Forbes

With 'Friedrichs V. California Teachers Association,' The Supreme Court Can Fix A 40-Year-Old Mistake

Trevor Burrus

January 11, 2016

Does the First Amendment allow public-sector unions to forcibly take money from non-members in order to better advocate for union contracts that are more favorable to teachers? That's the question the Supreme Court will be hearing today in *Friedrichs v. California Teachers Association*, one of the blockbuster cases of the term. With so much riding on this case, many eyes will turn to Chief Justice John Roberts, who will be chastised and berated by the political left to stay true to his famous promise during his confirmation to only call "balls and strikes" and to not overly "politicize" the Court.

While sometimes a case requires more finesse than calling balls and strikes, in *Friedrichs* just playing umpire will be sufficient to rule against the teachers unions. One strike will be very easy to call: Can the government assume that you've given up your First Amendment rights unless you affirmatively object to having them violated? Of course not. If the First Amendment means anything then it must be a right that people presumptively have, and the government must bear the burden of asking us to waive the right.

Another question will be more difficult, yet will still be relatively easy to answer if the justices focus on the origins of *Abood v. Detroit Board of Education* (1977), the case they're being asked to overrule: Are public-sector unions' bargaining demands just another type of political speech, and does forcing people to fund those demands violate the First Amendment?

In *Abood*, the Court was asked to decide whether a teachers union could extract money from non-members in order to fund the union's political speech as well as its less ostensibly political activities like collective bargaining, grievance adjudication and contract administration. The Court ruled that, while the First Amendment protected non-members from being forced to fund a union's obvious political speech, non-members could be compelled to fund the other activities. Consequently, in non-right to work states, unions must give non-members an opportunity to opt-out of funding the unions' political activities, but they do not have refund the "non-political" fees, what's called the "agency fee." That distinction is being challenged today.

Many will claim that overruling that distinction will not only go against 40 years of precedent, but that it will be a "politicized" decision or a type of "judicial activism." But since *Abood* always rested on shaky foundations, the Court should ignore these attempts to politicize what should be a fairly easy case.

In *Abood*, the Court transplanted to the public-sector the same justifications for allowing compulsory dues in private-sector. As city and state budgets around the country groan under the weight of their obligations to public-sector workers, that mistake *Abood* becomes all the more obvious. Public-sector unions are categorically different than private-sector unions, and everything they do, whether at the bargaining table or in supporting candidates with ads, is an attempt to extract favorable concessions from the government. No one has said it better than Justice Lewis Powell in his concurrence in *Abood*, which is worth quoting in full:

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

The mistake in *Abood* goes even deeper than Powell's prescient comments. The private-sector union cases that the *Abood* Court relied on were really about whether Congress has jurisdiction under the Commerce Clause to force workers into mandatory collective bargaining. The Court held that jurisdiction was authorized but it did not sufficiently address whether such agreements violate the First Amendment.

This is a subtle distinction that deserves further exploration: To say that Congress has jurisdiction over something is not the same as saying a certain law or regulation does not violate the First Amendment or any other part of the Constitution. Congress has jurisdiction over military bases, but that doesn't mean that Congress could ban all political discussions on military bases. Similarly, saying that Congress has the ability to authorize collective bargaining doesn't answer whether, when it comes to public-sector unions rather than private-sector unions, such collective bargaining violates the First Amendment. This question was never fully addressed in*Abood*, and it is long past the time for the Court to address it.

Longstanding precedents like *Abood* can be justifiably overruled when important questions were never properly vetted by the earlier courts. It is now clear that public-sector unions are little more than another political group seeking special favors and influence in the government, and there is no reason why the government should be allowed to put a thumb on the scale to privilege public-sector workers.

We've been on autopilot in the post-*Abood* world, letting public-sector unions take money from non-members in order to better advance their interests. The long-term effects of such damaging

privileges can be currently seen in Europe, where the obligations to public-sector workers threaten to devour entire countries' budgets. Today the Court can fix the mistake in *Abood* and help ensure that the United States doesn't end up like Greece.

Trevor Burrus is a research fellow in the Cato Institute's Center for Constitutional Studies and managing editor of the Cato Supreme Court Review.