AGENCY FEES AND THE FIRST AMENDMENT

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Agency fees are mandatory payments that certain employees are required to make to labor unions. In recent years, the Supreme Court has moved closer to declaring these fees an unconstitutional form of compelled speech and association and may soon invalidate them entirely. The Court — and the scholarship on agency fees — proceeds from the assumption that such fees are employees' money that employees pay to a union. This Article argues, however, that this is the wrong way to understand agency fees for two sets of reasons. One, the Court treats agency fees as employees' money because fees pass through employee paychecks on the way from employers to unions. But this is simply an accounting formalism required by labor law. Because employees have no choice but to pay the fees, the fact that the fees pass through paychecks is irrelevant for purposes of First Amendment analysis. Instead, under the First Amendment, agency fees are — and must be treated as — payments made directly by employers to unions. And payments made by employers to unions raise no compelled speech or association problems for employees. Two, irrespective of the accounting regime, the Article shows why agency fees ought to be treated as union property rather than as the property of individual employees. Unionization, by allowing employees to negotiate collectively, produces a premium for employees covered by union contracts. Agency fees are a small fraction of this union premium. Because it is the union that produces the premium out of which agency fees are paid, and because individual employees would never earn the premium as individuals, the premium and the fees that come out of it should be treated — under the Court's own cases — as the property of the union that secured them. The Article thus provides two sets of arguments with the same fundamental implication: agency fees are not properly understood as payments made by employees to unions, and there is accordingly no compelled speech or association problem with agency fees.

INTRODUCTION

In the last five years, the United States Supreme Court has decided three cases involving agency fees — the mandatory payments that certain employees are required to make to unions. The Court will hear a fourth case this Term.[1] All of these cases raise the question of whether agency fee agreements in the public sector are constitutional under the First Amendment. In a case argued in October Term 2015, *Friedrichs v. California Teachers Ass'n*,[2] the Court appeared poised to hold in the negative and to decide that agency fees amount to compelled speech and association.[3] The death of Justice Scalia prevented the Court from reaching such a holding in *Friedrichs*, but the question has returned

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[1] *See* Janus v. AFSCME, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 198 L. Ed. 2d 780 (2017).

[2] 136 S. Ct. 1083 (2016) (mem.) (per curiam) (affirming by an equally divided Court).

[3] *Id.* at 1083.

again in *Janus v. American Federation of State, County and Municipal Employees, Council 31*.[4]

To those outside the field of labor law, the issue of agency fees might seem picayune.[5] But it is not, and it is not for reasons that explain the Court's interest in the issue. Agency fees are the sole means through which unions have been permitted to overcome what otherwise would be an existential collective action problem. In brief, unions have a legal obligation to provide benefits to all workers in a given workplace or bargaining unit.[6] Union-negotiated benefits therefore have the character of public goods: if a union negotiates a wage increase, or better benefits package, or enhanced safety and health protections, these improvements must be extended to all the workers covered by the collective agreement. If unions are required to rely for their financing on voluntary payments from these workers, then unions would face extensive free riding by all those workers who would rather receive benefits for free than pay for them.[7] A decision holding agency fees unconstitutional would thus jeopardize the future of public sector unions.

Much has been written about agency fees, and the issue is among the most extensively adjudicated in American labor law. But this Article will argue that we have misconceived what agency fees *are*. The jurisprudence and scholarship on agency fees proceeds from the assumption that such fees are workers' money that workers pay to a union. As Justice Scalia put it in a recent opinion, an agency fee agreement gives the union authority "to acquire and spend *other people's* money."[8] This understanding of agency fees sets up the First Amendment question: because the money that becomes fees belongs to workers, its compelled transfer to the union may constitute compelled speech or association.[9]

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[4] *See, e.g.*, Moshe Z. Marvit, *Labor Opponents Already Have the Next* "Friedrichs" *SCOTUS Case Ready to Go Under Trump*, IN THESE TIMES (Jan. 4, 2017, 1:55 PM), http://inthesetimes.com/working/entry/19776/will_trumps_supreme_court_reverse_fair_share_fees_unions_foes_hope_so [https://perma.cc/NGW9-AMJK].

[5] For expositional simplicity, this Article will use "agency fees" or simply "fees" interchangeably to refer to payments to unions that are *required* by a collective bargaining agreement. "Dues" will be used to refer to payments that go beyond what is required by a collective bargaining agreement; that is, payments that include both the mandatory component and a nonmandatory component. *See, e.g.*, Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 858–59 (2014). This Article's analysis, like the Court's jurisprudence, is concerned only with agency fees.

[6] For a summary, see, for example, *id.*

[7] *See, e.g.*, Harris v. Quinn, 134 S. Ct. 2618, 2657 (2014) (Kagan, J., dissenting).

[8] Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 187 (2007).

[9] Of course, even on the traditional understanding — of fees as employee property paid by workers to unions — there are strong arguments that mandatory agency fees do not amount to unconstitutional compelled speech. *See, e.g.*, Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023 (2013). That set of arguments is beyond the scope of this Article.

But this is the wrong way to understand agency fees for two sets of reasons.

First, the Court treats agency fees as employees' money because those fees are paid, as a formal matter, out of employee paychecks. The money that becomes fees appears as wages on the income side of an employee's paycheck and as a mandatory payment on the expense side of the paycheck. But this is an accounting formalism required by labor law. *For purposes of First Amendment analysis*, agency fees are — and should be treated as — a payment made by employers to unions.

As this Article will show, in order to eliminate the company unions that were prevalent in the 1930s, the National Labor Relations Act[10] (NLRA), and the state public sector labor laws that followed it, prohibit employers from paying any monies directly to unions. Instead, labor law establishes an accounting regime under which employers pay wages to workers, who then must pay fees to the union. Although the specific numbers are not important, an example from the contemporary labor market will help explain the operation of this accounting rule. The most recent estimates show, for example, that unionization results in a wage premium of about 11%.[11] Agency fees now average in the neighborhood of 2% of wages.[12] Labor law's accounting rules require that employers

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[10] 29 U.S.C. §§ 151–169 (2012).

[11] By collectivizing their bargaining power, unionization allows workers to increase the compensation they receive from employers. This union "premium" includes higher wages, and a good approximation of the current wage premium is 11%. *See, e.g.*, FRANK MANZO IV ET AL., THE STATE OF THE UNIONS 2016, at 14–15 (2016). Of course, different studies report different specific premia and the 11% figure is used in this Article for illustrative purposes only. *See, e.g.*, JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 45 (2014) (reporting a 2009 premium of 22% for private sector workers, and 14% for public sector workers); LAWRENCE MISHEL, ECONOMIC POLICY INSTITUTE, ISSUE BRIEF No. 342, UNIONS, INEQUALITY, AND FALTERING MIDDLE-CLASS WAGES (2012), http://www.epi.org/publication/ib342-unions-inequality-faltering-middle-class/ [https://perma.cc/C9DW-YYRQ] (finding premia to vary based on demographics and identifying in 2011 a 10.9% premium for whites, a 17.3% premium for African Americans, and a 23.1% premium for Hispanics). Moreover, the union premium also includes things like expanded paid leave, better health and retirement benefits, and heightened protections against discharge. *See, e.g.*, John W. Budd, *The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation*, *in* WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 160 (James T. Bennett & Bruce E. Kaufman eds., 2007). Because the 11% figure captures only wage gains, and does not include benefits, it significantly underestimates the actual value of the union premium. *See, e.g.*, *id.* at 177. It is also true that, in certain contexts, the union premium amounts to a reduction in wage losses rather than an absolute wage increase: the 11% figure reflects an average across the entire labor market.

[12] Full union dues amount to approximately 3% of wages. *See, e.g.*, Ben Casselman, *Closer Look at Union vs. Nonunion Workers' Wages*, WALL ST. J. (Dec. 17, 2012, 3:40 PM), http://blogs.wsj.com/economics/2012/12/17/closer-look-at-union-vs-nonunion-workers-wages/ [https://perma.cc/V77W-7KVG]. Agency fees, which include only the amount that unions spend on collective bargaining and contract administration, vary widely across unions and across collective bargaining agreements. The specific number is irrelevant to the analysis in this Article. For purposes of illustration only, I estimate agency fees as equaling two-thirds of full union dues, or 2% of wages. The agency fee at issue in the *Friedrichs* litigation was approximately two-thirds of full dues, and thus

pay all 11% of the premium to individual workers in the form of higher wages, and then allows employers to mandate that workers pay — on pain of discharge — 2% back to the union. Prohibited by labor law is a functionally equivalent regime in which workers receive a 9% wage increase and employers pay 2% directly to unions.

As a result of this accounting regime, the money that becomes agency fees does in fact pass through employee paychecks *en route* from employer to union. But, for purposes of First Amendment analysis, the fact that these monies pass through employee paychecks is irrelevant: the payment must be treated as one made by the employer to the union. The Court established this rule in a cognate area of First Amendment law, where it resolved the question of whether government payments made to individual families and then paid, by those families, to religious schools violate the Establishment Clause. The answer to this question turns on whether the payments to the religious schools are treated as coming from the families or from the government. The Court has held that *this* answer, in turn, depends on whether the families have a "genuine choice" about paying the money to a religious school or a secular school.[13] Where there is "true private choice,"[14] the money is treated as coming from the family, breaking the "circuit between government and religion" and there is no First Amendment violation.[15] Where such choice is lacking, the fact that the monies pass through the hands of families becomes irrelevant and the monies must be treated as "a government program of direct aid to religious schools."[16]

In the agency fees context, employees of course have no "genuine choice" about whether or not they pay fees to a union — that is the

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the figure seems appropriate for illustration purposes here. *See, e.g.*, Alana Semuels, *Why Are Unions So Worried About an Upcoming Supreme Court Case?*, THE ATLANTIC (Jan. 8, 2016), https://www.theatlantic.com/business/archive/2016/01/friedrichs-labor/423129/ [https://perma.cc/M94S-LD6Y] ("In California, members pay annual dues that average about $1,000 a year, while non-members pay about $600 to $650 for the agency fee alone."); Complaint at 18, Friedrichs v. California Teachers Ass'n, No. 8:13-cv-00676 (C.D. Cal. Apr. 30, 2013) ("The total amount of annual dues generally exceeds $1,000 per teacher, while the amount of the refund received by non-members who successfully opt out of the non-chargeable portion of their agency fees is generally around $350 to $400."). Observers have calculated agency fees for a variety of contexts, generally aligning with the estimates above. *See, e.g.*, Jan Murphy, *Should Non-Union Members Have to Pay a Fair-Share Fee? Supreme Court to Decide*, PENN LIVE (Jan. 11, 2016, 7:45 AM), http://www.pennlive.com/politics/index.ssf/2016/01/should_non-union_members_have.html [https://perma.cc/G5TZ-PWMP] (showing that the agency fee paid by Pennsylvania teachers is 77% of full dues); *Member vs. Fee Payer: What's the Difference*, MINN. ASS'N OF PROF. EMPS., https://www.mape.org/my-mape/our-union/member-vs-fee-payer-whats-difference [https://perma.cc/RNK7-79HA] (showing that the agency fee paid by workers in Minnesota's largest public employee union was 85% of full dues).

13 Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

14 *Id.* at 650.

15 *Id.* at 652.

16 Mitchell v. Helms, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring).

essence of every constitutional challenge to agency fees. Because there is no employee choice on the matter, however, the fact that employer payments pass through employee paychecks does not "break the circuit" between the employer and the union. For purposes of First Amendment analysis, therefore, the payments should be treated as if they flowed directly from the employer to the union.[17] And monies that flow from the employer to the union do not create compelled speech or association problems for employees.

Second, irrespective of the accounting regime, there are more foundational reasons for treating agency fees as union property rather than as the property of individual workers. Unionization increases the bargaining power of workers by allowing them to negotiate collectively rather than individually with employers. This increased bargaining power enables workers, as a collective, to transfer more wealth from the employer to themselves than the workers would have been able to secure as individuals.[18] Agency fees amount to a small fraction of this transfer — a small fraction of the union premium. The question is whether the union premium, and the fees that come out of it, ought to be treated as property of the union in the first instance or as property of individual workers.

Because it is the union that produces the premium, and because individual workers would never earn the premium *as individuals*, it is not at all clear why we ought to treat the premium as the property of individual workers. To the contrary, it makes better sense to treat the excess wealth transferred by unionization — and the fees that come out of this transfer — as the product of collectivization that belongs to the collective that produced it. Agency fees, in other words, should be treated as the property of the union that secures them.

Although as yet unidentified in the literature, there is both doctrinal and theoretical support for this intuition. On the doctrinal side, two areas of takings jurisprudence are illuminating. One concerns the law of Interest on Lawyers' Trust Accounts (IOLTA) programs, which use interest generated by lawyers' trust accounts to fund legal services programs. As the Article will discuss, IOLTA programs are funded by in-

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[17] As also discussed *infra* note 97, although the First Amendment would ignore labor law's accounting formalism and treat agency fee payments as flowing directly from employer to union, the NLRA — and analogous state statutes — are entitled to impose this accounting system and to distinguish between payments made directly by employers to unions and payments that flow from employers, through employee paychecks, and on to unions. *Compare* 29 U.S.C. §§ 158(a)(2), 186 (2012), *with id.* §§ 158(a)(3), 186(c)(4). Thus, the fact that the First Amendment would view agency fees as a payment made by employers to unions does not invalidate a statutory regime that prohibits one kind of accounting system and enables the other.

[18] *See generally* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 6–7 (1984).

terest that is generated solely through the collectivizing effect of the program itself: but for the aggregating effect of the program, individual clients would earn no interest.[19] In light of this fact, courts have held either that individual clients have no property in the interest that the aggregated principal generates — they do not own it — or, alternatively, that the value of their property in the interest is zero. A similar rule emerges from a line of eminent domain cases: where value is created solely through the "union" of individual lots that results from the government's action in taking the land, the individual lot owners have no property interest in the value thus created through the union of the lots.[20] In both these areas of law, then, where value is created through collectivization, it is the collective, not the individual, that owns the value thus created. And, as the Article will also show, treating value created collectively as the property of the collective has a home in a strand of economic theory that traces back at least to the work of John Stuart Mill.[21]

The Article thus provides two sets of reasons for concluding the Court is wrong that agency fee agreements give the union authority to "acquire and spend other people's money."[22] And both arguments have the same fundamental implication for the jurisprudence of agency fees: if we understand that agency fees ought not to be treated as payments from employees to unions, the First Amendment problem with agency fees — the idea that such fees amount to compelled speech or association — disappears.

After providing a quick overview of the Supreme Court's agency fees cases, this Article endeavors to do four things. First, to show that although the money that becomes agency fees does pass through employee paychecks en route from employers to unions, for purposes of First Amendment analysis this does not convert the employer's money into employee property before the union receives it. Second, to show that there are strong justifications in precedent outside the labor context for treating the union premium, and the fees that come out of it, as the property of the union, and not as the property of individual workers. Third, to demonstrate the implications of no longer treating agency fees as payments from employees to unions: namely, that the First Amendment problem with agency fees evaporates. And, fourth, to note that states can also address this issue by changing public sector labor law's accounting regime to formally permit direct payments from employers

[19] *See infra* pp. 1063–66.
[20] Indeed, "union" is the term the Court uses in these cases. *See infra* pp. 1066–67122.
[21] *See infra* section III.B, pp. 1068–69.
[22] Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 187 (2007) (emphasis omitted).

to unions, and to discuss the implications beyond the First Amendment of such a change in policy.[23]

I. Background: A Brief Primer on the Law of Agency Fees

Before turning to the Article's main analysis, a brief grounding in the Supreme Court's agency fees caselaw is in order, primarily to establish two basic points: one, that the Supreme Court has long held that there are compelled speech and association questions posed by agency fee agreements, and, two, that the Court has been of this view because it understands agency fees as compelled payments of employee monies that employees make to unions.

The Court's encounter with mandatory fees began in 1956 with *Railway Employes' Department v. Hanson*,[24] a Railway Labor Act[25] (RLA) case. The plaintiffs, a group of railroad employees, challenged a provision in their collective bargaining agreement that required them, as a condition of employment, to pay dues and fees to the union.[26] The plaintiffs argued that the mandatory payments violated the First Amendment.[27] The *Hanson* Court agreed that the dues requirement raised a justiciable question under the First Amendment, but it ultimately rejected the employees' challenge on the merits.[28] The *Hanson* Court believed that the union's interest in overcoming the free-rider problem justified the dues arrangement, at least when it came to the union's economic functions.[29] Because there was no evidence in the record that the union was spending those dues for anything other than economic purposes — for example, for political purposes — the Court declined to find a First Amendment violation.[30] Four years later, in

[23] Two recent articles argue that states could amend their public sector bargaining laws and permit direct employer payments to unions as a substitute for the current system, and both articles discuss what they see as the First Amendment implications of that point. *See* Daniel Hemel & David Louk, *Is* Abood *Irrelevant?*, 82 U. CHI. L. REV. DIALOGUE 227 (2016); Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144 (2016). Neither piece argues, as this Article does, that the current system *is already* — for constitutional purposes — a system of direct payments from employers to unions. Nor does either of the earlier articles contend that, for the reasons developed here, agency fees ought to be treated as the property of the union that generates them.

[24] 351 U.S. 225 (1956). *Hanson* technically involved a "union shop" agreement, rather than an agency-shop agreement. That distinction is not relevant for present purposes: both involve mandatory payments to a union. *Id.* at 227–29. For a discussion, see, for example, Fisk & Sachs, *supra* note 5, at 860–64.

[25] 45 U.S.C. §§ 151–188 (2012).

[26] 351 U.S. at 227–28.

[27] *Id.* at 236.

[28] *Id.* at 238.

[29] *Id.* at 235.

[30] *See id.* at 238.

International Ass'n of Machinists v. Street,[31] however, the Court had before it a case in which the union clearly was spending mandatory dues for political purposes.[32] And, according to *Street*, the political use of mandatory dues — of "funds exacted from employees" for political purposes[33] — presented a First Amendment question of "the utmost gravity."[34] The Court accordingly engaged in a rigorous exercise of constitutional avoidance and construed the RLA as authorizing mandatory dues agreements to fund the "negotiation or administration of collective agreements" but not to fund political activity.[35]

The Court constitutionalized this position for public sector unions in *Abood v. Detroit Board of Education*.[36] *Abood* held that an agency fee agreement "compel[s] employees financially to support their collective-bargaining representative," and that such compelled funding is permissible only with respect to collective bargaining and contract administration functions.[37] The use of agency fees for political purposes violates the First Amendment because it compels employees to fund the union's political speech and thereby to associate with the union's political message.[38] Indeed, *Abood* invoked Thomas Jefferson for the proposition that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[39]

Abood remained settled law for several decades, during which time the Court continued to fine-tune the basic constitutional holding set out in that case. In cases including *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,[40] *Chicago Teachers Union v. Hudson*,[41] and *Lehnert v. Ferris Faculty Ass'n*,[42] the Court developed the line between union expenses that were appropriately includable in agency fees and

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[31] 367 U.S. 740 (1961).
[32] *Id.* at 744.
[33] *Id.* at 745.
[34] *Id.* at 749.
[35] *Id.* at 768.
[36] 431 U.S. 209 (1977).
[37] *Id.* at 222.
[38] *Id.* at 222–23; *see also* Robert Post, *Transparent and Efficient Markets: Compelled Commerical Speech and Coerced Commercial Association in* United Foods*,* Zauderer*, and* Abood, 40 VAL. U. L. REV. 555, 565 (2006).
[39] *Abood*, 431 U.S. at 234 n.31 (quoting IRVING BRYANT, JAMES MADISON: THE NATIONALIST 354 (1948)). The Court also quoted Madison's writings in defense of religious freedom: "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 THE WRITINGS OF JAMES MADISON 186 (Gaillard Hunt ed., 1901)).
[40] 466 U.S. 435 (1984).
[41] 475 U.S. 292 (1986).
[42] 500 U.S. 507 (1991).

those that were not. In *Davenport v. Washington Education Ass'n*,[43] the Court upheld against First Amendment challenge a Washington state law that requires a union to secure an employee's affirmative consent before using that employee's fees for political purposes.[44] In so doing, the Court reaffirmed its view that agency fee agreements in the public sector raise First Amendment concerns "because they force individuals to contribute money to unions as a condition of government employment."[45] As the *Davenport* Court concluded:

> What matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees. . . . [The Washington statute] is not fairly described as a restriction on how the union can spend "its" money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money.[46]

While *Abood* and its progeny allowed for agency fees that funded collective bargaining and contract administration, the constitutional permissibility of even that use of agency fees was called into direct question in 2012. That year, the Court decided *Knox v. SEIU, Local 1000*,[47] a case whose actual holding is narrow and largely irrelevant, but whose dicta strongly suggest that the Court might soon find that *all* agency fee agreements in the public sector violate the First Amendment. As the Court put it in *Knox*, "[b]ecause 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.'"[48] And, continuing in this vein, *Knox* suggested that overcoming the free-rider problem was an insufficient justification for permitting such an incursion into those First Amendment rights, even when it comes to economic uses of agency fees.[49]

Two years later, in *Harris v. Quinn*,[50] the Court did in fact reject *Abood*, at least with respect to a class of public employees — home-care workers — that the Court deemed to be something less than "full-fledged public employees."[51] Like *Knox*, moreover, the *Harris* opinion

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[43] 551 U.S. 177 (2007).

[44] *Id.* at 184.

[45] *Id.* at 181.

[46] *Id.* at 187. Professor Louis Michael Seidman uses *Davenport* to highlight an important and related point: that the assignment of property rights in this context — like in countless others — can determine the outcome of the constitutional analysis even though that assignment of property rights is not itself subject to constitutional scrutiny. *See* Louis Michael Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1588–89 (2008).

[47] 567 U.S. 298 (2012).

[48] *Id.* at 310–11 (quoting Ellis v. Bhd. of Ry., Airline and S.S. Clerks, 466 U.S. 435, 455 (1984)).

[49] *Id.* at 311.

[50] 134 S. Ct. 2618 (2014).

[51] *Id.* at 2627.

contained dicta that call into question the continuing force of *Abood*. For example, the *Harris* Court wrote, "[t]he *Abood* Court's analysis is questionable on several grounds,"[52] and it spent multiple pages explaining the reasons that *Abood* was wrongly decided.[53] In the end, the Court concluded:

> [N]o person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from [the employees at issue in *Harris*] who do not want to join or support the union.[54]

Finally, as noted at the outset, in 2016 the Court heard arguments in and was poised to decide *Friedrichs v. California Teachers Ass'n*, a case directly challenging the continuing validity of *Abood* and the permissibility under the First Amendment of all agency fee agreements in the public sector.[55] Based on the dicta in *Harris* and *Knox*, and on the oral arguments in *Friedrichs*, commentators nearly all agreed that the Court seemed ready to overrule *Abood* and to hold that agency fees in the public sector violate the First Amendment.[56] Justice Scalia died before an opinion was issued, however, and the Court ultimately split 4–4, leaving the law as it stood before *Friedrichs*.[57]

II. UNDERSTANDING AGENCY FEES AS A DIRECT PAYMENT FROM EMPLOYERS TO UNIONS

As the above synopsis should make clear, and as the Article will develop in more detail below, the Court's agency fees jurisprudence depends on treating fees as payments from employees to unions. From *Hanson* to *Harris*, each Supreme Court holding is predicated on the idea that *employees* are compelled to pay *their* money to the union. The question of compelled speech and association arises only because the Court assumes that this is the proper way to understand agency fees. In this Part, the Article questions that assumption by, first, describing how labor law's accounting regime works, and, second, discussing how the Supreme Court analyzes pass-through payment systems in a cognate area of First Amendment law.

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[52] *Id.* at 2632.

[53] *See id.* at 2630–34.

[54] *Id.* at 2644.

[55] *See* 136 S. Ct. 1083 (2016); *see also* Petition for Writ of Certiorari at i, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915).

[56] For a summary, see, for example, Juhyung Harold Lee, *Friedrichs Oral Argument Commentary Round-Up*, ONLABOR (Jan. 11, 2016), https://onlabor.org/2016/01/11/friedrichs-oral-argument-commentary-round-up/ [https://perma.cc/8WUA-X83G].

[57] *See Friedrichs*, 136 S. Ct. at 1083 (mem.) (per curiam).

A. Labor Law's Accounting System

Labor law establishes an accounting procedure that prohibits employers from paying anything directly to unions. Instead, labor law dictates that unions must be funded exclusively by monies that flow from employers, through employees' paychecks, and then to unions. The accounting regime — contained in the NLRA,[58] the RLA,[59] and the myriad state public sector bargaining laws that mirror the federal statutes — works by pairing a prohibition on employer payments with permission for employers to condition employment on a requirement that employees pay fees to the union.

The NLRA, which governs private sector labor relations and which has served as a model for state public sector labor laws (which cover employment by state and local government employees), announces the prohibition in two sections of the statute. First, section 8(a)(2) states that "[i]t shall be an unfair labor practice for an employer . . . to . . . interfere with the formation or administration of any labor organization or contribute financial or other support to it."[60] And, second, section 302 makes it "unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization."[61] State labor laws follow the two NLRA provisions. For example, Massachusetts's public sector bargaining law makes it an "unfair labor practice" for an employer to "dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it."[62] A separate section of the Massachusetts law makes it illegal for any employer to "pay or deliver . . . to any group or committee of employees . . . any money or other thing of value."[63] In California, a public agency "shall not . . . contribute financial or other support to any employee organization."[64] In Illinois, it is "an unfair labor practice for an employer . . . [to] contribute financial or other support to [any labor organization]."[65] Michigan,[66] New

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[58] 29 U.S.C. §§ 151–169 (2012).

[59] 45 U.S.C. §§ 151–188 (2012).

[60] 29 U.S.C. § 158(a)(2). The RLA states that "it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization." 45 U.S.C. § 152 Fourth.

[61] 29 U.S.C. § 186(a)(2).

[62] MASS. GEN. LAWS ch. 150A, § 4 (2014).

[63] MASS. GEN. LAWS ch. 149, § 20D (2016).

[64] CAL. GOV'T CODE § 3506.5 (West Supp. 2017).

[65] 5 ILL. COMP. STAT. 315/10(a)(1) (2014).

[66] *See, e.g.*, MICH. COMP. LAWS ANN. § 423.210 (West 1979).

York,[67] Connecticut,[68] Washington,[69] and many other states have analogous provisions.

Although labor law thereby prohibits employers from paying unions directly, the law allows that same objective to be accomplished indirectly. Thus, unions and employers are permitted to bargain contract clauses according to which employees are *required* to return — nearly always to "check off" — a portion of their wages to the union after they receive those wages from the employer.[70] Thus, for example, the NLRA — after banning direct payments — states that "nothing . . . shall preclude an employer from making an agreement with a labor organization" through which employees are required "as a condition of employment . . . to tender [to the union] the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."[71] Again, public sector labor law in the states mirrors the NLRA rule.[72] To be clear, the law permits unions and employers to make fee payments *mandatory*: employees can be required to pay to the union some portion of the wages that the employer pays to the employee. Any worker who refuses to pay the required amount to the union must be discharged by the employer.

To get a feel for how labor law's accounting regime works in practice, imagine a nonunion employer with 100 employees, all of whom earn $10 per hour. In the nonunion setting, then, the firm is paying the workers as a group $1000 per hour. Put somewhat differently, the baseline wage is $10 per hour per employee, or $1000 per hour across the workforce. Using the estimates provided above — a union premium of approximately 11%[73] and agency fee payments equaling 2% of wages[74] — unionization would require the firm to pay out an additional $110 per hour. Under labor law's accounting rules, none of this $110 can be paid by the employer to the union. Instead, all of it must be paid

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[67] *See, e.g.*, N.Y. CIV. SERV. LAW § 209-a (McKinney 2011).

[68] *See, e.g.*, CONN. GEN. STAT. § 53a-158 (2017).

[69] *See, e.g.*, WASH. REV. CODE § 49.44.020 (2014).

[70] If a worker wishes, she can choose to pay her agency fee via a separate check rather than through a deduction from her paycheck. For administrative convenience, nearly all workers choose deduction. In any case, the difference is irrelevant for the current analysis; all that matters is that the fees payment is mandatory. *See* 29 U.S.C. § 158(a)(3) (2012).

[71] *Id.* Similarly, section 302 explicitly exempts from its prohibition "money deducted from the wages of employees in payment of membership dues in a labor organization." *Id.* § 186(c)(4).

[72] *See, e.g.*, COLO. REV. STAT. § 8-3-108 (2016); HAW. REV. STAT. § 377-6 (1993); OR. REV. STAT. § 663.125 (2015); 43 PA. STAT. AND CONS. STAT. ANN. § 211.6 (West 2016); VT. STAT. ANN. tit. 21, § 1621 (2016); CONN. GEN. STAT. § 31-105 (2017); MASS. GEN. LAWS ch. 150A, § 4 (2014); N.Y. LAB. LAW § 704 (McKinney 2015).

[73] MANZO ET AL., *supra* note 11, at 14–15. Union workers also earned on average about $5 more per hour in benefits than did their similarly situated nonunion counterparts. *See* Budd, *supra* note 11, at 177. For the sake of expositional clarity, I restrict the discussion to wage gains, but the union effect is actually significantly stronger than the wage data suggests.

[74] *See supra* pp. 1048–49.

to individual workers and called, formally, wages. Thus, after unionization each individual worker's hourly wage increases by $1.10, but the union itself has received nothing. This, of course, is an unsustainable outcome because without some source of funding the union cannot exist. So, labor law permits the union and the employer to agree that each employee, after getting the $1.10 raise, must — as a condition of employment — pay 2% of their wages back to the union in the form of fees. Following the hypothetical, then, each agency fee payer would have a formal wage of $11.10 per hour and would be required to pay about $0.22 per hour to the union. This leaves each fee payer with an actual, take-home wage increase of $0.88 per hour and an actual take-home hourly wage of $10.88 per hour — $0.88 per hour above the non-union baseline. At the end of the transaction, the union receives a total of about $22 per hour, or 20% of the union premium, while the agency fee payers receive an extra $88 per hour, or 80% of the premium.[75]

Labor law's accounting regime makes it illegal for the employer to pay this $22 directly to the union; the law requires employers to call this $22 "wages." But the law permits the employer to give her employees the $22 and then require them — on pain of discharge — to pay the $22 to the union.[76] As should be clear, there is not much substantive distinction between the illegal accounting regime and the legal one.[77] From the agency fee payers' perspective, the application of labor law's rules means that their paychecks announce a $1.10 wage increase and a mandatory $0.22 deduction, instead of an $0.88 wage increase. From the employer's perspective, labor law means that she must pay $1.10 to her workers and then require those workers to pay $0.22 to the union, rather than paying $0.88 to her workers and $0.22 to the union. From the union's perspective, the rule means getting $22 from the employer, but channeled through workers' paychecks, rather than getting the $22 directly from the employer. In the end, the workers earn the same amount,

[75] This example assumes that all the workers in this bargaining unit are agency fee payers and that none elect, voluntarily, to pay full dues. Workers who elect to pay full dues would pay, on average, 3% of their wages to the union rather than the 2% amount of the agency fee. Casselman, *supra* note 12. Dues payers would thus see a $0.77 wage increase and pay $0.33 to the union. Workers who pay full dues thus capture less of the union premium than do workers who pay only the agency fee.

[76] *See* 29 U.S.C. § 158(a)(3).

[77] As I will discuss below, this is not to say that there is no symbolic difference between the two accounting regimes. It may be that, from the workers' perspectives, seeing the $0.22 deducted from their paychecks — even though they have no choice about the deduction — changes how they feel about the union: perhaps, for example, they feel a closer connection to and more ownership over the union, or perhaps they feel greater resentment about the union. Employers might, for their part, object to the symbolism of paying monies directly to a union; or, on the other hand, they might object to forcing their employees to do so. And unions might prefer the symbolism of getting fees from employees — even though employees have no choice in the matter — to the symbolism of being funded directly by employers. *See infra* section IV.B, pp. 1069–75.

the employer pays the same amount, and the union receives the same amount.

In sum, labor law's accounting regime requires that all employer payments pass through employee paychecks on the way from the employer to the union. The law also gives employees covered by agency fee agreements no choice about whether to pass on the payments; it allows employers to fire workers who refuse to pay the union the amount that must be paid.

B. The Principle of Choice

In the agency fees cases, the Supreme Court assumes (without discussion) that because fees pass through employee paychecks, they should be treated as if they originate with employees — as if they are a compelled transfer from the employee to the union.[78] But when the Court actually has engaged in an analysis of the constitutional relevance of pass-through payments of this sort, it has reached the opposite conclusion. As this section will show, in a set of cases decided under the Establishment Clause of the First Amendment, the Court has addressed the constitutional status of monies paid by governments to private individuals that the private individuals then pay to religious schools. The question the Court explored in these cases was whether the payments to the religious schools should be treated as coming from the private individuals or as coming from the government. The clear rule that emerges from the cases is that the payments are to be treated as coming from the private individuals only if those individuals have a "genuine choice" about what to do with the money.[79] Absent such choice, the fact that the government money passes through the private individuals' hands on the way to a religious school becomes irrelevant. Absent individual choice, the money must be treated as a direct payment from the government to the religious school.

Although the school-funding cases arise under the Establishment Clause, while the agency fees cases arise as compelled speech and asso-

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[78] *Hanson*, for example, assumed without any discussion that employees are compelled to "tender" their money to the union. Ry. Employes' Dep't v. Hanson, 351 U.S. 225, 229 (1956) (quoting 45 U.S.C. § 152 (1952)). *Street* assumed that dues are properly understood as "funds exacted from employees" and paid to the union, Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 745 (1960), *Davenport* that an agency fee requirement amounts to an agreement between the state and the union to "compel[] . . . employees to pay . . . fees," Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 187 (2007), and *Harris* that fees are properly treated as payments from employees because they are "deducted by the employer from the earnings of the . . . employee[] and paid to the employee organization," Harris v. Quinn, 134 S. Ct. 2618, 2625 (2014) (quoting 5 ILL. COMP. STAT. 315/6(e) (2014)). But in none of these cases did the Court engage in the kind of analysis that it uses to assess the First Amendment status of pass-through payments in the school-funding cases discussed in this section.

[79] Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

ciation questions under other parts of the First Amendment, these distinct clauses of the Amendment share a set of common concerns. In particular, as the Court's agency fees cases themselves make clear, the First Amendment's compelled speech and association protections are aimed at preventing the government from requiring individuals to support institutions and ideas they would not freely choose to support.[80] Similarly, the First Amendment's Establishment Clause is concerned, inter alia, with preventing the government from compelling individuals to associate with or support religion or religious institutions that they would not freely choose to support — with protecting, in Professor Noah Feldman's words, "liberty of conscience."[81] Indeed, according to Feldman, this concern — akin to the concerns of compelled speech and association doctrine — is at the root of the Establishment Clause. Liberty of conscience, as he puts it, was "the purpose that underlay the Establishment Clause when it was enacted" and therefore "the Framers cared mostly about dissenters' liberty of conscience from paying taxes."[82] Professor Kathleen Sullivan explicitly invokes the agency fees cases to make the point about the connection between the Establishment Clause and the compelled speech and association cases. As she writes:

> [N]onconforming citizens may object to forced association (through taxation) with any religious expression government is perceived to support. On this view, [the Supreme Court's] admonition that "[n]o tax in any amount, large or small, can be levied" to support the teaching or practice of religion creates a kind of *Abood* right on the part of citizens and taxpayers to disassociate from compelled financial support of religious associations with which they conscientiously disagree.[83]

In the school-funding cases, the Supreme Court was called on to determine whether programs, under which government monies flowed to individual students and then on to religious schools, violated the Establishment Clause.[84] The latest of these cases, *Zelman v. Simmons-Harris*,[85] provides a good illustration. *Zelman* involved an Ohio program "designed to provide educational choices to families with children who reside in the Cleveland City School District."[86] Under the program,

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[80] *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977).

[81] Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002).

[82] *Id.* at 351–52.

[83] Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1407 (2003) (third alteration in original).

[84] *See Zelman*, 536 U.S. 639; Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

[85] 536 U.S. 639.

[86] *Id.* at 643–44.

students could receive tuition aid from the state "to attend a participating public or private school of their parent's choosing."[87] The state would send checks made payable to the participating parents, who would then endorse the checks over to the school of their choice. Eligible schools included secular private schools, religious private schools, and public schools outside the student's geographic district.[88]

In *Zelman*, as in the other school-funding cases, the Court made clear that the constitutional validity of the program turned on the question of whether the tuition payment to the religious school was properly attributable to the government itself or whether it should be treated as coming from the participating parents.[89] If the payment was treated as coming from the government, then the Ohio program was "a program[] that provide[d] aid directly to religious schools," and was accordingly unconstitutional.[90] If the payment was treated as coming from the parents, then there was no constitutional problem.[91] The Court, it is worth stressing, did not simply assume that the payments should be attributable to the parents because they formally came from the parents. Instead, the Court offered a test in the form of "the principle of private choice."[92] Where a program ensures that the parents have a "genuine and independent private choice" over which school gets the funds — including the choice between secular and religious schools — then the payments should be treated as coming from the parents.[93] As the Court put it, where there is "true private choice"[94] then "the circuit between government and religion [is] broken, and the Establishment Clause [is] not implicated."[95] On the other hand, where a school-funding program does not ensure such genuine choice on the part of parents, then the fact that government money passes through private hands is irrelevant and the program remains one of "direct aid to religious schools."[96]

Thus, in the school-funding cases, and unlike in the agency fees cases, the Court actually explains when and why payments that flow from an original payor, through an intermediary, and on to a final recipient, should be attributed to the original payor and when and why they should be attributed to the intermediary. In the school-funding cases,

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87 *Id.* at 645.
88 *See id.*
89 *Id.* at 649.
90 *Id.*
91 *Id.* at 652.
92 *Id.*
93 *Id.*
94 *Id.* at 653.
95 *Id.* at 652.
96 *Id.* at 655 (citing Mitchell v. Helms, 530 U.S. 793, 842–43 (2000) (O'Connor, J., concurring)). The holding of *Zelman*, including the line it drew between choice and lack of choice, can certainly be critiqued, as it was by the dissenters in that case. *See, e.g.*, *id.* at 685 (Stevens, J., dissenting); *id.* at 699–707 (Souter, J., dissenting). But those critiques do not change the rule that emerges from *Zelman*.

the Court held that when the intermediary has a genuine choice about whether to pay the final recipient, then we should attribute the payment to the intermediary; in those cases, the circuit between original payor and final recipient is broken. But when the intermediary does not have a choice about paying the final recipient, then we attribute the payment to the original payor; the circuit is not broken, and the payment is treated as if it had been made directly from original payor to final recipient.

Application of this First Amendment rule to the agency fees context would be straightforward. In the agency fees cases, the employer is the original payor, the employee is the intermediary, and the union is the final recipient. The employees at issue in these cases, by definition, have no choice about whether to pay fees to the union; they are required by collective bargaining agreements to pay such fees. In these circumstances, then, the circuit between government employer and union is not broken by the fact that the payment passes through the employee's paycheck.[97] To the contrary, the lack of choice means that we should treat agency fees as a direct payment from employer to union.[98]

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[97] It is no objection to the school-funding analogy to assert that, in the agency fees context, the government employer is sending employees' money to the union whereas, in the schools context, the government is sending its own money to the schools. As the above discussion of agency fees shows, the money sent by the employer to the union is named employee "wages" only pursuant to a formalism of labor law accounting. The money that becomes fees begins with the employer and is transferred to the union pursuant to a collective bargaining agreement that requires the money to be transferred to the union. At least for purposes of First Amendment analysis, the fact that the money passes through employee hands in this manner does not convert that money into employee property, irrespective of how the money is classified or what it is named. Indeed, the existence of the First Amendment's true private-choice doctrine depends on a rejection of this formalism. If the government could convert its money into employee property simply by naming it "wages" — even though the employee never has any control over that money — the government could also convert its money into parent property simply by naming it "parent tuition funds" — even though the parent never has control over the money. If the government could do this, it could then set up a program that funded only Catholic schools or only Jewish schools merely by deeming all the money set aside for the program "parent tuition funds." Because "parent tuition funds" were — by formal definition — parent property, the program that funded only Catholic schools would pass constitutional muster because it involved parents spending their own money instead of the government spending its. But that is an intolerable result and one inconsistent with the Court's doctrine. What matters is choice, and because choice is lacking in the agency fees context, we are to treat the fees as paid directly by the employer to the union.

[98] The analysis in this Part incorporates the existence of the union premium because this is the reality in practice. But the same basic analysis would apply in the absence of a premium. In the absence of a union premium, the union would be entitled to, for instance, an agency fee of $0.20 per hour — that is, 2% of the wage rate of $10 per hour. Thus, without a union premium, the agency fee payment amounts to the employer reducing the employee's baseline wage from $10 per hour to $9.80 per hour. So long as the employer complies with any procedural rules governing such wage reductions in the public sector (and assuming that the new wage complies with state minimum wage law), the employer may of course change the baseline in this way. And once the baseline wage is reduced, the $0.20 per hour that passes through an employee's paycheck en route from employer to union is not the employee's wage but employer property. Indeed, with wages reduced to $9.80,

III. FOUNDATIONS: UNION FEES AS UNION PROPERTY

Understanding labor law's accounting regime thus allows us to see that agency fees ought to be treated — under the Court's own First Amendment jurisprudence — as flowing directly from employers to unions. But, irrespective of the accounting regime, there are even more fundamental reasons for objecting to the Court's assumption that agency fees are "other people's money."[99]

Even today, in an era of weakened unions, unionization increases the bargaining power of workers who unionize, and allows those workers to capture more of a firm's wealth than they would capture through individual bargaining. As noted, in 2015, unionization produced an average wage premium of 11.1%.[100] That's 11.1% that workers would not have if it were not for their union. Agency fees average about 2% of wages[101] — a small portion of the total amount of wealth transferred from the firm to its workers as a result of unionization. The question is whether this 2% — this portion of the union premium — should be treated as union property or as the property of individual workers. In this Part, the Article presents affirmative reasons for viewing union premia, and the fees paid out of them, as the property of the union that secures them.

A. *Doctrine*

On the jurisprudential front, a helpful analogy is found in the takings jurisprudence surrounding IOLTA programs. IOLTA programs use interest generated by lawyers' trust accounts to subsidize legal services for the poor.[102] In a series of cases, including a pair decided by the United States Supreme Court, the programs were challenged under the Takings Clause of the Fifth Amendment. The legal theory underlying the challenges was that the interest earned in the lawyers' trust accounts was the property of the clients whose principal generated the interest, and

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the $0.20 is again simply passing through employee paychecks en route from employer to union, with no genuine employee choice in the matter. The $0.20 thus remains a direct payment from employer to union.

To reiterate, this conclusion holds only with respect to First Amendment analysis. For purposes of statutory analysis, the NLRA — and its public sector analogues — distinguish between payments made directly from employers to unions and payments that flow from employer to employee to union. Namely, the statute explicitly prohibits the first kind of payment, *see* 29 U.S.C. §§ 158(a)(2), 186 (2012), while explicitly permitting the second kind, *see id.* §§ 158(a)(3), 186(c)(4). In other words, the fact that First Amendment law requires that we treat fees as payments made from employers to unions does nothing to alter the fact that these kinds of payments are explicitly prohibited by two parts of the labor law. *See id.* §§ 158(a)(2), 186.

99 Davenport v. Wash. Educ. Assoc., 551 U.S. 177, 187 (2007).

100 *See supra* p. 1057.

101 *See supra* note 12.

102 *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 220 (2003).

thus that the state could not take that interest — and use it to subsidize legal services — without compensating the clients who owned the principal.[103]

To see why IOLTA programs are analogous to union fees, it is necessary to understand a few details about how the programs work. In various settings, attorneys are required temporarily to hold client funds.[104] In general, state law requires that when an attorney receives client funds, the attorney must deposit those funds in an "identifiable interest-bearing trust account[]."[105] There are, in turn, two types of such accounts: the first pays interest to the client; the second — the IOLTA account — pays interest to a nonprofit entity that provides (or funds) legal services programs. Whenever client funds are of an amount sufficient to generate a net positive return to the client — that is, when the funds could earn net interest after deducting transaction costs, administrative costs, bank fees and the like — they must be placed in an account that pays interest to the client. But when client funds "cannot earn net interest for the client"[106] — when the amount of interest earned would not exceed the costs of setting up and administering the account — then those funds can be pooled with other such funds in accounts whose interest goes to fund legal services.[107]

The analogy to the union fees context comes from the following feature of the IOLTA program: with respect to the client funds deposited in IOLTA accounts, no individual client's funds would (by definition) generate net interest on its own. It is only by pooling individual clients' funds into a collective account that the interest generated comes to exceed the costs of administering the account. It is this pooling of funds — this collectivization of investment — that produces the income that is used to fund the legal services program.

The Fifth Amendment challenges to the IOLTA program called on the courts to determine whether the interest generated by IOLTA accounts was the property of the individual clients, and, if it was, to determine the value of the property taken.[108] When the challenges were heard by the courts of appeals and state supreme courts, those courts concluded that the interest in IOLTA accounts was not property of the individual clients but rather belonged to the IOLTA program.[109] The

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[103] *See, e.g.*, *id.*

[104] *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998). To take just two examples, these funds might be in the form of a retainer, or they might be deposits on real estate transactions.

[105] *Brown*, 538 U.S. at 224 (quoting IOLTA Adoption Order, 102 Wash. 2d 1101, 1102 (Wash. 1984)).

[106] *Id.*

[107] *Id.* at 224–25.

[108] *See, e.g.*, *id.* at 225–26.

[109] *See, e.g.*, *id.* (describing the Washington Supreme Court's conclusion that Washington's IOLTA program did not effect a taking).

courts' reasoning was straightforward: because the interest income would not have existed had the funds been invested by the individuals, it could not be property of the individual clients. Thus, for example, the Florida Supreme Court held that "[t]he most relevant distinction, plainly, is the fact that no client is compelled to part with 'property' by reason of a state directive, since the program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances."[110] Agreeing with this holding, the New Hampshire Supreme Court determined that "[i]nasmuch as the proposed trust program created a source of income that, as a practical matter, would not have been available for return to clients nor would otherwise exist . . . the income generated could not fairly be classified as client 'property.'"[111] And, similarly, the Eleventh Circuit held:

> [T]here was no taking of any property of the plaintiff. Standing alone, her deposit in the IO[L]TA account could not earn anything. By combining all such deposits, interest income has been *created* which was not within the legitimate expectations of the owner of any one of the principal amounts.[112]

In a pair of cases, the United States Supreme Court took a different approach than the lower courts, although, as Justice Scalia explained, the functional outcome was the same. In *Phillips v. Washington Legal Foundation*,[113] decided in 1998, the Court held that the question of whether IOLTA interest is the property of individual clients was to be determined by the common law rule applicable to all cases involving principal and interest: "interest follows principal."[114] Put simply, in principal and interest cases, the owner of the principal becomes the owner of any interest generated by the principal. Since the individual clients owned the principal, the Court held, they must also own the interest. *Phillips* generated a four-Justice dissent, based on the argument that had been the basis for all the lower court decisions.[115] As Justice Breyer wrote, because "'absent the IOLTA program,' no 'interest' could have been earned," the "interest earned is *not* the client's 'private property.'"[116]

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[110] *In re* Interest on Tr. Accounts, 402 So. 2d 389, 395 (Fla. 1981).

[111] Petition of N.H. Bar Ass'n, 453 A.2d 1258, 1261 (N.H. 1982) (citing *Interest on Tr. Accounts*, 402 So. 2d at 395–96).

[112] Cone v. State Bar of Fla., 819 F.2d 1002, 1007 (11th Cir. 1987) (emphasis added); *see also* Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 976 (1st Cir. 1993) ("The IOLTA program does not occupy or invade the plaintiffs' property even temporarily: . . . the interest earned on IOLTA accounts is not the plaintiffs' property."); Petition by the Mass. Bar Ass'n, 478 N.E.2d 715, 717–18 (Mass. 1985) ("We follow the weight of authority in concluding that interest on nominal or short-term trust deposits is not property for constitutional purposes.").

[113] 524 U.S. 156 (1998).

[114] *Id.* at 165–68.

[115] *Id.* at 179 (Breyer, J., dissenting).

[116] *Id.* at 183.

Five years after *Phillips*, however, the Supreme Court returned to IOLTA to determine the *value* of the property taken from clients. In *Brown v. Legal Foundation of Washington*,[117] the Court held that the value of client property taken by an IOLTA program is zero. Why? Because the compensation required by the Fifth Amendment's Takings Clause is to be measured "by the property owner's loss rather than the government's gain."[118] And what has the property owner — the individual client — lost here? Nothing: without the IOLTA program the clients would have earned no interest on their principal, and thus the clients lose nothing through the operation of the program.[119] In Justice Scalia's view, the holding in *Brown* is a direct repudiation of the holding in *Phillips*. As he put it in his dissent, "[t]his holding contravenes our decision in *Phillips* — effectively refusing to treat the interest as the property of petitioners we held it to be."[120]

What, then, is the rule of IOLTA property that emerges from *Phillips* and *Brown*? One possibility is, as Justice Scalia noted, that interest is not the property of the individual clients "because without the mandatory pooling arrangements . . . of IOLTA, [clients'] funds could not have generated any interest in the first place."[121] The other possibility is that IOLTA interest is the property of the individual clients, as a formal matter, but the value of that property is zero. In either case, the principle is roughly the same: where interest would not exist but for the operation of a pooling mechanism like IOLTA, either there is not property in the interest or the value of that property is zero.

A similar, if older, line of cases develops the same rule. In a series of eminent domain decisions, the Court held that when the value of an individual's property increases because that property is unified with parcels owned by others, and such unification occurs only through the exercise of eminent domain, then the individual owner is not entitled to the increase in value that flows from the unification. An important early example, which captures the rule, is *City of New York v. Sage*.[122] There, the City of New York took by eminent domain a number of parcels in order to unify them and create the Ashokan Reservoir.[123] In valuing the property thus taken, the City commissioners estimated the market value of the "reservoir as a whole" and allocated to each landowner a share of that value.[124] The Supreme Court found the valuation process flawed.

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[117] 538 U.S. 216 (2003).
[118] *Id.* at 235–36.
[119] *Id.* at 239–41.
[120] *Id.* at 242–43 (Scalia, J., dissenting).
[121] *Id.* at 242.
[122] 239 U.S. 57 (1915); *see also* McGovern v. City of New York, 229 U.S. 363 (1913).
[123] 239 U.S. at 60.
[124] *Id.* at 61.

Why? Because "[t]he City is not to be made to pay for any part of what it has added to the land by thus *uniting it with other lots*, if that union would not have been practicable or have been attempted except by the intervention of eminent domain."[125] That is, where the value of a parcel of land increases because of its unification with other parcels — and that unification occurs only through the eminent domain process — the value of that "union" does not belong to the individual parcel holder.[126]

The union premium is not, of course, exactly analogous to the interest in an IOLTA trust account or to an increase in property value occasioned by the unifying effects of eminent domain. Workers do not, for example, invest their wages in the union and pay fees out of the returns on that investment. But, just as individual clients would not have interest without the pooling function of the IOLTA program, and individual land owners would not have the increased property value without the unifying effect of eminent domain, individual workers would not have union premia without the collectivizing function of the union. If we follow the analogy, we can therefore understand the union premium — and the fees that come out of it — in two ways: (1) as not constituting property of the individual workers but as owned by the union that produces it; or (2) as individual workers' property in formal terms, but as property without any cognizable value to those workers.

If the union premium is not properly considered the property of individual workers, then there simply would be no First Amendment issue involved in an agency fee agreement. The fees paid out of the premium would be treated as union property in the first instance, and no compelled payment from worker to union would occur. Similarly, if the union premium is the property of individual workers but the value of that property is zero, it would be hard to understand how the First Amendment issue would arise. Workers are compelled to subsidize speech, but their subsidy is zero? Or they are compelled to speak or associate with the union by giving the union property that is valueless as a legal matter? It would be passing strange to build a constitutional doctrine of compelled speech or association around a legally required contribution that has, as a legal matter, zero value to the person compelled to contribute it.

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[125] *Id.* (emphasis added).

[126] *See id.*; *see also* Phillips v. Wash. Legal Found., 524 U.S. 156, 181 (1998) (Breyer, J., dissenting) (citing *Sage*, 239 U.S. at 61) (describing the holding in *Sage* as, "city need not pay for value added by unifying parcels where unification impracticable absent eminent domain"); United States *ex rel* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 276 (1943) (holding that where ability to unify land depends on exercise of eminent domain, value of unification is not owed to owners of individual parcels).

B. Economic Theory

It is also worth briefly noting that treating union premia as the property of the union, rather than of individual workers, finds support in the history of economic thought. Indeed, there is a strand of economic theory going back at least to John Stuart Mill holding that wealth that is available only because of collective efforts ought to be owned by (or at least shared among) the collective that produced it.[127] Building on Locke's labor theory of property and on David Ricardo's ideas about economic rents, Mill's economic writings distinguished between wealth that was generated through individual efforts "alone" and wealth that owed its creation to societal or collective forces.[128] Thus, "on the same 'earned' contribution principle that would give to the person that which he creates, Mill argued that society, too, should receive its due — a rent, essentially, for the benefit it provided to individuals beyond what they could produce purely as individuals acting alone."[129]

For Mill, increases in land values were a leading example of this phenomenon: some portion (he thought a large portion) of the increase in land prices came not from individual effort or investment, but from broad societal developments.[130] In Professor Barbara Fried's words, rents derived from land — including from urban lands — "were, in short, a social and not an individual product."[131] The implication for Mill was that a land tax was justified if it captured for the public the increase in value that public processes had produced. He described the tax as follows:

> The present value of all land should be exempt from the tax; but after an interval had elapsed, during which society had increased in population and capital, a rough estimate might be made of the spontaneous increase which had accrued to rent since the valuation was made. . . . On this and other data, an approximate estimate might be made, how much value had been added to the land of the country by natural causes; and in laying on a general land-tax . . . there would be an assurance of not touching any increase of income which might be the result of capital expended or industry exerted by the proprietor.[132]

Mill's idea for a land tax that would capture socially generated increases in value but not increases produced by individual effort was

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[127] *See, e.g.*, GAR ALPEROVITZ & LEW DALY, UNJUST DESERTS: HOW THE RICH ARE TAKING OUR COMMON INHERITANCE 104–08 (2008).

[128] *Id.* at 104.

[129] *Id.* at 104–05.

[130] *Id.* at 104–08. Of course, some increases in the value of land can be attributed to improvements made by owners. It is the increase attributable to social developments, not individual improvements, that is the concern here.

[131] BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE 123 (1998).

[132] JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 493 (London, Longmans, Green, and Co. 1894) (1848).

popularized in American economic thinking by Henry George's 1879 book *Progress and Poverty*.[133] George, like Mill, observed that much of the increase in land value over time was not attributable to individual action but was instead "brought about because of broader community and society-wide development."[134] George thus called these increases in value "the unearned increment" and thought that they should rightfully be taxed away by the society that created them rather than being left with the individuals who could not have produced them on their own.[135] George's theory was also advanced by British economist Philip Wicksteed, who argued for "public possession" of unearned increments, and by J.A. Hobson, who wrote about the "productive efficacy of social forces" and contended that "as the creation of society [unearned increments] should be returned to society in some proportionate measure."[136]

As with the lines of doctrine reviewed above, then, this line of economic theory suggests value that is produced only through collective efforts ought not simply be attributed to, or owned individually by, the individuals who constitute the collective. To the contrary, where income increases because of collectivization or collective effort, assigning a property interest to the collective itself "would be no violation of the principles on which private property is grounded."[137]

IV. IMPLICATIONS

A. *Constitutional Law*

The Article has now provided two sets of reasons for rejecting the Supreme Court's assumption that agency fees should be treated as compelled payments made by employees to unions. In Part II, the Article showed that, because employees lack any choice about whether to make these payments, the "circuit" between employer and union is not broken and, under the Court's own First Amendment rules, agency fees therefore ought to be treated as a direct payment from employer to union. In Part III, the Article provided more foundational reasons for treating fees as the union's property in the first instance.

The most important implication of these arguments is also the most obvious. The entire jurisprudence of agency fees is based around the

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[133] *See* HENRY GEORGE, PROGRESS AND POVERTY (London, William Reeves 1884) (1879); ALPEROVITZ & DALY, *supra* note 127, at 111.

[134] ALPEROVITZ & DALY, *supra* note 127, at 111.

[135] *Id.*

[136] *Id.* at 112–13.

[137] MILL, *supra* note 132, at 492. To say that union premia belong to the union rather than to individual workers is not to say that workers have no claim to the premia. This is because workers have a right — through the union's internal democratic procedures — to determine collectively what happens to all union finances. *See* Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (2012). Establishing that premia are collective property simply means, in other words, that premia are to be controlled through collective governance procedures rather than through individual choice.

Court's assumption that fees are compelled payments made by employees. *If* we treat fees as employee money or property, and *if* we treat fees as coming from employees rather than employers, *then* the questions of compelled speech and association arise. But it is *only if* we treat fees in this way that such questions arise. If we treat agency fees as payments that flow from employers to unions, then there can be no argument that employees are compelled to do anything: we take employees out of the loop — out of the "circuit" — and thereby eliminate the possibility that they are compelled to speak or associate or subsidize. If we treat fees as union property in the first instance, the implication is the same: not being employee property, the payment of agency fees cannot be said to compel employees to do anything.

As such, rejecting the Court's assumption that agency fees are payments made by employees — for either set of reasons provided here — would mean that there is no First Amendment question to be asked in the agency fees context.

B. Progressive Federalism and Agency Fees

The Court has treated agency fees as employee property because of the operation of labor law's accounting regime, a regime that requires money to flow through employee paychecks on the way from employers to unions. As I have argued, this accounting regime is an insufficient reason to treat fees as employee payments for First Amendment purposes. But it is clear, too, that should states amend their public sector labor laws and allow *in form* what labor law now permits in substance — namely, direct payments from employers to unions — this change would also eliminate any claims of compelled speech and association. If payments flow directly from employers to unions, there can be no argument that employees are being forced to subsidize, speak through, or associate with the union.[138]

To assess the desirability of — and possibility for — such a policy change, it is useful to first identify why labor law has imposed an accounting regime that requires the channeling of employer payments through employee paychecks. Most of the answer lies in the history of employer-dominated (or company) unions, which were organizations of employees established and funded by (and often also controlled by) employers.[139] Prior to the enactment of both the RLA (in 1926) and the NLRA (in 1935), these unions were prevalent across the industrial landscape. It was the view of Congress, as expressed in the two labor statutes, that employer-dominated unions were not real unions, but rather

[138] *See* Hemel & Louk, *supra* note 23, at 229–30.

[139] *See, e.g.*, Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1385 n.16 (1993).

"sham or dummy union[s]"[140] — organizations that, while appearing to advance the interests of employees, actually accentuated employer control and prevented the formation of genuine, autonomous employee organizations.[141] Because Congress viewed company unions as an impediment to its goal of autonomous union organization, the two statutes abolished them by, inter alia, prohibiting payments from employers to unions. If employers couldn't pay unions, the theory went, they would be unable to establish company unions.[142] As Professor Mark Barenberg explains, "[t]he immediate aim of [section 8(a)(2)] was to settle the primary legal-institutional contest in the 1930s workplace — that is, to extinguish the company-union structures that managers had interposed as a last-ditch alternative to outside unionization."[143]

Given that the law banned only direct payments from employers to unions and permitted agreements under which employers paid employees and then required that the employees pay the union, the formalism of the arrangement was not lost on some contemporary observers. In one notable exchange, Jack Larkin — who ran a company union at Weirton Steel — challenged Senator Wagner. Larkin testified:

> This is absurd. The ultimate source of the money paid in by the members of a labor organization is from the employer and I cannot see what difference it makes whether the company turns over a lump sum each year, according to a fixed arrangement, or whether the men pay a check-off, which is the system which the American Federation of Labor wants.[144]

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[140] 79 CONG. REC. 2371–72 (1935) (statement of Sen. Wagner), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1311, 1312–13 (1949).

[141] *See, e.g.*, Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 777–93 (1994).

[142] Legislative history, court decisions, and scholarship all make clear that the prohibition on financial contributions from employers to unions contained in NLRA section 8(a)(2) and RLA section 2 (Fourth) was designed as an anticompany union measure. Thus, for example, the House Report on the Wagner Act stated that "[t]he prohibition of financial support is particularly justified" because "[c]ollective bargaining is reduced to a sham when the employer . . . support[s] a particular organization with which he deals." H.R. REP. NO. 972, at 16 (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, *supra* note 140, at 2972. An early New York case, decided shortly after the Wagner Act was passed, confirms that the "section was designed, among other purposes, to prevent the employers from dominating or interfering with the union or in any way controlling or influencing it and preventing its free action. Financial contribution or other support to such an organization is one means of obtaining such domination or influence." Master Plumbers Ass'n of Albany v. Weir, 15 N.Y.S.2d 889, 890 (App. Div. 1939). In the RLA context, the agency charged with administering that statute has held that "[t]he language of Section 2, Fourth . . . was added to the RLA as part of the 1934 amendments and was directed at the continuing problem of company unions." National Mediation Board, Representation Election Procedure, 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206).

[143] Barenberg, *supra* note 141, at 773.

[144] *National Labor Relations Board: Hearings on S. 1958 Before the S. Comm. on Educ. & Labor*, 74th Cong. 412 (1935) (statement of Jack Larkin, Weirton Steel Co.), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 140, at 1798, *quoted in* Laura

Formalistic or not, the labor statutes banned direct payments from employers to unions, and they did so out of a policy objection to company unionism. In 1947, about a decade after Congress enacted the company union ban, it amended the statute with the Taft-Hartley Act[145] and added a provision that made it a felony for an employer to "pay, lend, or deliver . . . any money or other thing of value . . . to any labor organization, or any officer or employee thereof."[146] This section, now section 302 of the labor law, was an antibribery and anticorruption provision designed "to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."[147] Or, as the Seventh Circuit put it recently, "[s]ection 302 seeks to prevent employers from bribing union officials. It also seeks to prevent those representing employees from operating under conflicted interests and for personal profit."[148] Again, there is formalism in the approach. Section 302 prevents employers from bribing union officials by making it illegal to pay those officials directly. But section 8(a)(3) still allows employers to pay workers and then require those workers to pay unions, an accounting regime that also might be susceptible to corrupt intent.

There are ongoing debates within labor law scholarship about whether the policy goal of combating company unionism makes sense in the contemporary economy or whether that policy commitment is actually counterproductive today.[149] The efficacy of banning direct payments while allowing indirect ones — for combating company unionism or union corruption — is also subject to debate.[150] Accordingly, should a state legislature conclude that banning company unions is no longer important or even wise, or that the accounting regime of current law is a formalism that does more to mask problems — including problems of corruption — than to eliminate them, it could well decide that banning

J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837, 863–64 (2011).

[145] Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187 (2012)).

[146] *Id.* § 186(a). In fact, in 1984, Congress increased the penalties associated with such violations, making it a criminal felony in certain cases. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 98-473, § 801, 98 Stat. 1837, 2131 (1984) (codified at 29 U.S.C. § 186(d) (2012)).

[147] Turner v. Local Union No. 302, Int'l Bhd. of Teamsters, 604 F.2d 1219, 1227 (9th Cir. 1979) (citing Alvares v. Erickson, 514 F.2d 156, 164 (9th Cir. 1975)).

[148] Titan Tire Corp. of Freeport v. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int'l Union, 734 F.3d 708, 717 (7th Cir. 2013) (internal citation omitted).

[149] *Compare* Barenberg, *supra* note 141, *with* Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994). *See also* Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 CARDOZO L. REV. 1455 (2016).

[150] *See supra* pp. 1057–58.

direct payments from employers to unions no longer makes sense.[151] Most clearly, a state legislature could conclude that providing unions with a financing mechanism that avoids both the free-rider problem and the risks of First Amendment invalidation is a policy goal whose benefits justify whatever costs flow from allowing direct payments.

What would labor law amendments look like? To start, of course, states would have to lift the prohibitions on employer payments to unions in the public sector.[152] With the prohibition lifted, unions and employers could then negotiate as part of an overall collective bargaining agreement how much of the union premium would be paid directly to the union and how much would be transferred to individual workers in the form of higher wages and benefits. Unions' ability to claim too much of the premium for themselves would be checked in the same way that unions' ability to set dues rates is checked today: by the democratic rights of workers to elect union leadership and, at the extreme, to decertify a union.[153] If these democratic rights were thought to be insufficient to protect against self-dealing by unions, a revised regime could build in additional protections. To take just one example, states could grant workers a right not currently provided in private sector labor law: the right to approve by majority vote the collective bargaining agreements that their unions negotiate.[154] If the workers believed that the union was taking too much of the premium for itself, the workers could reject the agreement and send the union back to the bargaining table.

A change to state public sector labor law that permits direct payments from employers to unions would eliminate compelled speech and

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[151] With respect to corruption, moreover, a state might well decide that payments to union officials should still be illegal while payments to unions themselves should be permitted.

[152] Under the preemptive effect of federal labor law, states have jurisdiction over public sector employees, but not private sector employees. *See* 29 U.S.C. § 152(2) (2012). Accordingly, amendments to state labor law would reach state and local employees but not private sector ones. Of course, at least to date, the constitutional concerns regarding agency fee agreements have not been extended to the private sector, where the Court has not found state action. *See, e.g.*, Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 202 n.229 (2013). Again, prohibitions on payments to union *officials* — contained in section 302 and its state analogues — could remain as a mechanism for combating corruption, and states that do not currently have a section 302 analogue could adopt one. *See* 29 U.S.C. § 186(a). All that states would need to *permit* are payments to unions themselves.

[153] In the NLRA context, see, for example, 29 U.S.C. § 481 (providing for democratic election of union leadership) and 29 U.S.C. § 159(c)(1)(A) (providing for decertification election of existing union). Public sector bargaining laws contain analogous provisions.

[154] Under the NLRA law, unions may — and often do — provide members with the right to vote on collective bargaining agreements, but members generally have no independent legal right to such a vote. *See, e.g.*, Cleveland Orchestra Comm. v. Cleveland Fed'n of Musicians, Local No. 4, 303 F.2d 229, 232–33 (6th Cir. 1962). Three states already provide this right across the public sector, *see* IOWA CODE § 20.17(4) (2017); HAW. REV. STAT. § 89-10 (1993); MD. CODE ANN., STATE PERS. & PENS. § 3-601 (LexisNexis 2015), and a fourth provides it to teachers, *see* KAN. STAT. ANN. § 72-5421 (2013).

association challenges to union financing systems.[155] But substituting direct payments from employers to unions for the current system would have other effects as well. For one, should state governments begin making direct payments to unions, unions might become "contractors" under state law, which would impact unions' standing under, inter alia, state campaign finance rules. Many states have so-called pay-to-play statutes that regulate, and at times prohibit, campaign contributions by government contractors.[156] And although unions are often barred from making contributions by other provisions of campaign finance law, union-affiliated political action committees (PACs) are often allowed to make such contributions. Pay-to-play laws, however, often prohibit contributions not only from contractors, but from political action committees established by those contractors.[157] The end result: if unions become government contractors, they may lose the ability to make political contributions through their affiliated political action committees.[158]

Finally, I have shown throughout this Article that direct employer funding of unions is a functional substitute for the current regime in which employers pay workers and then require the workers to pay the union. Although these two regimes are functional substitutes, it is possible that they differ in a symbolic way: workers, that is, might *perceive* a difference between the two regimes. This would not change the constitutional analysis, but it might influence how workers behave vis-à-vis the union. In particular, the fact that agency fees show up on the workers' paychecks as income and then as payments to the union might operate to give workers a psychological sense of ownership over the money and thus over the union itself — even though the workers have no actual right to control that money and no right not to pay it to the union. An increased sense of ownership — even if purely symbolic — might in turn operate to make workers more active in and committed to their union.

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[155] *See* Hemel & Louk, *supra* note 23, at 299–300.

[156] *See, e.g.*, Green Party of Conn. v. Garfield, 616 F.3d 189, 199–205 (2d Cir. 2010) (upholding Connecticut's pay-to-play law barring state contractors from contributing to the campaigns of state candidates). *See generally* Allison C. Davis, *Presupposing Corruption: Access, Influence, and the Future of the Pay-to-Play Legal Framework*, 7 WM. & MARY BUS. L. REV. 197 (2016); KARL J. SANDSTROM & MICHAEL T. LIBURDI, OVERVIEW OF STATE PAY-TO-PLAY STATUTES (2010), https://www.perkinscoie.com/images/content/2/1/v2/21769/wp-10-05-pay-to-play.pdf [https://perma.cc/6XPM-XVQF].

[157] *See, e.g.*, SANDSTROM & LIBURDI, *supra* note 156.

[158] This would be true, for example, in Connecticut. There, unions are currently permitted to make contributions through a political committee. *See* CONN. GEN. STAT. § 9-614 (2017). But contractors — defined as "any person, business entity or nonprofit organization that enters into a state contract," CONN. GEN. STAT. § 9-612(f)(1)(D) — are prohibited from making contributions, including contributions made through a separate political committee. *See* CONN. GEN. STAT. § 9-612(f)(2)(A)–(B). California, Illinois, Indiana, and New Jersey also have pay-to-play laws that prohibit contributions by contractor PACs. *See* CAL. GOV'T CODE § 84308 (West 2017); 30 ILL. COMP. STAT. 500/50–37 (2014); IND. CODE §§ 4-30-3-19.5(j), 4-30-3-19.7(j) (1998); N.J. STAT. ANN. § 19:44A–20.15 (West 2014).

This intuition — that financially supporting the union creates a sense of ownership and, through ownership, a more active membership — was expressed by César Chávez, President of the United Farm Workers. Chávez explained:

> A union must have members who pay dues regularly. . . . Because they pay so much, they feel they are the important part of the organization; that they have a right to be served. They don't hesitate to write, to call, to ask for things — and to reaffirm their position in the association. . . . [T]he idea that the members are, alone, paying the salary of a man who is responsible to them is very important.[159]

The idea also has been developed in the social science literature on organizational commitment.[160] Although contested, a leading view in this literature is that dues payments can in fact give rise to one form of union commitment — a kind of "instrumental rationality-based commitment" in which a worker expects, or demands, benefits from the union in exchange for the payments she has made to the union.[161]

Even if accurate, however, there are two reasons not to worry too much about this dynamic. To start, the same literature that identifies the commitment effects of dues payments also observes that there is a distinct form of union commitment unrelated to, and unaffected by, the fact of dues payment. This is the "value-rational dimension" of union commitment and is centered on whether "the goals of the union are consistent with [the member's] values."[162] In other words, even if dues payments are one way to generate union commitment, they are not the only way. Second, the discussion here is limited to the question of *mandatory* payments, a fact relevant in two ways. One, if unions believe that dues payments create commitment and that this commitment is important to union vitality, unions could of course continue to rely on voluntary dues payments either in lieu of direct payments from employers or, more likely, in addition to those payments. The employer payment would solve the free-rider problem, and the voluntary dues payments from workers could be used to generate commitment — should the union decide that this made sense. Two, it seems highly unlikely that workers who pay fees to a union only because they are forced to do so by their employment contract — only because they will get fired if they decline to pay the fees — will be workers who display high levels of union commitment or participation. If this is correct, then substituting employer payments for *voluntary* dues payments might well have a significant

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[159] MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT 100 (2009).

[160] *See, e.g.*, Howard S. Becker, *Notes on the Concept of Commitment*, 66 AM. J. SOC. 32, 35–38 (1960); Rosabeth Moss Kanter, *Commitment and Social Organization: A Study of Commitment Mechanisms in Utopian Communities*, 33 AM. SOC. REV. 499, 504–07 (1968).

[161] Magnus Sverke & Sarosh Kuruvilla, *A New Conceptualization of Union Commitment: Development and Test of an Integrated Theory*, 16 J. ORG. BEHAV. 505, 514 (1995).

[162] *Id.*

impact on commitment and participation. But, again, that is not the substitution under discussion; all that is at issue here is the substitution of employer payments for mandatory fee requirements. And given that workers who pay fees only because they have to are unlikely to be highly committed union members, substituting employer payments for agency fee payments is unlikely to have much of an impact on either commitment or participation.

V. CONCLUSION

The constitutionality of agency fees is a matter of intense concern to the United States Supreme Court and a question that is returning to the Court soon.[163] When it does, the Justices will again be asked whether agency fees compel employees, in contravention of the First Amendment, to speak through a union that does not represent their views. And if the history of agency fees jurisprudence is a guide, the Court will again assume — without discussion — that fees should be treated as payments of employee money made by employees to unions. This Article, however, provides new reasons for rejecting this assumption. Most clearly, given labor law's accounting regime and current First Amendment law, it is a constitutional mistake to treat agency fees as payments that employees make to unions. As the Court has held, because monies pass through employee paychecks on the way from employers to unions without any employee choice in the matter, the payments should be treated as flowing from employers to unions. Moreover, as the Article also has argued, it makes better sense to treat union premia — and the fees that come out of them — as the property of the union that secured them, rather than as the property of individuals who, as individuals, never could. Accordingly, the Article provides a new way for the Supreme Court to approach and resolve the question of agency fees. Of course, as the Article shows, if states are unwilling to await a change of direction at the Court, they can themselves eliminate the question of compelled speech from the labor-relations landscape simply by doing formally what labor law now accomplishes in substance: revising their public sector labor laws to allow direct payments from employers to unions.

Finally, it is worth observing — given what this Article has argued — what it would mean for the Court to continue on the course it has been following in its agency fees jurisprudence. A labor law regime that permits direct payments from employers to unions is a functional substitute for the one we have today. But the Court could not find compelled speech or association problems in a direct-payment regime.[164]

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[163] *See* Janus v. AFSCME, Council 31, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 198 L. Ed. 2d 780 (2017).

[164] *See* Hemel & Louk, *supra* note 23, at 229–30.

This means that, should the Court find compelled speech or association problems with the current regime, the Court would be constitutionalizing one system of labor law accounting while invalidating a functionally equivalent alternative.[165] Agency fees would not be the first context in which the Court has engaged in such constitutional accounting — where it has drawn a constitutional line between two interchangeable financial accounting systems.[166] But, should the Court use the First Amendment to decide that one system of labor law accounting is constitutional, while an equivalent alternative is constitutionally impermissible, that decision would at a minimum require explanation and defense.

[165] Here, I part ways from Professor Aaron Tang, who believes that the availability of the direct payment "alternative" implies that the current system is not the least restrictive means of accomplishing the government's purpose. *See* Tang, *supra* note 23, at 197–201. In my view, the two regimes are equivalents for First Amendment purposes: neither actually compels employees to do anything because both amount — for First Amendment purposes — to payments from employers to unions. The fact that the direct-payment regime is constitutional implies, not that the current regime is unconstitutional, but that the Court's jurisprudence is giving constitutional significance to an accounting formalism.

[166] Another example comes from the taxpayer standing cases. There, the Court has distinguished between school funding regimes that rely on cash grants and those that rely on targeted tax breaks, holding that cash grants give rise to taxpayer standing while tax breaks do not. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 141–43 (2011). As Justice Kagan pointed out in dissent, however, these two "financing mechanisms," *id.* at 159 (Kagan, J., dissenting), are "readily interchangeable," *id.* at 168.