Friedrichs and the Right Wing Legal Attack on Public Sector Unions

February 22, 2016 CWA Stewards Conference
Know **Friedrichs** is an attempt to **weaken, if not destroy, public sector unions**.

It is part of a broader **attack on unions** in general.

When did most private sector workers win the legal right to organize for the first time?

- **1935 passage of the Wagner Act** – the National Labor Relations Act.

Between 1936 and 1940 went from 3 million workers in unions to **10 million unionized**.

**Corporate America was enraged**.

After WWII and the death of FDR the assault on unions intensified.
The Attack on Unions

- Legal attack began in 1947 with passage of Taft Hartley, a bill that amended the National Labor Relations Act.
- Among other things, Taft Hartley designed to weaken unions and make it as difficult as possible impossible for unions to organize in the South.
Forced progressives who were advocated trade union militancy and actively supported the civil rights and women’s rights movement out of the labor movement.

Inserted a “Free Speech” provision that gave employers the right to conduct vicious anti-union campaigns.

Excluded supervisors from coverage – proved to be a powerful weapon of management.

Outlawed secondary boycotts – general strikes.

Outlawed the closed shop and allowed states to pass laws outlawing the union or agency fee shop.
In 26 States it is unlawful for private sector unions to collect agency fees.

Not just southern states – Michigan, Wisconsin, Iowa, Idaho

Ten days ago on February 22, 2016, West Virginia also passed a right to work law.

Right to work laws, combined with a relentless attack on the rights of workers to organize and to collectively bargain have seen a precipitous decline the percentage of private sector workers in unions.
PERCENTAGE OF UNIONIZED WORKERS

![Bar chart showing the percentage of unionized workers from 1930 to 2004.]
The percentage of private sector workers who are unionized is 6.7% compared to public sector workers which is about 35%.

Conservatives have always understood that the union movement, along with the women’s and civil rights movements, represent a powerful organized opposition to their right wing agenda.

No accident that they leveled their sights on public sector unions.
1968 was a time of social and political upheaval in this Country
  - Anti-war movement
  - Civil Rights movement

It was the year of the Memphis Sanitation Workers strike when for the first time the Union and Civil Rights Movements became one lead by Dr. Martin Luther King.

The joining forces of the two movements struck terror into the hearts of the right wing.
Civil Rights and Labor Movements Merge in Memphis Sanitation Strike – 1968

- MLK speaking to AFSCME workers
Memphis Sanitation Strike
Agency Shop Laws

- And in NJ, **1968 was the year public workers won the legal right to organize and bargain collectively.**
- But Agency Shop provisions were not made lawful until 1979.
  - Other states, such as Michigan passed laws earlier that permitted public employees to negotiate agency fee provision.
- **Until 1979 NJ was a right to work state for public employees.**
- In same way that 30 years earlier right wing passed Taft Hartley and gave states the right to pass Right to Work laws, **same anti-union forces realized they needed to attack public sector agency fees.**
- The **first right wing challenge to agency fees was brought by a Detroit teacher – Louis Abood**
Detroit teachers union contract required non-members to pay a service charge equal to regular membership dues.

No requirement that nonmember join the union or participate in union affairs.

Mr. Abood and other teachers filed a class action claiming that they were opposed to collective bargaining in the public sector and should not be forced to support the union.
Argued that collective bargaining in the public sector is inherently political and to require them to support it violates their First Amendment rights.

A unanimous Supreme Court rejected this argument.

Court recognized that agency fee provision intrude upon First Amendment rights.

But Court held that government has a compelling interest in having one union as the exclusive majority representative so it does not have to deal with rival unions. Having one union as the exclusive majority representative fosters labor stability.
As the Exclusive Representative, unions must fairly represent both members and nonmembers.
- Creates a “free rider” problem
- Agency fees also eliminate free riders who cause resentment and disruption in the workplace.
Court’s Ruling in Abood

- Court rejected the idea that because public sector collective bargaining is inherently political public employees cannot be required to pay agency fees.
- Court recognized that because public employee unions in the process of bargaining contracts attempt to influence governmental policy-making public sector bargaining is inherently “political.”
But the Supreme Court also held that unions cannot use agency fees from employees who do not object for the expression of political views, on behalf of candidates or for other ideological causes not germane to collective bargaining.

Abood did not define what “germane to collective bargaining” means.
For 35 years after Abood, the right of a union to collect agency fees from nonmembers was unquestioned by any Supreme Court Justice.

Subsequent Supreme Court cases told us what we needed to do to protect objecting nonmembers against the use of fees for politics.

- Have to provide an advance reduction; conduct audits; notice of how union spends its money.

Also defined “germane to collective bargaining” – what is chargeable and what is not to nonmembers.

For example, in 1991 the Supreme Court issued its decision in Lehnert explaining what agency fees could and could not be used for.
Lehnert held that unions **could not use agency fees for lobbying unrelated to the ratification or implementation of a collective bargaining agreement.**

Although the liberal and conservative Justices disagreed as to the types of expenditures that could be charged to nonmembers, **no Justice questioned whether the union had a right to collect agency fees for purposes of collective bargaining and representation.**
Even Justice Scalia, who dissented in Lehnert, because he disagreed with the scope of the expenditures permitted by the majority, affirmed that “Where the State imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; where the state creates in nonmembers a legal entitlement from the union, it may compel them to pay the cost.”

So what happened?
Justice Alito Happened!

- Justice Alito – Appointed in 2006 by President Bush.
- **Alito, who hails from Trenton had an agenda** – At the top of the list – reverse **Abood**.
- **He was the first Justice to question whether unions could use agency fees for collective bargaining.**
- He had four potential votes from conservative Justices – Chief Justice Roberts and Justices Scalia, Kennedy and Thomas
- Justice **Alito waited for his case**
- **In 2012** he was presented with the opportunity to begin the dismantling of public sector agency fees.
In 2012 a divided court decided Knox v. Service Employees. An SEIU local imposed a special assessment of 25% of dues on all members and nonmembers to be used to build a “Political Fightback Fund.”

7 of 9 justices held that nonmembers should not have been charged for this assessment because it was not “germane to collective bargaining.”

Writing for the majority Justice Alito made clear that he wanted to go much further and one day would: “we do not revisit today whether the Court’s former cases have given adequate recognition to the critical First Amendment rights at stake.”
Justice Alito foreshadowed his disagreement with the basic premise of *Abood* – a premise which the conservative justices in the past, including Justice Scalia embraced.

Alito wrote, “Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly – one we have found to be justified by the interest of furthering ‘labor peace.’”
According to Alito, by authorizing a union to collect fees from nonmembers and permitting an opt out system for the collection of fees – where objection is not presumed for nonmembers – “our prior decisions [read Abood] approach, if they do not cross, the limit of what the First Amendment can tolerate.”
Joining Alito’s decision were Chief Justice Roberts and Justices Scalia, Kennedy and Thomas.

The liberal justices were split.

Justice Sotomayor filed an opinion concurring in the judgment, joined by Justice Ginsburg.

Justice Breyer filed a dissenting opinion, joined by Justice Kagan.

Two years later Justice Alito got yet another chance to attack agency fees.
In *Harris v. Quinn* Right to Work challenged whether a public sector union could collect agency fees from Personal Assistants (“PAs”) who provided in-home care to “customers” – the elderly and infirm.

Again *Justice Alito wrote the majority opinion*, joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas.

This time the *four liberal justices all dissented*, with Justice Kagan writing the opinion in which Justices Ginsburg, Breyer and Sotomayor joined.
Holding in Harris v. Quinn

- **Harris**, also was decided on narrow grounds based on fact that PAs are not full-fledged public employees.
- Under Illinois law the customer is “responsible for controlling all aspects of the employment relationship between the customer and the PA, including . . . hiring the PA, training the PA, directing, evaluating and otherwise supervising the work performed by the PA, imposing . . . disciplinary action . . . and terminating the employment relationship between the customer and the PA.”
Alito lays the groundwork for a wholesale attack on agency fees

- Alito again took the opportunity to directly attack the distinction between activities germane to collective bargaining and political and ideological activities.

- “Abood failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. In the public sector, core issues such as wages, pensions and benefits are important political issues, but that is generally not so in the private sector.”
Alito’s Decision in Harris

- **Alito rejects** the critical distinction drawn by the **Abood Court** between supporting activities germane to collective bargaining and support for political and ideological activities.

- For Alito, there is **no meaningful difference** between demanding higher wages or decent health and pension benefits and supporting Democrats over Republicans.

- **Alito invited** Right to Work to bring yet another case to the Court.
In light of Justice Alito’s invitation in Harris, it is not surprising that another law suit was brought almost immediately after Harris was issued.

The next law suit sought to have agency fees declared unconstitutional because collective bargaining in the public sector is inherently political.

The case was fast-tracked to the Supreme Court. How?

◦ The plaintiffs asked the courts to rule against them.
Friedrichs was argued on January 11.

Court poised to decide the case this term – before the end of June.

Widely assumed by knowledgeable Supreme Court observers that the same five justices that joined Alito’s opinion in *Knox* and *Harris* would **overrule Abood** and find unconstitutional the use of agency fees for any purpose, including for collective bargaining and contract administration.

Since January 11, waiting for the guillotine to drop any day.
What Impact does Scalia’s death have on Friedrichs?

- Scalia was a critical fifth vote for the reversal of *Abood*.
- Now, *at best there are four votes for reversal*.
- That means the Ninth Circuit decision ruling against the plaintiffs and upholding constitutionality of agency fees is affirmed, unless Court carries the case over to the next term.
  - *Then case would have to be re-argued*. 
If a liberal Justice is confirmed to replace Scalia, it will be the first time in almost 45 years that there was a solid liberal majority on the Court.

The next Justice will likely be the deciding vote on this and a host of other critical issues, including reproductive rights, affirmative action, voting rights and the scope of presidential authority.

If Senate will not confirm an Obama nomination then next president, assuming two terms could appoint four justices.

- Ginsburg – 82
- Kennedy – 79
- Breyer – 77