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Is *Abood* Irrelevant?

Daniel Hemel[†] & David Louk^{††}

INTRODUCTION

Laws in roughly half of US states allow labor unions and public sector employers to establish “agency shop” arrangements that cover state and local government workplaces. In an agency shop arrangement, all employees in a particular unit are required—as a condition of their employment—to pay a “fair-share” or “agency” fee to cover the local union’s collective bargaining costs, regardless of whether the employee joins the union or agrees with its positions. The union, for its part, is required to represent the interests of all employees in the unit—both members and nonmembers.¹ Supporters of agency shop arrangements argue that the fee requirement is justified to prevent nonunion members from free riding off the union’s bargaining efforts without contributing anything to the union themselves. Opponents of agency shop arrangements argue that the fee requirement violates the First Amendment rights of nonunion members. These opponents contend that requiring a public sector employee to pay money to a union is like forcing her to speak out in favor of a cause with which she disagrees.

Although the Supreme Court rejected this First Amendment argument in the 1977 case *Abood v Detroit Board of Education*²—which has survived for nearly four decades—the Court will soon reconsider that ruling. In January 2016, the justices will hear oral argument in *Friedrichs v California Teachers Association*,³ and many observers believe there is a substantial likelihood that the

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¹ See, for example, Cal Govt Code § 3546(a).

² 431 US 209 (1977).

³ Petition for a Writ of Certiorari, *Friedrichs v California Teachers Association*, Docket No 14-915, *i (US filed Jan 26, 2015) (available on Westlaw at 2015 WL 393856) (“*Friedrichs* Petition”).

Court will use *Friedrichs* as an opportunity to overrule *Abood*.⁴ The *Friedrichs* plaintiffs took their cue from the 2014 case *Harris v Quinn*,⁵ in which the Court declined to overturn *Abood*, but Justice Samuel Alito's majority opinion nonetheless expressed substantial misgivings about the precedent.⁶ Alito wrote that *Abood* is "something of an anomaly" and that "[t]he *Abood* Court's analysis is questionable on several grounds."⁷ The majority's message was not subtle: as Justice Elena Kagan observed in dissent, "the majority [could not] restrain itself from providing a critique of [*Abood*], suggesting that it might have resolved the case differently in the first instance."⁸

In the aftermath of that decision, opponents of agency shop arrangements did not wait long before asking the Court to do what it stopped short of doing in *Harris*: overrule *Abood* and hold that the First Amendment forbids agency shop arrangements in the public sector.⁹ After *Harris* came down, the plaintiffs in *Friedrichs* asked the Ninth Circuit to rule *against* them without oral argument so that they could bring their challenge to the Supreme Court as quickly as possible.¹⁰ The Ninth Circuit complied, and the Supreme Court granted certiorari to decide "[w]hether *Abood* . . . should be overruled and public-sector 'agency shop' arrangements invalidated under the First Amendment."¹¹ As seasoned observers of One First Street know, the Court does not generally grant certiorari to reconsider its own precedent; when it does, it often does so with the intention of overruling its earlier decision.¹²

⁴ See Adam Liptak, *Supreme Court to Hear Challenge to Union Fees* (NY Times, June 30, 2015), archived at <http://perma.cc/3EKZ-BTNE> (noting that *Abood* may be overturned).

⁵ 134 S Ct 2618 (2014).

⁶ *Id.* at 2632.

⁷ *Id.* at 2627, 2632. This was not the first time that Alito expressed doubts about the wisdom of *Abood* in a majority opinion. See *Knox v Service Employees International Union, Local 1000*, 132 S Ct 2277, 2290 (2012) (suggesting that the *Abood* Court had applied private sector precedents to the public sector union context "without any focused analysis").

⁸ *Harris*, 134 S Ct at 2651 (Kagan dissenting). Leading scholars of labor and constitutional law have reached a similar conclusion. See, for example, Cynthia Estlund and William E. Forbath, *The War on Workers: The Supreme Court Ruling on Harris v. Quinn Is a Blow for Unions* (NY Times, July 2, 2014), archived at <http://perma.cc/KK3D-LS8T> ("[T]he majority makes clear that [agency] fees now rest on shaky constitutional ground, at least in the public sector, and are vulnerable to broader attack in the future.").

⁹ See *Friedrichs* Petition at *i (cited in note 3).

¹⁰ See *Friedrichs v California Teachers Association*, 2014 WL 10076847, *1 (9th Cir), cert granted, 135 S Ct 2933 (2015).

¹¹ *Friedrichs* Petition at *i (cited in note 3).

¹² See, for example, *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877, 881–82 (2007) (overruling *Dr. Miles Medical Co v John D. Park & Sons Co*, 220 US 373 (1911), after granting certiorari to reconsider *Dr. Miles*); *Crawford v Washington*, 541 US

So when the Court took up the *Friedrichs* case this past June, it was only natural that union leaders “expressed alarm” over the grant of certiorari.¹³ As Ilya Shapiro of the Cato Institute recently put it, “the smart money is [] 5-4 in favor of the petitioners here.”¹⁴

This Essay does not take a position on whether *Abood* will—or ought to—survive. Instead, we set out to answer a different question: Why do government employers and unions in more than twenty states continue to choose agency shop arrangements over alternative mechanisms for addressing the free rider problem in public sector workplaces? If a public sector employer wants to make sure that a labor union is compensated for the cost of representing nonmembers, the employer could just as easily reimburse the union for those expenses directly. To offset the cost of this direct payment, the employer could then reduce each employee’s salary by an amount equal to the employee’s share of the union’s collective bargaining expenses while also freeing employees from the obligation to pay agency fees. This direct payment alternative would seem to accomplish the same objective as existing agency shop arrangements: it would prevent employees who are not union members from reaping the benefits of union representation without sharing the costs. And while the wages of public sector employees would be reduced by their pro rata shares of the union’s bargaining costs, existing agency shop arrangements already reduce wages by that amount, since employees must pay their pro rata shares in the form of union dues or agency fees.

In fact, what we call the direct payment alternative might leave public sector employers and employees *better off* than existing agency shop arrangements. First, the direct payment alternative eases the First Amendment concerns that are front and center in *Friedrichs*. A direct payment from a government entity to a union would almost certainly qualify as “government speech” and would thus be subject to less-stringent scrutiny under present

36, 68 (2004) (overruling *Ohio v Roberts*, 448 US 56 (1980), after granting certiorari to reconsider *Roberts*); *Lawrence v Texas*, 539 US 558, 563–64, 578 (2003) (overruling *Bowers v Hardwick*, 478 US 186 (1986), after granting certiorari to reconsider *Bowers*). To be sure, the grant of certiorari in *Friedrichs* does not necessarily mean that *Abood* is dead. Very occasionally, the Court will grant certiorari to reevaluate a precedent and then decide to let the earlier ruling stand. See, for example, *Kimble v Marvel Entertainment, LLC*, 135 S Ct 2401, 2405 (2015) (declining to overrule *Brulotte v Thys Co*, 379 US 29 (1964), when “[t]he sole question presented” was “whether [the Court] should overrule *Brulotte*”).

¹³ Liptak, *Supreme Court to Hear Challenge to Union Fees* (cited in note 4).

¹⁴ Sean Higgins, *Big Labor’s Unlikely Hope: Antonin Scalia* (Washington Examiner, Nov 16, 2015), archived at <http://perma.cc/3VTV-U3KK>.

First Amendment doctrine.¹⁵ Second, the direct payment alternative would lead to lower federal taxes for most public sector employees. An employee's pro rata share of union bargaining expenses would not be included in gross pay for the purposes of Social Security or Medicare taxes, and it would not be included in adjusted gross income for the purposes of personal federal income tax liability. While union dues and agency fees are deductible expenses under current federal tax law, these deductions are subject to several restrictions that substantially limit their value in practice. As we argue, most public sector employees would fare better on an after-tax basis if their employers adopted the direct payment alternative instead of the agency shop arrangement.

The apparent advantages of the direct payment alternative give rise to a puzzle: If the direct payment alternative would allow public sector employers and unions to accomplish the same objective as agency shop arrangements with fewer constitutional concerns and with favorable tax consequences, why do state and local governments and unions nevertheless maintain agency shop arrangements? It is true that in many states a switch to the direct payment alternative would require a legislative change, but agency shop arrangements are themselves mostly a product of legislative choice. And yet state and local governments in nearly half of US states have chosen—either legislatively or otherwise—to adopt an agency shop arrangement instead of the direct payment alternative.¹⁶

In this Essay, we compare and contrast the basic features of the agency shop arrangement and the direct payment alternative, and we consider the constitutional, economic, and political factors that might lead state and local governments and public sector unions to choose one approach over the other. On first glance, the direct payment alternative appears to be the more advantageous approach for all parties involved: state and local governments, employees, and unions. Thus the puzzle: Why does the agency shop approach persist today? We present several hypotheses drawn from behavioral economics and political psychology—and, in particular, from the emerging literature on the salience of taxes and fees—that might explain why employers and unions would opt for agency shop arrangements despite the apparent advantages of the direct payment alternative. We conclude by

¹⁵ See *Rust v Sullivan*, 500 US 173, 193–94 (1991).

¹⁶ See Pamela A. MacLean, *Friedrichs v. CTA: Supreme Court Case Could Topple Protections for Teachers Union Fees* (California Lawyer, Oct 2015), archived at <http://perma.cc/P3H8-N43L>.

considering the practical consequences of a possible Supreme Court decision overruling *Abood*.

I. THE AGENCY SHOP STATUS QUO

We begin by briefly outlining the agency shop arrangement that gives rise to the constitutional challenge in *Friedrichs*. Like many states with agency shop arrangements for public sector workplaces, California will recognize a union as the exclusive bargaining representative for the teachers in a public school district after the union submits proof to a state board that it has the support of a majority of the district's teachers.¹⁷ Once a union attains exclusive-representative status, it has a duty to "fairly represent" all teachers in the district—including teachers who decline to join the union.¹⁸ While teachers can opt to not join the union, nonmembers still must pay the union a "fair share services fee" (or "agency fee"), which covers the teachers' pro rata share of the union's collective bargaining-related costs.¹⁹ Importantly, teachers who decline to join the union are obligated to pay only for expenses that the union has incurred in carrying out its exclusive-representative function. Nonmembers are entitled to a refund for their pro rata portion of other union expenses (for example, expenses for political activities).²⁰

California's agency shop arrangement is not limited to public school teachers; similar provisions cover, for example, employees of the state's transit districts and its universities.²¹ Nor are these arrangements limited to California: by our count, twenty-one other states also allow public sector unions to collect agency fees.²² Some states (such as California) mandate that certain public sector employees pay agency fees to their local unions if the employees decline to join.²³ Other states (such as Ohio and Pennsylvania)

¹⁷ See Cal Govt Code § 3544(a).

¹⁸ Cal Govt Code § 3544.9.

¹⁹ Cal Govt Code § 3546(a) (stating that the fee covers the "cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative"). See also *Friedrichs* Petition at *6 (cited in note 3).

²⁰ Cal Govt Code § 3546(a).

²¹ See Cal Pub Util Code § 99566.1(a); Cal Govt Code § 3583.5(a)(1).

²² See Jason Hart, *State, Local Laws Force Public Employees to Pay Labor Unions* (Watchdog.org, Sept 24, 2014), archived at <http://perma.cc/X6L4-ZQM7>.

²³ States with arrangements similar to California's include Connecticut, Delaware, and Rhode Island. See Conn Gen Stat Ann § 5-280 (implementing a mandatory agency fee); 19 Del Code Ann § 1319 (same); RI Gen Laws § 28-9.3-7 (implementing a mandatory agency fee for teachers while permitting but not requiring other state and local government employers to include agency shop clauses in collective bargaining agreements). Hawaii

permit but do not require public sector employers and unions to include agency fee provisions in collective bargaining agreements.²⁴ Still other states carve out exceptions for non-union-member employees who hold bona fide religious beliefs that are inconsistent with support for the union.²⁵ In virtually all states in which public sector agency shops exist, however, state legislatures have enacted specific statutes authorizing or mandating these arrangements.²⁶

Public sector employees who object to paying agency fees have brought several constitutional challenges to agency shop arrangements over the years. In *Abood*, teachers who declined to join their local union in Detroit argued that the agency shop arrangement violated their First Amendment rights to free speech and free association.²⁷ The Supreme Court, per Justice Potter Stewart, rejected the teachers' argument. The Court acknowledged that requiring teachers to pay agency fees "has an impact upon their First Amendment interests," but it found that the "governmental interests advanced by the agency-shop provision" outweighed the plaintiffs' First Amendment objections.²⁸ As the Court noted, the agency fee requirement "counteracts the incentive that employees might otherwise have to become 'free riders'"

has a mandatory agency shop requirement with an exception for nonunion employees' bona fide religious beliefs. See Hawaii Rev Stat §§ 89-3, 89-3.5, 89-4(a).

²⁴ See Ohio Rev Code Ann § 4117.09(C) ("The agreement may contain a provision that requires as a condition of employment . . . that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee."); 43 Pa Cons Stat Ann § 1102.3 ("If the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee."). Other states that permit but do not require agency shop arrangements include Illinois, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, Vermont, and Wisconsin. See 5 ILCS 315/6(a); 115 ILCS 5/11; 26 Me Rev Stat Ann §§ 963, 979-B; Mass Gen Laws Ann ch 150E, § 12; Minn Stat Ann § 179A.06; NJ Stat Ann § 34:13A-5.5; NM Stat Ann § 10-7E-9; 21 Vt Stat Ann §§ 1503, 1631, 1634; Wis Stat § 111.85 (permitting agency fees only for "public safety employees").

²⁵ Several states, such as Alaska and Washington, have permissive agency shop statutes with exceptions for bona fide religious beliefs. See Alaska Stat Ann § 23.40.225; Wash Rev Code Ann §§ 41.56.122, 41.59.060, 41.59.100. Others, like Montana, Oregon, and Wisconsin, require that public employees seeking bona fide religious exceptions instead donate the same amount as the agency fee to the charity of their choice. See Mont Code Ann § 39-31-204; Or Rev Stat § 243.666; Wis Stat § 111.85(1)(d).

²⁶ In a handful of states, state laws appear to neither expressly permit nor prohibit agency shop arrangements, but the states have permitted such arrangements in practice. See Md Labor & Empl Code Ann § 4-503; NY Civ Serv Law § 203; NH Rev Stat Ann § 273-A:3; *Nashua Teachers Union v Nashua School District*, 707 A2d 448, 452-53 (NH 1998) (interpreting NH Rev Stat Ann § 273-A:3 as permitting agency shop arrangements).

²⁷ *Abood*, 431 US at 213, 222.

²⁸ *Id* at 222, 224.

who “refuse to contribute to the union while obtaining benefits of union representation.”²⁹

Abood was not the Court’s last word on agency fees, however. In the 1986 case *Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson*,³⁰ the Court held that “[p]rocedural safeguards” are necessary to ensure that public sector unions charge nonmembers only for collective bargaining costs and not for “ideological activities unrelated to collective bargaining.”³¹ Five years later, in *Lehnert v Ferris Faculty Association*,³² the Court set forth further limits on the types of expenses for which unions can seek reimbursement from nonmembers.³³ The Court did not cast doubt on *Abood*’s essential holding in either *Hudson* or *Lehnert*; however, in two much more recent cases involving public sector agency fees, the majority voiced qualms about *Abood*. First, in the 2012 case *Knox v Service Employees International Union, Local 1000*,³⁴ Justice Alito, writing for the majority, stated that the *Abood* Court had failed to engage in “any focused analysis” of the constitutional differences between public sector agency shops and similar private sector arrangements.³⁵ Two years later, in *Harris*, Alito, again for the majority, concluded that *Abood* did not apply to home care personal assistants who were jointly employed by Illinois and by individuals with disabilities.³⁶ In holding that personal assistants who declined to join a union could not be required to pay agency fees, the majority said that “even the best argument for the ‘extraordinary power’ that *Abood* allows a union to wield is a poor fit” for these circumstances.³⁷ The majority made its message even clearer when it explicitly said that *Abood* rested on “questionable foundations.”³⁸ Given the language in *Knox* and *Harris*, as well as *Friedrichs*’s hasty arrival on the Court’s docket, many observers have come to suspect that the Court may be ready to overturn *Abood* and reconsider the continued constitutionality of agency shop arrangements.³⁹

²⁹ *Id.* at 222.

³⁰ 475 US 292 (1986).

³¹ *Id.* at 302–05.

³² 500 US 507 (1991).

³³ *Id.* at 524 (“The union surely may not, for example, charge objecting employees for a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally.”).

³⁴ 132 S Ct 2277 (2012).

³⁵ *Id.* at 2290.

³⁶ *Harris*, 134 S Ct at 2636–37.

³⁷ *Id.* at 2636 (citation omitted).

³⁸ *Id.* at 2638.

³⁹ See text accompanying notes 13–14.

II. THE DIRECT PAYMENT ALTERNATIVE

The primary justification for agency shop arrangements—and one that the *Abood* Court expressly acknowledged—is that the fee requirement “reduce[s] the risk that nonunion employees will become ‘free riders’ by fairly distributing the costs of exclusive representation.”⁴⁰ But an agency shop arrangement is not the only way that states can ensure this result. If public sector employers want to guarantee that unions are reimbursed for their collective bargaining costs (including the cost of representing nonmembers), then there is an even more straightforward way to achieve that objective: the employer could reimburse the union for those expenses directly.

A concrete example illustrates this point. Let’s say that a union in California represents a school district’s one hundred teachers and incurs \$100,000 a year in collective bargaining–related expenses. For the sake of simplicity, let’s also assume that each teacher in the district earns \$50,000 a year. Under the existing agency shop arrangement, every teacher must pay \$1,000 to the union to cover her share of the union’s collective bargaining costs. (Teachers who choose to join the union also pay additional dues to cover expenses that are unrelated to collective bargaining.) The end result is that although all teachers nominally earn \$50,000, their pretax pay is really \$49,000 because each pays a minimum—and mandatory—\$1,000 agency fee to the union.

The direct payment alternative would reproduce this result. Instead of requiring *teachers* to pay the union, however, the *school district* would reimburse the union directly for its \$100,000 in collective bargaining–related expenses. To account for these costs, the district would then want to reduce each teacher’s salary from \$50,000 to \$49,000. The teachers, however, would be no worse off: they would no longer have to pay their \$1,000 share of the union’s collective bargaining costs, so their pretax pay would be the same as in the agency shop arrangement. The union would also be no worse off: it would still be reimbursed for its collective bargaining–related expenses and could still charge additional dues to members. And the school district would be in the same position as well: instead of a \$5 million payroll, it would have a \$4.9 million payroll plus a \$100,000 line item on its budget for the union reimbursement.

From an economic perspective, then, the direct payment alternative appears to be identical (at least on a pretax basis) to the

⁴⁰ *Abood*, 431 US at 260 (Powell concurring).

agency shop status quo; from a constitutional law perspective, though, it is not. If money is speech,⁴¹ then the money flowing from the public sector employer to the union under the direct payment alternative is government speech. (After all, it is the government's money.) And while the First Amendment restricts the government's ability to compel private individuals to communicate (and fund) messages with which they disagree, the First Amendment does not prevent the government from communicating whatever message it wants (within broad bounds).⁴² The Court has long held that the government may make a "value judgment" regarding even highly controversial policy objectives, and that the government may "implement that judgment by the allocation of public funds."⁴³ As Chief Justice William Rehnquist put it in the 1991 case *Rust v Sullivan*,⁴⁴ "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest."⁴⁵ So if a state believes that the public interest requires unions to be reimbursed for the costs of representing all employees (both members and nonmembers) in collective bargaining, the *Rust* rule would seem to allow the state to reimburse unions for those costs.

Indeed, regardless of whether the Court overrules *Abood*, the direct payment alternative seems to offer advantages over the agency shop status quo. While *Abood* allows public sector unions to charge nonmembers for collective bargaining costs, it limits the unions' ability to charge nonmembers for other expenses not directly related to collective bargaining.⁴⁶ As the Court later elaborated in *Lehnert*, "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."⁴⁷ The *Lehnert* Court concluded that a union "surely may not . . . charge objecting employees" for the expense of "promoting employee rights or unionism generally," and that a union also may not

⁴¹ See *Buckley v Valeo*, 424 US 1, 19 (1976) (treating financial contributions to political campaigns as protected under the First Amendment).

⁴² See *Regan v Taxation with Representation of Washington*, 561 US 540, 547–50 (1983) (applying rational basis review to reject a First Amendment challenge to government speech).

⁴³ *Maher v Roe*, 432 US 464, 474 (1977).

⁴⁴ 500 US 173 (1991).

⁴⁵ *Id.* at 193.

⁴⁶ *Abood*, 431 US at 235–36.

⁴⁷ *Lehnert*, 500 US at 519.

charge dissenters for a contribution to a parent union unless it is “part of the local’s responsibilities as an affiliate.”⁴⁸ Moreover, *Lehnert* places the burden on the union to “prov[e] the proportion of chargeable expenses to total expenses.”⁴⁹ And when nonmembers believe that they have been billed for nonchargeable activities, they can sue the union in state or federal court for a refund.

The direct payment alternative would make much of this case law moot. Public sector entities can—consistent with government-speech doctrine—use their own funds to promote employee rights or unionism generally. And if it is the *government* using its own funds to reimburse public sector unions, then we doubt that any taxpayer would have standing to challenge the specifics of the reimbursement decision in court.⁵⁰ At the very least, it appears that a nonunion public employee would have much more trouble contesting the government’s decision to reimburse a public sector union for a specific expense than she would have contesting the chargeability of costs under *Abood* and *Lehnert*. For unions, then, the agency shop status quo creates a headache that the direct payment alternative potentially avoids.⁵¹

Federal tax law provides a further reason to suspect that public sector employers, employees, and unions would be better off under the direct payment alternative than under the existing agency shop arrangement. Although taxpayers can claim a deduction for union dues and agency fees,⁵² the deduction is subject to a 2 percent floor on miscellaneous itemized deductions.⁵³ Thus, if a public sector employee’s miscellaneous itemized deductions amount to less than 2 percent of her adjusted gross income, the deduction for agency fees and union dues does not help her at all.

⁴⁸ *Id.* at 524.

⁴⁹ *Id.*

⁵⁰ See, for example, *DaimlerChrysler Corp v Cuno*, 547 US 332, 346 (2006) (holding that “state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers”).

⁵¹ We should note that the direct payment alternative might be less favorable from the union’s perspective if the public sector employer exercises significant discretion over which costs it will reimburse and which costs it will not. For instance, if the public sector employer could selectively deny reimbursement for certain expenses, then it could use the reimbursement process to exercise control over the union’s bargaining positions. If, on the other hand, the public sector employer could credibly commit to reimburse the union for all bona fide collective bargaining expenses, then the extent to which the employer exercises control over the union in the direct payment model would be comparable to the employer’s control over the union under the agency shop status quo (and the union would be spared the expense of litigating *Lehnert*-like challenges to chargeability). See text accompanying note 67.

⁵² On the deductibility of agency fees, see Rev Rul 68-82, 1968-1 Cum Bull 68.

⁵³ 26 USC § 67.

(Note that the most common itemized deductions—for home-mortgage interest, state and local income and property taxes, charitable contributions, and medical and dental expenses—do not count toward the 2 percent floor.)⁵⁴ Moreover, many low- and middle-income public sector employees opt to take the standard deduction, in which case the deductibility of union dues and agency fees provides no benefit to them whatsoever. And under an agency shop arrangement, union dues and agency fees are included in an employee's wages for purposes of federal Social Security and Medicare taxes, regardless of whether the employee itemizes or claims the standard deduction.⁵⁵ True, payroll tax payments also increase an employee's ultimate Social Security benefits—but for most workers, the effective marginal Social Security tax rate is positive (an additional \$1 in taxes paid leads to less than \$1 more in lifetime benefits).⁵⁶ Under the direct payment alternative, by contrast, the employee would owe no payroll tax on her pro rata share of her local union's collective bargaining expenses. So most public sector employees would be better off after taxes if their workplaces switched to the direct payment alternative.⁵⁷

III. THE PUBLIC SECTOR PUZZLE

Why, then, do public sector employers and unions continue to choose the agency shop arrangement instead of the direct payment alternative as a mechanism for making sure that nonmembers bear a share of bargaining expenses? In the private sector, the answer is quite simple: federal labor law prohibits private sec-

⁵⁴ 26 USC § 67(b)(1)–(2), (4)–(5). See also Kelly Phillips Erb, *Five Most Common Tax Deductions* (DailyFinance, Jan 3, 2011), archived at <http://perma.cc/57TH-VL84>.

⁵⁵ See 26 USC § 3121(a) (defining “wages” for the purposes of Social Security and Medicare taxes).

⁵⁶ See generally Martin Feldstein and Andrew Samwick, *Social Security Rules and Marginal Tax Rates*, 45 Natl Tax J 1 (1992). See also *Social Security Reform: Work Incentives* *1 (Department of the Treasury), archived at <http://perma.cc/LL5F-EYGN> (stating that “workers pay more in taxes than they expect to receive in lifetime Social Security benefits”).

⁵⁷ Most state and local government employees are covered by Social Security, and virtually all pay into Medicare. See *State and Local Government Pension Plans: Current Structure and Funded Status* *3 n 5 (GAO, July 10, 2008), archived at <http://perma.cc/572Y-UYAC> (noting that about 70 percent of state and local government workers were covered by Social Security as of 2008); *How State and Local Government Employees Are Covered by Social Security and Medicare* (Social Security Administration, Oct 2015), archived at <http://perma.cc/ZP67-V2TX> (“Most [public sector] employees have Social Security protection, because their states have special agreements with the Social Security Administration.”).

tor employers from making direct payments to unions. Section 302 of the Labor Management Relations Act of 1947⁵⁸ (LMRA) provides that no employer may pay “any money or other thing of value” to any labor organization representing that employer’s workers.⁵⁹ Yet the definition of “employer” for purposes of the LMRA (and the earlier National Labor Relations Act⁶⁰) excludes “any State or political subdivision thereof.”⁶¹ And courts have concluded that § 302 of the LMRA does not apply to public sector employers.⁶²

To be sure, many states with agency shop models—including California—currently prohibit public sector employers from making direct payments to labor unions,⁶³ and a number of other states have laws that arguably effect the same ban.⁶⁴ But this fact does not *account* for the outcome we seek to explain; rather, it *is* the outcome we seek to explain. Put differently, our question is why states have chosen agency shop arrangements instead of adopting the direct payment alternative. It is no answer to say: because states have chosen to prohibit the direct payment alternative. Furthermore, in a number of states, existing statutes

⁵⁸ 61 Stat 136, codified as amended at 29 USC § 141 et seq.

⁵⁹ LMRA § 302(a), 61 Stat at 157, codified as amended at 29 USC § 186(a). See also Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 27 *Cardozo L Rev* *47–48 (forthcoming 2016), archived at <http://perma.cc/FQT2-QXNR> (discussing the origins and effects of LMRA § 302(a)).

⁶⁰ 49 Stat 449 (1935), codified as amended at 29 USC § 151 et seq.

⁶¹ 29 USC § 152(2).

⁶² See, for example, *Crilly v Southeastern Pennsylvania Transportation Authority*, 529 F2d 1355, 1361 (3d Cir 1976). This conclusion is perhaps not as obvious as it initially seems: the definition of “employer” in 29 USC § 152 applies “in this subchapter,” and the restriction on financial transactions between employers and unions appears in a different subchapter. We are aware of no authority, however, suggesting that § 302 of the LMRA applies to the public sector.

⁶³ Seven agency shop states—California, Illinois, Minnesota, Ohio, Pennsylvania, Vermont, and Wisconsin—expressly ban employer contributions to unions. See Cal Govt Code § 3519(d) (“It shall be unlawful for the state to . . . [d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.”); 5 ILCS 315/10; Minn Stat Ann § 179A.13; Ohio Rev Code Ann § 4117.11; 43 Pa Cons Stat Ann § 211.6; 21 Vt Stat Ann § 1621; Wis Stat § 111.06.

⁶⁴ Some states have no express prohibition on contributions but instead prohibit efforts by public sector employers to dominate, interfere with, or *assist* labor unions. See 19 Del Code Ann § 1307(a)(2) (prohibiting public employers from “[d]ominat[ing], interfer[ing] with or assist[ing] in the formation, existence or administration of any labor organization”); Hawaii Rev Stat § 89-13; Mass Gen Laws Ann ch 150E, § 10; Mont Code Ann § 39-31-401; Or Rev Stat § 243.672.

merely prohibit public employers from “dominating” or “interfering” with labor unions:⁶⁵ in these states, the direct payment alternative is arguably already permissible, and a switch to direct payment may require no change in the law.

Perhaps one could argue that even though § 302 of the LMRA does not apply to public sector unions, the policy rationales underlying § 302 should apply with equal force to public sector workplaces. We are skeptical of this claim, at least insofar as it may be used to justify states’ choice of an agency shop arrangement over the direct payment alternative. There are very good reasons to ban employers—public or private—from making payments to union officials: at the extreme, an employer who makes such a payment might be bribing the official to take a softer stance in bargaining.⁶⁶ The antibribery rationale is less compelling, though, when the employer reimburses the union only for its collective bargaining expenses. After all, this already happens in a more roundabout way under the agency shop status quo, since the employer pays its employees and requires the employees to reimburse the union for their pro rata share of collective bargaining costs. Channeling the payment through the employee does not change the fact that money ultimately flows from employer to union.

Concededly, the arrangement could undermine union independence if the employer exercised control over which expenses were reimbursed and which expenses were not. But a state could mitigate that risk if, for instance, it established an independent board that reviewed union expenses and made reimbursement decisions itself. The board would then tell the employer how much it had to pay the union; the employer would have no role in setting that amount.⁶⁷ And given the looming background threat of litigation over which activities are properly “chargeable” under *Lehnert*,⁶⁸ the agency shop arrangement is also not free from the threat that unions’ reimbursement requests may be denied. We

⁶⁵ These states include Alaska, Connecticut, Maine, New Hampshire, New Jersey, New Mexico, New York, and Rhode Island. See Alaska Stat Ann § 23.40.110(a)(2); Conn Gen Stat Ann § 5-272; 26 Me Rev Stat Ann §§ 964, 979-C; NH Rev Stat Ann § 273-A:5; NJ Stat Ann § 34:13A-5.4; NM Stat Ann § 10-7E-19; NY Civ Serv Law § 209-a; RI Gen Laws § 28-7-13. Washington adds a further prohibition on “control” of the union. Wash Rev Code Ann § 41.56.140. Maryland bans “coercion.” Md Labor & Empl Code Ann § 4-302(b)(2)(ii).

⁶⁶ See, for example, *United States v Lanni*, 466 F2d 1102, 1108 (3d Cir 1972) (noting that in the case of LMRA § 302, “the statutory purpose is clear: [t]he stamping out of ‘all forms of bribery’ between management and labor officials”).

⁶⁷ Employers and unions might also establish a similar payment by contract, agreeing to delegate reimbursement decisions to an independent arbitrator.

⁶⁸ *Lehnert*, 500 US at 519.

are skeptical that the policies underlying the LMRA's ban on employer-to-union payments can justify the adoption of agency shop arrangements over the direct payment model.

Instead, we believe that behavioral economics offers a more plausible account of why agency shops might appear preferable. The choice between the agency shop and direct payment models has an analog in the behavioral-economics literature examining the difference between tax-inclusive and tax-exclusive prices. If a jurisdiction imposes a 7 percent sales tax and a product's pretax price is \$1, a display of the price is tax inclusive if the label shows a \$1.07 cost to consumers; the display is tax exclusive if the label shows a \$1 price and the \$0.07 sales tax is added at the register. The distinction between agency shop arrangements and the direct payment alternative is in some ways similar to the distinction between tax-exclusive and tax-inclusive prices. Salaries in an agency shop arrangement are "agency fee exclusive": in the example above, California teachers are told that they will earn \$50,000 even though their pretax pay (net of agency fees) is never higher than \$49,000. By contrast, salaries under the direct payment alternative are "agency fee inclusive": each employee's pro rata share of the union's bargaining costs is factored into the wage before it is presented to the employee. So under the direct payment alternative, what you see is what you get—just as with tax-inclusive prices, what you see is what you pay.

Researchers in recent years have found that consumers reduce their purchases by a larger margin when presented with tax-inclusive prices rather than tax-exclusive prices. For example, Professor Raj Chetty and his coauthors conducted an experiment in 2006 in which some grocery store customers saw labels that included a 7.4 percent sales tax, while others saw a tax-exclusive price and were charged the 7.4 percent sales tax upon checkout. Chetty and his coauthors found that quantity sold and revenue raised were 8 percent lower when consumers were presented with a tax-inclusive price as opposed to a tax-exclusive price.⁶⁹ Professors David Gamage and Darien Shanske cite the Chetty study as evidence that policymakers can manipulate the "market salience" of taxation: When taxpayers are confronted with tax information at the time that they make market decisions, the tax is more likely to affect their market behavior. When taxpayers learn only

⁶⁹ Raj Chetty, Adam Looney, and Kory Kroft, *Salience and Taxation: Theory and Evidence*, 99 *Am Econ Rev* 1145, 1146 (2009).

later how a market decision will affect their tax liability, the market salience of the tax is lower and its likely effect on behavior is diminished.⁷⁰ Since the seminal paper by Chetty and his coauthors was published, several other studies have reached similar conclusions.⁷¹

This literature suggests that the choice between agency shop arrangements and the direct payment alternative may affect teachers' labor market decisions. Imagine a teacher who is weighing a job at a unionized public school in California with a \$50,000 salary versus a nearly identical job at a nonunionized private school with a \$49,500 salary. The teacher may fail to account for the fact that the \$50,000 salary at the unionized public school yields \$49,000 in pretax pay once the agency fee is subtracted. The teacher may choose the public school job on the basis of the seemingly higher salary even though the private school offer is actually more remunerative. Under the direct payment alternative, the same teacher faced with a \$49,000 offer from a unionized public school and a \$49,500 offer from a nonunionized private school may choose the private school job instead. By reducing the salience of union costs at the time that teachers make labor market decisions, agency shop arrangements may make public school offers appear to be more attractive than they would look under the direct payment alternative.⁷²

We should attach two immediate caveats to this hypothesis. First, it is not yet clear whether conclusions from market-salience

⁷⁰ David Gamage and Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 *Tax L Rev* 19, 27–29 (2011).

⁷¹ See *id.* at 27–31 (compiling studies); Jacob Goldin and Tatiana Homonoff, *Smoke Gets in Your Eyes: Cigarette Tax Salience and Regressivity*, 5 *Am Econ J: Econ Pol* 302, 328–31 (2013).

⁷² Of course, unionization may also affect wage rates. See, for example, Bruce Western and Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 *Am Sociological Rev* 513, 533 (2011) (examining the relationship between lower wages and decreased union membership). But even if unionization causes employees' wages to rise, and even if unions are more effective in an agency shop setting than in a right-to-work environment, we have no reason to believe that the impact of unionization on wage rates would be conditional on the choice between the agency shop arrangement and the direct payment alternative.

We should note that there may be instances in which an employee benefits from a higher nominal salary, even if the higher nominal salary does not translate into a higher after-tax wage. An employee's nominal salary may be relevant when the employee is seeking to qualify for a mortgage loan or when the employee is negotiating a salary with a subsequent employer. We strongly suspect, though, that the tax benefits from a lower nominal wage under the direct payment alternative would outweigh the mortgage market and subsequent labor market benefits of the higher wage in an agency shop setup—at least in most cases.

research in the retail sales tax context translate to the labor market context. The evidence so far is largely limited to laboratory experiments, and even those results are inconclusive.⁷³ When the financial stakes are high (as in the choice between two jobs), individuals may be willing to bear the cognitive cost of calculating their effective wage rates net of taxes and fees.⁷⁴ Accordingly, the presentation of taxes and fees may matter less in the labor market context than when consumers are making a series of low-stakes decisions in the aisles of a grocery store.⁷⁵ And workers in some professions (for example, teaching) may be so familiar with agency fees and union dues that they compare job opportunities with full awareness of the union-related costs associated with each salary offer.

Second, our hypothesis is *not* that public sector employers and unions consciously chose agency shop arrangements over the direct payment alternative because they set out to trick workers into public sector jobs. We make no claims regarding the initial motivations of states and unions that have adopted agency shop arrangements: it is possible, and perhaps probable, that public sector employers simply borrowed the agency shop model from the private sector context, in which the direct payment alternative is prohibited.⁷⁶ Our point is only that when states, public sector employers, and unions consider a switch to the direct payment alternative, market salience may be a relevant factor. This is especially so if the switch from an agency shop arrangement to the direct payment alternative would result in an immediate cut to the nominal salaries of public sector employees. To use the same

⁷³ Compare Tomer Blumkin, Bradley J. Ruffle, and Yosef Ganun, *Are Income and Consumption Taxes Ever Really Equivalent? Evidence from a Real-Effort Experiment with Real Goods*, 56 *Eur Econ Rev* 1200, 1206 (2012) (finding that “subjects’ labor supply is significantly more responsive to the income tax than the consumption tax”), with Andrew T. Hayashi, Brent K. Nakamura, and David Gamage, *Experimental Evidence of Tax Salience and the Labor-Leisure Decision: Anchoring, Tax Aversion, or Complexity?*, 41 *Pub Fin Rev* 203, 205 (2013) (noting that “willingness to work is sensitive to wage framing, but that these effects disappear when all-inclusive wages are made transparent”).

⁷⁴ Note, though, that even when the financial stakes are high, public school teachers appear to be more responsive to incentives that are framed as losses rather than as gains. See Roland G. Fryer Jr, et al, *Enhancing the Efficacy of Teacher Incentives through Loss Aversion: A Field Experiment* *3 (NBER Working Paper Series, July 2012), archived at <http://perma.cc/F58A-C7AA>. While not directly on point, the Fryer study suggests that raising the financial stakes may not eliminate behavioral anomalies. See note 77 and accompanying text.

⁷⁵ On the market salience of taxation and cognitive costs, see generally Goldin and Homonoff, 5 *Am Econ J: Econ Pol* 302 (cited in note 71).

⁷⁶ On the history of public sector unions in the United States, see generally Joseph A. McCartin, “A Wagner Act for Public Employees”: *Labor’s Deferred Dream and the Rise of Conservatism, 1970–1976*, 95 *J Am Hist* 123 (2008).

example, even though teachers may be at least as well off with a \$49,000 salary under the direct payment alternative as with a \$50,000 salary plus a \$1,000 agency-fee obligation, convincing teachers of that fact may be difficult—particularly in light of the behavioral-economics evidence indicating that individuals tend to focus on nominal prices and are especially averse to outcomes that are framed as losses.⁷⁷

The market-salience hypothesis is not the only plausible explanation for the persistence of agency shop arrangements. Tax scholars have drawn a useful distinction between “market salience” and “political salience”: the latter refers to the way in which “tax presentation affects voting behavior and political outcomes.”⁷⁸ The study of political salience springs from the idea that voters focus on “who appears to pay the tax rather than who actually bears the burden.”⁷⁹ So, for example, voters may perceive the Federal Insurance Contributions Act⁸⁰ (FICA) tax as a 7.65 percent tax on employees and a 7.65 percent tax on employers, even though economists generally believe that the FICA tax would have the same effect on after-tax incomes if it were styled as a 15.3 percent tax on workers’ wages.

Political salience may affect the choice between agency shop arrangements and the direct payment alternative in two ways. First, voters in agency shop states may perceive fair-share fees as being paid by employees—despite the fact that an agency shop arrangement is virtually identical on a pretax basis to a scenario in which government employers directly reimburse labor unions for their bargaining costs. A lump-sum transfer from a state or local government to a labor union might well spark a public outcry, even though the economic effect of an agency shop arrangement is no different.

Second, public sector employees in agency shop states may perceive union dues and agency fees as being paid by employees *themselves*, and not by their employers. This may be so even though current agency shop arrangements exist either because the

⁷⁷ See, for example, Fryer, et al, *Enhancing the Efficacy of Teacher Incentives* at *15–18 (cited in note 74); Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J Econ Persp 193, 199 (1991).

⁷⁸ Gamage and Shanske, 65 Tax L Rev at 20 (cited in note 70). See also Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 Yale J Reg 253, 272–73 (2011).

⁷⁹ George Loewenstein, Deborah A. Small, and Jeff Strnad, *Statistical, Identifiable, and Iconic Victims*, in Edward J. McCaffery and Joel Slemrod, eds, *Behavioral Public Finance* 32, 39 (Sage 2006).

⁸⁰ 68A Stat 415 (1954), codified as amended at 26 USC § 3101 et seq.

state has mandated them (as in California⁸¹) or because public sector employers have agreed to them (as in Ohio and Pennsylvania⁸²). In both cases, the revenue flow from agency fees depends on the acquiescence or affirmative enforcement of the state or its subdivisions. Agency shop arrangements thus give the appearance that a labor union's funding stream is independent of the government employer, even though the funding stream is dependent on the employer's decision to require that all public employees in a bargaining unit pay agency fees or union dues as a condition of employment. Union leaders may also value the *appearance* of being independent from their collective bargaining adversaries, even if the agency shop arrangements exist only with the blessing of state and local governments. In sum, government employers and unions alike may prefer the optics of an agency shop arrangement over the direct payment alternative, even though the distinction between the two is largely a matter of appearance.⁸³

Again, we do not mean to cast aspersions on state employers and unions that have opted for agency shop arrangements. We concede that the direct payment alternative may very well be a tough sell—to voters and to union members alike. Voters may react negatively to the idea that their tax dollars are going to unions, while union members may react negatively to the idea that their representatives in collective bargaining are funded by the very employers on the other side of the table. Our point is only that when one pierces through the surface of the agency shop arrangement, one sees that this is exactly what is happening already: unions are being reimbursed for their collective bargaining costs because public sector employers have decided that each employee's pro rata share of those costs should go to the union instead of to the worker.

⁸¹ See Cal Govt Code § 3546(a).

⁸² See Ohio Rev Code Ann § 4117.09(C); 43 Pa Cons Stat Ann § 1102.3.

⁸³ Our observations regarding the differences between agency shop arrangements and the direct payment alternative may apply more generally to the analysis of compelled subsidies versus government spending. See, for example, *United States v United Foods, Inc.*, 533 US 405, 425 (2001) (Breyer dissenting) (noting that a law compelling mushroom producers to make payments to a Mushroom Council for advertising efforts “resemble[d] a targeted tax” on mushroom sales coupled with an allocation of government funds to the Council). See also text accompanying notes 86–91 (discussing the compelled-subsidy arrangement in *Board of Regents of the University of Wisconsin System v Southworth*, 529 US 217 (2000)). While we limit our focus to the public sector union context here, we believe that findings from the tax-salience literature may shed light on the choice between compelled subsidies and direct government spending more broadly.

IV. LIFE AFTER *FRIEDRICHS*

What does the availability of the direct payment alternative mean for *Friedrichs*? We imagine that both the petitioners and the respondents in the case could argue that the availability of the direct payment alternative strengthens their case. The petitioners might say that the availability of the direct payment alternative further undermines the *Abood* Court's reasoning. The *Abood* Court held that agency fees are justified—even though they have “an impact upon [employees'] First Amendment interests”—because the fee requirement prevents “free riders” from gaining the benefits of union representation without bearing the costs.⁸⁴ Yet if state and local governments can achieve the same result through the direct payment alternative, then the agency shop arrangement would seem to impose an entirely unnecessary burden on the First Amendment rights of public employees.⁸⁵ The respondents, for their part, might argue that the availability of the direct payment alternative reveals the extreme formalism of the *Friedrichs* petitioners' claim. The respondents might say that the economic equivalence between the agency shop arrangement and the direct payment alternative shows that agency fees really are government speech and dissident schoolteachers have no constitutional basis to object to the government's allocation of public funds.

We leave it to others to debate the merits of the *Friedrichs* petitioners' claim. Instead, we conclude by considering the likely effect of a Supreme Court decision to overrule *Abood* (without hazarding any guess as to just how likely such a decision is). A natural reaction to the analysis above might be to say that *Friedrichs* does not matter much: even if *Abood* is overruled, public sector employers and unions can still prevent free riding by adopting the direct payment alternative. In our view, this reaction—however natural—is nonetheless misplaced.

⁸⁴ *Abood*, 431 US at 222.

⁸⁵ For a powerful argument to this effect, see generally Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 NYU L Rev *1 (forthcoming 2016), archived at <http://perma.cc/PEZ9-SPSS>. In an article posted to SSRN after this Essay had been accepted for publication, Aaron Tang exhaustively and incisively analyzes the constitutional implications of the direct payment alternative and, in particular, whether the availability of the direct payment alternative undermines the constitutional case for public sector agency shops. Tang concludes: “Under the First Amendment's well-established least restrictive alternative requirement, the government-payer work-around is actually a less restrictive means for attaining the government's labor peace interests that renders the fair share fee approach unconstitutional by comparison.” Id at *5 (citation omitted).

First, while we believe that the direct payment alternative would pass First Amendment muster under the Court's current government-speech doctrine, we cannot say so with 100 percent certainty. A skeptic might point to *Board of Regents of the University of Wisconsin System v Southworth*,⁸⁶ in which the Court considered a challenge to a "mandatory student activity fee" at University of Wisconsin–Madison's campus.⁸⁷ In that case, the university required full-time students to pay a fee each year to finance various campus services and extracurricular activities. The student government then allocated those funds to various campus groups, and the student body could override those allocation decisions via referendum. The respondents in *Southworth* argued that the university violated their First Amendment rights by forcing them—through the activity fee—to fund groups with which they disagreed (a chapter of Amnesty International, the Lesbian Gay Bisexual Campus Center, and a student chapter of the National Organization for Women, among other groups).⁸⁸ The *Southworth* Court ultimately upheld the activity-fee arrangement because it was "viewpoint neutral," but in the process, the Court cast doubt on whether the distribution of activity-fee funds could be considered "government speech."⁸⁹ The Court, per Justice Anthony Kennedy, said:

The case . . . does not raise the issue of the government's right . . . to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.⁹⁰

The skeptic might argue, in a similar vein, that a public sector employer does not engage in government speech when it reimburses unions for their bargaining *expenses*. After all, union members—not the public sector employer—give "purpose and content" to the union's collective bargaining positions.

While we acknowledge this potential argument, we do not take it too seriously. In *Southworth*, the university denied that the speech in question was government speech, taking that issue

⁸⁶ 529 US 217 (2000).

⁸⁷ *Id.* at 221.

⁸⁸ Brief for Respondents, *Board of Regents of the University of Wisconsin System v Southworth*, Docket No 98-1189, *11 (US filed Aug 13, 1999) (available on Westlaw at 1999 WL 618376).

⁸⁹ *Southworth*, 529 US at 234–35.

⁹⁰ *Id.* at 229.

off the table.⁹¹ And more importantly, the direct payment alternative is distinguishable from the university fee system in *Southworth*. In *Southworth*, students who objected to the use of activity-fee funds still had to pay the activity fee themselves, just as nonunion public employees presently pay fair-share fees under agency shop arrangements. Given the latitude granted to government speech, the students would have had no basis to object to the university's allocation of its *own* money (for example, they would not have gotten very far on a First Amendment challenge to the university's funding of its gender-studies department). Likewise, the force of the *Friedrichs* petitioners' argument comes from the fact that dissident teachers are forced to pay the agency fee themselves. It is hard to see how the petitioners would have any grounds on which to challenge the school district's decision to support a union with district funds. Even if the district reduced each teacher's salary by the pro rata share of collective bargaining costs, that fact would not change the First Amendment analysis. As the Court made clear in *Johanns v Livestock Marketing Association*,⁹² citizens "have no First Amendment right not to fund government speech," and this "is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object."⁹³

To be sure, if the Supreme Court overrules *Abood*, and if a significant number of states respond by adopting the direct payment alternative, the Court might be persuaded to reconsider elements of its government-speech doctrine. The Court's current

⁹¹ *Id.* The Court confronted a similar situation in *United States v United Foods, Inc.*, 533 US 405 (2001), which involved a mandatory assessment imposed on mushroom handlers to pay for advertisements promoting mushroom sales. The Court held that the assessment violated the First Amendment rights of mushroom handlers who objected to the advertisements because it forced them to fund speech with which they disagreed. *Id.* at 410. While the solicitor general argued that the advertisements should be considered "government speech" financed through a tax-like assessment, the Court found that the government-speech argument had been forfeited. *Id.* at 416–17 (acknowledging the solicitor general's argument but noting that the government-speech theory "was not raised or addressed in the Court of Appeals" and therefore would not be entertained on certiorari) (quotation marks omitted).

⁹² 544 US 550 (2005).

⁹³ *Id.* at 562. *Southworth* can potentially be distinguished on another ground as well: Whereas the expenditures in *Southworth* were entirely beyond the university's direction (the fees were collected and then immediately returned to the independent student government allocating expenditures), a public sector employer's direct reimbursement of a union would likely involve scrutiny of the union's expenses. Each ex post reimbursement would in essence be a government validation of the union's costs. See *id.* at 561–62 (noting that the "degree of governmental control over the message funded" by an assessment affects the government-speech analysis).

government-speech doctrine has few fans in the academy⁹⁴—and quite a few critics on the Court itself.⁹⁵ It may well be that the widespread adoption of the direct payment alternative reveals the formalism of the Court’s government-speech case law, leading the justices to alter the doctrine in ways that would put the direct payment alternative on weaker constitutional footing. We leave this question for others, as we anticipate a more immediate obstacle to the direct payment alternative’s adoption.

That obstacle is, in a word, politics. Although some states may be able to implement the direct payment alternative without legislative change, most states with agency-fee laws also have statutory bans on direct payments to unions.⁹⁶ In order for state and local governments to reimburse unions, many states would have to change their public sector labor laws by removing the prohibitions on contributions to unions by public employers. And this, of course, would be no simple task: unions would need to secure the support of majorities in both legislative chambers as well as the state’s governor (or else a legislative supermajority sufficient to override a gubernatorial veto). In many of the states with agency shop laws now in effect, this could prove to be an insuperable barrier.⁹⁷

One might ask why a state that *would not* adopt the direct payment alternative would nonetheless retain the agency shop status quo. The short answer is that the path from bill to statute in US states, as at the national level, is dotted with “vetogates”: points at which various actors can stop a legislative initiative in its tracks.⁹⁸ For example, in a state with a number of powerful pro-union legislators but a governor who would like to weaken the state’s public sector unions, it could be impossible to repeal existing agency shop laws but also impossible to pass a law authorizing the direct payment alternative. In such a state, the outcome of *Friedrichs* could have a significant impact: if the Court overrules *Abood*, the state would be unlikely to adopt the direct

⁹⁴ See, for example, Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 BC L Rev 695, 696 (2011) (identifying tensions between the Court’s viewpoint-neutrality and government-speech doctrines).

⁹⁵ See, for example, *Walker v Texas Division, Sons of Confederate Veterans, Inc*, 135 S Ct 2239, 2255–56 (2015) (Alito dissenting).

⁹⁶ See notes 63–64.

⁹⁷ It is difficult to imagine, say, Illinois Governor Bruce Rauner endorsing a bill that would allow state and local government employers to reimburse unions for their bargaining costs. See Associated Press, *Illinois: Governor Tells Agencies to Divert Union Fees* (NY Times, Mar 19, 2015), archived at <http://perma.cc/F4X7-7ZTG>.

⁹⁸ See generally William N. Eskridge Jr., *Vetogates, Chevron, Preemption*, 83 Notre Dame L Rev 1441 (2008).

payment alternative as a fallback. In the states where public sector unions are more powerful, by contrast, political support for the direct payment alternative could be so strong that a decision to overrule *Abood* would have only a limited practical effect: before long, the state might implement the direct payment alternative that we outline here.

To see how this might play out in practice, consider two states—California and Illinois—both of which allow (or, as in California’s case, sometimes require) agency shops.⁹⁹ In California, Democrats control the State Senate and State Assembly, and Democratic Governor Jerry Brown “has been allied with the labor movement since his political career began more than four decades ago.”¹⁰⁰ If *Abood* is overruled, we suspect that public sector unions would have sufficient sway in Sacramento to enact the direct payment alternative. In Illinois, on the other hand, Republican Governor Bruce Rauner has emerged as a fierce foe of public sector unions,¹⁰¹ and it would certainly surprise many in the Land of Lincoln if he ever signed legislation allowing unions to be reimbursed by the state for collective bargaining costs. Rauner lacks the support in the majority-Democrat General Assembly to abolish agency shop arrangements, but he still could veto legislation to implement the direct payment alternative and might well be able to defeat a veto-override attempt.¹⁰²

All of this is, of course, only speculation. But it takes us one step toward answering the question that titles our Essay. The direct payment alternative may allow public sector employers and unions to reproduce the basic effects of the agency shop arrangement even if *Abood* is overruled, but that does not mean *Abood* is irrelevant. Some states will likely switch to the direct payment alternative if the petitioners prevail in *Friedrichs*, but the direct payment model still differs from the agency shop arrangement in meaningful ways: potential public sector employees may respond

⁹⁹ See notes 23–24 and accompanying text.

¹⁰⁰ Chris Megerian, *Unions Remain a Crucial Backer of Gov. Jerry Brown’s Campaign* (LA Times, Oct 23, 2014), archived at <http://perma.cc/4AZZ-EF83>. This is not to say that Brown always sees eye-to-eye with public sector labor leaders. See Jon Ortiz, *Jerry Brown, Employee Unions Set to Tangle over Health Insurance* (Sacramento Bee, Jan 25, 2015), archived at <http://perma.cc/258Y-BXCC>.

¹⁰¹ See Monica Davey and Mitch Smith, *Illinois Governor Acts to Curb Power of Public Sector Unions* (NY Times, Feb 9, 2015), archived at <http://perma.cc/R2B3-K9XP>.

¹⁰² See Becky Schlikerman and Natasha Korecki, *House Dems Fail to Override Rauner Veto of Labor Bill* (Chi Sun-Times, Sept 2, 2015), archived at <http://perma.cc/773G-VEC2> (noting that Illinois House Democrats fell three votes short of the seventy-one votes needed to override Rauner’s veto of SB1229, “a bill that would have empowered an arbitrator to settle disputes between public sector unions and the governor”).

differently to salary offers that appear lower in nominal terms, while union members and voters may react differently once the public subsidy for unions becomes more transparent. And in other states, veto players will be able to block implementation of the direct payment alternative, so the outcome in *Friedrichs* will indeed determine whether public sector unions are reimbursed for the costs of representing nonmembers. There, the direct payment alternative may be theoretically possible (and perhaps preferable) but, as a practical matter, may lie out of reach. So while in some states the survival of *Abood* affects only the *mechanism* by which government employers reimburse unions for the cost of representing nonmembers, in other states the outcome of *Friedrichs* will determine *whether* unions are reimbursed at all.