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# Unions and Democracy: When Do Nonmembers Have Voting Rights?

## I. INTRODUCTION

UNIONS WERE CREATED – and their operations covered by federal and state law – for the purpose of protecting workers.<sup>1</sup> Yet union activities have long been the subject of observations that they operate in decidedly undemocratic ways. Unions, for example, are not normally required to let their members participate in negotiations or to ratify contracts.<sup>2</sup> And those represented by (but are not members of) unions have even fewer rights.<sup>3</sup> In many states and under federal law, employees can be compelled to contribute to the cost of union representation even while not joining the union.<sup>4</sup> Known as “agency fee payers,” the rationale is that those who choose not to join a union should be required to pay for the services received, i.e. union representation in bargaining and other employment negotiations.<sup>5</sup> While federal and state law exists to protect these agency fee payers from discrimination, there is little (and, what there is of it, inconsistent) enforcement of legislative guarantees that the union will treat such employees with fairness and impartiality. But with few democratic processes in place to protect union members, there are fewer still to

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1. See, e.g., Erin Murdock, *The Result of Disparate Treatment of Third-Country Alien Employees in Multi-national Enterprises: A Class Distinction*, 43 TEX. INT'L L.J. 325, 336 (2008).

2. Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 805 (1984).

3. See Note, *The Agency Shop, Federal Law, and the Right-to-Work States*, 71 YALE L.J. 330, 338–39 (1961).

4. See Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 428–30 (2012).

5. See Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855 (1989).

protect agency fee payers, who have no right to vote on union officials, contract ratification, or strike authorization.<sup>6</sup>

The article explores the somewhat inconsistent judicial treatment of the question of whether agency fee payers are entitled to vote on matters related to the terms and conditions of employment. The article then examines a recent California decision holding that a union did not unlawfully discriminate against agency fee payers by refusing to let them vote on a proposed furlough unless they joined the union. It then explores the topic of “elite” union bargaining that forecloses democratic processes.

## II. RIGHTS OF FAIR REPRESENTATION FOR AGENCY FEE EMPLOYEES

### A. AGENCY FEE PAYERS

In twenty-four states, union membership for covered employees is purely voluntary.<sup>7</sup> Such “right to work” states legislate (by constitutional amendments, statutes or both) that workers cannot be compelled to join unions.<sup>8</sup> In the remaining twenty-six states and in some employment governed by federal labor law, however, employees were traditionally required to join a union as part of a “closed shop.”<sup>9</sup> Such workers could be compelled, as a condition of employment, to join a union.<sup>10</sup> Employees paid union dues that covered not only the cost of employment representa-

6. Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 503 (2000).

7. See Marisa Benson & Tiffany Nichols, *Labor Organizations and Labor Relations: Amend Article 2 of Chapter 6 of Title 34 of the Official Code of Georgia Annotated, Relating to Membership in Labor Organizations, so as to Provide for Definitions; Provide for a Statement of Rights Under Federal Law; Provide for Certain Contract and Agreement Employment Rights; Provide for Policy Concerning Passage of Laws, Ordinances, or Contracts that Waive or Restrict Federal Labor Laws; Provide for Changes to Agreements and Contracts Permitting Labor Organizations to Deduct Fees from Employees' Earnings; Provide for Related Matters; Provide for Severability; Repeal Conflicting Laws; And for Other Purposes*, 30 GA. ST. U. L. REV. 191, 193 (2013).

8. ALA. CODE § 11-43-143 (1967), §§ 25-7-1, -2, -3, -6 (1943), 25-7-9 (1886), 25-7-12, -13, -16 (1943), 25-7-30 to -35 (1953); ARIZ. CONST. art. XXV (1982); ARK. CONST. amend. 34 (1944); FLA. CONST. art. 1, § 6 (1968); GA. CODE ANN. §§ 34-6-6, -7, -20 to -28 (1947); IDAHO CODE §§ 44-2001 to -2010 (1985), -2011 (1995), -2012 to -2013 (2011); IND. CODE § 1.1C 22-6-6 (2012); IOWA CODE ANN. §§ 20.8, 20.10 (1974) and 731.1 to .8 (1977); KAN. CONST. art. 15, § 12; LA. REV. STAT. Ann. § 23:881 to :889 (1956); MICH. COMP. LAWS ANN. §§ 423.1, .2, .8, .14, .17, .22 (2012); MISS. CONST. art. 7 § 198-A (1960); NEB. CONST. art. XV, §§ 13-15 (1946); NEV. REV. STAT. §§ 613.130 (1967), -.230, -.250 to -.300 (1952), 288.140 (1969); N.C. GEN. STAT. §§ 95-78 to -84 (1947), -98, -100 (1959); N.D. CENT. CODE § 15.1-16-07 (2001); §§ 34.01-14 (1948), -01-14.1 (1987), -08-02 (1935), -09-01 (1947), -11.1-01, -11.1-03, -11.1-05, -11.1-08 (1985), -12-02, -12-03 (1961); OKLA. CONST. art. XXIII (2001); S.C. CODE ANN. §§ 41-7-10 to -90 (1954); S.D. CONST. art. VI, § 2 (1946); TENN. CODE ANN. §§ 50-1-201 to -204 (1947), §§ 49-5-602, -603, -609 (2011); TEX. LAB. CODE ANN. §§ 101.003, .004, .052, .053, .102, .111, .121 to .124 (1993); UTAH CODE ANN. §§ 34-34-1 to -17 (1955); VA. CODE ANN. §§ 40.1-58 (1970), -58.1 (1973), -59 to -68 (1970), -69 (1973); WYO. STAT. ANN. §§ 27-7-108 to -115 (1963).

9. Rex H. Reed, *Revolution Ahead: Communications Workers v. Beck*, 13 Harv. J.L. & Pub. Pol'y 635, 635 n.5 (1990); see also Clyde W. Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States*, 112 U. PA. L. REV. 647, 669 (1964) (discussing “closed shop” agreements as examples of “union security” clauses).

10. Summers, *supra* note 9, at 669.

tion but also the cost of the union's political activities— activities with which the employee may or may not have agreed.<sup>11</sup> The result was particularly problematic for public sector employees. If public employees were required to pay, indirectly, for campaign contributions and political initiatives as a condition of employment, how could corruption be avoided?

The issue was decided in *Abood v. Detroit Bd. of Educ.* when the U.S. Supreme Court held that while the government had a legitimate interest in requiring government workers to be represented by a union, but held that agency fee payers could not be compelled to contribute to any union activities not related to employment representation.<sup>12</sup> The court noted that “contributing to an organization for the purpose of spreading a political message is protected by the First Amendment” and that “a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment (citations omitted).”<sup>13</sup> When public employees were compelled to make political contributions through a union, the court held, their constitutional rights had been infringed, for “at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State (citations omitted).”<sup>14</sup>

Thus, the *Abood* court observed, nonunion employees have a constitutional right to “prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.”<sup>15</sup> Further, the court noted that this conclusion was based on the U.S. Constitution’s guarantee of freedom of association as well as freedom of expression.<sup>16</sup> “These principles prohibit a State from compelling any individual to affirm his belief in God, or to associate with a political party, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.”<sup>17</sup> Therefore, under *Abood*, a union may charge agency fee payers only for those costs associated with employment representation. Subsequently, the court later held in *Chicago Teachers Union, Local No. 1 v. Hudson*, that unions must segregate costs associated with employment representation

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11. See Reed, *supra* note 9, at 635–36 (1990) (discussing the impact of the Supreme Court’s decision in *Communications Workers v. Beck* on “coerced, ideological, and other non-bargaining spending” by unions).

12. 431 U.S. 209, 234 (1977).

13. *Id.*

14. *Id.* at 234–35.

15. *Id.*

16. *Id.* at 233.

17. *Id.* at 235.

from funds used for other union activities including political advocacy and must notify nonmembers of the ability to “opt out” of union membership.<sup>18</sup>

Critics have noted that while agency fees were designed to prevent “free riders,” this rested on the assumption that employees had a unified goal that was being furthered by union representation.<sup>19</sup> The more a union engages in political activities and subsidies, of course, the less likely that is to be true. Putting that conundrum aside, the next problem was to ensure that agency fee payers were represented fairly and impartially while, at the same time, honoring a union’s right to have its members govern the organization free from unwarranted governmental interference.

What followed were various federal and state regulations to require some employees to pay “agency fees,” i.e. those costs associated with employment representation with the requirement that unions treat such employees fairly and without discrimination. These may be summarized as follows:

**Private sector employees:** Most private sector employees are covered by the provisions of the National Labor Relations Act (NLRA). In *Communication Workers v. Beck*<sup>20</sup> the U.S. Supreme Court ruled that such employees could not be compelled to join unions but could be required to pay agency fees.<sup>21</sup> The *Hudson* holding (i.e. that unions must notify employees of their right not to join the union and to assess only agency fees) was extended to private sector employees in *Abrams v. Communications Workers*.<sup>22</sup> Private sector employees in right-to-work states may (depending on the legislation) be permitted to refuse to join a union or to pay any fees.<sup>23</sup>

**Federal employees:** Most federal employees, including postal workers but excluding airline and railroad employees, need not join a union or pay agency fees.<sup>24</sup> Federal employees may be excluded from self-representation but receive all employment-based benefits of union representation.<sup>25</sup>

**Airline and railway employees:** Employment relations for such workers are covered by the Railway Labor Act (RLA).<sup>26</sup> Following the *Abood* approach, the U.S. Su-

18. 475 U.S. 292, 305–06, 310 (1986).

19. See, e.g., Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 39 (2008).

20. 487 U.S. 735 (1988).

21. *Id.* at 745.

22. 59 F.3d 1373, 1375, 1379 (D.C. Cir. 1995).

23. See James C. Thomas, *Right-to-Work: Settled Law or Unfinished Journey*, 8 LOY. J. PUB. INT. L 163, 163 (2007).

24. 5 U.S.C. § 7102 (2012) (federal employees generally); 39 U.S.C. § 1209(c) (2006) (postal employees).

25. See David Silverstein & Erin Siuda, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Labor Law*, 73 GEO. WASH. L. REV. 896, 906–07 (2005) (noting that unions may become the “sole bargaining representative” for a unit of federal employees and that “managers of federal employees have a reciprocal duty to engage in good-faith collective bargaining with those unions on any condition of employment” (emphasis added)).

26. See William E. Thoms & Frank J. Dooley, *Collective Bargaining Under the Railway Labor Act*, 20 TRANSP. L.J. 275, 275 (1992).

preme Court ruled that these workers cannot be compelled to join a union but may be required to pay agency fees.<sup>27</sup>

*B. RIGHTS OF FAIR REPRESENTATION*

Whether agency fee payers had a right to be fairly treated by their unions was decided in *Steele v. Louisville & Nashville Railroad Co.*<sup>28</sup> In *Steele*, African American employees were exclusively represented by a union but were denied the ability to join the union, based on their race.<sup>29</sup> The union then enacted rules that “disqualified” all African American employees and prevented African Americans from being hired by the railroad.<sup>30</sup> The Alabama Supreme Court permitted the discriminatory conduct, holding that once a majority of represented employees had chosen their union, the union had no duty to protect the rights of minorities and the state had no right to interfere with union operations.<sup>31</sup> Reversing the state court decision, the U.S. Supreme Court held that unions must represent “all of its members, regardless of their union affiliations or want of them.”<sup>32</sup> It concluded that unions owe a duty to represent its workers “fairly, impartially, and in good faith” regardless of whether they were union members.<sup>33</sup>

Whether the right of fair representation requires unions to permit represented non-members to vote on matters relating to employment, however, has gotten inconsistent treatment in the courts. There are few such cases; the paucity of litigation probably a result of the heavy burden on employees to show a breach of duty of fair representation<sup>34</sup> and partly due to the high costs and low benefits to individuals in challenging unions, discussed more fully below.<sup>35</sup>

Some courts have held that there is no duty to permit agency fee payers to vote on negotiated employment matters. In *Penn. Labor Relation Bd. v. Eastern Lancaster Co. Educ. Ass’n*, for example, the Commonwealth Court of Pennsylvania held that a union that allowed its members but not nonunion employees to vote on a proposed contract ratification did not constitute a denial of the union’s duty of fair representation.<sup>36</sup> The court held that the ratification of employment contracts was an inter-

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27. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 447–48 (1984).

28. 323 U.S. 192 (1944).

29. *Id.* at 194–95.

30. *Id.* at 195–97.

31. *Steele v. Louisville & N. R. Co.*, 16 So. 2d 416, 420 (Ala. 1944), *rev’d* 323 U.S. 192 (1944).

32. 323 U.S. at 200.

33. *Id.* at 204.

34. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 73–74 (1975) (Douglas, J., dissenting) (noting that the evolution of the law regarding the duty of fair representation has placed a heavy burden on employees).

35. *See infra* Part I.E.

36. 427 A.2d 305, 307–09 (Pa. Commw. Ct.1981).

nal union matter that should be free from “judicial interference.”<sup>37</sup> Despite the fact that the proposed contract ratification would affect all employees regardless of whether they were union members, the court placed the burden on nonunion employees to show that the union’s representation was not performed in good faith.<sup>38</sup> The court justified judicial non-interference, at least in part, on the state’s compelling interest in the “orderly resolution of labor disputes.”<sup>39</sup>

Similarly, in *Afro-American Police League v. Fraternal Order of Police, Chicago Lodge*,<sup>40</sup> a federal court held that represented non-union members had no right to vote to ratify a negotiated employment contract, even when the petitioners claimed that the proposed contract was racially discriminatory. The court found that the duty of fair representation “is not violated by the mere failure of the union to allow the nonmembers to vote on the contract.”<sup>41</sup> With a similar approach, another federal court held in *Standard Fittings Co. v. NLRB* that when an employer tried to negotiate with represented non-union member employees who had been excluded from voting on a proposed contract revision, it committed an unfair labor practice.<sup>42</sup> Even if the union had violated its duty of fair representation to nonmembers, the court held, such a duty was owed only to the employees, and the employer could not use the union’s conduct as a justification to bargain directly with employees.<sup>43</sup> Thus, a union could exclude agency fee payers from voting on their employment contracts and an employer’s efforts to appeal directly to those employees was wrongful.

Other courts, by contrast, have concluded that nonmembers do have a right to vote on employment matters. In *Int’l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 310 v. NLRB* two unions, the Teamsters and the AFL-CIO, were joint representatives of a company’s employees.<sup>44</sup> The AFL-CIO accepted a collective-bargaining agreement before the Teamsters had an opportunity to ratify it.<sup>45</sup> The court found that the AFL-CIO violated its duty of fair representation to the Teamster workers when it effectively denied them an opportunity to vote.<sup>46</sup> Unlike the positions taken elsewhere, the court rejected the argument that voting on contract ratification was an internal union matter. “As a general proposition,” the court acknowledged, “it is true that a union only breaches its duty of fair representation when it discriminates against employees ‘in matters af-

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37. *Id.* at 308.

38. *Id.* at 309.

39. *Id.* at 310.

40. 553 F. Supp. 664 (N.D. Ill. 1982) The case was decided not under labor law but instead as a Title VII claim. *See id.* at 668.

41. *Id.* at 668.

42. 845 F.2d 1311, 1319 (5th Cir. 1988).

43. *Id.* at 1317–18.

44. 587 F.2d 1176, 1178 (D.C. Cir. 1978).

45. *Id.* at 1179.

46. *Id.* at 1184.

fecting their employment.’ . . . Notwithstanding the correctness of its premise, however, the Board’s argument that depriving the Teamsters of the opportunity to vote on a contract that would govern them for the next three years had ‘no effect on the terms and conditions of [their] employment’ is preposterous.”<sup>47</sup>

Similarly, another federal court found that it was an unfair labor practice to deny a vote to nonunion members in a bargaining unit. In *Branch 6000, Nat’l Ass’n of Letter Carriers v. NLRB*, a union had held a referendum to determine how to allot days off from work and pledged to be bound by the voting results.<sup>48</sup> Agency fee payers were not permitted to vote. In affirming the decision of the NLRB, the court held that since the vote affected the terms of employment and since the union, by agreeing to be bound by the vote of the union employees, had delegated its decision-making power to union membership, they must allow represented nonmembers to vote.<sup>49</sup> The court fell short of finding that contract ratification would require a vote of all affected employees if the union had retained their negotiation function and had some mechanism for considering the positions of nonunion employees. But allowing the matter to be decided by a vote that excluded nonmembers, the court held, was a breach of the union’s duty of fair representation.<sup>50</sup> Additionally, the court acknowledged the NLRB’s finding that the union breached its duty of fair representation when it used the vote as an opportunity to lobby nonmember employees to join the union.<sup>51</sup> The union “improperly encouraged non-union employees to join the union so as to have their interests fairly represented,”<sup>52</sup> the court held, since, as members of the bargaining unit, they already had a right to have their views considered. In dicta, the court noted that ratification of a contract would not necessarily require inclusion of nonmembers in a vote, as long as the union had some mechanism for considering the views of nonmembers.<sup>53</sup>

Relying on *Branch 6000*, the NLRB held in *Int’l Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith Forgers and Helpers, Local 202*, that a union violated its duty of fair representation when it excluded nonmembers from voting on when a “floating holiday” should be taken.<sup>54</sup> The Board found that the voting was a substitute for negotiation, thus eliminating the union representation function. It constituted an unfair labor practice, therefore, to allow the matter to be determined by a vote reserved to union members alone.<sup>55</sup>

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47. *Id.* at 1183.

48. 595 F.2d 808, 810 (D.C. Cir. 1979).

49. *Id.* at 810–11.

50. *Id.* at 813.

51. *Id.* at 811 n.13.

52. *Id.*

53. *Id.* at 813.

54. 300 NLRB 28, 30–32 (1990).

55. *Id.* at 32.



C. *WILLIAMS V. PUBLIC EMPLOYMENT RELATIONS BOARD*

In this context of mixed federal rulings on whether agency fee payers had a right to vote on matters relating to the terms and conditions of employment and with no rulings under applicable state law, the California Court of Appeals considered in *Williams v. Pub. Employment Relations Bd.*<sup>56</sup> whether agency fee payers had a right to vote on matters related to the terms and conditions of employment. The case arose in the context of California's fiscal crisis of 2009.

Petitioners Williams and Halcoussis were professors at California State University.<sup>57</sup> They were agency fee payers to a union which acted as their exclusive representative pursuant to California's Higher Education Employer-Employee Relations Act.<sup>58</sup> Similar to federal law, California law required that the union represent all unit employees "fairly and impartially"<sup>59</sup> and that a "breach of this duty shall be deemed to have occurred" if their "conduct in representation is arbitrary, discriminatory, or in bad faith."<sup>60</sup> As part of its negotiation during the fiscal crisis, the union put to a vote whether to accept furloughs which would result in salary reductions of more than 9%.<sup>61</sup> The union permitted only members to vote although the proposed furloughs would affect all unit employees.<sup>62</sup> Likewise, only members were permitted to participate in the union's online poll.<sup>63</sup> Williams and Halcoussis alleged that the union violated its duties of fair in nondiscriminatory representation.<sup>64</sup> In addition to permitting only members to vote, the union used the threat of furloughs as an opportunity to encourage nonmembers to join the union so that they could vote,<sup>65</sup> similar to the union's solicitation in *Branch 6000*.

Unlike *Branch 6000*, however, the California Court of Appeals had no objection in the union taking the opportunity to encourage nonmembers to join the union so that they could vote. This was, for the trial court, a simple issue of paying for a ser-

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56. 139 Cal. Rptr. 3d 618, 620 (Cal. Ct. App. 2012).

57. *Id.* at 619. The authors were the petitioners.

58. CAL. GOV. CODE § 3560 (1983).

59. CAL. GOV. CODE § 3571.1(e) (1989).

60. CAL. GOV. CODE § 3578 (1979).

61. Joint Appendix at 234–36, *Williams v. Pub. Emp't Relations Bd.*, 139 Cal. Rptr. 3d 618 (Cal. Ct. App. 2012) (No. BS127710) [hereinafter J.A.].

62. *Id.* at 236.

63. *Id.* at 132.

64. *Id.* at 236.

65. *Id.* at 132 n.1. One union solicitation read: "A vote of the CFA membership on whether to accept the Chancellor's proposal for a two-day-a-month furlough (equivalent to a 9.5 percent reduction in pay during the 2009/10 academic year). . . . As in contract ratification votes that also determine salary and other terms of employment, all active CFA members will be eligible to vote in this election. . . . In addition to voting on the furlough proposal, faculty members will also be given the opportunity to participate in an exit survey immediately following the vote to capture the broader spectrum of faculty opinion on this issue. . . . You must be a member to vote. Sign up to become a member[:] Non-CFA-members who would like to join in time to vote on the furlough issue are invited to do so at any time now through Thursday, July 16, 2009 at 5 pm."

vice, treated not much differently than a poll tax.<sup>66</sup> “In exchange for paying less,” the trial court noted, “they do not get to vote.”<sup>67</sup> The Court of Appeal acknowledged that while there was conflicting evidence, it was not clear that the union had abandoned its representative function in leaving the issue of furloughs to a vote.<sup>68</sup> Therefore, the court reasoned, the petitioners had not demonstrated that the union had violated its duty of fair representation.<sup>69</sup>

It is difficult to draw conclusions on an agency fee payer’s right to vote on matters relating to employment from such a slim history of inconsistent decisions. Often, courts have found that if a union retained any negotiating capacity, then it need not permit nonmembers to vote. If a matter relating to the terms and conditions of employment is left solely to a vote, however, some courts have found it to be a violation of a union’s duty of fair representation to refuse to allow nonmembers to vote. *Local No. 310*, which found that refusing non-members an opportunity to vote, can be distinguished because it did not involve agency fee payers but instead members of a competing union.<sup>70</sup> The other cases that have held that the union committed an unfair labor practice by refusing to permit agency fee payers an opportunity to vote, i.e. *Branch 6000*<sup>71</sup> and *Int’l Brotherhood of Boilermakers, Local 202*,<sup>72</sup> are ostensibly distinguished by whether the union had relinquished its negotiation function but, oddly, they also involve the less important issues. Both *Branch 6000* and *International Brotherhood of Boilermakers, Local 202* raised questions of how to determine employee days off.<sup>73</sup> While courts have often ruled against agency fee payers’ rights to vote on the basis that the decision is not significant enough to justify judicial interference in what are characterized as internal union matters, it is odd that in cases where more significant employment decisions were at issue (e.g. the contract ratifications in *Eastern Lancaster Co.* and *Afro-American Police League* and furloughs in *Williams*) courts have declined to “interfere.” These odd distinctions and somewhat inconsistent decisions are partly the result of a paucity of cases; there have simply been so few cases it is difficult to identify common judicial themes or approaches. The inconsistencies, however, illustrate a general judicial aversion to challenge the conduct of unions, even when the equivalent discriminatory conduct would be intolerable in other contexts.

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66. *Williams v. Pub. Emp’t Relations Bd.*, 139 Cal. Rptr. 3d 618, 626 (Cal. Ct. App. 2012).

67. J.A., *supra* note 61, at 241 n.7.

68. *Williams*, 139 Cal. Rptr. 3d at 625–26.

69. *Id.* at 626.

70. *Int’l Bhd. of Teamsters, Local No. 310 v. NLRB*, 587 F.2d 1176 (D.C. Cir. 1978).

71. *Branch 6000, Nat’l Ass’n of Letter Carriers v. NLRB*, 595 F.2d 808 (D.C. Cir. 1979).

72. *Int’l Bhd. of Boilermakers, Local 202*, 300 NLRB 28 (1990).

73. *Branch 6000*, 595 F.2d at 810; *Int’l Bhd. of Boilermakers*, 300 NLRB at 29.

## D. ECONOMIC ANALYSIS OF BENEFITS OF UNION MEMBERSHIP TO FACULTY

Aside from the issue of whether excluding nonmembers from voting constitutes an unfair labor practice, why wouldn't an employee want to join a union? Presumably there are financial advantages that outweigh the cost of membership. Taking the university employment of the employees in *Williams* as an example, however, there is little or no demonstration that union representation increases employee compensation. In one study, researchers used data for U.S. faculty from 1970-76 to calculate simple ratios and t-tests and found no gains in income from unionization.<sup>74</sup> Another study used individual level faculty data for the U.S. from 1977 to estimate three regression models. The results show less than a 2% premium for faculty who were unionized.<sup>75</sup>

A subsequent study by Randall Kesselring advanced the sophistication of the research by treating the union versus non-union choice as endogenous.<sup>76</sup> By using a series of maximum likelihood probit regressions and data from U.S. Ph.D.-granting institutions for the early 80s, Kesselring found that unions actually decreased faculty compensation at the margin.<sup>77</sup> Ashraf found an average premium for unionization of 4.4% but discovers the premium varies widely, from -7.63% to 13.07, depending on the characteristics of the faculty member.<sup>78</sup>

Two studies not only show the return from unionization to be low, but also suggest that the one can get inconsistent higher results for the premium by focusing on a cross-section technique rather than using panel data.<sup>79</sup> A likely explanation for this phenomenon is that a cross-section model would not capture the effect of unionization on a faculty member's salary across the course of his career. One of the studies found a 5-6% premium for unionization for the U.S. by using a cross-section model, but when using panel data and a fixed effects model, the unions have a negative effect on faculty salary.<sup>80</sup> The remaining study found a union premium of 2-3% for Canada, using a fixed effects panel data model.<sup>81</sup> Monks found a 7-14% union premium by using a cross-section model estimated with U.S. data from 1992-93.<sup>82</sup> Monks noted that this is substantially higher than what is found in the rest of

74. William W. Brown & Courtenay C. Stone, *Academic Unions in Higher Education: Impacts on Faculty Salary, Compensation and Promotions*, 15 ECON. INQUIRY, 385, 385 (1977).

75. Debra A. Barbezat, *The Effect of Collective Bargaining on Salaries in Higher Education*, 42 INDUS. & LAB. REL. REV., 443, 453 (1989).

76. Randall G. Kesselring, *The Economic Effects of Faculty Unions*, 7 J. LAB. RES. 61, 61 (1991).

77. *Id.* at 69-70.

78. Javed Ashraf, *Do Unions Affect Faculty Salaries?*, 11 ECON. OF EDUC. REV. 219, 219 (1992).

79. See Daniel I. Rees, *The Effect of Unionization on Faculty Salaries and Compensation: Estimates from the 1980s*, 14 J. LAB. RES. 399, 416 (1993); Daniel I. Rees, Pradeep Kumar & Dorothy W. Fisher, *The Salary Effect of Faculty Unionism in Canada*, 48 INDUS. & LAB. REL. REV. 441, 443 (1995).

80. Rees, *supra* note 79, at 416.

81. Rees, Kumar & Fisher, *supra* note 79, at 446.

82. James Monks, *Unionization and Faculty Salaries: New Evidence from the 1990s*, 21 J. LAB. RES. 305, 305 (2000).

the literature.<sup>83</sup> Note that the cross-section model used in Rees and Monks would not adequately capture the dynamic effect of salary compression which has increased over time.

Martinello provided a detailed investigation of salary compression, inversion effects, and their interaction with unionization.<sup>84</sup> Martinello found that for universities in Ontario, after controlling for a series of faculty characteristics, the salary differential between associate and full professors decreased 50% from 1970 to 1990.<sup>85</sup> By 2005 there was salary inversion, so that younger faculty were earning more than those 5-15 years older.<sup>86</sup> In addition, Martinello's sample exhibited classic salary compression with those in their early 30s making approximately the same average salary as those in their early 40s.<sup>87</sup>

Consistent with previous results, Hosios and Siow used data from 1973-1995 and OLS estimation to find only a small positive earnings effect from unionization at Canadian Universities.<sup>88</sup> More recently, Hedrick et al. used instrumental variables estimation to correct for measurement error in estimating union strength.<sup>89</sup> Utilizing panel data set from 1988, 1993, 1999 and 2004 for two- and four-year U.S. schools, Hedrick et al. found a union premium that varied from -0.1% to 1.8%.<sup>90</sup> Henson et al. used the same data set as Hedrick et al. (2011) but focused only on two-year schools.<sup>91</sup> Using a random effects model, Henson et al. found a union premium of 2.8-3.0% for two-year schools in the United States.<sup>92</sup>

Summarizing these studies, the only papers that found a substantial union premium were papers that utilized cross-section rather than panel data. At least in this case, there is no reason to prefer a technique which utilizes less rather than more information (panel data include data over time as well as for different faculty; cross-section data represent different faculty but are for only one point in time). When panel data are used, there is a consensus in the literature that the premium earned by unionized faculty is small, somewhere from 3% down to a negative value. Note that this result does not account for the cost of dues, calling into question whether faculty experience any gains in income from belonging to a union.

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83. *Id.*

84. Felice Martinello, *Faculty Salaries in Ontario: Compression, Inversion, and the Effects of Alternative Forms of Representation*, 63 *INDUS. & LAB. REL. REV.* 128 (2009).

85. *Id.* at 143.

86. *Id.*

87. *Id.*

88. Arthur J. Hosios & Aloysius Siow, *Unions Without Rents: The Curious Economics of Faculty Unions*, 37 *CANADIAN J. ECON.* 28, 50 (2004).

89. David W. Hedrick, Steven E. Henson, John M. Krieg & Charles S. Wassell, Jr., *Is There Really a Faculty Union Salary Premium?*, 64 *INDUS. & LAB. REL. REV.* 558, 572 (2011).

90. *Id.* at 573.

91. Steven E. Henson, John M. Krieg, Charles S. Wassell, Jr. & David W. Hedrick, *Collective Bargaining and Community College Faculty: What Is the Wage Impact?*, 33 *J. LAB. RES.* 104, 106 (2012).

92. *Id.* at 114.

## E. UNDEMOCRATIC LABOR

Even if there were economic gains from union membership justifying the imposition of its costs on all represented employees, there is little to justify the undemocratic nature of unionism. In his seminal 1984 study, Alan Hyde surveyed the laws governing democratic processes in union activities and found that “elitist bargaining” had become the model of American labor.<sup>93</sup> Hyde found that until the late 1970s, “no reported cases protected democracy in collective bargaining” and that few subsequent developments had ensured democratic protections.<sup>94</sup> The duty of fair representation (at issue in *Williams*) “does not seem to require any particular bargaining procedures”<sup>95</sup> but instead “imposes on unions only a modest and ill-defined obligation to consider employees’ interests.”<sup>96</sup> Hyde finds that “judicial queasiness”<sup>97</sup> to mandate democratic processes – instead preferring a model of elitism – to be rooted in three outdated social science notions.<sup>98</sup> First, it rests on an assumption of political scientists in the 1950s that elitism in labor relations “was both desirable and inevitable” in industrialized nations.<sup>99</sup> Second, a reliance on a 1950s political science model that assumes that union bargainers are responsive to their represented workers and that the representatives have considered all viewpoints in proportion with their overall representation in the group<sup>100</sup> and finally an assumption that since unions are representative and, in fact, more reasonable and conciliatory than those they represented given the delay and disorder that occur from democratic collective bargaining, elitism is preferable.<sup>101</sup> Hyde observes generally that judicial tolerance that allows the most minimal showings of “fair representation” is based on models that assume that true democracy is inefficient and “reveal the shallowness of the national commitment to union democracy.”<sup>102</sup> He surmises that “judicial reluctance to require the same levels of democracy in collective bargaining as in other union actions stems only partly from a sense that democracy is unimportant, though surely its full importance is not appreciated, and only partly from a sense that democracy is infeasible.”<sup>103</sup> Courts prefer elitism mainly because they think that democratic collective bargaining would be cumbersome, inefficient, inflationary, and destructive of fair representation.<sup>104</sup>

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93. Hyde, *supra* note 2, at 831.

94. *Id.* at 796.

95. *Id.* at 806.

96. *Id.* at 819.

97. *Id.* at 796.

98. *Id.* at 831–33.

99. *Id.* at 831.

100. *Id.* at 832.

101. *Id.* at 832–33.

102. *Id.* at 856.

103. *Id.* at 848.

104. *Id.*

Extending Hyde's work, Professors Michael C. Harper and Ira C. Lupu called for a revision of the standard of "fair representation" to mean equal protection.<sup>105</sup> Citing *Steele v. Louisville*<sup>106</sup> to note that a union bears "at least as exacting a duty to protect equally the interests of the members of the [unit] as the Constitution imposes upon the legislature to give equal protection to the interests of those for whom it legislates,"<sup>107</sup> Harper and Lupu observed that subsequent decisions did not impose a standard of equal protection, but instead the "arbitrary, discriminatory, or in bad faith" standard in ways that were "haphazard" and "willy-nilly."<sup>108</sup> Instead, they posited, there should be a model of principled democracy – one that requires representatives to act in concordance with a notion of fairness equally to those it represents.<sup>109</sup>

Legal and social science research developed to show that the consequence of undemocratic union representation was to marginalize racial minorities,<sup>110</sup> women,<sup>111</sup> and the young<sup>112</sup> and to sanction union corruption.<sup>113</sup> For many unions, a history of exclusiveness results in income redistribution that benefits the predominantly white and male membership.<sup>114</sup> Union corruption explains part, but not all, of employees' disengagement in union activities.<sup>115</sup> In a 1977 case, the U.S. Supreme Court concluded that most meetings were attended by no more than 3.5% of members.<sup>116</sup> Not surprisingly, unions are controlled by small groups of insiders.<sup>117</sup> Monitoring costs are high and even if undertaken, there are significant limits to any change that could result. Unions are not generally required to provide full accountings of its financial

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105. Michael C. Harper & Ira C. Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1212, 1216 (1985).

106. 323 U.S. 192 (1944).

107. *Id.* at 1213.

108. *Id.* at 1214.

109. *Id.* at 1216.

110. Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369, 405 (2010).

111. Michael Wallace, Andrew S. Fullerton & Mustafa E. Gurbuz, *Union Organizing Effort and Success in the U.S., 1948-2004*, 27 RES. SOC. STRATIFICATION & MOBILITY 13, 30 (2009).

112. Union membership in 2012 was highest among workers aged 55 to 64 (at 14.9 percent) and lowest for those in the 16 to 24 age group (4.2 percent). Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members—2013* (Jan. 24, 2013), available at <http://data.bls.gov/cgi-bin/print.pl/news.release/union2.nr0.htm>.

113. Christopher K. Coombs & Richard Cebula, *The Impact of Union Corruption on Union Membership*, 50 INDUS. REL. 131, 132 (2011).

114. MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COST OF LABOR LAW* 29 (1987).

115. Brian Petruska, *Choosing Competition: A Proposal to Modify Article XX of the AFL-CIO Constitution*, 21 HOFSTRA LAB. & EMP. L.J. 1, 8 (2003) (observing, for example, that union meetings tend to be monopolized by a small group of insiders, exacerbating the problem of union members' disengagement).

116. *Local 3489, United Steelworkers of Am. v. Usery*, 429 U.S. 305, 307 (1977) ("At the time of the challenged election, there were approximately 660 members in good standing of Local 3489. The Court of Appeals found that 96.5% of these members were ineligible to hold office, because of failure to satisfy the meeting-attendance rule.").

117. Petruska, *supra* note 115, at 8.

activities,<sup>118</sup> there are few mandates requiring voting,<sup>119</sup> and courts, as seen, are reluctant to protect worker rights or impose remedies. Taken together, it is hardly surprising that unions are unrepresentative oligarchies.

One solution is to mandate union democracy. Among other benefits, democratic unions are generally more effective at their “core collective bargaining functions.”<sup>120</sup> Additionally, democratically-run unions show lower rates of corruption, labor racketeering and organized crime.<sup>121</sup> “[C]orruption and oligarchy within unions are closely related,”<sup>122</sup> noted Seymour Martin Lipset many decades ago.

Others see little value in pursuing a goal of union democracy, finding it both ineffective and counterproductive.<sup>123</sup> Estreicher observes that unions are run as one-party states,<sup>124</sup> and only insider activists have power. Most union members do not find it worthwhile to monitor union performance and have little power to change matters even if they did. Instead, Estreicher proposes, if all employees (including agency fee payers) had a right to vote a secret ballot on the key matters affecting them economically,<sup>125</sup> it would narrow the agency cost problems and keep the agents (regardless of whether they were democratically elected) in check. Under Estreicher’s proposal, “participational rights in critical economic decisions directly affecting the welfare of bargaining unit employees would be divorced from membership in the labor organizations.”<sup>126</sup> “While there are many arguments against dual unionism,” Lipset noted in 1961, “it remains true that the existence of two unions with similar jurisdictions serves to make each of them more responsive to

118. See, e.g., *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986) (requiring only an “adequate explanation” of fees charged to nonmembers).

119. Hyde, *supra* note 2, at 793.

120. Michael J. Goldberg, *The Employment and Labor Law Professor as Public Intellectual: Sharing Our Work with the World: In the Cause of Union Democracy*, 41 SUFFOLK U. L. REV. 759, 763 (2008).

121. *Id.* at 764; see also Seymour Martin Lipset, *The Law and Trade Union Democracy*, 47 VA. L.R. 1, 6 (1961) (“[T]here can be little doubt that corruption, racketeering, and other practices detrimental to the public interest are much more likely to flourish in dictatorial unions than in those subject to membership control.”). *But see* Petruska, *supra* note 115, at 22 (noting that union democracy has not only failed to stop corruption but, because of the judicial tendency to adopt a “hands-off” view, “union democracy has had the effect of fortifying the dominion of union oligarchies”).

122. Lipset, *supra* note 121, at 13.

123. Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501, 502 (2000).

124. *Id.* at 502–03 (citing SEYMOUR MARTIN LIPSET, *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHIC UNION* (1956)).

125. Estreicher, *supra* note 123, at 503–04 (“These ‘critical voting opportunities’ should include a statutory right of all represented employees (whether or not they are union members) to vote in secret ballot on: (1) authorization of the exclusive bargaining representative; (2) reauthorization at periodic intervals of the bargaining agency; (3) the employer’s final contract offer; (4) strike authorization; (5) contract ratification; and (6) the level of fees to be assessed for the bargaining agency (i.e., union dues). If these critical election opportunities are provided, we should have a substantial narrowing of agency cost problems, (i.e., greater fidelity of union agents to the employee principal) and at the same time open the way for alternative forms of bargaining agents potentially to emerge.”).

126. *Id.* at 517.

membership wishes.”<sup>127</sup> Competition, then, would be the solution to the problem of unrepresentative and unresponsive union conduct.

### III. CONCLUSION

While there have been repeated calls for increased democracy in union activities since at least the 1970’s, few judicial decisions have mirrored the concern. As long ago as the 1960’s, noted Lipset, there was “general agreement” that “the ordinary procedures of the law, which rely heavily on complaints to the courts or law-enforcement agencies by individuals who have grievances, have not served to protect union member and other workers whose rights were denied. The courts are unable to afford adequate relief in many cases because they either lack consistent and explicit standards and are not familiar with union practices, or because most union members are reluctant to use the courts or cannot bear the costs of litigation.”<sup>128</sup> Instead, legislation that limits employees’ obligation to join unions or pay agency fees have increasingly made the point moot: in the roughly half of all states that have “right to work” statutes,<sup>129</sup> union democracy is of little import. The second significant trend affecting union power is the sharp decline in the number of employees belonging to unions; almost half the representation of thirty years ago.<sup>130</sup>

However, for those employees still bound by exclusive representation pacts, unions still have broad powers to limit participation in decisions affecting their employment. Protecting union autonomy is more important, in the view of many courts, than is protecting the employment participation rights of employees. Under federal law and that of many states, at least, agency fee employees must either elect to join unions (and subsidize the unions’ political and campaign contributions) or be refused an opportunity to vote on employment matters. Whether the solution is to mandate democracy, institute competition, or enforce equal protection rights, the current state of the law requires employees to choose between exercising their first amendment rights or their employment rights; they cannot have both.

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127. Lipset, *supra* note 121, at 12.

128. *Id.* at 16–17.

129. See *supra* note 3 and accompanying text.

130. Press Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Members – 2013 (Jan. 24, 2014), available at <http://data.bls.gov/cgi-bin/print.pl/news.release/union2.nr0.htm>. Union membership, i.e. the percentage of wage and salary workers who belong to a union, has declined to 11.8 percent in 2012, down from 20.1 percent in 1983, the first year for which such data is available; in 2012, public-sector employees had unionization rates of 35.9 percent - more than five times higher than in the private sector, at 6.6 percent; within the public sector, local government employees had the highest unionization rate at 41.7 percent; men were more likely to be union members than were women (12.0 percent compared with 10.5 percent); union membership was highest for workers in the education, training and library worker sector (35.4 percent) and protective service groups (e.g. police, firefighters) at 34.8 percent. Press Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Members – 2012 (Jan 23, 2013), available at [http://www.bls.gov/news.release/archives/union2\\_01232013.pdf](http://www.bls.gov/news.release/archives/union2_01232013.pdf).



