/blogs/politics/2014/01/gov-chris-christie-faces-yet-another-controversy-over-sandy-ads/ (noting controversy over government-funded ads featuring Governor Christie in his role handling the aftermath of Hurricane Sandy). Micah Schwarzman has suggested that government's use of tax revenues to support private speech does in fact implicate the expressive interests of individual taxpayers, but that such burdens are ordinarily minimal and thus permissible under First Amendment balancing. *See* Schwartzman, *supra* note 316, at 348–54. Yet the notion of case-by-case balancing of every governmental program affecting citizens' expressive autonomy may be disquieting to those concerned with predictability in the administration of government affairs.

would provide public sector unions with a source of financial security in the event of an adverse ruling in *Friedrichs* (to the disappointment of those opposed to unions altogether), yet that very alternative would provide objecting workers with a powerful argument that fair share fees are unconstitutional in the first place (much to the chagrin of labor supporters).[321]

A ruling to this effect would represent more than mere formalism, even if its ultimate outcome would enable the business of public sector collective bargaining to resume in a near-usual manner. For in requiring public employers to reimburse union bargaining costs directly, the Court would serve a fundamental value undergirding compelled speech and subsidy theory. That is to say (and to conclude where we began), a decision that embraces the government-payer alternative would alleviate objecting public workers of what Jefferson long-ago recognized as the "sinful and tyrannical" practice of being compelled "to furnish contributions of money for the propagation of opinions which [they] disbelieve,"[322] without sacrificing the important labor law goals furthered by collective representation. And that is an outcome that government employers, workers, and public sector unions alike ought to find agreeable.

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[321] That this outcome would represent something of a middle ground outcome is reflected by the fact that neither party volunteered the government-payer solution as a viable alternative in the briefing in *Harris v. Quinn* or *Friedrichs v. California Teachers' Association*. Defenders of fair share fee agreements of course had no desire to do so, since a finding that there exist no less restrictive alternatives for pursuing labor peace would preserve the current of state of affairs under which fair share fees are permissible. The challengers, by contrast, might have secured a ruling striking down all fair share fees by arguing the government-payer option, yet did not do so.

[322] BRANT, *supra* note 1, at 354.