WAKE FOREST JOURNAL OF BUSINESS AND INTELLECTUAL PROPERTY LAW

VOLUME 15 SPRING 2015 NUMBER 3

HARRIS V. QUINN'S PARADOXICAL RELATIONSHIP WITH PAST UNION JURISPRUDENCE AND THE PATH TO THE FUTURE

Ashley Brompton[†]

I. **INTRODUCTION** **514**

II. **BACKGROUND** **515**
A. PUBLIC SECTOR UNIONIZATION GENERALLY 515
B. THE *ABOOD* DECISION 517
C. OTHER FAIR SHARE DECISIONS 519

III. ***HARRIS V. QUINN*** **522**
A. BACKGROUND 522
B. THE DECISION 523

IV. **ANALYSIS** **524**
A. WHY *HARRIS* WAS WRONGLY DECIDED 524
B. IMPACT OF THE *HARRIS* DECISION 526
C. THE FUTURE OF *ABOOD* AFTER *HARRIS* 532
D. WHAT IS THE PATH TO THE FUTURE? 534

V. **CONCLUSION** **536**

[†] J.D. candidate, May 2015, Wake Forest University School of Law. Staff Member 2013-15, *Wake Forest Journal of Business and Intellectual Property Law*. The author thanks her family for supporting her in all of her endeavors and Professor Sidney Shapiro for sparking her interest in this topic.

I. INTRODUCTION

Marissa Klein stays home to take care of her severely disabled son. Her son is unable to care for himself so Marissa was forced to quit her job to provide twenty-four hour care. She was relieved and shocked when Illinois decided to fund "personal assistants" like herself so that they can afford to care for disabled family members. At first, the wages were barely sustaining her family's basic needs, until the Service Employees International Union Healthcare Illinois and Indiana (henceforth "SEIU-HCII") was elected to be the exclusive bargaining representative of "personal assistants."[1] Since it became the industry's union in Illinois, Marissa and others like her received a substantial increase in compensation as well as other benefits, including state health insurance, allowing her to stay home with her child and prevent him from being institutionalized.[2] This is a fictitious story that is characteristic of the stories of the homecare workers that were impacted by the *Harris v. Quinn* litigation. With the Supreme Court's decision in *Harris*,[3] the union's ability to continue to bargain for such results may be restricted.

This comment will discuss the general background of *Harris*, the decision, and the potential impact of the decision, which allows non-member employees to avoid paying for the collective bargaining efforts from which they benefit. Part II will include background information on public sector unionization, fair share dues in the public sector, and Supreme Court jurisprudence on the issue. Part III will review *Harris v. Quinn*. Part IV will analyze why *Harris* was wrongly decided, as well as its impact on previous precedent, and the real-life consequences of the decision. Additionally, it will outline the solution: to maintain the strength and precedential value of *Abood v. Detroit Board of Educ.*,[4] and continue to give public sector employees

[1] While this story is fictional, it represents the story of many personal assistants in Illinois. The SEIU-HCII was elected to be the personal assistants' exclusive representative for the purposes of collective bargaining. Harris v. Quinn, 134 S. Ct. 2618, 2626 (2014).

[2] The union contract under attack in *Harris* raised wages from $11.55 to $13.00. It also required that the state pay for safety and health training for personal assistants, as well as for gloves to protect against disease and bacteria. Additionally, the agreement established a labor management committee and a procedure for those home care workers wanting to file a grievance. Ross Eisenbrey, Harris v. Quinn *is About the Right of Home Care Workers to Improve Their Wages*, ECON. POLICY INST. BLOG (May 20, 2014, 3:09 PM), http://www.epi.org/blog/harris-quinn-home-care-workers-improve-wages/.

[3] *Harris*, 134 S. Ct. at 2618.

[4] 431 U.S. 209 (1977).

the freedom to implement "fair share" dues as part of collective bargaining agreements.

II. BACKGROUND

A. Public Sector Unionization Generally

Private sector unions have been nationally accepted since the National Labor Relations Act was passed in 1935.[5] In the public sector, however, a historical belief in government supremacy led many to reject the idea that the government should be challenged and forced to bargain with public sector employees.[6] President Franklin D. Roosevelt, one of the most labor-friendly presidents in American history, said:

> The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employers alike are governed and guided, and in many cases restricted, by laws which establish policies, procedure or rules in personnel matters.[7]

It was not until 1962, when President John F. Kennedy signed Executive Order 10988, that most public sector employees were able to bargain collectively on non-economic issues.[8] These non-economic issues today include things like tenure, seniority, the form of a grievance system, a system of arbitration between employers and employees, and more.[9] Many states passed state bargaining laws between 1965 and 1976, finally giving public sector employees the

[5] National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

[6] Vijay Kapoor, *Public Sector Labor Relations: Why it Should Matter to the Public and to Academia*, 5 U. PA. J. LAB. & EMP. L. 401, 402 (2003).

[7] Letter from Franklin D. Roosevelt, U.S. President, to Luther C. Steward, President, Nat'l Fed'n of Fed. Emps. (Aug. 16, 1937), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15445#axzz1UdkHgsqd. However, President Roosevelt's final position on the issue is debatable.

[8] Kapoor, *supra* note 6, at 403.

[9] LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POLICY INST., HOW UNIONS HELP ALL WORKERS 11–14 (2012), *available at* http://www.epi.org/publication/briefingpapers_bp143/.

ability to bargain collectively on both non-economic and economic issues.[10]

While private sector union membership has decreased over the last few decades,[11] public sector unionization has grown dramatically in the same time period.[12] As of 2013, 39.6% of public sector employees were represented by unions, as opposed to only 7.3% of private sector employees.[13] Teachers, police officers, firefighters, office workers, and even janitors have gained statutory rights to bargain collectively in the years since public sector unionization has gained popularity.[14] At this point, it is likely that without public sector unionization, unions would be a thing of the past.

1. "Fair share" dues in the public sector

In order to support the collective bargaining functions of unions, they collect dues from their members.[15] The funds collected are used for multiple purposes, including collective bargaining efforts, general union overhead costs, and political and lobbying activity.[16] In some states, unions can only collect dues from members; these states are known as "right to work" states.[17] In many states, however, non-member employees can be required to pay "fair share" payments to the union.[18] Employers that require these payments are known as "union

[10] EATON CONANT & GREG HUNDLEY, THE STATUS OF PUBLIC-SECTOR BARGAINING LAW IN COLLECTIVE BARGAINING IN THE PUBLIC-SECTOR IN THE UNITED STATES: A TIME OF CHANGE 39 (Amarjit S. Sethi et al. eds., 1990).

[11] Drew DeSilver, *American Union Membership Declines as Public Support Fluctuates*, PEW RES. CENT. (Feb. 20, 2014), http://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support/.

[12] *Id.*

[13] *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, Feb. 26, 2014, *available at* http://www.bls.gov/cps/cpsaat42.htm.

[14] Catherine Phillips, Note, *The Lost Democratic Institution of Petitioning: Public Employee Collective Bargaining as a Constitutional Right*, 10 FIRST. AMEND. L. REV. 652, 660-61 (2012).

[15] *See* Rick Ungar, *'Right to Work' Laws Explained, Debunked, and Demystified*, FORBES, Dec. 11, 2012, http://www.forbes.com/sites/rickungar/2012/12/11/right-to-work-laws-explained-debunked-demystified/.

[16] *See id.*

[17] James C. Thomas, *Right to Work: Settled Law or Unfinished Journey?*, 8 LOY. J. PUB. INT. L. 163, 163 (2007).

[18] Charlotte Garden, Harris v. Quinn *Symposium: Decision Will Affect Workers and Limit States' Ability to Effectively Manage Their Workforces*, SCOTUSBLOG

continued . . .

shops" or "agency shops."[19] These payments, usually a certain percentage of members' dues, are only to help pay for collective bargaining efforts of the unions, which benefit non-members as much as members; political or ideological lobbying activities may not be funded with fair share payments.[20] Fair share payments are at issue in *Harris*.

B. The *Abood* Decision

In *Abood v. Detroit Board of Educ.*,[21] the Court declared that it is constitutional to have a union shop in the public sector workplace.[22] The decision formed the foundation of public sector labor jurisprudence and is still the premier case on the topic today.[23] The case is highly influential in *Harris* as well as other fair share dues cases, and should have made the *Harris* decision an easy one.

1. History and procedure

In *Abood*, the public sector employees at issue were teachers.[24] After a secret ballot election, the Detroit Federation of Teachers was certified in 1967 as the exclusive representative of teachers working for the Detroit Board of Education.[25] The collective bargaining agreement that the union reached with the Board of Education included an agency shop provision, requiring teachers who elected not to join the union to pay their fair share to the union.[26] Teachers who failed to pay their fair share towards collective bargaining efforts were subject to discharge.[27] Some of the Detroit public school teachers

(July 2, 2014, 1:08 PM), http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-decision-will-affect-workers-limit-states-ability-to-effectively-manage-their-workforces/.

[19] *Glossary*, U.S. DEP'T OF LAB., http://www.dol.gov/dol/aboutdol/history/glossary.htm (last viewed Feb. 8, 2014).

[20] Ezra Klein, *The Misleading Framing of 'Right-to-Work'*, WASH. POST (Dec. 12, 2012), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/12/the-misleading-framing-of-right-to-work/.

[21] 431 U.S. 209 (1977).

[22] *Id.* at 224-26. *See also* Richard J. Darko and Janet C. Knapp, *Legal Problems in Administering Agency Shop Agreements – A Union Perspective*, 13 J.L. & EDUC. 77, 77 (1984).

[23] *See, e.g.*, *Harris*, 570 U.S. at __, 134 S. Ct. at 2645 (Kagan, E., dissenting) (categorizing *Abood* as "deeply entrenched" and the foundation of thousands of contracts between unions and governments nationwide).

[24] *Abood*, 431 U.S. at 214.

[25] *Id.* at 211–12.

[26] *Id.* at 212.

[27] *Id.*

attempted to overturn this requirement that non-union members pay dues to the union on the grounds that they objected to public sector bargaining and opposed ideological activities of the union.[28] The plaintiffs argued that forcing non-union members to pay the equivalent of membership dues violated the plaintiffs' freedom of association as protected by the First and Fourteenth Amendments.[29]

2. The decision

The Supreme Court held that public unions could require non-members to pay their fair share, as long as none of the funds contributed by non-members went toward political action or some other ideological cause.[30] Justice Stewart wrote in the majority opinion that although public employee unions' activities are political to the extent that they attempt to influence governmental policymaking, unlike private sector union activities, public sector employees do not have weightier First Amendment rights than their private sector counterparts.[31] On balance, the interference with employees' freedom of association, or to refrain from association, is justified by the important contribution of the union shop in the system of labor relations, ensuring that labor peace was constant and that all bargaining unit members were fairly represented.[32] Because they receive the benefits of union representation, public sector employees may be compelled to pay the costs of exclusive union representation even if they are not members of the union, just like their private sector counterparts.[33]

The Court's reasoning in this case is what created the strong precedent still followed today. The Court determined that unions, in carrying out their duties of negotiating and administering collective bargaining agreements, must represent all employees within the relevant bargaining unit, whether or not they have elected to be members of the union.[34] There were several reasons that exclusive union representation was considered vital to the union structure. First, the Court said that the designation of a single representative avoids confusion stemming from attempting to enforce multiple agreements specifying specific terms of employment.[35] Thus, the Court expressed

[28] *Id.* at 211–13.
[29] *Id.* at 213.
[30] *Id.* at 210.
[31] *Id.*
[32] *Id.* at 223.
[33] *Id.* at 225–26.
[34] *Id.* at 221.
[35] *Id.* at 220.

concern about employers having to comply with differing terms for the same class of employees.[36] Additionally, the Court reasoned that the fair share payments ensured that the cost of fulfilling those duties was spread amongst all of the employees that would benefit.[37] Otherwise, there would be incentive for employees to not become members of the union, but instead be "free-riders" because they would receive the same representation without the cost of paying membership dues; this would place massive financial hardship on the unions.[38]

The Court noted that commentators also expressed doubt that there was any difference between public and private sector employees.[39] They quoted one known scholar as saying, "[t]he union security issue in the public sector . . . is fundamentally the same issue . . . as in the private sector . . . . No special dimension results from the fact that a union represents public rather than private employees."[40] This statement has guided public-sector labor jurisprudence in the decades since *Abood* was decided. Just as in the private sector union setting, public sector unions are able to establish agency or union shops.[41]

C. Other Fair Share Decisions

Besides *Abood*, there are other Supreme Court decisions that specifically condone the collection of "fair share" dues.[42] In fact, several decisions were instrumental in developing the framework that *Abood* eventually adopted for the public sector and implementing that framework into the twenty-first century.

1. Hanson *and* Street*: Fair share dues before* Abood

In its 1956 *Railway Employees v. Hanson* decision, the Supreme Court recognized the validity of a "union shop" as applied to the Railway Labor Act and private sector railroad employees.[43] In *Machinists v. Street*, also decided pursuant to the Railway Labor Act,

---

[36] *Id*. at 221.
[37] *Id.* at 222.
[38] *Id.*
[39] *Id.* at 232.
[40] *Id.* (quoting H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES 95–96 (1971)).
[41] *Abood* at 225–26; *id.* at 232.
[42] While the decisions address fair share payments in the private sector, they were applied to public sector unions in *Abood*, where the Court accepted that public sector unions do not violate the First Amendment by collecting fair share dues from public employees.
[43] Ry. Emp. v. Hanson, 351 U.S. 225, 238 (1956).

the Court affirmed the ability of unions to collect dues from non-members through union shop agreements, but determined that unions could not spend non-member's fair share dues to support political causes.[44]

While both of these cases determined the validity of union shops in the private sector context, they were later referenced in *Abood*. In determining the reasons for allowing union shop agreements, the *Abood* Court quoted *Hanson*:

> 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 its cost, and that legislative judgment was surely an allowable one.[45]

The *Abood* Court based the principle that non-member funds could be used for collective bargaining and operation costs, but not for ideological or political action, on the reasoning in *Hanson* and *Street*, the need for exclusive union representation, which the *Abood* Court called a "central element in the congressional structuring of industrial relations."[46]

2. Hudson*: Unions must tell non-members where the fees are going*

In *Chicago Teacher's Union v. Hudson*, a unanimous Supreme Court determined the procedural safeguards necessary when collecting fair share fees from public sector employees who were not union members.[47] In *Hudson*, the Court reaffirmed that the government interest in labor peace is strong enough to support an agency shop even with its infringement on non-union employees' constitutional rights and that procedures should be followed to minimize the allowed infringement.[48] The Court held that the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, an opportunity to challenge the fee in front of a neutral decision maker, and an escrow for the amounts reasonably in dispute while challenges are pending.[49] Thus, the case not only

[44] Machinists v. Street, 367 U.S. 740, 749–50 (1961).
[45] *Abood*, 431 U.S. at 219 (quoting *Hanson*, 351 U.S. at 235).
[46] *Abood*, 431 U.S. at 220.
[47] Chi. Teachers' Union, Local No. 1 v. Hudson, 475 U.S. 292, 310–11 (1986).
[48] *Hudson*, 475 U.S. at 302–03.
[49] *Id.* at 310.

affirmed *Abood*, but it also expanded the scheme set up in *Abood* to protect the constitutional rights of public sector non-union members.

3. Knox: *The beginning of the end of* Abood?

In 2012, Justice Alito authored opinion in *Knox v. Service Employees International Union*, signaling for the first time that the Court would be critical of earlier precedent.[50] In the decision, Alito describes the precedent involved in the case as follows:

> Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights. Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.[51]

The opinion also says that generally, free-rider agreements are insufficient to overcome First Amendment objections, and that the *Abood* holding—that such agreements were constitutional because of their importance to the union functioning as a whole—was an anomaly.[52] However, in the same opinion Justice Alito, speaking for a five member conservative majority, stated that the Court never called for a balancing test of the right of the union to collect agency fees against the First Amendment rights of non-members.[53] Although these two statements contradict each other, they nevetheless seem to indicate that *Abood*, which weighed the rights of non-members with the union's reasons for requiring fair share dues, was subtly being criticized for employing such a test.

The majority decided that the First Amendment requires an opt-in system[54] when the union levies a special assessment or dues increase

[50] Knox v. Serv. Emp. Int'l Union, 132 S.Ct. 2277, 2289 (2012)

[51] *Knox*, 132 S.Ct. at 2289 (internal citations omitted).

[52] *Id.* at 2289–90.

[53] *Id.* at 2291.

[54] An opt-in system means that non-member employees would be given a notice of the change in dues (as required by *Hudson*) and then they could either pay the new dues amount, known as "opting in" or challenge the change and not pay anything. This is in contrast to an opt-out system, where employees are required to pay the new dues and then may challenge and possibly receive a refund. *Id*. 2292–93.

for non-members.[55] The concurrence, authored by Justice Sotomayor, points out that this rebuked precedent going all the way back to *Abood* and *Hudson*, which provides for an opt-out system.[56] Both the concurring opinion and Justice Breyer's dissenting opinion hint to the fact that the Court was taking a small step toward requiring an opt-in system for fair share dues generally, rather than the current opt-out system prescribed in *Abood*.[57] This was the first sign that the Court was questioning the *Abood* decision.

III. *HARRIS V. QUINN*

A. Background

Harris' main plaintiff, Pamela Harris, is a mom from Illinois.[58] Her son, Josh, has a rare genetic condition called Rubenstein-Taybi syndrome.[59] Due to his condition, Ms. Harris stays at home and is the main caretaker for her son on a daily basis.[60] In her capacity as his caretaker, Harris received Medicaid funding that enabled her to stay home, preventing her from having to institutionalize her son.[61]

Under the Illinois Medicaid program, which is really two programs: the "Rehabilitation Program" and the "Disabilities Program,"[62] the home care workers are paid by the state and their

[55] *Id.* at 2293.

[56] *Knox*, 132 S.Ct. at 2297–98 (Sotomayor, J, concurring).

[57] *Id.* at 2306 (Breyer, J., dissenting) ("The decision is particularly unfortunate given the fact that each reason the Court offers in support of its 'opt-in' conclusion seems in logic to apply, not just to special assessments, but to ordinary yearly fee charges as well."); *see id.* at 2299 (Sotomayor, J., concurring) ("[W]hile the majority's novel rule is, on its face, limited to special assessments and dues increases, the majority strongly hints that this line may not long endure.").

[58] Paul Kersey, *A Mom's Fight for Justice:* Harris v. Quinn, IL. POL'Y (Jan. 21, 2014), http://www.illinoispolicy.org/a-moms-fight-for-justice-harris-v-quinn/.

[59] Ben Yount, *Illinois Mom Takes Fight Against Forced Unionization to Supreme Court*, ILL. WATCHDOG, (Jan. 21, 2014), http://watchdog.org/124523/one-brave-mom-pam-harris-fight-il-unions-nears-end/. Rubinstein-Taybi syndrome is a genetic disorder "characterized by short stature, moderate to severe intellectual disability, distinctive facial features," heart and kidney defects, eye abnormalities, among other common symptoms. *Genetics Home Reference, Rubinstein-Taybi syndrome*, NIH, (Jan. 2007), http://ghr.nlm.nih.gov/condition/rubinstein-taybi-syndrome.

[60] Kersey, *supra* note 58.

[61] *Id.*

[62] Max Utzschneider, *An Explainer on* Harris v. Quinn *and the Constitutionality of Fair-Share Agreements*, ON LAB., (Sept. 26, 2013), http://onlabor.org/2013/09/26/an-explainer-on-harris-v-quinn-and-the-constitutionality-of-fair-share-agreements/.

contract terms are broadly dictated by the state.[63] However, other terms of the employment, including specific tasks of the worker, are determined by the "client" or "customer," the person needing in home care.[64] This gives the program flexibility to meet the needs of the wide array of people requiring various in home care services.

Several years after the program began, then-Illinois governor Rod Blagojevich signed an executive order which declared home care workers who were paid through the program as public employees for the purpose of collective bargaining.[65] Soon after, the home care workers voted and determined that SEIU-HCII would be the exclusive union representing them in collective bargaining.[66] The state of Illinois and SEIU-HCII negotiated a contract for the home care workers and the union was able to increase the workers' salaries and get the state to provide health insurance, along with training and general oversight.[67]

B. The Decision

In a 5-4 decision, the conservative majority of the Supreme Court determined that in-home personal assistants under the Illinois program could not be compelled to pay fair share dues because doing so would infringe on their First Amendment right to be free from compelled speech or association.[68] At the beginning of the opinion, Justice Alito takes his first opportunity to critique *Abood* by calling the case an "anomaly."[69] He later goes on to critique the reasoning behind the earlier decision.

First, the majority opinion criticizes the *Abood* Court for "fundamentally misunder[standing]" the holdings of *Hanson* and *Street*, arguing that those decisions were based on statutory interpretation rather than constitutional interpretation as *Abood* suggested.[70] Additionally, Justice Alito's opinion argues that there is a

---

[63] *Harris*, 134 S. Ct. at 2624–25.

[64] *Id.*

[65] Sasha Volokh, *What Harris v. Quinn Might Mean for Public-Employee Unions*, WASH. POST (June 30, 2014), *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/what-harris-v-quinn-might-mean-for-public-employee-unions/.

[66] Dave Johnson, *What the Court's* Harris v. Quinn *Decision Means*, CAMPAIGN FOR AMERICA'S FUTURE (June 30, 2014), http://ourfuture.org/20140630/what-the-courts-harris-v-quinn-union-decision-means.

[67] *Id.*

[68] *Harris*, 134 S. Ct. at 2620–22.

[69] *Id.* at 2627.

[70] *Id.* at 2632.

difference between the speech at issue when dealing with public sector employees and the speech at issue when dealing with private sector employees because public employee wages, benefits, and terms of employment are matters of public concern.[71] This is a bedrock reason for the holding in *Abood*, but is criticized by the *Harris* case. The *Harris* majority was also critical of the administrative framework that *Abood* created by distinguishing between collective bargaining and operating costs and ideological or political costs, arguing that the distinction could create confusion and risk comingling of funds.[72] Lastly, a point that the opinion spends a vast amount of time discussing is the supposed assumption that the *Abood* Court made—that the principle of exclusive representation in the public sector is dependent on the union or agency shop.[73]

The Court then went on to distinguish the facts in *Harris* from the case of *Abood* by deciding that the employees at issue in this case were not full public employees and therefore *Abood* did not apply to the case that they were addressing.[74] Instead, the Court decided that these employees were only "partial public employees," and that because their main employer was the customer, rather than the state, the Court could completely avoid either affirming or overruling the rule of law which had been in place for four decades.[75] While it is a narrow decision, it forces one to wonder why the lengthy discussion of *Abood* at all, if it was all dicta and had no impact on the final decision.

IV. ANALYSIS

A. Why *Harris* Was Wrongly Decided

In *Abood*, the Court clearly decided that the First Amendment allows public sector unions to require non-member employees to pay fair share dues as long as those funds were only used for collective bargaining and not for political purposes.[76] As such, under the decision in *Abood* the employees in *Harris* would have been required to pay their fair share towards the operating costs of the union. The reasoning of *Abood* applies to the facts in *Harris* and it is inexplicable

[71] *Id.* Justice Alito says that "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." *Id.*

[72] *Id.* at 2633.

[73] *Id.* at 2634.

[74] *Id.* at 2638.

[75] *Id.*

[76] Abood v. Detroit Bd. Of Educ., 431 U.S. 209, 235–36 (1977).

that the Court was able to draw a line between the employees in the two cases.

The *Abood* Court's rationale that public employees should not have more free speech rights than private employees is correct. The simple fact that a person is a public employee does not mean that the issues that all employees deal with—wages, benefits, hours, etc.—are suddenly ideological or policy related. They are issues that do not impact politics, ideology, or policy decisions in any way. Instead, they are terms of employment that are specific to a group of employees and impact no one other than the employer and employees. The only difference is that the employer in *Abood* and *Harris* was a governmental body rather than a private employer. While the Court in *Harris* did not explicitly overrule or abrogate this reasoning, it spent a fair share of time criticizing it even after it has been affirmed repeatedly since 1977 when *Abood* was decided.[77]

The fact that the *Harris* Court takes issue with the idea that agency shop is vital to unions in the public sector goes against the basic foundation of unions in general. In order for a union to be effective in its exclusive representation of a bargaining unit, it must have adequate funds to provide the services. Without agency shop provisions, free-riders do not have to pay anything towards these costs and yet they still reap all of the benefits of unionization. There is little incentive to become a member of the union at that point. Why would someone want to pay dues when they can receive the same services for free? The *Harris* Court ignores this vital point entirely. Instead, it seems to characterize the *Abood* Court's concern about such "free-riders" as a misplaced assumption rather than a simple economic fact that needs to be addressed.

The majority also completely ignores the doctrine of stare decisis, which "promotes the evenhanded, predictable, and consistent development of legal principles, [and] fosters reliance on judicial decisions . . . ."[78] *Abood* has been relied on by over twenty states that have enacted statutes authorizing fair share provisions.[79] Such a repudiation of a long-standing, relied upon law is the very reason that the Court follows stare decisis so closely. Rather than overturning relied upon precedent every time the Court membership changes, the Court has decided that "'any departure' from precedent 'demands special justification.'"[80] As long as a decision is founded in the law, it will stand, barring some special changed circumstance, in most cases.

[77] *Harris*, 134 S.Ct. at 2632–34.
[78] Payne v. Tenn., 501 U.S. 808, 827 (1991).
[79] *Harris*, 134 S.Ct. at 2652 (Kagan, J., dissenting).
[80] *Id.* at 2651 (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

In addition to the fact that the *Harris* decision attacks and refuses to conform to precedent, it also has far reaching implications on its own.

B. Impact of the *Harris* Decision

1. The Partial Public Employees Distinction

Despite the criticism of *Abood* that may be found in the majority opinion, the Court did not ultimately overrule *Abood*. Instead, it found a fine, almost illogical distinction by which to differentiate this case from the facts of *Abood*. In the opinion, Justice Alito distinguished the class of employees at issue from the class of employees at issue in *Abood*, which allowed the Court to restrict collection of fair share payments in this particular fact pattern because the employees in this case were joint employees of the state and the customer and therefore not "full fledged public employees . . . ."[81]

The opinion begins by stating that under Illinois law the "personal assistants are public employees for one purpose only: collective bargaining."[82] It then describes the myriad of factors that make the personal assistants in this case something other than public employees.[83] For example, the Court argues that since the specific duties on a day-to-day basis are determined by the customer rather than the state, the personal assistants are employees of the customer.[84] It also cites the fact that the customer oversees the day-to-day work of the personal assistant.[85]

However, the Court's determination makes little sense when viewed through its own definition of a public employee. The Court stated that in the case of "full fledged" public employees, the State establishes the duties imposed on each employee and establishes the qualifications for each position.[86] It also stated that the state hires, trains, and evaluates public employees.[87] In the case of the personal assistants, it is true that the customer—the person being cared for—is able to dictate the specifics of employment, such as the hours and specific duties of the assistant.[88] However, it is also true that the state must approve the assistant, provide minimum qualifications for the assistant, train the assistant, and approve the hours and duties of the

[81] *Id.* at 2634–35.
[82] *Id.* at 2634.
[83] *Id.*
[84] *Id.* at 2635.
[85] *Id.* at 2634.
[86] *Id.*
[87] *Id.*
[88] *Harris*, 134 S.Ct. at 2647 (Kagan, J., dissenting).

assistant.[89] As the dissenting opinion authored by Justice Kagan makes clear, Illinois determined the employees' wages and benefits, including health insurance.[90] It is common knowledge to anyone who has worked in any capacity that employers decide wages and, if benefits are offered through employment, they are decided by the employer. The assistant's paycheck comes from the state, not the customer. Generally, one's paycheck comes from their employer, not a third party.

The uniform nature of the wages, benefits, training, and minimum qualifications for personal assistants provides more support to the fact that the state of Illinois is the employer in this case. If personal assistants were the employees of the customers, as Justice Alito stated in the opinion, each of these decisions would be decided, or at least partially decided, by the customer rather than the state. However, in Illinois, these topics are negotiated between the union and the state, not the union and each individual customer as an employer of one personal assistant.[91] That the most important terms of employment are negotiated on a program wide basis with the state, rather than with the individual customers (which the majority opinion claims are the true employers[92]), means that the collective bargaining efforts of the union are generally going to come into play in negotiations with the state, not the customers. Thus, the state's interests are at issue in these determinations rather than the many individuals' interests.

Also, even if the distinction of "partial public employees" is accepted, it could have a greater impact than the Court anticipated. It is clear from the decision that, although the Court used much of the opinion to criticize *Abood*, in the end it was unable to overturn it. However, the Court was clearly not inclined to once again affirm *Abood*, even if it could not outright overturn the precedent. Therefore, the majority came up with a completely new, arbitrary distinction to avoid applying *Abood* again. However, in doing so, the Court may have opened the floodgates for further arbitrary distinctions to be made which could lead to the continued erosion of the protection against free-riders so valued in public sector union jurisprudence since *Abood*.

There are several sectors of workers that could fit into this *ad hoc* category because they are paid and employed by the state, but their day-to-day functions and responsibilities are dictated by a third party. As could be expected, the decision will impact homecare workers in

[89] *Id.*
[90] *Id.*
[91] *Id.* at 2645.
[92] *Id.* at 2624.

other states. The decision means that unions can no longer require union shops in the homecare worker context. They can still be the exclusive representative of the employees, but they cannot require non-union workers to pay their fair share. The decision could also impact daycare employees, which are often funded as part of government pre-school programs but are run autonomously. Charter schools are also funded by the government and must follow minimum standards prescribed by the government. However, they can sometimes have private boards that govern day-to-day activities. Arguments could be made that many categories of employees, including the ones mentioned above, could be decided to be "partial public employees," "public employees," or "private employees" rather arbitrarily because the distinguishing factor among them is arbitrary. The lines between public and private employees could be blurred by this unnecessary distinction.

2. Effects on unions

Harris may also affect efforts to unionize in the public sector. Over the past few decades, unions have faced an uphill battle in maintaining their positions.[93] In many states, there are no unions; in others, the number of unions is minimal.[94] Public sector unions are stronger and more powerful than their private sector counterparts, but they still face challenges in surviving in today's free market.[95] Dues pay for the cost of collective bargaining. The impact of *Harris* is that it is likely that the unions' income will decrease at the same time that costs are rising in the public sector, where union presence is growing.

Harris implies that public sector unions can no longer require that non-member employees pay their fair share dues.[96] Now the states that had allowed agency shop agreements in the home care industry are unable to do so. This fact alone could set public sector unions on the path of private sector unions—the path to disaster. Collective bargaining is expensive, time consuming, and difficult. However, the

[93] DeSilver, *supra* note 11.

[94] *Union Affiliation of Employed Wage and Salary Workers by State*, BUREAU OF LAB. STATISTICS, http://www.bls.gov/news.release/union2.t05.htm (last modified Jan. 23, 2015).

[95] Daniel Disalvo, *The Trouble with Public Sector Unions*, NAT'L AFF. http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions (last visited Feb. 7, 2015).

[96] Ruben J. Garcia, Harris v. Quinn*: The Supreme Court Further Marginalizes Public Employees*, HAMILTON-GRIFFIN (July 1, 2014), http://hamilton-griffin.com/harris-v-quinn-the-supreme-court-further-marginalizes-public-employees/.

decision means that a democratically elected union can be forced to negotiate on behalf of all members of a bargaining unit, even if they are not dues-paying members. This is the exact free-rider dilemma that the *Abood* Court wanted to avoid in deciding that union or agency shops were constitutional. The economic burden of forcing unions to spend money and time representing people who do not contribute could be debilitating.

Christine Owens, the executive director of the National Employment Law Project has said this about the *Harris* decision: "[i]n dismissing the role the fair-share fee plays in advancing important economic and health care interests in Illinois and elsewhere, the Court showed indifference to how labor-management relations can be properly and lawfully constructed to promote meaningful worker input into issues affecting their employment and the service they provide . . . ."[97] This quote explains the value that unions add to labor relations. Without unions, it becomes increasingly difficult for employees to act in furtherance of their best interests. A group of employees is stronger than a single employee, and the ability to collectively bargain allows for a more equal bargaining relationship between the more powerful employers and their employees. Without proper funding, unions will be unable to continue such efforts and may simply fade away. This will not only impact the unions themselves, it will also impact all unionized employees.

3. Effects on discrete socio-economic classes

Harris will have a disproportionate impact on already marginalized members of the workforce. The employees at issue in *Harris*—home care workers—are largely female and minority individuals.[98] This decision will disparately impact these populations and bring a return to the instability that plagued workers in this field prior to union representation. The Economic Policy Institute has compiled data about home care workers, including economic and demographic characteristics.[99] Nationally, 90% of all in home

[97] Meteor Blades, *Union Leaders, Others Respond to* Harris v. Quinn *Supreme Court Ruling on Home Health Care Workers*, DAILY KOS (June 30, 2014, 10:45 AM), http://www.dailykos.com/story/2014/06/30/1310618/-Unions-leaders-others-respond-to-Harris-v-Union-Supreme-Court-ruling-on-home-health-care-workers#.

[98] Heidi Shierholz, *Low Wages and Scant Benefits Leave Many In-Home Workers Unable to Make Ends Meet*, ECON. POLICY INST., 1, 4 (Nov. 26, 2013), *available at* http://www.epi.org/publication/in-home-workers/.

[99] The organization has published the compiled data separately from the report. Shierholz, *supra* note 98.

workers are female.[100] The median weekly pay for full time in-home workers is $382, compared to $769 for people in other occupations.[101] One in five in-home workers do not have a high school degree, compared to only 8.3% of workers in other occupations.[102] These general statistics are staggering; they show that in-home workers, including direct care aids such as Pamela Harris, are largely poor, less educated, and female.

The ability to unionize is one perk of a job as a personal assistant in many cases. Unions are typically seen as helping to secure better wages, benefits, and working conditions for the employees that they represent and unionized jobs attract employees looking for security and stability. Additionally, the aging population of the United States means that the field will continue to expand, providing economic opportunity for those that face income inequality and immobility. In a time when wages are stagnant and the economy is struggling, jobs with a steady wage and benefits are much more attractive—and the growing need for home care employees could also help with unemployment and under-employment.[103]

The struggles facing the unions that represent them will impact the wages, benefits, and terms that these communities need to have the money and stability they desperately need. Without the union in *Harris*, for example, home care workers would be making only $11.55 an hour and have no health benefits—it is difficult to live on that even in the best circumstances, especially in a state with a high cost of living like Illinois.[104] When you add into the equation the fact that so many are immigrants, single parents, or already disenfranchised in some way, the impact of these small wages is amplified. People do not want to work in these less desirable jobs, especially not if many of the benefits of the employment can be ripped away when unions are no longer able to function. Not only will the decision impact workers, but it will impact those who require in-home care.

4. Effects on the ill and disabled

The chronically ill and disabled who form the client base of the employees at issue in this case also suffer adverse effects. As the

[100] *Id.*
[101] *Id.* at 2.
[102] *Id.* at 6.
[103] Lawrence Mishel & Heidi Shierholz, *A decade of flat wages: The Key Barrier to Shared Prosperity and a middle class*, ECON. POLICY INST.1, 1 (Aug. 21, 2013), *available at* http://www.epi.org/publication/a-decade-of-flat-wages-the-key-barrier-to-shared-prosperity-and-a-rising-middle-class/.
[104] Eisenbrey, *supra* note 2.

consumers they are impacted whenever those that they "employ" are impacted. Part of the reasoning behind the implementation of programs such as the ones at issue in *Harris* is that the ill and disabled are able to avoid institutionalization when they can get paid, in home care with funding from the state.[105] While many of the ill and disabled that use the program hire their family members or friends to care for them, many also hire strangers, often certified nursing assistants or other trained professionals.[106] Additionally, the customer is able to feel empowered by setting up a care plan that allows him or her to determine what tasks they need help with and when—providing a sense of independence that many that require these services often do not experience.[107]

The collective bargaining efforts of the SEIU-HCII and other similar unions have served to stabilize the fluctuating workforce that serves as personal assistants. Before union efforts, the low pay and varying conditions made it difficult to sustain a job as a personal assistant, thus marking the job with high turnover rates and less than qualified workers.[108] Professional caretakers were able to work at nursing homes and rehabilitation facilities and make more money with more stability.[109] That changed with the collective bargaining agreement.

When Governor Blagojevich signed the executive order designating personal assistants as state employees and allowing them to unionize, he immediately stabilized and added credibility to the job. All of a sudden, personal assistants had to meet certain minimum qualifications and standards and were protected from inadequate working conditions, abusive hours, and dismal pay.[110] The job was more attractive after these changes, and more trained professionals were willing to work for strangers in their home, comforted by the

---

[105] Samuel Bagenstos, Harris v. Quinn *Symposium: The Coming Conflict in Public Employee Speech Law and the Immediate Risks to People with Disabilities*, SCOTUSBLOG (June 30, 2014), http://www.scotusblog.com/2014/06/harris-v-quinn-symposium-the-coming-conflict-in-public-employee-speech-law-and-the-immediate-risks-to-people-with-disabilities/.

[106] EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA: HOME CARE WORKERS ARE CHANGING THE FACE OF AMERICAN LABOR 23, http://www.law.yale.edu/documents/pdf/Intellectual_Life/Klein_Introduction.pdf (last visited Nov. 1, 2014).

[107] Bagenstos, *supra* note 105.

[108] *Id.*

[109] *Id.*

[110] Harold Pollack, *Supreme Courts Would Prefer People With Disabilities to Receive Care From Disgruntled, Low-Wage, High-Turnover Workers*, NEW REPUBLIC (June 30, 2014), http://www.newrepublic.com/article/118489/supreme-courts-harris-decision-hurts-disabled.

state's protection.[111] Additionally, the increase in wages negotiated by the union lured more qualified professionals to the job.[112] This meant that the customers were employing more qualified individuals and experiencing fewer turnovers. These jobs are often very personal in nature, such as when a person needs help with grooming and bathing. Building a strong relationship of trust and understanding between the customer and the personal assistant is vital in these circumstances. Fewer turnovers mean that customers have the chance to bond with their aides and truly build a lasting relationship.

With the Court's decision, however, this could change. The possible ineffectiveness of unions in the wake of losses of funding and an increase in free-riders will lead to an inability to effectively bargain. This could lead to less beneficial agreements, making the jobs less lucrative. The people who now think that being a personal assistant is a desirable career may no longer think so when their benefits and pay are slashed. Or they may try to find other jobs and have to leave, even when they want to stay as a personal assistant, for practical and economic reasons, hurting the people that desperately need their services—the ill and disabled customers. Despite all of these potential effects from the decision, the most important question raised in *Harris v. Quinn* is what will happen to the sixty year precedent established by *Abood*.

C. The Future of *Abood* After *Harris*

A large portion of the majority opinion in *Harris* is dedicated to criticizing the decision in *Abood*. The Court has signaled a desire to

---

[111] *See* Dave Johnson, *What the Court's "Harris v. Quinn" Union Decision Means*, OURFUTURE.ORG (June 30, 2014), http://ourfuture.org/20140630/what-the-courts-harris-v-quinn-union-decision-means (stating that, prior to organizing the SEIU-HCII, home care workers in Illionois were "treated poorly and did not have job security." Following the organization of the union, "they were able to almost double their hourly wages and they get health insurance, regular professional training, and representation from the union."); *see also* Press Release, Home Care Workers Vow to Stand Up for Good Jobs and Quality Home Care in Wake of *Harris v. Quinn* Ruling (June 20, 2014, 11:10AM), *available at* http://www.seiu.org/2014/06/home-care-workers-vow-to-stand-up-for-good-jobs-an.php (implying that without the wage and job security provided through a strong union, personal assistants may be unable or unwilling to remain in such tenuous positions, eventually leading to an unstable and unqualified homecare workforce).

[112] Sam Hananel, *Obama Administration Plan Would Raise Wages of Home Health Care Workers*, HUFFINGTON POST (Dec. 15, 2011, 9:24 AM), http://www.huffingtonpost.com/2011/12/15/home-health-care-workers-obama_n_1150710.html.

overturn the decision, but has not yet done so.[113] However, this latest decision has cast even more doubt over the future of *Abood*. With the critical view that Justice Alito's majority opinion took of *Abood* over a large section of dicta in the middle of the decision, it is hard to believe that the five member majority feels favorably about the decision even though it was not prepared to overrule the strong precedent in this case.

1. *Difficulties in overruling* Abood

Thus far, the Court has hesitated in overruling *Abood* outright, despite the fact that multiple decisions have indicated an intent to do so. However, overruling *Abood* could have disastrous consequences for the entire framework of First Amendment rights in the public sector because it would provide public employees with more free speech rights regarding labor issues than in other aspects of public employment.

The Court has already limited public employees' free speech rights in other contexts.[114] In *Pickering v. Board of Education*,[115] the Court laid out a test to determine whether public employees' speech is protected. In order for their speech to be protected, an employee must show that: (1) his speech addresses a matter of public concern; and (2) his speech interest outweighs the employer's interest in business efficiency.[116] In *Garcetti v. Ceballos*, the Roberts Court declared that the First Amendment allows public employees to be disciplined or discharged for speech – even on matters of the highest public concern – if the speech is made "pursuant to" the employee's job duties.[117]

---

[113] *See Knox*, 132 S.Ct. at 2290 (describing the *Abood* decision as an anomaly, stating that "acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly . . . "); *Harris*, 134 S.Ct. at 2632–34 (critiquing the reasoning of the *Abood* Court extensively).

[114] The best example of the Court limiting government employees' free speech occurred in Garcetti v. Ceballos, 547 U.S. 410, 421 (2006), when the Supreme Court determined that a public employee may be disciplined for expressions they make pursuant to their professional duties. Speech made within the course of their job, therefore, is not protected.

[115] 391 U.S. 563 (1968).

[116] *Id.* at 568. This test was used when an employee as speaking as a private citizen, not as a public employee. The test was further explored in Myers v. Connick, 461 U.S. 138 (1983), where the Court determined that personal grievances as a government employee were not matters of public concern. *Myers*, 461 U.S. at 154.

[117] *Garcetti*, 547 U.S. at 421.

In these two cases, as well as a string of others, the Court has seemed comfortable with infringing on public employees' free speech rights in circumstances other than the labor relations context. The fact that the Court has accepted these limitations makes it even more difficult to overrule *Abood* because doing so would require a repudiation of the ability to limit freedom of speech in the public employment context. *Abood* fits squarely within the Court's jurisprudence in that it allows for one infringement on First Amendment rights in the public sector, but not the only infringement. It is part of a system of infringements that have been accepted as constitutional because the benefits outweigh the cost of suppressing freedom of speech slightly. Thus, not only *Abood* would be impacted by such a decision and the Court would be forced to address multiple cases. The doctrine of stare decisis, which makes the Court reluctant to overrule or change rules outlined in previous cases,[118] is highly valued by the Supreme Court and rejecting decades of precedent in multiple cases would require a rejection of the stare decisis doctrine that is almost always followed.

In addition to the impact on precedent, a complete overruling of *Abood* would lead to chaos and uncertainty throughout the public sector. While the minor limitation on fair share dues required by *Harris* may harm unions, a complete outlawing of the fair share dues would impact every industry in the public sector. Collective bargaining agreements all over the country would have to be altered and unions would face a sudden and dramatic decline in revenue. An entire labor system has been built around reliance on fair share payments, and without them employers, employees, and unions would be in a state of uncertainty and unrest.

If unions stop providing services, there could be lawsuits. If employees are confused about what overturning *Abood* means, it could lead to strikes. The dramatic, nationwide reliance on *Abood* means that a reversal could cripple an entire labor force. While this is speculation, it is entirely feasible given the forty years that these systems have been in place. The fair share payments are ingrained in union culture and suddenly changing anything ingrained in an industry's culture can have far reaching consequences.

D. What is the Path to the Future?

The solution to the conundrum that the Supreme Court has put itself in is to leave *Abood* as settled precedent, and to continue to

[118] RONALD B. STANDLER, OVERRULED: STARE DECISIS IN THE SUPREME COURT, 11 (July 19, 2009), http://www.rbs2.com/overrule.pdf.

allow, but not require, agency shop provisions that require payment of fair share dues in the public sector. This allows the state to determine whether it wants a right to work rule, an agency or union shop rule, or a complete ban on collective bargaining in the public sector. Of course, decisions made by the Supreme Court are floors, not ceilings. States can choose to be more protective of their citizens' rights if they choose—and some states have done so.[119] Nothing has changed from the time that *Abood* was decided to justify overturning the precedent that it produced and to encourage stability, reliance, and the benefits of unionization, the decision should remain intact.

However, given the Supreme Court's make-up, it is likely that it will continue to review *Abood* unless and until one or more Justices retire, changing the ideological beliefs of the Court's majority. Currently, the Court seems unable to obtain a majority for overruling *Abood*, but that will change as the make-up of the Court changes. Justice Ginsberg, for example, one of the Court's leading liberal members, is in her eighties and there has been considerable discussion about when she will choose to leave the Court.[120] If she does not retire before the end of President Obama's presidency, and a Republican is elected to the White House in 2016, it is completely possible that she could be replaced by a conservative justice more inclined to side with the conservative majority in overturning *Abood*.

This is the very reason for the stare decisis rule. Precedent so important should not be subject to normal fluctuations in the Court's makeup. For lower courts and citizens alike, it is vital that there be predictability and settled law coming from the highest court in the land. *Harris* has thrown that predictability aside in favor of speculation and uncertainty. Unless *Abood* is continuously and rigorously defended, it is likely that the unsettled nature of public sector unionization will plague the courts for years to come.

---

[119] Some states, including North Carolina, have banned collective bargaining in the public sector completely. MILLA SANES & JOHN SCHMITT, CENTER FOR ECON. & POL'Y RES., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 10 (Mar. 2014), *available at* http://www.cepr.net/documents/state-public-cb-2014-03.pdf.

[120] *See, e.g.*, Robert Barnes, *The Question Facing Ruth Bader Ginsberg: Stay or Go?*, WASH. POST (Oct. 4, 2013), http://www.washingtonpost.com/lifestyle/magazine/the-question-facing-ruth-bader-ginsburg-stay-or-go/2013/10/04/4d789e28-1574-11e3-a2ec-b47e45e6f8ef_story.html.

V. CONCLUSION

Harris will have an impact on home care workers all across the nation, since now states and unions cannot implement agency shop provisions for such workers. While *Abood* was clearly brought into question by the decision, the holding was narrow enough to impact only a portion of all public sector unions. However, despite the limitation on the holding, it may be more expansive than originally expected. The future of unionization of the public sector, and therefore the future of unions altogether, is in flux after *Harris v. Quinn* and will not be settled until the Court clarifies its opinion of *Abood*. The simple and correct way to handle the uncertainty would be to affirm *Abood* and continue with the rule that has been in place for forty years. The Supreme Court, however, rarely makes such decisions as simple as they can be. So for now, we must wait and see what the future brings.