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Much hangs in the balance in teachers vs. union case

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Yogi Berra famously said, "It's hard to make predictions, especially about the future." The late great catcher wasn't a legal pundit, but his aphorism is absolutely true for those of us who follow the Supreme Court.

And it's doubly true for those who try to make predictions based on oral arguments in high-profile cases. While these hearings can reveal and reinforce justices' thinking – and cases are almost always won on the briefs, not in verbal combat – what you don't hear may be more important than what you do.

Still, last week's argument in *Friedrichs v. California Teachers Association*, in which an Orange County teacher and nine colleagues are challenging a state law that forces them to fund union activities even though they're not union members, went about as well as it could, maybe better. Those who support the First Amendment rights of public-sector workers to the freedoms of speech and association, and oppose the corrupt collusion of state governments and union bosses, are on the cusp of a historic victory.

This is the biggest case of the term. While cases involving abortion, affirmative action, voting rights, Obamacare's contraceptive mandate and immigration inflame the culture wars, it's this workers-rights lawsuit that will really have the most practical impact. Imagine how educational policy will change – how national politics will change – if public-sector unions are denied this guaranteed revenue stream and have to actually respond to the needs of the employees they purport to represent.

The conventional wisdom going into the *Friedrichs* argument was that Justice Antonin Scalia, of all people, will be the swing vote. Based on what he's previously said and written, we could expect that, in the private-sector context, he would reject the teachers' claims. His view is that if a private employer agrees that all employees have to join the union, that's its prerogative.

But Scalia gave no indication that this principle transfers to the public sector, where, of course, the employer is the government. "The problem is that everything that is collectively bargained with the government is within the political sphere, almost by definition," he explained. And that dynamic goes against the rule the Supreme Court established in *Abood v. Detroit Board of Education* (1977) that states can't force workers "to contribute to the support of an ideological cause [they] may oppose as a condition of holding a job."

In other words, while *Abood* allowed states to pass laws requiring nonunion members to pay "agency fees" to fund collective bargaining, the distinction between such "chargeable" activity and "nonchargeable" lobbying and electioneering – if it ever existed – has essentially evaporated.

Thus the biggest issue for the more conservative justices is the matter of compulsion: Why should nonmembers of a union be forced to pay for so-called collective bargaining when a) all issues that are collectively bargained by public-sector unions are matters of public policy (not simply wages and conditions of labor, as in the private sector); and b) those workers disagree with the supposed "benefits" that the unions want them to pay for (for example, tenure protections versus merit pay)?

"It's hard to visualize this in a pure employer-employee relationship, when the collective bargaining agreement itself has to be submitted for public review and public comment. That suggests that you're doing more than simply regulating the employment relationship," Chief Justice John Roberts told California's solicitor general, Edward Dumont.

Roberts, who was silent during the plaintiffs' argument – typically a sign of agreement – went on to press Dumont to give him examples of negotiated issues that aren't matters of public concern. When the state's lawyer suggested mileage reimbursement rates and safety policies, the chief justice was unconvinced: "It's all money that's going to be allocated to public education as opposed to public housing, welfare benefits; that's always a public policy issue."

Justice Anthony Kennedy, meanwhile, attacked the claim that without "agency fees," the nonmembers are free-riding on unions' good efforts. "The union basically is making these teachers *compelled* riders for issues on which they strongly disagree," posited Justice Kennedy, who is no "swing vote" when it comes to the First Amendment.

Justice Scalia put a finer point on it: "Is it OK to force somebody to contribute to a cause that he does believe in?" Under the doctrine of "unconstitutional conditions," supporting a cause, or even benefiting from it, is insufficient justification for being compelled to pay for it as a condition of exercising some other constitutional right.

With Justice Samuel Alito having written the two most-recent labor-related opinions, *Knox v. SEIU* (2012) and *Harris v. Quinn* (2014) – both of which cast doubt on *Abood*'s continuing validity – there seem to be five clear votes for the teachers. (Justice Clarence Thomas said nothing, as usual, but his vote is in no real doubt.)

And if that's the case, then the second question presented by *Friedrichs* – whether nonmembers can be forced to jump through hoops to "opt out" of those "chargeable" political fees, rather than setting the default at noncontribution – is a no-brainer.

While the progressive justices focused on the importance of *stare decisis*– respecting *Abood* and the reliance interests built up around it – that didn't appear to be a major concern for anyone else, regardless of the age of the ruling that's now under attack. The Supreme Court won't overrule precedent just because it thinks it's wrong, but it will if that old ruling was particularly

badly reasoned or has become unworkable. Just last week, the court overruled two cases from the 1980s regarding death-penalty-sentencing procedure.

In sum, to the extent we can predict anything based solely on oral argument – as I said, take that with a mine full of salt – the smart money is with those who support the teachers rather than those who side with the union and state governments. That would be a huge victory for workers' rights, the First Amendment and educational freedom.

We'll know by the end of June.

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