

HARRIS V. QUINN AND THE EXTRAORDINARY PRIVILEGE OF COMPULSORY UNIONIZATION

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Introduction

This Article discusses four issues surrounding mandatory collective bargaining and how they apply both to broader public policy issues and to the Supreme Court’s recent decision in *Harris v. Quinn*.¹ In *Harris* the Court took up the question of whether the state of Illinois, and by extension other states that had done similar things, could unionize health care workers who worked in the homes of Medicaid recipients and received payments through Medicaid.² By a five-to-four vote in a majority opinion written by Justice Alito, the Court ruled that “[a]ny individual employed in

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1. 134 S. Ct. 2618 (2014).

2. *Id.* at 2623–24.

the domestic service of any family or person at his home' is excluded from coverage under the National Labor Relations Act."³

But as many commentators have pointed out, there were larger issues at stake in *Harris*.⁴ Some see it as a "huge step backward in the national effort to develop rights and protections for home care workers" and "a clear call to action for all of us not to become complacent or take for granted the rights and protections that were hard fought and hard earned by the labor movement."⁵

While it is understandable why labor activists would see the case this way, it is also possible to view the case as a levelheaded step toward a coherent jurisprudence on the justifications for forced unionization. It is often forgotten that unionization and compulsory dues are an extraordinary, government-granted privilege that requires justification. When it comes to public-sector unions, it can no longer be complacently accepted that the arguments for private-sector unions can be easily transferred to the public sector. In *Harris*, for the first time since *Abood*,⁶ the Court made it clear that public-sector unions are a different thing altogether.⁷ Now that public-sector unionized workers outnumber private-sector unionized workers and pension liabilities granted to unions are threatening to drown state budgets,⁸ it is the perfect time to ask how far public-sector unions should be allowed to stretch and, possibly, whether compulsory public-sector unions should exist at all.

This Article discusses these issues in four parts. Part I discusses the genesis of modern labor law as it evolved during the New Deal's tendency toward cartelization. Part II discusses how compulsory

3. *Id.* at 2640 (quoting 29 U.S.C. § 152(3) (2012)).

4. *See, e.g.*, Cynthia Estlund & William E. Forbath, *The War on Workers*, N.Y. TIMES, July 3, 2014, at A23 (identifying as a larger issue in *Harris* the weakening of workers' ability to organize and bargain collectively) ; John Eastman, *Harris v. Quinn Symposium: Abood and the Walking Dead*, SCOTUSBLOG (June 30, 2014, 6:09 PM), <http://www.scotusblog.com/2014/06/harris-v-quinn-symposium-abood-and-the-walking-dead/> (identifying as a larger issue in *Harris* the weakening of public-sector unions' generally); Ross Eisenbrey, *What's At Stake in Harris v. Quinn*, WORKING ECONOMICS (June 26, 2014, 11:30 AM), <http://www.epi.org/blog/whats-stake-harris-quinn/> (identifying as a larger issue in *Harris* the weakening of economically disadvantaged workers' ability to command higher wages);

5. LeeAnn Hall, *3 Reasons Harris v. Quinn Matters to All of Us*, HUFFINGTON POST (July 2, 2014), http://www.huffingtonpost.com/leeann-hall/three-reasons-harris-v-qu_b_5549524.html.

6. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

7. *See generally* 134 S. Ct. 2618.

8. Daniel Disalvo, *The Trouble with Public Sector Unions*, NAT'L AFFAIRS, Fall 2010, at 3, 4, 16, available at <http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions>.

unionization is an extraordinary privilege that should neither be granted easily nor accepted uncritically. Part III discusses the fundamental mistake at the heart of *Abood* that turned a Commerce Clause rationale into a counterbalance of First Amendment rights and how that mistake allowed the *Abood* Court to blithely transfer private-sector union justifications into the public sector. Lastly Part IV discusses the inherently political nature of public-sector unions and how all jurisprudence in this area must deal with this inescapable fact. Public-sector unions are most analogous to lobbying groups, not labor organizations, and in that context this Article argues that attempts to forcibly extract dues from non-members should be looked at very skeptically.

I. UNIONS, TRADE ASSOCIATIONS, AND CARTELIZATION

A. History of Cartelization Within Enterprise and Labor

One of Franklin Roosevelt's first New Deal programs was based on the theory that the mass cartelization of the economy—including both labor and business—was the key to recovery.⁹ The National Industrial Recovery Act (NIRA), passed on June 16, 1933, was an act to “encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works.”¹⁰

A cartel is a “combination of independent commercial or industrial enterprises designed to limit competition or fix prices.”¹¹ Yet this definition, like many popular images of cartels, focuses too much on industrial actors—that is, employers—and not enough on employees. Employees can and do cartelize for the same purposes as industrial actors; employees have a product to sell—their labor—

9. See generally BURTON W. FOLSOM, JR., *NEW DEAL OR RAW DEAL: HOW FDR'S ECONOMIC LEGACY HAS DAMAGED AMERICA* (2008); JIM POWELL, *FDR'S FOLLY: HOW ROOSEVELT AND HIS NEW DEAL PROLONGED THE DEPRESSION* (2004); AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* (2009).

10. Pub. L. No. 73-67, 48 Stat. 195, 195.

11. *Cartel*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/cartel> (last visited Apr. 15, 2015). As the word “cartel” is not expressly used or defined in the National Industrial Recovery Act or the Sherman Antitrust Act, Clark catalogs its origin in the German language and usage within the law. See Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1136–39 (1985).

and labor unions put restrictions on both who can compete for a job and how much can be charged.¹²

The NIRA empowered businesses and labor to join together to pass “codes of fair competition.”¹³ The National Recovery Administration (NRA), the organization created by the NIRA to administer the law, instructed both business and labor to cartelize in order to promote the general welfare through “the organization of industry for the purpose of cooperative action among trade groups,” the “united action of labor and management under adequate governmental sanctions and supervision,” and the “eliminat[ion] of unfair competitive practices.”¹⁴

In practice this meant that trade associations, industrial organizations, and labor organizations were given the authority to collude to pass “codes of fair competition” that would be approved by President Roosevelt himself.¹⁵ In the case of New York City’s Live Poultry Code, for example, the live poultry dealers for New York and the surrounding areas convened to create a code that regulated, inter alia, prices, hours, bookkeeping practices, wages, and methods of selecting and killing poultry.¹⁶ In other words these dealers were a cartel that, through an executive order by the President, had been imbued with the power of the state. In some instances violators of industry-created NIRA codes were even thrown in prison.¹⁷

12. *Cf.* Clark, *supra* note 11 (noting that both the German and American conceptions of cartels are focused on businesses and enterprises, and do not associate cartels with labor actors). *See generally* CHARLES W. BAIRD, OPPORTUNITY OR PRIVILEGE: LABOR LEGISLATION IN AMERICA 17 (1984) (“[L]abor unions are legal cartels. All the sellers of labor services to the automobile industry have joined together into the United Automobile Workers Union. Acting together they fix the price for the labor they sell. No individual workers would dare undercut the wage.”).

13. NIRA § 3.

14. *Id.* § 1.

15. *Id.* § 3.

16. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 523–26 (1935).

17. *See* FOLSOM, *supra* note 9, at 54. One such story deals with Fred Perkins, a battery manufacturer in York, Pennsylvania:

Thus, when the NRA Battery Code became law, Perkins had the choice either to close his business, or pay his remaining employees less than 40 cents per hour and try to squeak out a profit. Perkins and his employees all preferred to remain in business with the lower wages. He, therefore, personally appealed to Hugh Johnson for an exemption, but did not receive one. When NRA officials came to York and threatened Perkins, he refused to close his shop and also refused to raise wages. Within two months, Perkins was in the York County jail for violating the NRA code.

Id.

Transferring to private associations the power to define the terms of law and imprisonment is an extraordinary delegation of powers that are traditionally held only by the states.¹⁸ In 1935 in *A.L.A. Schechter Poultry Corp. v. United States*, a unanimous Supreme Court overturned the NIRA as both a violation of the Commerce Clause and as an overly broad delegation of executive power.¹⁹ Yet Roosevelt's obsession with cartelization as the solution to the nation's economic woes continued. Three months after the Court issued its decision in *Schechter Poultry*, Roosevelt signed the Guffey-Snyder Act, also known as the Bituminous Coal Conservation Act, which applied NIRA-type codes to the coal industry.²⁰

The NIRA cartelized both labor and business. Section 7(a) of the act granted employees "the right to organize and bargain collectively through representatives of their own choosing," and provided that they "shall be free from the interference, restraint, or coercion of employers of labor."²¹ Section 7(b) of the Act, however, outlawed so-called "closed shops"²² and "yellow-dog contracts."²³

B. Cartelization Problems

The key issue of cartelization is how to deal with those who do not want to abide by the cartel's rules. This is a difficult question that legally enforceable cartels must answer. In the words of one economist: "Once formed, a cartel must then remain vigilant against 'cheating' from within its ranks and competition from outside. Experience has shown that, very frequently, the greatest threat comes from entry into the industry by sellers who choose not

18. *Cf.* U.S. CONST. amend X.

19. 295 U.S. at 550-51.

20. Pub. L. No. 74-4012, 49 Stat. 991 (1935). The Supreme Court later struck down the Guffey-Snyder Act as a violation of the Commerce Clause. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

21. NIRA § 7(a)(1).

22. E.H. Schopler, *Closed Shops and Closed Unions*, 160 A.L.R. 918, 1 (1946) ("[A] closed-shop agreement, that is, a collective labor agreement which binds the employer to employ only members of a single labor union, is a valid contract, and not void as in restraint of trade or against public policy.").

23. NIRA § 7(b). A "closed shop" refers to an employer that makes membership in a particular union a condition of employment; a "yellow-dog contract" refers to a contract that makes not joining a particular union a condition of employment. See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036 (1996) (describing early nineteenth century yellow dog contracts as contracts in which employees had to promise not to join a union in order to secure a job).

to follow the cartel's pricing lead."²⁴ Without squashing and controlling those who shirk the cartel's mission, the cartel will be ineffective.²⁵ Roosevelt and the drafters of the NIRA knew this, and thus they gave private industry the unprecedented power to enforce the cartel's commands with imprisonment.²⁶

An industry's biggest players generally control cartels, and thus cartelization entrenches big business against its competitors.²⁷ In the tire industry, for example, Goodyear, Goodrich, and Firestone colluded to write the NIRA's code of fair competition.²⁸ Those codes privileged the large tire manufacturers and hurt smaller manufacturers. As one smaller manufacturer, Carl Pharis of Pharis Tire and Rubber Company in Newark, Ohio, wrote to William Borah, a Republican Senator from Idaho who collected complaints about the NRA:

Since the industry began to formulate a Code under the N. R. A., in June, 1933, we have at all times opposed any form of price-fixing. We believe it to be illegal and we know it to be oppressive. . . . We quite understand that, if we were compelled to sell our tires at exactly the same price as they sell their tires, their great national consumer acceptance would soon capture our purchasers and ruin us. Since we have so little of this consumer publicity when compared with them, our only hope is in our ability to make as good or a better tire than they make and to sell it at a less[er] price²⁹

The cartelization of labor suffers from the same difficulties. A successful cartel must enforce its commands against those who refuse to voluntarily comply. In the case of labor those "noncompliant" people are the laborers who do not want to join the union, are willing to work for less money, or are otherwise not disposed to play along with the union's demands and practices.³⁰ Those

24. Andrew R. Dick, *Cartels*, CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/Cartels.html> (last visited Apr. 15, 2015).

25. See Herbert Hovenkamp & Christopher R. Leslie, *The Firm As Cartel Manager*, 64 VAND. L. REV. 813, 835–36 (2011) (discussing the problem of cheating within cartels and methods used to detect and punish cheaters within a cartel).

26. See NIRA § 4(b).

27. See Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209, 210–15 (1998).

28. FOLSOM, *supra* note 9, at 49.

29. FOLSOM, *supra* note 9, at 50.

30. See James E. Pfander, *Federal Jurisdiction Over Union Constitutions After Woodell*, 37 VILL. L. REV. 443, 444 & n.6 (1992) (reviewing the history of state and federal courts' willingness to enforce union rules designed to hold members responsible for rule violations, and noting the development of federal jurisdiction

noncompliant workers are thus like Carl Pharis, struggling against competitors who have been granted the power to control their economic lives.

II. THE EXTRAORDINARY PRIVILEGE OF CARTELIZATION

A. *Effects of Cartel Power*

Under most circumstances cartels are rightfully considered anticonsumer and antimarket.³¹ The Sherman Antitrust Act of 1890 prohibited cartel behavior in labor and business by outlawing “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”³² Although labor unions were originally considered violations in restraint of trade, the Clayton Act of 1914 explicitly exempted labor unions from antitrust rules.³³ Unions retain the unique privilege of cartelization to this day.³⁴

This extraordinary aspect of forced unionization, whether justified or not, is often elided. In her recent dissent in *Harris v. Quinn*, for example, Justice Kagan treated unionization as a run-of-the-mill practice rather than as an extraordinary privilege conferred by the government.³⁵ At one time even pro-union commentators seemed to understand that unionization essentially collectivizes people into a subgovernment created by the government itself. In the words of noted labor law expert Clyde Summers, for example:

over the interpretation of union constitutions through section 301 of the Labor Management Relations (Taft-Hartley) Act of 1947).

31. See Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1004–10 (1986) (analyzing from a microeconomic perspective the effects of labor unions on the supply and demand for labor, inputs, and outputs); cf. Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151 n.5 (1988) (discussing the Supreme Court's treatment of the conflict between the antitrust laws, which seek to promote competition, and labor unions, which seek to limit competition).

32. ch. 647, § 1, 26 Stat. 209, 209 (codified as amended at 15 U.S.C. § 1 (2012)).

33. ch. 323, § 6, 38 Stat. 730, 731 (codified as amended at 15 U.S.C. § 17 (2012)).

34. See Morgan O. Reynolds, *Labor Unions*, CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/LaborUnions.html> (last visited Apr. 15, 2015) (quoting FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 267 (1960) (“We have now reached a state where [unions] have become uniquely privileged institutions to which the general rules of law do not apply.”)).

35. 134 S. Ct. 2618, 2644 (2014) (Kagan, J., dissenting).

Unions, in bargaining, are not private organizations but are governmental agencies garbed with the cloak of legal authority to represent all employees in the unit and armed with the legal right to participate in all the decisions affecting terms and conditions of employment. . . . It negotiates a contract which becomes the basic law of that industrial community. In making those laws, the union acts as the worker's economic legislature. After the laws have been made, the union is charged with their enforcement, and through its grievance procedure helps judge their interpretation and application. It is the worker's policeman and judge. The union is, in short, the employee's economic government. The union's power is the power to govern.³⁶

Losing sight of the nature of this government-like power may lead to losing sight of a coherent conceptual framework through which one can ask important questions: Who should receive the right to be a subgovernment? How is that subgovernance authorized? How is the scope of the subgovernment's power decided? And—most importantly for purposes of this Article—how are the rights of dissenters who may be forced to support and belong to subgovernments respected?

To some extent *Harris* dealt with these issues. The Court was asked to look back at the justifications for public-sector unionization and explain their limits, particularly when applied to dissenting employees.³⁷ As discussed previously, dissenting members of a cartel create the most significant conceptual problem.³⁸ As Justice Black noted in a dissent that Justice Alito quoted approvingly in *Harris*, the customary objection is to mandatory, not voluntary unionization:

Unions composed of a voluntary membership, like all other voluntary groups, should be free in this country to fight in the public forum to advance their own causes, to promote their choice of candidates and parties and to work for the doctrines or the laws they favor. But to the extent that Government steps in to force people to help espouse the particular causes of a group, that group—whether composed of railroad workers or lawyers—loses its status as a voluntary group.³⁹

36. Clyde Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805, 811, 815–16 (1951).

37. 134 S. Ct. at 2627–34.

38. See *supra* Part I.B.

39. 134 S. Ct. at 2630 (quoting *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 796 (1961) (Black, J., dissenting)).

When moving into the realm of nonvoluntary unions and cartels, however, it is important to carefully examine the privilege of being granted the status of a subgovernment. Upon examination this Article argues that compulsory unionization and collective bargaining is not a right; it is an “anomaly,” as Justice Alito correctly described it in the last major union case before *Harris, Knox v. SEIU*.⁴⁰

B. A Simple Analogy

Many union supporters may be angered by the argument that compulsory unionization and collective bargaining should not be regarded as a “right.” Yet certainly this argument has been advanced in other contexts. For example ever since *Schechter Poultry* ended the NIRA’s cartelization scheme for businesses, trade associations have neither been able to compel membership nor to extract forced dues. The American Booksellers Association (ABA), for example, does not enjoy the privilege of being able to command membership and extract forced dues from all booksellers in the nation.⁴¹ In other words the ABA does not enjoy the “right” of collective bargaining when carrying out its lobbying and political activities; membership is voluntary and is granted on the basis of filling out a simple form.⁴²

Or to use an absurd example to further illustrate the point, should one redhead be permitted to declare himself the representative of all redheads and be allowed to forcibly collectivize them into the United Association of Redheads and to coercively make

40. 132 S. Ct. 2277, 2290 (2012). In *Knox*, the Court ruled that a public-sector union must issue a new *Hudson* notice when assessing a special increase in nonmembers’ agency fees. *Id.* *Hudson* notices come from *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and are a direct consequence of the Court’s decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). If, as *Abood* held, unions cannot use compulsory dues for purely political activities, then there must be a procedure for delineating political and nonpolitical spending (so-called “chargeable” and “nonchargeable” dues) and for offering a refund to objecting nonmembers. *Cf. Hudson*, 475 U.S. at 305–07. Unions are required to give nonmembers a *Hudson* notice of expected political activities and the opportunity to opt-out. *See id.* at 310. *Knox* held that a new *Hudson* notice is required if a union imposes a mid-year dues increase for the purpose of carrying out political activities. *See generally* 132 S. Ct. 2277.

41. *See* AM. BOOKSELLERS ASS’N, BYLAWS OF THE AMERICAN BOOKSELLERS ASSOCIATION art. II (2011) (“Any commercial establishment that is involved in the sale of books shall be eligible to become a Bookstore Member.”), available at <http://www.bookweb.org/about/govern/bylaws>.

42. *See Regular Membership Application—New Member*, AM. BOOKSELLERS ASS’N, <http://www.bookweb.org/regular-membership-application-new-member> (last visited Mar. 15, 2015).

them pay dues? After all, redheads share many common interests, one being the harms of sun exposure.⁴³ FDA regulations currently prohibit American sunscreens from having “the latest and most effective ingredients for blocking the type of ultraviolet rays associated with premature aging and serious skin cancer.”⁴⁴ Ending those regulations would be in the interest of all redheads, and the United Redheads Association could lobby accordingly.

In a free and liberal society, voluntary organization should be the baseline, and any attempt to force nonvoluntary association should be treated skeptically. This is partially because interest groups—be they the ABA or the hypothetical United Association of Redheads—would likely revel in the ability to compel association, particularly if they get to collect forced dues. Organizations imbued with this privilege would likely vigorously defend it as necessary to accomplish their groups’ goals. The simple question this Article asks is: Do unions have a better case for compelled association than the ABA or the United Association of Redheads?⁴⁵

C. *Fair Share and Labor Peace Rationales Behind Cartel Power*

Many of the same arguments used by unions can be applied to both the ABA example and the redhead example. One of the core arguments for forced dues extraction, for example, is the “fair share” theory. Under the fair share theory, employees who benefit from collective bargaining should be forced to contribute something to the process.⁴⁶ Otherwise, they would become free riders. This is particularly true because unions are under the “duty of fair

43. Ryan Jaslow, *Scientists: Genes, Not Sun, Behind Redheads’ Increased Melanoma Risk*, CBS NEWS (Nov. 12, 2012, 11:28 AM), <http://www.cbsnews.com/news/scientists-genes-not-sun-behind-redheads-increased-melanoma-risk/>.

44. Jodie Tillman, *Here’s the Rub on U.S. Sunscreen*, SEATTLE TIMES (July 5, 2014), http://seattletimes.com/html/nationworld/2024002269_sunscreensfdaxml.html.

45. This Article does not deal with the question of whether workers suffer from an inequality of bargaining power compared to employers and thus whether compulsory unionization can be justified on that ground. The adequacy of bargaining power requires economic analysis and is therefore beyond the scope of this Article. For the analogy in this Part, however, the question remains whether a similar deficit in bargaining power is present in the case of the American Booksellers Association or the United Association of Redheads.

46. *See, e.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2645 (2014) (Kagan, J., dissenting) (“*Abood* held that a government entity may, consistently with the First Amendment, require public employees to pay a fair share of the cost that a union incurs negotiating on their behalf for better terms of employment.”).

representation,” which “requir[es] the union to work on behalf of all employees, members and non-members alike.”⁴⁷

This argument certainly applies to both trade associations and the United Association of Redheads. The non-dues-paying members of the American Booksellers Association are free riders, and any redhead who benefits from lobbying for better sunscreen is also a free rider. Yet it is unlikely that in either case forced dues would be permitted.

The late Professor Clyde Summers spent much of his career trying to create democratic procedures by which unions could achieve power while respecting the rights of dissenters. As described in his *Washington Post* obituary, “[a] staunch believer in the role of labor unions, Professor Summers was just as resolute about ensuring that they allowed free and fair elections as well as dissent among members.”⁴⁸

Professor Summers understood that the free rider argument is not as simple as some claim:

Why is it not applicable to a wide range of private associations? 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.⁴⁹

Similarly the labor peace argument has rarely been looked at with the skepticism it deserves. In *Abood* the labor peace argument was taken on its face, and it was seen as a corollary to the necessity of forced dues extraction. In the words of Justice Stewart, “Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share

47. *Id.* at 2650.

48. Emma Brown, *Legal Scholar Was an Influential Advocate of Union Democracy*, WASH. POST, Nov. 23, 2010, at B8.

49. Clyde W. Summers, Book Review, 16 COMP. LAB. L. & POL. J. 262, 268 (1995).

its cost, and that legislative judgment was surely an allowable one.”⁵⁰

Because the labor peace argument piggybacks on the free rider argument, it is difficult to see how it also does not apply to trade associations and the United Association of Redheads; those who pay dues to the ABA or the United Association of Redheads might be upset that others are free riding on the benefits, thus creating a less than peaceful environment. Or to ask the question a different way, if Congress in its judgment decided to create a forced dues system for trade associations and the United Association of Redheads, would the Court accept that labor peace and free rider arguments override the right to freedom of association⁵¹ and the right not to be compelled to support speech with which one might disagree?⁵² In order to explore this question further, Part III looks at the fundamental mistake at the heart of *Abood*.

III. THE MISTAKE IN *ABOOD*

In *Abood v. Detroit Board of Education* the Burger Court took a rule meant to apply to private-sector unions and unthinkingly applied it to public-sector unions.⁵³ The Court seemed to think that public-sector employees are essentially like private-sector employees.⁵⁴ Private-sector employees need to bargain over the terms and conditions of employment and to have a voice in the workplace; so do public-sector employees.⁵⁵ Just as private-sector employees need unions to overcome the “free rider problem” and the problems with achieving “labor peace,” so too do public-sector employees.⁵⁶

50. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 219 (1977).

51. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”).

52. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990) (“Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.”).

53. *See generally* 431 U.S. 209.

54. *See id.* at 230–32 (“Public employees are not basically different from private employees . . .”).

55. *See id.*

56. *Id.* at 224.

Yet in the words of Justice Alito, the *Abood* Court “seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union.”⁵⁷ By treating private-sector and public-sector unions as functionally identical, the *Abood* Court did not recognize that the difference is fundamental, and it cannot be papered over by applying private-sector doctrines to public-sector situations. “In the public sector,” wrote Justice Alito,

[C]ore issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. In the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home.”⁵⁸

In applying *Hanson* and *Street* to justify forced dues extraction on the labor peace rationale, the *Abood* Court missed the fact that the labor peace rationale never received a sufficient First Amendment vetting.⁵⁹ The labor peace rationale was a product of Commerce Clause jurisprudence, not First Amendment concerns,⁶⁰ and therefore should not be seen as something that counterbalances infringements on those First Amendment rights.

The concept of labor peace first appears in the 1917 case *Wilson v. New*.⁶¹ In *Wilson* the Court addressed whether Congress’s Commerce Clause authority could be extended to setting the hours and wages of railroad employees in order to settle a nationwide railroad strike.⁶² The Court ruled that this authority was justified because of “the entire disruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent.”⁶³ In *Wilson* the Court merely explained why the effects on commerce provide Congress with a jurisdictional hook under the Commerce Clause.⁶⁴ But saying that Congress has jurisdiction over something does not mean that First Amendment rights can be ignored. That Congress has jurisdiction over the military, for exam-

57. *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) (citing *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961) and *Ry. Emp. Dep’t v. Hanson*, 351 U.S. 225 (1956)).

58. *Id.*

59. *See id.*

60. *See supra* Part II.C.

61. 243 U.S. 332 (1917).

62. *Id.* at 340.

63. *Id.* at 347–48.

64. *Id.*

ple, does not mean it can outlaw all political speech from servicemen.⁶⁵

In 1937 the Court again picked up the question of whether maintaining labor peace was a hook for Commerce Clause jurisdiction. In *Virginian Railway Co. v. System Federation No. 40* the Court was asked to decide whether a federal unionization system could extend to “back shop” employees who are not directly engaged in interstate commerce.⁶⁶ In a sense this case was a *Wickard v. Filburn* for Congress’s affirmative power to unionize employees: just as Roscoe Filburn argued that his 11.9 acres of “excess” wheat production were not within Congress’s commerce power,⁶⁷ *Virginian Railway* argued that back-shop workers were similarly immune.⁶⁸ Both arguments lost, but in neither case was the First Amendment an issue.⁶⁹

In the same year as *Virginian Railway* the Court decided *NLRB v. Jones & Laughlin Steel Corp.*,⁷⁰ a cornerstone case of Commerce Clause jurisprudence. In that case a steel company challenged the extension of the National Labor Relations Act to its workforce, arguing that the “Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation.”⁷¹ Predictably the Court did not accept the argument and instead used the same *Virginian Railway* arguments: regulating labor relations in the steel company “presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent’s employees to self-organization and freedom in the choice of representatives for collective bargaining.”⁷² Again peaceful labor regulations were seen as a jurisdictional hook: “[C]ollective bargaining,” the Court wrote, “is often an essential condition of industrial peace.”⁷³ The issue was not analyzed in a First Amendment context.⁷⁴

65. See generally Lawrence Jude Morris, *Free Speech in the Military*, 65 MARQ. L. REV. 660 (1982).

66. 300 U.S. 515, 554–58 (1937).

67. *Wickard v. Filburn*, 317 U.S. 111, 114–15, 118–20 (1942).

68. *Virginian Railway*, 300 U.S. at 541.

69. See generally *Wickard*, 317 U.S. 111; *Virginian Railway*, 300 U.S. 515.

70. 301 U.S. 1 (1937).

71. *Id.* at 29.

72. *Id.* at 43.

73. *Id.* at 42.

74. See generally *id.*

When the labor peace argument arose in *Railway Employees' Department v. Hanson* in 1956, one of the first cases to deal explicitly with forcibly extracted dues, the Court explicitly declined to rule on First Amendment grounds.⁷⁵ Instead the Court used Commerce Clause jurisdiction to decide the case:

It is argued that compulsory membership will be used to impair freedom of expression. *But that problem is not presented by this record.* Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, and assessments." *If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.* For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is *within the power of Congress under the Commerce Clause* and does not violate either the First or the Fifth Amendments.⁷⁶

Moreover the *Hanson* Court emphasized that the union-shop "provision of the Railway Labor Act is only permissive" and that "Congress has not compelled nor required carriers and employees to enter into union shop agreements."⁷⁷ In his concurrence in *Abood*, Justice Powell rightly inferred that this statement meant that "Congress might go further in approving private arrangements that would interfere with those [First Amendment] interests than it could in commanding such arrangements."⁷⁸

In *Street* the Court addressed a similar question about forced dues as it had in *Hanson* but this time with a record that was "adequate squarely to present the constitutional questions reserved in *Hanson*."⁷⁹ The Court also clearly affirmed that *Hanson* contained no substantive First Amendment analysis:

Hanson was brought before the union-shop agreement became effective and that the appellees never thereafter showed that the unions were actually engaged in furthering political causes

75. 351 U.S. 225, 236–38 (1956).

76. *Id.* at 258 (emphases added).

77. *Id.* at 231.

78. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 248 (1977) (Powell, J., concurring).

79. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (citing *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225 (1956)).

with which they disagreed and that their money would be used to support such activities, it becomes obvious that this Court passed merely on the constitutional validity of § 2, Eleventh of the Railway Labor Act on its face, and not as applied to infringe the particularized constitutional rights of any individual.⁸⁰

The Court then construed the act to “den[y] the authority to a union, over the employee’s objection, to spend his money for political causes which he opposes.”⁸¹

Street and *Hanson* taken together stand for the proposition that when Congress *authorizes* private sector unionization, then it is possible that forced dues and forced association can raise serious constitutional questions when an individual is compelled to spend for a political cause with which he or she disagrees.⁸² Neither case deals with the questions of whether Congress can *compel* association to support a union, nor does either gainsay the longstanding doctrine that the labor peace argument is only a Commerce Clause jurisdictional hook.⁸³ And since neither dealt with public-sector unions, they also do not address the question of whether all forced dues from public-sector workers are in fact forced political speech.⁸⁴

IV.

THE POLITICAL NATURE OF PUBLIC-SECTOR UNIONS

A. *Public Sector Union Power to Disrupt Public Services*

In the summer of 2014 the United Kingdom stood on the brink of a massive public-sector strike.⁸⁵ Public-sector workers from teachers to firefighters planned a day of havoc for the country if their demands for pay increases were not met.⁸⁶ Not for the first time in British history and likely not for the last, the unionized public sector had the country balancing on the edge of near collapse. Thousands of schools were poised to close as a result of the strike—

80. *Id.* at 748.

81. *Id.* at 750.

82. *See generally* Int’l Ass’n of Machinists v. Street, 367 U.S. 740 (1961); *Hanson*, 351 U.S. 225.

83. *See generally* cases cited *supra* note 57.

84. *Id.*

85. Jack Doyle, *Labour Backing for Public Sector Strike that Threatens Chaos: Senior Party Figure Says Thursday’s Walkout Is “Entirely Legitimate,”* DAILY MAIL (July 7, 2014), <http://www.dailymail.co.uk/news/article-2683955/Labour-backing-public-sector-strike-threatens-chaos-Senior-party-figure-says-Thursdays-walkout-entirely-legitimate.html>.

86. *Id.*

brought on by teachers over “performance related pay, pensions, and ‘workload’”—thus sending parents scrambling for childcare options.⁸⁷ In its long fight over pay and pensions the Fire Brigades Union would again endanger public safety by threatening what would be its fifteenth strike.⁸⁸

An invading army could hardly have created as much disruption for the people of Britain as its own public-sector unions. All throughout Europe strikes by public-sector workers have been common occurrences.⁸⁹ On this side of the Atlantic the Chicago Teachers Union kept students out of school for seven days during the summer of 2012.⁹⁰

Public-sector unions have the unique ability to hold citizens hostage. Unlike private-sector unions they often bargain over services, such as fire, police, and education, in which the government holds either a monopoly or a near-monopoly.⁹¹ As such their bargaining positions are much stronger than those of private-sector workers.⁹² Not only do public-sector workers often enjoy monopoly or pseudo-monopoly status, they bargain with government officials who do not have sufficient interest in the outcome to push back against union demands.⁹³

B. Public Sector Union Influence Over Elections and Politics

Public-sector unions can also be significant players in elections. Obligated to represent the interests of their members, public-sector unions will rarely, if ever, advocate that any government program or service be curtailed.⁹⁴ Moreover public-sector unions will spend lav-

87. *Id.*

88. *Id.*

89. See, e.g., Brian Love, *Scores of Flights Halted by French Air Control Strike*, REUTERS (Apr. 8, 2015), <http://www.reuters.com/article/2015/04/08/us-air-france-flights-idUSKBN0MZ0WU20150408>; Matthew Taylor & Rowena Mason, *Strikes by Public Sector Workers Largest in Three Years*, THE GUARDIAN (July 10, 2014), <http://www.theguardian.com/society/2014/jul/10/strikes-public-sector-industrial-action-pay-pensions>; *Italy Hit by Public Transportation Strike*, THE LOCAL (Mar. 30, 2015), <http://www.thelocal.it/20150330/italy-hit-by-public-transport-strike>.

90. Monica Davey & Steve Yaccino, *Teachers End Chicago Strike on Second Try*, N.Y. TIMES, Sept. 19, 2012, at A1.

91. See generally Lee C. Shaw & R. Theodore Clarke, Jr., *The Practical Differences Between Private & Public Sector Collective Bargaining*, 19 UCLA L. REV. 867 (1972); Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441 (2003).

92. See sources cited *supra* note 89.

93. *Id.*

94. Cf. Michael L. Marlow, *Public Sector Unions and Government Size*, 20 APPLIED ECON. LETTERS 466, 469 (2013) (concluding from statistical analysis that “[s]trong

ishly to support policies that will help their profession. For example, the California Correction Police Officer's Association (CCPOA)—the prison guard union—has spent millions opposing efforts to legalize marijuana, to lower the prison sentences for non-violent crimes, and to reduce the number of crimes that carry life sentences.⁹⁵ The CCPOA seems to want more people in prison in order to create more work for prison guards. The CCPOA enjoys the extraordinary privilege of compulsory unionization and mandatory monthly dues; they collect about \$80 each month from all prison guards, amounting to \$23 million in annual revenue, of which \$8 million is spent on lobbying.⁹⁶

Like everyone else, California prison guards are free to spend their own money on political activity and organize voluntary groups to push for the policies they prefer. The added ability to extract compulsory dues from members and to spend that money on lobbying gives them an extraordinary leg up in the political arena. Public-sector unions can thus play both sides of the issue: they can bargain for concessions from their employers, and they can spend their compulsory dues on political activities that try to influence policy in a specific direction. Public-sector unions' political activities are yet another reason why collective bargaining with the government is undesirable.

At one time many union officials and advocates believed that unionization could not be legitimately extended to the public sector. George Meany, former president of the AFL-CIO, famously said, "[i]t is impossible to bargain collectively with the government."⁹⁷ At a 1959 meeting the AFL-CIO Executive Council endorsed a statement by the Government Employees' Council, which read, "In terms of accepted collective bargaining procedures, government workers have no right beyond the authority to petition Congress—a right available to every citizen."⁹⁸

support is shown for the hypothesized positive influence of public sector unionism on state and local government size").

95. See Tim Cavanaugh, *The Golden State's Iron Bars*, REASON (July 2011), <http://reason.com/archives/2011/06/23/the-golden-states-iron-bars>; *California Proposition 5, Nonviolent Drug Offenders*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/California_Proposition_5,_Non-Violent_Drug_Offenders_\(2008\)](http://ballotpedia.org/wiki/index.php/California_Proposition_5,_Non-Violent_Drug_Offenders_(2008)) (stating the CCPOA spent \$1 million opposing non-violent prison reductions).

96. Amanda Carey, *The Price of Prison Guard Unions*, LABOR WATCH, Oct. 2011, at 1, available at <http://capitalresearch.org/2011/10/the-price-of-prison-guard-unions-2/>.

97. George Meany, *Meany Looks into Labor's Future*, N.Y. TIMES, Dec. 4, 1955, at 38.

98. LARRY KRAMER, LABOR'S PARADOX 41 (1962).

President Franklin Roosevelt also held this view. In a 1937 press conference he was asked explicitly about government unions. He recalled an instance when the question came up when he was the Assistant Secretary of the Navy:

[T]he question of whether we would enter—whether the Government, with its civilian employees, would enter into an agreement, an agreement with, as I remember it, the Draftsmen’s Union, and I made a very simple and obvious ruling: The Government does not engage—of course, the words “collective bargaining” were unheard of in those days—the Government does not make contracts with any Government employee. The administrative executive officers operate under a law. They have no discretion. The pay is fixed by the Congress and the workmen are represented by the members of the Congress in the fixing of Government pay. They ought to have the privilege always of coming and laying their case before the administrative officer who is in charge of their department. That ruling, made, I think, in 1913, is just as good today as it was then.⁹⁹

Moreover, separating out the political and the nonpolitical when it comes to forced public-sector dues is an impossible task. In the words of Justice Powell:

Collective bargaining in the public sector is “political” in any meaningful sense of the word. This is most obvious when public-sector bargaining extends . . . to such matters of public policy as the educational philosophy that will inform the high school curriculum. But it is also true when public-sector bargaining focuses on such “bread and butter” issues as wages, hours, vacations, and pensions. Decisions on such issues will have a direct impact on the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates. . . . Under our democratic system of government, decisions on these critical issues of public policy have been entrusted to elected officials who ultimately are responsible to the voters.¹⁰⁰

C. The Example of Teachers’ Unions

When it comes to teachers’ unions, the scope of what is bargained over is truly astounding. Many items in union contracts are

99. President Franklin Roosevelt, Press Conference (July 9, 1937) (transcript available at http://www.fdrlibrary.marist.edu/aboutfdr/pdfs/union_pressconf.pdf).

100. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 257–58 (1977) (Powell, J., concurring).

directly tied to substantive educational policy, and many aspects of the contract affect the cost, quality, and character of public education. For example in some union-negotiated contracts there are rules that “require principals to give advance notice to teachers before visiting their classrooms to evaluate their performance,” “limit the number of faculty meetings and their duration,” “limit how many minutes teachers can be required to be on campus before and after school,” “limit the number of courses, periods, or students a teacher must teach,” and “limit the number of parent conferences and other forums in which teachers meet with parents.”¹⁰¹ It all adds up; the Miami/Dade County school system contract is 314 pages long, and Cleveland’s is 277 pages.¹⁰²

These massive contracts, which touch every aspect of the educational experience, are fundamentally political documents. As the Court recognized in *Knox*, “a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences.”¹⁰³ The objective of a teachers’ union “is to bring school board policy and decisions into harmony with its own views. . . . In these respects, the public-sector union is indistinguishable from the traditional political party in this country.”¹⁰⁴ While political lobbying itself is not bad, it profoundly distorts democracy when one group, such as teachers, is granted the privilege of collecting compulsory dues while another group, such as parents, must struggle to collect voluntary contributions.

If a group of concerned citizens form a coalition to fight for a particular change to education policy, perhaps extending the school year or changing the length of classes, they are obliged to lobby through normal political channels. Teachers, as individuals, are free to join that coalition or to create an opposing coalition seeking a different policy change. Moreover, teachers are free to create voluntary unions that spend dues on lobbying for a particular policy change. What they should not be free to do, what no citizen should be free to do, is to coercively extract money from nonmembers to fund their political activities.

In just the area of education, teachers unions have molded American public education in ways that are detrimental to students but beneficial to teachers. Many states have salary structures for teachers that, from a pedagogical standpoint, make little to no

101. TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 175 (2011).

102. *See id.* at 174.

103. *KNOX v. SEIU*, 132 S. Ct. 2277, 2289 (2012).

104. *Abood*, 431 U.S. at 256–57 (Powell, J., concurring).

sense.¹⁰⁵ By regarding teachers' unions as political lobbying organizations primarily bargaining for the *benefit of teachers*, however, teachers' salary structures make perfect sense.

Studies have shown that master's degrees or extra professional development credits have no effect on teacher quality.¹⁰⁶ Yet in school districts around the country, teachers are rewarded for accumulating degrees. In Seattle for example, the district spends \$48 million per year—twenty-two percent of the payroll—rewarding teachers for extra degrees.¹⁰⁷ According to one study America's school districts spend \$8.6 billion per year on extra degrees.¹⁰⁸

Looking at teacher dismissal rates, the same story emerges. In 2006–07 for example, New York City dismissed for poor performance just eight teachers out of 55,000.¹⁰⁹ According to a *Los Angeles Times* study the Los Angeles Unified School District dismissed only one-tenth of one percent, or twenty-one per 30,000 tenured teachers.¹¹⁰

These numbers point to one conclusion: that in many areas of the country, public education has been taken over by teachers unions and is being run primarily for their benefit. Yet despite this obvious political takeover through union pressure, judges still operate under the illusion that public-sector workers are just like private-sector workers in terms of justification for unionization.¹¹¹

Some may object that this Article does not adequately analyze the effects of teachers' unions on educational outcomes. Perhaps teachers' unions have increased education outcomes. There are certainly many great public schools and many great public school teachers who work hard to ensure that students get a quality education. But an extensive discussion of the effects of unionization on the quality of education is beyond the scope of this Article. This Article's focus is on aberrant situations, such as the difficulties faced when trying to dismiss a teacher, that are unknown outside of heavily unionized workforces. The unmatched security of many public-sector teachers' jobs can be seen as a direct product of the extraordinary privilege of compulsory unionization. Lastly it is worth mentioning that there is significant evidence that keeping poor

105. See *infra* notes 108–110 and accompanying text.

106. ERIC A. HANUSHEK & STEVEN G. RIVKIN, *Teacher Quality*, in HANDBOOK OF THE ECONOMICS OF EDUCATION 1061 (Eric A. Hanushek & Finis Welch eds. 2006).

107. MOE, *supra* note 101, at 180.

108. *Id.*

109. *Id.* at 187.

110. Jason Song, *Failure Gets a Pass*, L.A. TIMES, May 3, 2009, at A1.

111. See *supra* Part III (discussing *Abood*).

teachers in place can have pronounced detrimental effects on education quality.¹¹²

CONCLUSION

Harris v. Quinn presented an opportunity to begin rolling back the misguided rules behind public-sector unionization.¹¹³ Given that public-sector workers were originally unionized under a mistaken interpretation of the so-called labor peace doctrine,¹¹⁴ *Harris* was a welcome clarification of *Abood's* “questionable foundations,”¹¹⁵ and an important reexamination of the limits and justifications for government-created subgovernments that enjoy extraordinary privileges.

112. See Eric A. Hanushek, *The Economic Value of Higher Teacher Quality*, 30 ECON. EDUC. REV. 466, 467 (2011) (citations omitted) (“Literally hundreds of research studies have focused on the importance of teachers for student achievement. Two key findings emerge. First, teachers are very important; no other measured aspect of schools is nearly as important in determining student achievement. Second, it has not been possible to identify any specific characteristics of teachers that are reliably related to student outcomes. Understanding these findings is central to the subsequent discussions of policies and their underlying economics. The general finding about the importance of teachers comes from the fact that the average gains in learning across classrooms, even classrooms within the same school, are very different. Some teachers year after year produce bigger gains in student learning than other teachers. The magnitude of the differences is truly large, with some teachers producing 1.5 years of gain in achievement in an academic year while others with equivalent students produce only 1/2 year of gain. In other words, two students starting at the same level of achievement can know vastly different amounts at the end of a single academic year due solely to the teacher to which they are assigned. If a bad year is compounded by other bad years, it may not be possible for the student to recover.”).

113. See *generally* 134 S. Ct. 2618 (2014).

114. See *supra* notes 53–81 and accompanying text.

115. *Harris*, 134 S. Ct. at 2638.