The Law, Politics, and Evidence of *Friedrichs v. California Teachers Association*

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Introduction

In March 2017, the U.S. Supreme Court decided *Friedrichs v. California Teachers Association* (*Friedrichs*), a case addressing the constitutionality of “agency fees” for non-union teachers in California. With a four-to-four split after Justice Scalia’s death, the Court’s decision left intact the decision of the Ninth Circuit Court of Appeals and upheld the constitutionality of agency fees by following the precedent set by *Abood v. Detroit Board of Education* (1977) (*Abood*). As *Friedrichs* was viewed as having implications for the constitutionality of agency fees for public sector unions generally, deeming agency fees unconstitutional would have had the likely effect of significantly weakening the power of public sector unions across the country to engage in collective bargaining. Twenty-one states currently have laws in place that permit the collection of agency fees, and *Friedrichs* could have resulted in the demise of these laws (Antonucci, 2016). The Supreme Court refused to rehear the case, but similar lawsuits have been filed since then (e.g. *Janus v. AFSCME*, 2017), with the hope that a nine-member Supreme Court with Justice Gorsuch will hear the case and issue a different decision.

Although *Friedrichs* and the recent litigation that has followed it focus on the constitutionality of agency fees, these cases are part of a broader effort to weaken the power of teachers unions in particular and public sector unions more generally. Since 2010, at least 12 states have weakened their public sector bargaining laws, often in concert with the passage of teacher evaluation laws (Malin, 2012). As the logic of such policies goes, teacher evaluation cannot fulfill its promise of increasing teacher effectiveness unless such evaluation can be used to remove poorly performing teachers from classrooms. Moreover, in cases like *Vergara v. California* (2016), plaintiffs similarly have used litigation to attack the constitutionality of state statutes that articulate and protect teachers’ rights to tenure and from dismissal without certain
processes. Indeed, such attempts to weaken teachers unions, along with opponents’ attempts to preserve them, are grounded in a patchwork of ideological commitments, partisan politics, and empirically oriented claims about the impact of teachers unions on states’ and districts’ abilities to provide students with strong educational opportunities.

*Friedrichs* accordingly involves a host of interrelated issues that sit at the nexus of judicial, democratic, and scientific decision-making. We unpack these issues and focus on the tensions between them, ultimately highlighting how knowledge of these tensions can help guide judges and reformers as similar cases are brought before the courts in the coming years. We first articulate an analytical framework focusing on the tensions between judicial, democratic, and scientific modes of decision-making in education reform cases. Second, we provide a brief overview of the history of teachers unions and the challenges they have faced in balancing their roles of serving as a professional organization, a political organization, and an organization that collectively bargains on behalf of teachers, with an emphasis on recent efforts to weaken teachers unions through legislation and litigation. Third, we examine *Friedrichs* in detail and focus on the legal and scientific arguments made by both parties in briefs and oral arguments, and arguments made in over fifty amicus briefs written by government entities, public school employees, think tanks, and legal foundations. Fourth, we examine research on teachers unions that directly bears upon the arguments made in the case and the broader political arguments that appear to have motivated it. Finally, we analyze the tensions in *Friedrichs* and articulate critical considerations for evaluating the efficacy and appropriateness of cases like it as a strategy for weakening teachers unions and improving teacher effectiveness.

**Analytical Framework**
Given that agency fees are permitted by 21 states, and the range of empirically oriented arguments made both in the case and political sphere about agency fees, *Friedrichs* reflects interrelated tensions between judicial, scientific, and democratic decision-making. The courts have become a key institution in struggles to reform education policy. Since at least the civil rights era, interest groups have used the courts to promote large-scale education reform, often for promoting educational equity (Rebell & Block, 1982). Reformers have particularly looked to the courts because their strictly structured decision-making processes and political insulation theoretically make them less susceptible to political bias (Komesar, 1994). Yet decision-making in courts is more complicated than it appears on the surface.

Welner (2012) explained that judicial-decision making exists within a “zone of judicial constraints” or an environment that bounds the sorts of decisions courts make, which is shaped by many forces outside of courts’ formal institutional structure (p. 11). For example, judges’ pre-existing political beliefs certainly influence their decision-making (Heise, 2002), as does public opinion (Welner 2012) and the scientific evidence at play (Author, 2009). Still, given the institutional characteristics of courts, their decisions are generally subject to political bias to a lesser extent than many other governmental institutions, such as legislatures or agencies (Komesar, 2004).

Despite the hope that scientific knowledge can guide judicial decision-making in ways that buffer against prevailing political forces, the courts have faced challenges dealing with complicated scientific issues. The courts have engaged with complex scientific evidence in several types of education cases, particularly since *Brown v. Board of Education* (1954). On one hand, Chesler, Sanders & Kalmuss (1988) found that expert witnesses can play useful role in educating judges and driving the development of legal theories, specifically in the desegregation
context. On the other hand, parties often present courts with competing scientific evidence that supports opposed outcomes (Blumenthal, 2002). Indeed, the adversarial nature of the judicial decision-making process incentivizes parties to present “junk science” specifically developed for ongoing or anticipated litigation (Edmond, 2007). Given such issues, courts have displayed difficulty understanding scientific evidence in education cases, and they have sometimes expressed more security about particular facts that the scientific evidence warrants (Welner & Kupermintz, 2004).

In addition to the institutional characteristics of courts, fundamental disjunctures between scientific and judicial modes of decision-making have influenced how the courts have engaged with scientific evidence. Jasanoff (1995) highlighted critical differences in the goals, methods, and epistemologies of law and science. Although oversimplifying for space, scientific claims are probabilistic and tentative while legal conclusions must appear certain; science is descriptive, while the law is prescriptive; the law aims at justice, while science aims at truth. Indeed, Chemerinsky (2003) argued that legal rules and principles may guide courts toward decisions that are justified from a legal perspective but do not reflect a sound understanding of empirical evidence about education policy.

Complicating the tensions between judicial and scientific decision-making in education, both judicial and scientific decision-making can also be in tension with democratic decision-making. As Lugg (2004) argued, science is generally not democratic, while education policy is, or at least purports to be. Though to be sure, interest groups can capture areas of education policy and insulate them from direct democratic influence (Moe, 2000). And scientific knowledge reflects continuous social interaction and construction among members of the scientific community (Jasanoff, 1995). However, science is generally conducted by experts that possess
legitimacy and knowledge not possessed by the general public, and science does not have direct links to formal democratic processes.

At the same time, legal researchers have long recognized the tension between judicial and democratic decision-making. In particular, such researchers have highlighted the *countermajoritarian difficulty*—the problem created by courts’ ability to overrule laws that reflect the will of the majority as manifested by elected officials (Bickel, 1986). On one hand, the Supreme Court stated in *Marbury v. Madison* (1803), “It is emphatically the province and duty of the judicial department to say that the law is” (p. 1977). On the other hand, this system can result in judges have the final word instead of voters. As a result, some courts have highlighted the virtue of “local control” while refusing to overturn state or local education policy decisions (Heise, 2004).

A deep analysis of *Friedrichs* accordingly reflects the interrelated tensions between judicial, scientific, and democratic decision-making. Reflecting the tensions raised by the countermajoritarian difficulty, the case involves the courts deciding the constitutionality of a type of law enacted and sometimes rolled back by state legislatures throughout the U.S. At the same time, agency fees arrangements are potentially anti-democratic because they involve restrictions on union member speech. Moreover, the case involves a number of competing scientific claims about the effects of agency fees and teachers unions more generally. We unpack these in *Friedrichs* to highlight how knowledge of how these decision-making systems are in tension and yet influence one another can help guide judges and reformers as similar cases are brought before the courts in the coming years.

**Legal, historical, and political contexts**
Although states began to enact collective bargaining law for public sector workers like teachers in the 1960s, the major teachers unions have existed for over a century. Over this history, there has long been a tension between teachers unions acting as traditional labor unions that bargain on behalf of teachers and as professional organizations. For example, while the AFT began explicitly as a labor union, early AFT platforms argued that administrators did not treat teachers like other professionals because of their lack of autonomy, susceptibility to arbitrary treatment, and low pay (Russo, 2016). Similarly, in its early years, the members of the NEA largely considered their group to be a professional organization of teachers and administrators, and they largely opposed collective bargaining (Kahlenberg, 2006).

However, aware of the success of private sector unions and frustrated by their working conditions, teachers unions began collective bargaining efforts in the early 1960s (Maitland, 2007). The laws historically underlying the activities of teachers unions have influenced how teachers unions have tended to behave. The primary ideas undergirding states’ public sector bargaining laws are rooted in those originally driving private sector bargaining and particularly those underlying the federal National Labor Relations Act (NLRA). Originally enacted as the Wagner Act and passed in 1935, the NLRA provided most private sector workers the right to bargain collectively through unions. The NLRA was founded on the idea that these unions represented workers in traditional industrial workplaces in which management controls decision making and workers carry out tasks (Malin & Kerchner, 2007). Notably, the Supreme Court interpreted the NLRA as providing workers only with the right to force bargaining over “wages, hours, and other terms and conditions of employment,” and not the core operations of business, which must be left to management (First National Maintenance Corporation v. NLRB, 1981, p. 667). Public sector collective bargaining laws were built largely on the same logic.
Grounded in these public sector laws, local NEA affiliates became the exclusive bargaining agent for teachers in most school districts across the country. NEA affiliates increased their number of CBAs from about 1,000 in 1969 to more than 5,000 in 1979 (Maitland, 2007). Moreover, state NEA chapters gained considerable power in state legislatures in the 1970s and 1980s, particularly because teachers were numerous, widely dispersed, highly educated, and politically motivated (Rosenthal, 1993). Indeed, differences between acting as a traditional labor union representing the rights of industrial workers, a professional organization, and a political organization continued to resurface throughout the history of teachers unions. And because they have endorsed only Democratic presidential candidates since Jimmy Carter, and approximately 95% of their donations have gone to Democratic candidates running at all levels of government, both the NEA and AFT have settled into the role of a reliable ally of a single party (Brill, 2010).

**Continuing ideological battles**

Since their authorization under state laws, the legitimacy of public sector unions generally (and teachers unions specifically) has been the subject of high-profile political battles. While these battles have visibly played out along the familiar partisan divide between Democrats and Republicans, specific ideological stances about public sector unions also underlie those debates.

Those who decry public sector unions argue that they are both anti-democratic and lead to inefficiencies in governmental service provision (Malin, 2009). The charges of being anti-democratic stem mainly from the fact that the managers in public sector jobs are either elected officials or directly responsible to them. Union leaders are accountable only to their members. When negotiating agreements with management, then, the unions are fundamentally arguing for their cause against what would presumably be best for the larger group of citizens who have
chosen leaders to run a governmental agency (Brooks, 2011). When considering collective bargaining cases involving teachers unions, some courts have sharply articulated the conceptual difficulty of separating labor issues from political issues. For example the Court of Appeals of Maryland stated, “Every managerial decision in some way relates to salaries, wages, hours, and other working conditions and is therefore arguably negotiable … [but] virtually every such decision also involves educational policy considerations and is therefore arguably nonnegotiable.” (Montgomery County Educational Association v. Board of Education, 1987, p. 986). Moreover, unions may not be representing the myriad political views and positions within their own membership—the central legal claim of the plaintiffs in Friedrichs. Finally, public sector union critics often hold that government employees are inefficient (Malin, 2009). Such perspectives are particularly prominent when Republican politicians and conservatively oriented advocacy groups critique teachers unions (Sawchuck, 2012)

On the opposing side, those who support public sector unions argue that collective bargaining increases wages and reinforces the due process protections that government employees already enjoy, thereby promoting more satisfaction and more efficient work (Kerchner & Koppich, 1993). Proponents of teachers unions in particular believe they serve as a key lever to protecting democracy and promoting social justice for students (Weiner, 2012). As such, state level NEA and AFT affiliates have lobbied in state legislatures to protect their members from neoliberal educational reforms even in Southern states where collective bargaining by teachers is widely banned (Cooper & Sureau, 2008).

**Recent weakening of teachers unions bargaining rights**

Given the ideological battles over teachers unions and public sector unions more broadly, it is hardly surprising that observers have long noted their inherently political nature (Freeman,
1984). Such battles intensified in the 1990s, as teachers unions became the object of a significant backlash in a handful of states (Malin, 2009). In the wake of the GOP Tea Party movement, a wave of similar state legislation was enacted in the late 2000s and early 2010s, which Malin (2012, p. 557) labeled a “tsunami” that hit public sector collective bargaining. Since 2010, at least twelve states have weakened collective bargaining rights for teachers over a range of different issues, including wages, benefits, lengthening the time it takes to achieve tenure, and procedures for teacher discipline and firing. Such legislation was sometimes enacted in conjunction with other legislation requiring the development of teacher evaluation systems. Therefore, in addition to weakening teachers unions’ ability to bargain over traditional industrial issues, such legislation also weakened their ability to bargain over issues that fall more in the “professional” domain.

Such attacks on teachers unions have carried over to the legal arena as well. For example, a children’s advocacy group sued California and argued that five California laws protecting teachers were unconstitutional (Vergara v. California, 2016). These laws generally governed teacher tenure and dismissal, and required that the least senior employees are the first terminated if there is a reduction in force. As the plaintiffs argued, these laws resulted in grossly ineffective teachers obtaining and sustaining permanent employment and the disproportionate representation of these teachers in low income/high minority schools. Given that the maintenance of such protections is one of teachers unions’ primary goals, Smarick (2014) argued that Vergara represents an “existential threat” to teachers unions. While the trial court found for the plaintiffs, the California Supreme Court ultimately dismissed the case in a 4-3 split decision. However, similar litigation was filed in New York, and some observers expect similar litigation to emerge in other states and cities (Aronson, 2015). In short, teachers unions have faced a variety of
attacks in the past couple decades under the idea that they are overly political, anti-democratic, and promote ineffective teaching. Given its appearance in front of the Supreme Court, *Friedrichs* is arguably the most high-profile and important of these cases yet.

**Friedrichs v. California Teachers Association**

In *Friedrichs v. California Teachers Association* (2016), several teachers sued their local unions, the California Teachers Association (CTA), and the NEA, arguing that the California law authorizing the collection of agency fees by teachers’ unions violated the U.S. Constitution. The teachers were joined by the Christian Educators Association International, a non-profit organization with a mission that includes promoting the rights of Christians in public schools. Because the case had implications for the ability of labor unions to collect agency fees across the country, the case was highly publicized, receiving extensive national coverage in newspapers and other media outlets (e.g. Liptak, 2016; McArdle, 2016).

*Friedrichs* centered on key provisions in California state law governing public sector unions. Approximately half of U.S. states, including California, maintain laws that permit “agency shop” arrangements (Hemel & Louk, 2015). Under California law, all workers in a state or local unit are required to pay an “agency fee,” or their “fair share” of their local union’s costs that are “germane” to the union’s collective bargaining activities (California Government Code, sec. 3546(a)). These fees include those that are devoted to bargaining, grievance procedures, contract administration, and other related activities. While workers may decide not to join a local union, workers must pay these fees regardless of whether they are members or not. Under the law, unions have a duty to fairly represent all unit members, regardless of whether they have joined the union (California Government Code, Sec. 3544.9). Under the logic of these “agency shop arrangements,” the requirement for nonunion members to pay agency fees prevents these
members from “free riding” on the collective bargaining work of the union without paying for it. However, non-members may object to funding union activities that are “non-chargeable” and be exempt from making such contributions. Under state regulations, unions must provide non-members with a notice that contains the calculation of chargeable and non-chargeable costs (8 C.C.R., sec. 32992(b)(1)(JA64-65)). Non-chargeable expenses generally include those that are not related to unions’ worker representation activities, such as those involving political activities.

After Friedrichs was filed, the case made its way with uncharacteristic speed to the Supreme Court. As discussed below, existing precedent directly foreclosed the plaintiffs’ claims, and one of their central goals was to have earlier cases overturned by the Supreme Court. In 2013, a federal district court in California issued a very short and unpublished opinion in favor of the CTA. The opinion focused almost entirely on the existing legal structure for agency fees in California and procedural issues. As the district court noted, the plaintiffs argued that Supreme Court precedent clearly applied, so the case should be dismissed (Friedrichs v. CTA, 2013). In 2014, the Ninth Circuit Court of Appeals affirmed the district court’s decision, noting that the legal questions presented in the appeal “are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent” (Friedrichs v. CTA, 2014). The plaintiffs immediately appealed to the Supreme Court. While the parties had opportunities to submit briefs and engage in oral arguments before a nine-member court, Justice Scalia died before the Court issued its opinion. The Court’s decision was split 4-4, and it ruled in a per curiam opinion that “the judgment [of the Ninth Circuit] is affirmed by an equally divided court” (Friedrichs v. CTA, 2016). As such, the split decision in Freidrichs only applied to the Ninth Circuit, and the Court’s decision left the door open for future litigation.

**Legal arguments in Friedrichs**
Despite the lack of a fully developed Supreme Court opinion, the parties’ briefs, *amicus curiae* briefs, and oral arguments reveal the legal contours of the case. The case centered around the continuing viability of *Abood v. Detroit Board of Education* (1977), a case decided by the Supreme Court decades earlier. In *Abood*, a unanimous Supreme Court upheld the constitutionality of allowing unions to charge employees agency fees that represent a fair share of the union’s bargaining costs. The Court specifically found that employees’ First Amendment rights to freedom of speech were not violated by being forced to pay fees, provided that the fees do not force non-member employees to support activities unrelated to collective bargaining.

The plaintiffs argued that *Abood* should be overturned. In their brief to the Supreme Court, the plaintiffs argued that California administers “the largest regime of compelled speech in the Nation” because it requires public school teachers to make hundreds of millions of dollars of payments to the CTA, NEA, and their local affiliates (Rosman et al., 2015, p. 1). The plaintiffs further equated the chargeable portion of agency fees with political speech. As the plaintiffs stated, “In this era of broken municipal budgets and a national crisis in public education, it is difficult to imagine more politically charged issues than how much money local governments should devote to public employees, or what policies public schools should adopt to best educate children” (Rosman et al., 2015, p. 10). Several amicus briefs supported this position. For example, one brief argued that “many teachers disagree with the positions and agenda of their exclusive bargaining representatives” (The Center on National Labor Policy, 2016, p. 3). The evidence in support of this included an article about the Denver Classroom Teachers Association opposing a plan to increase teacher pay using incentives for taking on more difficult assignments in lieu of annual step arrangements. During oral arguments, Justice Scalia also agreed with this position:
The problem is that everything that is collectively bargained with the government is within the political sphere … Should the government pay higher wages or lesser wages? Should it promote teachers on the basis of seniority or on the basis of—all those questions are necessarily political questions (Oral Argument, 2016, p. 44).

Citing issues that are allowed to be collectively bargained in California, like teacher tenure and classroom size, Justice Kennedy also agreed: “The union basically is making these teachers compelled riders for issues on which they strongly disagree” (Oral Argument, 2016, p. 43).

Grounded in this logic, the plaintiffs argued that governmental interests cannot justify the compelled speech represented by chargeable agency fees. The plaintiffs cited a governmental interest articulated in *Abood*—that school districts have an interest in maintaining labor peace and therefore avoiding the confusion and conflict that could emerge from negotiating with rival teachers unions with different views. However, the plaintiffs continued that there was no evidence that agency fees are in fact necessary for unions to survive, arguing that “public-sector unions are flourishing in the federal government [which prohibits agency fees] and the many states that prohibit agency fees” (Rosman et al., 2015, p. 11). As the plaintiffs further argued, agency fees could only be justifiable if they are necessary to prevent unions from going bankrupt and therefore opening the door to the rise of several different unions in the same district.

Arguments in several *amicus* briefs also supported this position. For example, the Mackinac Center for Public Policy (2016) *amicus* brief cited data from the Bureau of Labor Statistics’ Current Population Survey to offer Michigan and Wisconsin as examples of states in which unions thrive without agency fees, since their union membership levels continued to be strong, although slightly lower, after right to work legislation was adopted.
The defendants attempted to respond directly to the plaintiffs’ arguments about the need for agency fees to maintain labor peace. They argued that the line drawn in *Abood* between chargeable and non-chargeable expenses was legally legitimate and useful. According to the defendants, this line “reflects a careful balancing of public employees’ legitimate First Amendment interests against the State’s prerogatives as an employer, taking account of the distinctive and critical role that collective-bargaining activities play in enabling States to maintain stability in their workforces” (Collins et al., 2015, p. 15). The defendants further emphasized the large expenditures needed to pay personnel like lawyers, expert negotiators, economists, and administrative personnel, as well as the “free-rider” problem.

**Empirically oriented claims in *Friedrichs***

It is worth noting that some of the *amicus* briefs went beyond the legal aspects of the case to make empirically oriented claims about the overall financial impact of public-sector bargaining. The State of Michigan (2016) brief claimed that “the impact of collective bargaining on matters of public concern … has enormous consequences for, among other things, the fiscal solvency of state and local governments. These consequences demonstrate why issues at the heart of public-sector bargaining are matters of great public concern, and are not merely employment issues between employee and employer” (p. 9). However, a key argument in *amicus* briefs for the defendants was that cooperative relationships between school districts and teachers unions enhance the delivery of public services. The brief for 21 States and the District of Columbia noted that many states rely on a collective bargaining model built on agency fees “to ensure the effective and efficient provision of services to the public” (Brief for the States, 2016, p. 13). Examples of the kind of collaboration strong stable unions can provide included recommendations for cost savings during times of budget constraints, development of training
programs to promote better work practices, and a shift from contracting out of services to using existing personnel to perform the work (Cities, Counties and Elected Officials, 2016).

Moreover, some briefs made empirically oriented claims about the general impact of collective bargaining on the quality and equality of the education students receive. For example, in line with the *Vergara* plaintiffs, *amicus* former California Governor Pete Wilson (R) (2016) noted that policies unions promote a system of employment for teachers that rewards seniority over job performance through extensive procedural protections prior to suspension or dismissal, reduction in force based on teacher seniority, and single salary schedules. These, in addition to transfer and assignment policies, have a negative impact on minority and low-income students because “teachers with seniority tend to invoke preferential treatment by transferring to or seeking assignments at schools with higher percentages of Caucasian and/or affluent students” (p. 12).

However, *amicus* briefs for the defendants made the empirical claim that supporting teachers unions through agency fees also promotes close working relationships among staff and a better education for all students. For example, the brief by School Districts (2016) argued that agency fee arrangements reduce the risk of staff discord and provide a means of resolving workplace conflict. This brief also argued that “partnerships with stable unions are powerful vehicles for innovation” (p. 4). By setting conditions for innovation through “long-term planning, non-adversarial mindsets, experimentation, and effective communication,” (p. 17-18), several districts have adopted successful initiatives, such as Peer Assistance and Review (PAR) Programs that promote quality instruction for students through mentoring of struggling teachers.

As noted above, the Supreme Court ultimately left intact the decision of the Ninth Circuit Court of Appeals in a 4-4 split decision after the death of Justice Scalia. However, as also noted
above, similar cases have already been filed with the hope that a different decision will be handed down by a nine-member Court.

Research bearing on claims in Friedrichs

Given that key arguments made in Friedrichs rest on claims that are empirically oriented and ostensibly scientific, key insights from empirical research can inform our understanding of the case and its implications. Despite the often highly politicized debates about teachers unions and the claims made by the parties and amici curiae, there is very little empirical research on the issues raised in the case. As put by Hannaway and Rotherham (2006), “the lack of empirical evidence on the effects of collective bargaining by teachers on educational practice, finance, and operations is striking” (p. 260). Still, some research directly addresses the parties’ claims.

While some studies have found that union members perceive their unions as too political or extreme, other research suggests that members want their unions to be more politically active, to fight for policy changes, or to support their professional lives. Murphy (1990) found that inactive members perceive union activity as too politically radical. Farkas et al. (2003) found that union members perceive bread-and-butter functions—like bargaining about salaries, working conditions, and benefits—as valuable, while positions on national political issues seemed out of touch to many members. However, Popiel (2015) found that inactive union members wanted their unions to be more, not less, political. Two-thirds of the inactive members in her study reported that they were inactive because they did not feel that their unions were politically powerful enough to fight for needed changes in schools. Yet unions can and do participate in lobbying and other types of political activity related specifically to the education system (e.g., school funding, teacher evaluation reform) and broader progressive social issues, and it is unclear from the research what political/policy issues members want their unions to prioritize.
Moreover, it is difficult to tease out exactly how most teachers unions spend their money. Reporting on 990 tax returns reveals only high-level expenses such as salaries or executive compensation. However, we are able to glean some information about how unions support their activity and what, generally, they do with their revenue. For instance, in 2014, the California Teachers Association raised $171,393,317 from membership dues/fees, according to its publicly available 990 tax return. This accounted for about 92% of the CTA’s total revenue that year. However, the union reported that just $3,967,299 was used to support political organizations and that all of those funds were from political contributions specifically received for those purposes (Pro Publica, 2014). These data do not reveal how the CTA may be using their political influence in other ways, but they do raise questions about the plaintiffs’ arguments regarding the use of agency fees to support political speech as conceived outside of bread-and-butter bargaining issues.

Several empirical cases are also instructive in considering the legitimacy of the parties’ arguments regarding the necessity of agency fees to maintain labor peace. As noted above, Wisconsin enacted a law in 2010 that severely limited public sector collective bargaining in the state and required school district unions to hold annual re-certification elections. A subsequent right-to-work law prohibited Wisconsin unions from requiring fees from workers. Analyzing the effects of these laws, Novak (2014) found that, in 2014, 100 fewer school district unions sought recertification compared to the previous year, and of the 305 that sought recertification, 25 voted to decertify. In analyzing the effects on union membership, the Milwaukee Journal Sentinel found that “nationally, no state has lost more of its labor union identity than Wisconsin since 2011. […] Union members made up 14.2% of workers before Act 10, but just 8.3% in 2015” (Umhoefer, 2016). Michigan passed a similar right-to-work law in 2013, preventing unions from
requiring that members pay agency fees. Like Wisconsin, Michigan saw a decline in paying union members of just over one percent since 2013, according to data from the Bureau of Labor Statistics. The federal government also provides an instructive case because federal government employee unions are not allowed to charge agency fees. Union membership from 2003 shows that membership rates are significantly lower in federal unions, where 30.9% of unionized workers are members, compared to local unions, where the rate is 42.6% (Mayer, 2004). So, while it is not clear whether eliminating agency fees will decrease “labor peace,” it does appear that prohibiting agency fees is likely to have a negative impact on union membership.

While the evidence on the claims about the financial effects of teachers unions is also limited, there are some indications that they decrease district financial efficiency. It has generally been found that collective bargaining increases the costs of operation, primarily in terms of higher teacher compensation and smaller class sizes (Fuller, Mitchell, & Hartman, 2000; Goldhaber, 2006; Hoxby, 1996). Collective bargaining agreements often place additional constraints on administrators in terms of human capital management (e.g., teacher evaluation, teacher placement and transfer) (Anzia & Moe, 2014; Strunk & Grissom, 2010). Collective bargaining also tends to result in a back-loaded salary structure for teachers, rewarding teachers for time spent in a district (Grissom & Strunk, 2012).

At the same time, there is no consistent evidence that these increased costs or constraints are associated with teacher productivity or student outcomes (Goldhaber, 2006; Strunk, 2011). To be sure, there is likely some promise in “professional unionism” to strengthen student learning opportunities. This mode of union-district relations focuses on “joint custody” between the union and district of any reform; collegial working relations, collaboration, and ongoing-problem solving rather than periodic negotiations; and a shared concern for public interest in
which the union is partially responsible for the long-term success of the district and is not solely focused on bread-and-butter issues for members (Kerchner & Koppick, 1993). But this mode of bargaining is far from the norm (Moe, 2011). The legal structures guiding local collective bargaining vary from state to state, and union power (e.g. influence on board elections) and labor relations also vary across states and localities, ultimately influencing collective bargaining agreements and the day-to-day operations of school districts in different ways. Therefore, drawing broad generalizations regarding the impact of collective bargaining on specific outcomes is empirically challenging and contingent on developing a deep understanding of local climate and culture which influences and is influenced by collective bargaining.

Analysis

As a detailed examination of Friedrichs illustrates, the case reflects tensions between judicial, scientific, and democratic modes of decision-making. Friedrichs most obviously reflects the countermajoritarian difficulty. As discussed above, 21 states have enacted laws that permit agency fees, and Friedrichs could have resulted in these laws being deemed unconstitutional. To be sure, the 2010s experienced a wave of anti-public sector bargaining efforts, including legislative modifications to weaken laws governing collective bargaining in several states and particularly the prohibition of agency fees. And specific to education, Friedrichs appears at least partially motivated by the political movement to weaken long-standing legislative teacher protections like tenure, which were also recently attacked in the wave of state legislation and Vergara. However, if cases like Friedrichs are successful, they would accomplish this same goal through the strategy of litigation instead of legislation, which would circumvent the more traditional channels of the democratic process.
Given the particular issues at play in *Friedrichs*, the countermajoritarian difficulty appears considerably more complicated in this case than in a “standard” case where a court has been asked to overrule a federal or state law. The fundamental structure of *Friedrichs* reflects the long-standing political argument that public-sector unions are anti-democratic. As the plaintiffs argued, a judicial decision that agency fees are unconstitutional would in fact enhance democratic decision-making—the plaintiffs’ central legal argument attacked the notion that citizens could be forced to pay agency fees to support political speech with which they might not agree. Indeed, the conceptual difficulty of separating even bread-and-butter bargaining issues from political issues was highlighted not only by the plaintiffs, *amici curiae*, and some Supreme Court justices, but also courts considering this issue in other cases involving the negotiability of particular school district decisions. At the same time, some have argued that strong teachers unions, supported by agency shop agreements, are a key lever for protecting democracy and promoting social justice for students. As such, *Friedrichs*’ implications for democratic decision-making hinge on how one construes the democratic process—how one prioritizes issues of free speech, ability to determine what is legal, and the role of teachers unions in supporting democratic education or students is central for determining the appropriateness and validity of the various arguments regarding the relationship between agency fees and democracy in the case.

Moreover, *Friedrichs* strongly reflects the tension between judicial and scientific decision-making. In line with research on the use of science in education cases involving large-scale reform, many of the primary claims in *Friedrichs* rested on limited and mixed evidence at best. For example, in contrast to the plaintiffs’ (and Justice Scalia’s) arguments that all bargaining issues are political, some research has found that union members perceive bargaining over bread-and-butter issues as valuable, while bargaining over political issues is out of touch.
and union activity is too extreme on this front. On the other hand, other research has found that some union members do not feel their unions are politically powerful enough to fight for needed changes, much as state level NEA and AFT affiliates have done in the legislative arena. Empirically oriented claims in Friedrichs also reflect opposed political arguments about the conception of teachers unions as professional and labor organizations—while opponents of teachers unions argue that they detract from the efficiency and effectiveness of public education, proponents argue that they are critical for ensuring that teachers’ professional judgment is respected. Indeed, despite the state of the evidentiary base, amicus briefs directly raised such arguments.

Similarly, while the evidence appears to support the defendants’ arguments that eliminating agency fees would likely lead to lower teacher union membership rates, it is not clear whether this lower membership rate would weaken “labor peace” to any significant degree—we simply do not know whether lower membership would necessarily give way to a system of “confusion and conflict” that would result from single districts dealing with different teachers unions. And while teachers unions might result in greater financial costs to districts, there is little concrete indication that weakening unions would strengthen teacher effectiveness and student outcomes. Moreover, there is little indication that maintaining the current agency shop system in states like California would promote stronger student outcomes than there otherwise would be. Despite this shaky scientific foundation for many of the claims in the case, parties on both sides of the case expressed certainty about the effects of a legal decision to deem agency fees unconstitutional. And at least during oral arguments, members of the Supreme Court did not appear to show any recognition that the scientific foundations of the case are shakier than they were made out to be. Accordingly, despite the comparative political insulation of courts, this
certainty appears driven much more by political inclination than a hard look at the existing evidentiary base.

Given the legal rules and principles at play in Friedrichs, it should theoretically take extremely strong arguments for a court to deem agency fees unconstitutional. The Abood Court established the constitutionality of agency fees in 1977. Under the principle of stare decisis precedent should only be overturned if it is completely untenable. Guided by stare decisis, the trial court dismissed the case with little analysis, and the Ninth Circuit Court of Appeals affirmed. Defendants argued that stare decisis “applies with special force when literally tens of thousands of contracts governing millions of public employees have been entered into in reliance on this Court’s precedent” (Collins et al. 2015, p. 2). Justice Kagan appeared to agree, particularly asking the plaintiffs during oral arguments, “Those contracts affect … maybe as high as 10 million employees. So what special justification are you offering here?” (Oral Argument, 2016, p. 18). On the other hand, given the ostensible positions of the Justices during oral arguments, it appears likely that the Supreme Court would have overturned Abood in a 5-4 decision if Justice Scalia had survived (Russo, 2016). While it is not clear how newly appointed Justice Gorsuch would decide in a similar case, his presence on the court is generally seen as solidifying the conservative presence on the Court (Higgins, 2017). If the Supreme Court overturns Abood in the near future, it would likely do so in the face of shaky scientific evidence and complicated implications for democratic decision-making that ultimately depend on the eye of the beholder. As such, the case has the potential to exacerbate the already existing tensions at the heart of judicial decision-making in education reform. Both reformers and courts would do well to keep these tensions in mind to understand the full scope of the implications for any sweeping decision that ultimately comes down.
Conclusion

*Friedrichs* is one of the latest and most high-profile attempts to weaken teachers unions and public sector unions more generally. While the Supreme Court’s split decision in *Friedrichs* left intact existing agency shop arrangements, a future decision from a nine-member Court could deem them unconstitutional. Although the existing evidence does not clearly reveal what would happen as a result, such a decision would implicitly involve critical determinations of where the Court stands on issues that exist at the nexus of judicial, scientific, and democratic decision-making. On a concrete level, such a decision would immediately have implications for issues ranging from union membership to district financial efficiency, and potentially teacher effectiveness and student learning opportunities and outcomes, despite a shaky evidentiary base for relationship between these issues. More broadly, teachers unions would stand to lose a substantial amount of political power, likely weakening their ability to fight for particular policies affecting the teacher workforce, such as those governing teacher tenure. Moreover, teachers unions would be a weaker player within educational policy debates, which could mean less advocacy for social justice and educational equity. At the same time, individual teachers would be given more choice about how their money is spent, particularly for political purposes.

Courts and reformers should be particularly sensitive to the tension between judicial, scientific, and democratic decision-making in cases like *Friedrichs*. Given the potentially sweeping impact of judicial decisions in this area, the limited and sometimes conflicting state of scientific evidence, and the complicated implications of such cases for democracy, courts should follow Justice Kagan’s reasoning by following the principle of *stare decisis*. This type of decision would let *Abood* stand as good law, and the fight for the future of agency fees would continue through the political process in the legislative arena of the states. While the political
process appears to be trending toward a rollback of agency shop arrangements for teachers unions, it would at least avoid the tensions that emerge in the particular institutional setting of the courts.

However, coming to an understanding of these tensions and, in turn, the tenuous reasons for reversing precedent that is decades old, would seem to require significant changes to the ways that relevant stakeholders and judges frame the issues in such cases. Parties, *amici curiae*, and particularly judges should be much more careful to focus on a rigorous analysis of relevant law and evidence rather than the high-profile politics driving the issues. Given courts’ lack of capacities to deal with complex scientific evidence, cases like *Friedrichs* arguably point to the need for even more fundamental changes to courts in the long-term with regard to how they engage in complicated social and particularly educational policy cases. While courts can be very useful to sort through highly charged issues in such cases, their limitations in dealing with complex scientific evidence limit their efficacy and effectiveness. As *Friedrichs* reflects, addressing this limitation, potentially through training to better sort through such evidence and dealing with their own political biases, is critical if the courts are to play a useful role in such cases moving forward.

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