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DOES PUBLIC EMPLOYEE COLLECTIVE BARGAINING DISTORT DEMOCRACY? A PERSPECTIVE FROM THE UNITED STATES

Martin H. Malin†

I. INTRODUCTION

Almost three decades after the Wagner Act guaranteed most private sector employees in the United States the right to organize and bargain collectively, the Michigan Supreme Court upheld the constitutionality of the City of Muskegon's prohibition on any city police officer being a member of a labor union.¹ Although it is now settled that such restrictions are unconstitutional,² collective bargaining by public employees remains highly controversial in the United States. For many decades, some states have prohibited public employee collective bargaining by statute.³ The controversy flared in 2011 most visibly in Wisconsin, which, over the largest protest demonstrations seen in that state since the Vietnam War, largely eliminated collective bargaining for all public employees except most law enforcement and firefighters and some transit workers, and in Ohio where the public rejected by referendum amendments passed by the legislature and signed by the governor that would have severely restricted public employee bargaining rights. The controversy, however, was not confined to those very visible states. Major legislation eliminating or severely restricting public employee collective bargaining was enacted in numerous other states including Indiana, Michigan, New Jersey, Oklahoma, and Tennessee. In 2012, legislation was introduced in Arizona and South

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1. Local 201, AFSCME v. City of Muskegon, 120 N.W. 197 (Mich. 1963).

2. See AFSCME v. Woodward, 406 F.2d 137 (8th Cir. 1969); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969) (3-judge district court).

3. See, e.g., N.C. GEN. STAT. ANN. § 95-98 (West 2000); VA. CODE ANN. § 40.1-57.2. (West 2002).

Dakota that would prohibit voluntary recognition of unions by units of local government.⁴

Among the attacks against public employee collective bargaining is the contention that it distorts democracy. Traditionally, this attack has argued that decisions over public employees' wages, hours and terms and conditions of employment inherently raise issues of public policy, and collective bargaining mandates that one interest group, workers and their unions, have an avenue of access that is not available to any other interest group. Collective bargaining, the argument goes, may preempt other interest groups from being heard on such policy issues. Even where this argument has not led to a complete prohibition on collective bargaining, it has led to restrictions on the scope of bargaining. In essence, this argument urges that workers and their unions should have to compete against all other interest groups in the broader political process in attempting to persuade public decision makers to resolve workplace issues in workers' favor.

The attacks in 2011, however, raised a new argument. Many attacking the legitimacy of public employee collective bargaining have argued that collective bargaining distorts democracy by inappropriately advantaging public employee unions in the broader political process. According to these arguments, confining workers and their unions to the broader political process is not sufficient to maintain democratic processes; rather unions must be stripped of their inappropriate advantages by prohibiting unions and employers from agreeing to allow union members to pay their dues through payroll deduction (dues check off) and from requiring employees represented by the union who are not union members to pay a fee for their representation (agency-shop or fair-share fees).

This Article considers these dual attacks on the legitimacy of public employee collective bargaining. Part II examines the claim that collective bargaining distorts democracy by conferring an exclusive avenue of access on one privileged interest group, thereby preempting the broader political process. Part III examines the claim that public employee collective bargaining inappropriately advantages workers and their unions in the broader political process.

4. Az. S.B. 1485 (2012) would have prohibited public employers from "recogniz[ing] any union as a bargaining agent of any public officer or employee," or even meeting and conferring with any union for purposes of "discussing or reaching any employment bargain," and would have authorized any taxpayer to sue to enforce the prohibition. The bill's final disposition is listed as "Held awaiting Committee of Whole." SB1485 Bill Status Overview, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/50leg/2r/bills/sb1485o.asp&Session_ID=107 (last visited Sept. 25, 2012). S.D. H.B. 1261 would have prohibited all public employee collective bargaining in that state. It was unanimously tabled in the House Commerce and Energy Committee. <http://legis.state.sd.us/sessions/2012/Bill.aspx?Bill=1261> (last visited Sept. 25, 2012).

II THE TRADITIONAL ATTACK: PREEMPTION OF THE BROADER POLITICAL PROCESS

Public sector collective bargaining in the United States greatly increased in the 1960s and 70s. In 1955, public sector unions had about 400,000 members; by the 1970s that number had increased to more than 4 million.⁵ Not surprisingly, the dramatic increase attracted considerable academic attention. Among the leading theorists of public sector collective bargaining were Harry Wellington and Ralph Winter, Jr., and Clyde Summers. Wellington and Winter and Summers shared a common starting point of analysis. They urged that unlike collective bargaining in the private sector, which is primarily an economic process, collective bargaining in the public sector is primarily a political process. As such, it poses a danger of distorting basic democratic processes because it gives one interest group, public employees and their unions, an avenue of access that is unavailable to other interest groups and may, as a practical matter, preempt the voices of competing interest groups. Summers expressed the concern as follows:

Collective bargaining significantly changes the role of public employees in the budget-making process The first crucial change is that . . . the majority union becomes the exclusive representative of all employees in the bargaining unit Dissonance or indifference in the employee group is submerged, giving the employees' voice increased clarity and force.

The second, and more crucial, change is that a responsible public official must bargain in good faith until either an agreement or impasse is reached. This means that a public official representing the city must deal with the union face-to-face and at length. Granting an interview, listening to a presentation or even engaging in discussion—the normal courtesy given by public officials to other interest groups—is not enough. When the union presents its demands, the public official or his representative must respond, not with evasive ambiguities or noncommittal generalities, but with hard answers. . . .

The third, and perhaps most important, change is that collective bargaining provides the union a closed two-sided process within what is otherwise an open multi-sided process. Other groups interested in the size or allocation of the budget are not present during negotiations and often are not even aware of the proposals being discussed. Their concerns are not articulated and their countervailing political pressures are not felt except by proxy through the city's representative at the bargaining table.⁶

5. See MARTIN H. MALIN, ANN C. HODGES & JOSEPH E. SLATER, *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* 229 (2d ed. 2011).

6. Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1164 (1974).

Wellington and Winter expressed similar concerns over the impact of public employee collective bargaining on the political process:

Collective bargaining by public employees and the political process cannot be separated. The costs of such bargaining, therefore, cannot be fully measured without taking into account the impact on the allocation of political power in the typical municipality. If one assumes, as here, that municipal political process should be structured to ensure a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision, then the issue is how powerful unions will be in the typical municipal political process if a full transplant of collective bargaining is carried out.

The conclusion is that such a transplant would, in many cases, institutionalize the power of public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage⁷

Neither Summers nor Wellington and Winter regarded their concerns as justifying a prohibition on public employee collective bargaining. Rather, they cautioned that private sector labor law doctrine should not be transplanted wholesale to the public sector. They agreed that the scope of bargaining in the public sector should be narrower than in the private sector and disagreed over the implications of their concerns for the right to strike in public employment. Others, however, have urged that what they see as the distorting effects of public employee collective bargaining on democratic processes should lead to a complete prohibition on such bargaining.⁸

The U.S. Supreme Court has been agnostic in this debate as a matter of constitutional law. The Court has rejected arguments that exclusive representation offends the constitutional rights of free expression or free association of parties excluded from the forum,⁹ but has also held that there is no constitutional right to be represented by a union, even as an individual in a public employer's unilaterally established grievance procedure.¹⁰ The common reasoning is that although individuals have a right of free speech, they do not have a right to compel the government to listen; the government may decide who it wishes to consult and who it wishes to shun.

State courts, however, have been influenced strongly by the concern that collective bargaining by public employees may distort the political process. Enactment of the Virginia statute prohibiting public sector

7. HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* 29-30 (1974) (quotation marks and footnote omitted).

8. See, e.g., Robert S. Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, *GOV'T UNION REV.* Winter 1980, at 5.

9. *Minn. State Bd. for Comty. Colls. v. Knight*, 465 U.S. 271 (1984).

10. *Smith v. Ark. State Highway Emps. Local 1315*, 441 U.S. 463 (1979).

collective bargaining was preceded by the Virginia Supreme Court's decision in *Commonwealth v. County Board of Arlington County*, in which the court held that units of local government lacked authority to enter into collective bargaining agreements.¹¹ At issue before the court was whether the authority to recognize unions and bargain collectively with them was implied in a county's and a school district's express authority to manage their jurisdictions' affairs and make contracts for services.¹² In addressing this question, the court characterized the collective bargaining process as in tension with democratic principles.¹³

[T]here can be no question that the two boards involved in this case, by their policies and agreements, not only have seriously restricted the rights of individual employees to be heard but also have granted to labor unions a substantial voice in the boards' ultimate right of decision in important matters affecting both the public employer-employee relationship and the public duties imposed by law upon the boards.¹⁴

As noted above, neither Summers nor Wellington and Winter believed that their perceived tensions between public employee collective bargaining and democratic processes warranted prohibiting bargaining. Wellington and Winter identified four arguments for collective bargaining in the private sector: that it reduces workplace conflict by developing a common understanding of firm and industry conditions by management and labor, that it furthers workplace democracy by providing a vehicle of worker voice in workplace governance, that it facilitates worker organization and participation in the public political arena, and that it equalizes inherently unequal bargaining power.¹⁵ They maintained that the first three arguments applied to the public sector but questioned the need for collective representation to equalize bargaining power.¹⁶ They distinguished the costs of equalization of bargaining power in the two sectors, observing that in the private sector the costs are economic whereas in the public sector they are political and less constraining on the union.¹⁷ They urged that the lesser need to equalize bargaining power coupled with the effect that mandating collective bargaining had in excluding other interested groups from the decision-making process should drive determination of the scope of bargaining in the public sector.¹⁸

11. 232 S.E.2d 30 (Va. 1977).

12. *Id.* at 32.

13. *Id.* at 39.

14. *Id.* For a history of the treatment of public sector collective bargaining in Virginia, see Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735 (2009).

15. WELLINGTON & WINTER, *supra* note 7, at 8-9.

16. *Id.* at 12-14.

17. *Id.* at 14-24.

18. *Id.* at ch. 9.

Summers regarded the antidemocratic tendencies of public sector collective bargaining as justified because public employees will often be outnumbered in the broader political process by the general public which will demand greater levels of service at lower prices.¹⁹ He urged that bargaining be required only on those subjects on which the workers' interests are in clear direct confrontation with the unified interests of the public at large. With respect to other subjects, public employee unions should be left to make their case in the broader political and policy debate.²⁰

The caution urged by Summers and Wellington and Winter against importing the private sector approach to the scope of bargaining has been picked up by the states. For example, in *Unified School District No. 1 of Racine County v. WERC*,²¹ the Wisconsin Supreme Court expressly rejected the private sector test for determining whether a matter is a mandatory subject of collective bargaining:

In the private sector, collective bargaining is limited by the need to protect the "core of entrepreneurial control," particularly power over the deployment of capital. If resources are to be employed efficiently in a market economy, capital must be mobile and responsive to market forces. . . .

Different concerns are present in the public sector, however In the public sector, the principal limit on the scope of collective bargaining is concern for the integrity of political processes.²²

The court continued:

Where a decision is essentially concerned with public policy choices, no group should act as an exclusive representative; discussions should be open; and public policy should be shaped through the regular political process. Essential control over the management of the school district's affairs must be left with the school board, the body elected to be responsible for those affairs under state law.²³

The court concluded that whether a matter is a mandatory subject of bargaining depends on:

whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people.²⁴

19. Summers, *supra* note 8, at 1165-68.

20. *Id.* at 1192-97.

21. 259 N.W.2d 724 (Wis. 1977).

22. *Id.* at 730.

23. *Id.* at 730-31.

24. *Id.* at 731-32.

Concern with preempting other interest groups from the decision-making process has led to numerous state court decisions finding matters that would clearly be mandatory subjects of bargaining in the private sector to be merely permissive or even prohibited subjects in the public sector. In *City of Brookfield v. WERC*, the Wisconsin Supreme Court held that an economically motivated decision to lay off firefighters was not a mandatory subject of bargaining, characterizing it as "a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government."²⁵ The New Hampshire Supreme Court held that a proposal requiring just cause for discipline and discharge was not a mandatory subject of bargaining.²⁶ These decisions, like most state scope-of-bargaining decisions, left whether to bargain up to the employer. However, the Maryland Court of Appeals went further and held that school calendar and employee reclassifications were prohibited subjects of bargaining, reasoning:

Local [school] boards are state agencies, and, as such, are responsible to other appropriate state officials and to the public at large. Unlike private sector employers, local boards must respond to the community's needs. Public school employees are but one of many groups in the community attempting to shape educational policy by exerting influence on local boards. To the extent that school employees can force boards to submit matters of educational policy to an arbitrator, the employees can distort the democratic process by increasing their influence at the expense of these other groups.²⁷

Like Maryland, New Jersey also prohibits bargaining over subjects it determines to fall outside the scope of mandatory bargaining, reasoning that "the very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiation, where citizen participation is precluded."²⁸

State courts have made determination of the scope of bargaining in the public sector turn on an ad hoc balancing of workers' democratic rights to a voice in their terms and conditions of employment against the public's democratic right of participation in governmental decision making. As aptly described by the Iowa Supreme Court, "[T]he balancing test requires courts to balance the apples of employee rights against the oranges of employer rights. No court has been able to successfully advance a

25. 275 N.W.2d 723, 728 (Wis. 1979).

26. Appeal of City of Concord, 651 A.2d 944 (N.H. 1994).

27. *Montgomery Cnty. Educ. Ass'n v. Bd. of Educ.*, 534 A.2d 980, 987 (Md. 1987) (citation omitted).

28. *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 393 A.2d 278, 287 (N.J. 1978); see also *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.*, 215 N.W. 2d 837 (S.D. 1974).

convincing formula for determining how many employee rights apples it takes to equal an employer rights orange."²⁹ As the Massachusetts Court of Appeals conceded, "Any attempt to define with precision and certainty the subjects about which bargaining is mandated... is doomed to failure...."³⁰

The stakes in this ad hoc balancing of competing interests are large. If a matter is not a mandatory subject of bargaining, an employer has no obligation to provide the union with information relevant to the matter.³¹ With respect to a matter that is not a mandatory subject, an employer may bypass the union completely and pick its favored employees from whom to seek input.³²

Elsewhere, I have argued that this approach to the scope of bargaining in the public sector is counterproductive. I have shown how it impedes positive labor-management cooperation by encouraging legal battles over rights and power.³³ I have also urged that the flaw in the evolution of the law governing public employee collective representation has been its adoption of the private sector model that recognizes a significant regime of employee rights with respect to mandatory subjects of collective bargaining while leaving all other matters to the unilateral control of management. I have maintained that such a dichotomy excludes worker voice from decisions that go to the basic delivery of public services and channels worker voice to gaining protections from the effects of such decisions unilaterally made by management. I have suggested that it is not surprising that when so channeled, unions have succeeded in impeding the effective and efficient delivery of public services. For example, a union excluded from having a voice in establishing and implementing standards for evaluating teachers will, not surprisingly, use all means at its disposal to protect its teacher members from management's unilateral imposition and enforcement of those standards. But, when the union has a voice in developing and implementing evaluation standards, as in school districts that employ peer review, the union's role changes to include protection of the professional standards it helped to develop. I have called for experimentation in the public sector to impose duties on employers to

29. *Waterloo Educ. Ass'n v. Iowa PERB*, 740 N.W.2d 418, 424 (Iowa 2007).

30. *City of Lynn v. Mass. Labor Relations Comm'n*, 681 N.E.2d 1234, 1237 (Mass. App. Ct. 1977).

31. See, e.g., *Vill. of Franklin Park v. Ill. State Labor Relations Bd.*, 638 N.E.2d 1144, 1148 (Ill. App. Ct. 1994).

32. See, e.g., *Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi*, 10 S.W.3d 723, 728 (Tex. App. 1999).

33. See Martin H. Malin, *Public Sector Labor Law Doctrine and Labor Management Cooperation*, in *GOING PUBLIC: THE ROLE OF LABOR-MANAGEMENT RELATIONS IN DELIVERING QUALITY GOVERNMENT SERVICES* 267 (Jonathan Brock & David Lipsky eds., 2003).

provide meaningful voice to their workers in a broad range of decisions beyond traditional collective bargaining.³⁴

The wave of legislation following the 2010 elections that I have elsewhere called the tsunami that hit public sector collective bargaining³⁵ has eschewed finding creative approaches to worker voice that preserve both workplace democracy and public democracy and instead has greatly increased the scope of unilateral employer control. Oklahoma repealed collective bargaining rights for employees of mid-sized municipalities,³⁶ and Tennessee did the same for teachers.³⁷ Wisconsin stripped state university faculty, all employees of the University of Wisconsin Hospitals and Clinics, and daycare and home healthcare providers of collective bargaining rights.³⁸ Nevada took bargaining rights away from doctors, lawyers, and some supervisors.³⁹

States also significantly restricted the scope of bargaining for public employees. Wisconsin now prohibits bargaining on any subject other than "base wages," which expressly excludes overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions.⁴⁰ Furthermore, base wages may not increase more than the increase in the consumer price index (CPI) as of 180 days before the expiration of the collective bargaining agreement.⁴¹ In many respects, Oklahoma employees have more collective

34. See Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369 (2009); Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885 (2007).

35. Martin H. Malin, *The Tsunami that Hit Public Sector Collective Bargaining*, 16 EMP. RTS. & EMP. POL'Y J. 531 (2012).

36. H.B. 1593, 53d Leg., 1st Sess. (Okla. 2011), www.oklegislature.gov/BillInfo.aspx?Bill=HB1593&Tab=0.

37. Public Chapter No. 738 (Tenn. 2011).

38. 2011 Wis. Act 10 §§ 265 (state university faculty); 279 (U.W. Hospitals and Clinics), 280 (day and home health care providers).

39. S.B. 98, §§ 5, 6, 76th Leg. (Nev. 2011) (codified at NEV. REV. STAT. § 288.140 (2011)).

40. 2011 Wis. Act 10 § 314.

41. *Id.* On March 30, 2012, the United States District Court for the Western District of Wisconsin upheld the constitutionality of the restricted scope of bargaining against attacks by a coalition of unions. The unions argued that Act 10's disparate treatment of most public employees, on the one hand, and security employees on the other, lacked a rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment and distinguished between employees whose unions had supported Wisconsin Governor Scott Walker in the 2010 election and those who opposed him, in violation of the First Amendment. The court did find two other provisions of Act 10 unconstitutional. The court found that provisions of Act 10 which prohibited voluntary payroll deduction of union dues for all employees except security employees lacked a rational basis and, thus, violated the Equal Protection Clause and the requirement that unions representing bargaining units other than security employees submit to annual recertification elections violated those unions' and their members' Equal Protection and Free Speech rights. *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012). On September 14, 2012, the Circuit Court for Dane County held Act 10's changes to the Municipal Employment Relations Act prohibiting bargaining on all subjects other than base wages, dues check-off, and fair share fees, and requiring annual recertification elections invalid on constitutional and state law grounds. *Madison Teachers, Inc. v. Walker*, No. 11CV3744 (Wis. Cir. Ct. Madison Cnty. Sept. 14, 2012). Both decisions have been appealed.

bargaining protection than Wisconsin employees. Although Oklahoma repealed its statute that mandated collective bargaining rights in mid-sized municipalities, it allows collective bargaining at the option of the employer. In contrast, Wisconsin prohibits collective bargaining even if the employer is willing to engage in it.⁴² It is not surprising that Wisconsin Act 10 repealed the declarations in the Municipal and State Employee Relations Acts that had found public employee collective bargaining to be in the public interest.⁴³

Idaho limited negotiations for teachers to "compensation," which it defined as salary and benefits, including insurance, leave time, and sick leave.⁴⁴ Previously, bargaining subjects were determined by an agreement between the parties. The Idaho enactment also limited collective bargaining agreements to one fiscal year, July 1 through June 30, and prohibited evergreen clauses or other provisions that allow a contract to continue until a new one is reached.⁴⁵ However, Idaho voters rejected the enactment in a referendum in November 2012.⁴⁶

Similar to Idaho, Indiana limited collective bargaining for teachers to wages and salary and wage-related fringe benefits including insurance, retirement benefits, and paid time off.⁴⁷ The statute permits collective bargaining agreements to have grievance procedures, but deletes the prior law's express authorization for a grievance procedure culminating in binding arbitration.⁴⁸ The new statute prohibits bargaining on everything else, including express prohibitions on bargaining about the school calendar, teacher dismissal procedures and criteria, restructuring options, and contracting with an educational entity that provides post-secondary credits to students.⁴⁹ It also prohibits any contract that would place a school district in a budgetary deficit⁵⁰ and prohibits collective bargaining agreements from extending beyond the end of the state budget biennium.⁵¹ The new law repeals a prior provision that authorized parties to agree to arbitrate teacher dismissals.⁵²

The Indiana enactment provides that the parties shall discuss curriculum development and revision; textbook selection; teaching

42. Wis. Act. 10 § 169(1m).

43. *Id.* § 261.

44. S.B. 1108 § 17, 61st Leg. (Idaho 2011).

45. *Id.* § 22.

46. IDAHO SEC'Y OF STATE, *Election Day, Nov. 6, 2012 General Election Results, Proposition 1*, www.sos.idaho.gov/elect/Results/2012/tot_stwd.html (last visited Dec. 28, 2012).

47. Senate Enrolled Act No. 575 § 14, 117th Gen. Assemb. (Ind. 2011).

48. *Id.* § 17.

49. *Id.* § 15.

50. *Id.* § 13.

51. *Id.* § 16.

52. *Id.* § 6.

methods; hiring; evaluation; promotion; demotion; transfer; assignment; retention; student discipline, expulsion, or supervision of students; pupil/teacher ratio; class size or budget appropriations; safety issues; and hours.⁵³ However, any agreements reached in such discussions apparently may not be included in the contract.

The Ohio enactment that was overturned in a voter referendum deemed the following inappropriate for collective bargaining: health-care benefits; restricting contracting out or providing severance pay to employees whose jobs are contracted out; granting more than six weeks of vacation, more than twelve holidays, or more than three personal days; employer contributions to retirement systems; minimum staffing provisions, class size, and restrictions on school district authority to assign personnel; reductions in force of educational employees; and seniority as the sole factor in reductions in force.⁵⁴

Michigan added to an existing lengthy list of prohibited subjects of bargaining for educational personnel. Decision and impact bargaining are now prohibited with respect to placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption, and implementation of a policy regarding employee discharge or discipline; the format, timing, and number of classroom visits; the development, content, standards, procedures, adoption, and implementation of the method of employee compensation; decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content, and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective.⁵⁵

At the behest of the Mayor of Chicago, Illinois made a surgical strike against teacher collective bargaining in the Chicago Public Schools. It amended the Educational Labor Relations Act to provide that, in the Chicago Public Schools, the length of the school day and the length of the school year are permissive, rather than mandatory, subjects of bargaining,⁵⁶ thus empowering the Mayor through his appointed school board to unilaterally lengthen the school day and school year.

53. *Id.* § 18.

54. S.B. 5, 29th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. STAT. ANN. §§ 4117.08(B)(4) (contracting out); 4117.105(B) (severance pay to employees whose jobs have been contracted out); 4117.108(A)(1) (vacation); 4117.108(A)(2)-(3) (holiday and personal time); 4117.08(B)(3) (employer contribution to the public employees retirement system); 4117.08(B)(5) (staffing); 4117.081(B)(1) (school district authority to assign); 4117.081(B)(3) (class size); 4117.081(B)(4) (RIF-educational employees); 306.04(B) (seniority-transit); 709.012 (seniority-firefighters); 3316.07(A)(11) (seniority-nonteaching school employees).

55. 2011 Mich. Pub. Act 103.

56. S.B. 7 § 10, 97th Gen. Assemb. (Ill. 2011).

Although much of the "tsunami" focused on eliminating employee involvement in noneconomic workplace decision making, a number of states focused on healthcare benefits. Although most law enforcement and fire protection personnel were exempted from Wisconsin's prohibition on bargaining for anything other than base wages, the state's regular biannual budget act prohibited bargaining over law enforcement and firefighter health insurance.⁵⁷ Ohio's enactment deemed "not appropriate" for bargaining, *inter alia*, health-care benefits, except that the parties may agree that the employer will pay up to eighty-five percent of the premiums.⁵⁸

New Jersey suspended bargaining over healthcare benefits for four years while a new statute is phased in. The statute sets a sliding scale according to salary of mandatory employee contributions to healthcare premiums and provides for healthcare plans to be designed by two state committees, one for education and one for the rest of the public sector.⁵⁹

Massachusetts enacted a new method for local governments to make changes in health insurance. The governing body may adopt changes in accordance with estimated cost savings and proof of the savings. It gives notice to each bargaining unit and a retiree representative. The retiree representative and the bargaining unit representatives form a public employee committee that negotiates with the employer for up to thirty days. After thirty days, the matter is submitted to a tripartite committee, which, within ten days, can approve the employer's proposed changes, reject them, or remand for additional information. The committee's decision is final.⁶⁰

These legislative initiatives replace worker voice with unilateral employer control. Wisconsin Governor Scott Walker called for as much. In an op-ed in the *Wall Street Journal*, he argued that such action would give employers "the tools to reward productive workers and improve their operations. Most crucially, our reforms confront the barriers of collective bargaining that currently block innovation and reform."⁶¹

In contrast to Governor Walker's urgings, during the debates over the Wisconsin legislation, the Wisconsin Association of School Boards reported that many of its members were "gravely concerned" that the bill

57. 2011 Wis. Act 32 § 2409cy.

58. S.B. 5, 29th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. CODE ANN. § 4117.08(B)(2), (E).

59. 2011 N.J. Laws ch. 78.

60. 2011 Mass. Acts, ch. 69. Media reports suggested that in April when the Massachusetts House passed more restrictive legislation, President Obama's Director of Intergovernmental Affairs telephoned Massachusetts Governor Deval Patrick with concerns about the bill, which had been strongly opposed by organized labor. The governor negotiated changes with labor leaders whose attitude changed from a vow to fight the legislation "to the bitter end" to support and congratulations to the governor for "listening to labor's concerns." See Michael Levenson, *National Scrutiny for Mass. Labor Law*, BOS. GLOBE, July 12, 2011.

61. Scott Walker, Op-Ed., *Why I'm Fighting in Wisconsin*, WALL. ST. J., Mar. 10, 2011, at A17.

would “immeasurably harm the collaborative relationships that exist between school boards and teachers.”⁶² Hundreds of local government officials signed an open letter to the governor opposing the bill on similar grounds.⁶³ In Chicago, the school board’s assertion of its newly acquired right to unilaterally increase the length of the school day contributed to a relationship with the teachers’ union that an independent fact finder called “toxic,”⁶⁴ and led to a strike that closed the Chicago Public Schools for seven school days. The view that replacing mandated worker voice with unilateral employer control will result in improved public services is naïve at best. As discussed previously, the elimination of worker voice in most decisions affecting public employees will likely redound to the detriment not only of employees, but also the public.

III. THE NEW ATTACK: PUBLIC SECTOR COLLECTIVE BARGAINING INAPPROPRIATELY ADVANTAGES PUBLIC EMPLOYEE UNIONS IN THE BROADER POLITICAL PROCESS

The shift toward unilateral employer control shifts decision making concerning public employees’ compensation and working conditions from the bargaining table to the broader political process. In this process, public employee unions must compete against other interest groups. Although Wellington and Winter regarded as a positive rationale for collective bargaining rights in both the private and public sectors that such action facilitates worker organization as a political force,⁶⁵ more recent attacks on public sector collective bargaining regard worker organization as a political force negatively.

For example, CCNY Professor Daniel DiSalvo contends that public sector unions spend massively on political candidates and lobbying to increase the demand for public services and maintain public employment at unsustainable levels.⁶⁶ He suggests, as an example, that political expenditures of the California Correctional Peace Officers Association led to the building of more prisons and California’s three strikes law,

62. Letter from John H. Ashley, Executive Director, Wisconsin Association of School Boards to Hon. Alberta Darling and Hon. Robin Vos, Co-Chairs, Wisconsin Legislature Joint Committee on Finance (Feb. 15, 2011) (on file with author).

63. See Erin Richards et al., *Clash Continues: Budget Battle—Day 12 Many City Officials Think Union Limits Go Too Far*, MILWAUKEE J. SENTINEL, Feb. 27, 2001, available at 2011 WLNR 3854288.

64. Chicago Board of Education and Chicago Teachers Union Local 1, Am. Fedn of Teachers, AFL-CIO, Arb. Ref. 12.178 at 56 (July 16, 2012) (Benn, Fact-Finder); see Noreen S. Ahmed-Ullah & Joel Hood, *Arbitrator Scolds CPS Teachers Union for Stubbornness as Threat of Strike Looms*, CHI. TRIB., July 18, 2012, http://articles.chicagotribune.com/2012-07-18/news/ct-met-cps-fact-finder-report-0718-20120718_1_cps-teachers-teachers-union-school-day-and-year.

65. WELLINGTON & WINTER, *supra* note 7, at 8, 12.

66. Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT’L AFFAIRS, Fall 2010, at 1.

mandating incarceration of individuals convicted for the third time of certain felonies.⁶⁷ He argues that prohibiting agency-shop fees and dues check-off "would let workers retain their right to negotiate with their employers but put them on a level playing field in the political arena."⁶⁸ Similarly, Northwestern University Law Professors John McGinnis and Max Schanzenbach argue, "Public employee unions, by virtue of the dues they collect from members, possess war chests from which they can contribute to politicians who support their goals. These goals, not surprisingly, involve first and foremost accruing benefits for their members. It is an axiom of political science that politicians tend to reward concentrated groups at the expense of the public, because these groups can in turn provide the most rewards to them."⁶⁹ Unlike other interest groups, McGinnis and Schanzenbach maintain, "public sector unions enjoy the legal privilege of assessing dues from their members," something they label "the coercive authority to collect dues" that provides "the legal infrastructure to become particularly effective at wielding political influence."⁷⁰

Not surprisingly, the tsunami that has hit public sector collective bargaining has taken aim at union treasuries. Legislatures have taken steps to preclude unions from assessing agency-shop or fair-share fees against employees in the bargaining unit they represent who choose not to join the union. Legislatures have also taken steps to make it more difficult for unions to collect dues from those employees who voluntarily choose to join, by prohibiting employers from agreeing to dues check-offs or restricting such arrangements.

In 2012, amid much controversy, Indiana enacted a "right to work" law which prohibited union security agreements in the private sector.⁷¹ A year earlier, amid much less controversy, Indiana prohibited such agreements in public education.⁷² Similarly, Wisconsin prohibited agency-

67. *Id.* at 11-12.

68. DANIEL DiSALVO, DUES AND DEEP POCKETS: PUBLIC SECTOR UNIONS' MONEY MACHINE 10 (Manhattan Institute Civic Report No. 67, Feb. 2012), available at http://www.manhattan-institute.org/pdf/cr_67.pdf.

69. John O. McGinnis & Max Schanzenbach, *The Case Against Public Sector Unions*, 162 HOOVER INST. POL'Y REV. (Aug. 1, 2010), <http://www.hoover.org/publications/policy-review/article/43266>.

70. *Id.*

71. H. Enrolled Act No. 1001, 117th Gen. Assembly (Ind. 2012).

72. Prior to the 2011 enactment, the Indiana Court of Appeals held lawful a collective bargaining agreement provision obligating teachers who were not members of the union to pay the union a fair share fee, as long as failure to pay was not grounds for the nonpayer's dismissal. *Ft. Wayne Educ. Ass'n v. Goetz*, 443 N.E.2d 364 (Ind. Ct. App. 1982). The 2011 enactment prohibited bargaining over all subjects, presumably including union security, except for wages and wage-related fringe benefits. See *supra* note 47 and accompanying text. Indiana has no statute conferring collective bargaining rights on public employees outside of public education but municipalities may confer such rights on their employees. See *AFSCME v. City of Gary*, 578 N.E.2d 365 (Ind. Ct. App. 1991). In 1990, Indiana

shop or fair-share fee agreements for all public employees except exempted public safety personnel.⁷³ Following the November 2012 elections, the lame duck Michigan Legislature enacted "right to work" laws for the private⁷⁴ and public sectors.⁷⁵ The latter does not apply to police, firefighters, or state troopers.⁷⁶

Wisconsin also prohibited voluntary dues check-off for all employees except exempted public safety personnel.⁷⁷ As discussed *infra*, the United States District Court for the Western District of Wisconsin enjoined the dues check-off prohibition as unconstitutional, but that decision was reversed by a divided Seventh Circuit Court of Appeals.⁷⁸ Michigan prohibited dues check-off for employees in public education.⁷⁹ It too has been enjoined by a United States District Court.⁸⁰ The Tennessee Collaborative Conferencing Act, which replaced its teacher collective bargaining statute, permits dues check-off generally, but prohibits it for political contributions.⁸¹ California voters have three times rejected initiatives that would have prohibited payroll deductions used for political purposes, most recently in November 2012.⁸² In 2009, the Supreme Court upheld Idaho's prohibition on dues deduction for political expenditures against constitutional attack.⁸³ The attacks on union security fees and dues check off are considered in turn below.

A. Union Security Fees

The law is clear that public employers and the unions representing their employees may not require employees to join the union as a condition of employment, but may require them to pay an agency-shop or fair-share

Governor Evan Bayh issued an executive order conferring collective bargaining rights on state employees. Exec. Order 90-6 (Ind. 1990). Although Governor Mitch Daniels, on his first full day in office in 2005 revoked the executive order, thereby eliminating collective bargaining for state employees; see Steven Greenhouse, *In Indiana, Clues to Future of Wisconsin Labor*, N.Y. TIMES, Feb. 26, 2011; the Indiana Court of Appeals held lawful a fair share fee provision of a collective bargaining agreement negotiated under the Bayh executive order. *Byrd v. AFSCME*, 781 N.E.2d 713 (Ind. Ct. App. 2003). By analogy to *Byrd*, with the absence of any statutory prohibition, it is arguable that union security provisions in municipal collective bargaining agreements remain lawful in Indiana.

73. 2011 Wis. Act 10 §§ 219, 276.

74. 2012 Mich. Pub. Acts No. 348 (Dec. 11, 2012).

75. 2012 Mich. Pub. Acts No. 349 (Dec. 11, 2012).

76. *Id.* §§ 14(4)(a)(i), (ii).

77. 2011 Wis. Act. 10 §§ 227, 298.

78. *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012), *rev'd*, Nos. 12-1854, 12-2011 & 12-2058 (7th Cir. Jan. 18, 2013).

79. Mich. Pub. Act 53 (2012).

80. *Bailey v. Callaghan*, 193 L.R.R.M. (BNA) 2820 (E.D. Mich. 2012), *stay denied*, 2012 WL 3134338 (E.D. Mich. Aug. 1, 2012).

81. TENN. CODE ANN. § 49-5-608(b)(6) (2011).

82. See Gene Cubbison & Lauren Steussy, *Voters Reject Prop. 32 in California* (Nov. 7, 2012), <http://www.nbcalosangeles.com/news/local/Proposition-32-Results-Come-In-177558611.html>.

83. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009).

fee representing their pro rata share of the costs of their representation.⁸⁴ The fee must be based on the percentage of union expenditures that went to chargeable activities and the Court has undertaken an expenditure by expenditure review of what the parties may constitutionally charge non-member fee payers.⁸⁵ The First Amendment also requires that the parties provide procedural protections against fee payers paying for nonchargeable political or ideological expenditures. These procedures include advance reductions from base dues and escrowing to ensure that nonmember payments are not used even temporarily for political or ideological purposes, notice to fee payers detailing how the percentage of dues attributable to chargeable activity was calculated, and an opportunity for fee payers to challenge the union's calculation of the fee and have their challenges resolved by an independent decision maker.⁸⁶ Although the Constitution does not require unions to reduce the fees charged to nonmembers who voice no objection to being charged for political or ideological expenditures, states are constitutionally free to limit unions to charging fee payers only for chargeable expenditures unless the fee payer affirmatively consents to paying for political or ideological activity.⁸⁷

Thus, agency-shop and fair-share fee provisions of collective bargaining agreements cannot obligate nonmembers to subsidize union political or ideological activity. However, when such union security agreements are prohibited, the ability of union members to participate in the broader political process is significantly reduced. This is because the union remains obligated to represent nonmembers who are employed in the bargaining unit. Thus, the dues paid by union members must be used to subsidize the nonmembers, causing the union to divert resources that might otherwise be used for political activity to fund the subsidy. Moreover, as Mancur Olson demonstrated almost half a century ago in his classic work *The Logic of Collective Action*, absent a union security fee provision in the collective bargaining agreement, many workers who desire union representation will make the economically rational decision not to join the union and pay dues. This is because improved wages and working conditions and most other goals sought by a union are, with respect to the workers it represents, collective goods. They cannot be withheld from workers in the bargaining unit who choose not to join the union. Absent a union security agreement requiring those who choose not to join to pay a service fee, economically rational workers will not join the union because

84. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

85. *See id.*; *see also Locke v. Karras*, 555 U.S. 207 (2009); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

86. *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

87. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

each worker will not perceptibly strengthen the union through his or her membership alone and all workers will receive the benefits the union achieves regardless of whether they join and pay dues.⁸⁸

In a more recent study, Greg Hundley found that where the law permits an agency-shop fee, the probability of coverage by a collective bargaining agreement increases for union members and for nonmembers, but where the law mandates an agency-shop fee the probability overall for coverage by a collective bargaining agreement increases but the probability that those covered will be nonmembers is at its lowest compared to where agency-shop fees are permitted or prohibited. The lowest rates of coverage by collective bargaining agreements for union members and nonmembers occur where the law does not allow agency shop. Hundley writes:

The very low rate of covered nonmembership under a mandatory agency-shop law is consistent with the low marginal cost of membership under such a law. But this does not explain why so many workers prefer coverage, as the certain prospect of an agency fee should deter some workers from seeking representation. It could be . . . that workers are more likely to engage in a collective activity when other members of the group are required to contribute.⁸⁹

Hundley's findings and explanation are consistent with Olson's analysis.

The experience in the Nebraska public sector is also consistent with Olson's analysis. Under a Nebraska statute, employees who are not members of the union that represents them may choose their own representatives in grievances or legal actions or pay the union for the costs incurred in representing them.⁹⁰ Consequently, even though Nebraska is a right-to-work state, teacher unions enjoy 100% membership because teachers do not want to lose representation if they should need it individually.⁹¹

The Nebraska public sector notwithstanding, unions who serve as exclusive bargaining representatives generally may not discriminate against employees in the bargaining unit who are not members with respect to representation.⁹² Consequently, in the absence of an agency-shop or fair-share agreement, we can expect union membership to be considerably

88. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 76-91 (1965).

89. Greg Hundley, *Collective Bargaining Coverage of Union Members and Nonmembers in the Public Sector*, 32 *INDUS. REL.* 72, 90 (1993).

90. NEB. REV. STAT. § 48-838.

91. E-mail from Professor Steven Willborn, University of Nebraska, to Martin Malin (July 6, 2011).

92. For example, a union's duty of fair representation generally does not require it to provide a lawyer to represent an employee in a grievance arbitration, *see, e.g.*, *Castelli v. Douglass Aircraft Co.*, 752 F.2d 1480, 1483 (9th Cir. 1985), but a union does breach its duty if it provides attorneys only to union members. *See id.*; *Nat'l Treasury Employees Union v. FLRA*, 721 F.2d 1402 (D.C. Cir. 1983); *Del Casal v. Eastern Airlines*, 634 F.2d 295 (5th Cir. 1981).

lower, even among workers who desire union representation. This magnifies the degree to which dues paid by members have to be diverted to subsidize representation of nonmembers. To those who regard union security arrangements as inappropriately advantaging unions in the political process, this diversion is exactly what is intended. To the extent that union security arrangements allow unions to avoid diverting dues paid by members to fund representation of nonmembers, such arrangements do advantage unions in the political process by enabling them to allocate greater resources to political and ideological activity, but the case has not been made that such advantage is inappropriate.

McGinnis and Schanzenbach's claim that unions are privileged because they have "the legal privilege of assessing dues from their members," and "the coercive authority to collect dues" is simply false. Unions' assessment of dues from their members is no different than that of any other membership group. To become a member and to be entitled to the rights and privileges of membership, an individual has to pay dues. The consequence of a failure to pay dues is a loss of membership. A union's authority to collect dues is no more or less coercive than that of any other membership organization.

A union that has a union security agreement does have authority to coerce the payment of agency-shop or fair-share fees, as opposed to dues. But the strict limitations that the law places on those fees ensure that they will not be used, even indirectly, for political or ideological purposes. Thus, it cannot be said that unions are coercively gaining the ability to advance their political agendas by using funds from individuals opposed to those agendas. Individuals who object have the right to not be charged for such political or ideological expenditures. Indeed, in the absence of union security arrangements, unions labor under a disadvantage that is not imposed on other membership groups as they are forced to divert members' dues to subsidize services provided to nonmembers. As I have argued elsewhere, the strongest constitutional justification for allowing agency-shop or fair-share fees is that such arrangements appropriately balance the conflicting First Amendment rights of fee payers and union members.⁹³

Agency-shop and fair-share fee agreements result in more employees becoming members of the union because the relatively small monetary savings they would achieve by being fee payers is not worth the costs of nonmembership, such as not having a right to vote for union officers and being excluded from internal union events limited to members. Consequently, the argument goes, even though unions cannot compel

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

employees to subsidize their ideological and political activities, allowing agency-shop and fair-share fee arrangements enables unions to build their treasuries for political purposes through dues paid by members who do not necessarily support the union's political agenda. But members who disagree with their unions' political or ideological expenditures retain the option of terminating their memberships and becoming fee payers. Such a right to opt out places them in a superior position to, for example, public employees who contribute to retirement funds that invest those contributions in stock of companies that make political or ideological contributions from their general treasuries to which the employees object. Those employees have no opt-out option,⁹⁴ and the Supreme Court has held that a desire to protect them from such expenditures does not constitutionally justify restrictions on the companies' abilities to spend from the general treasury on political campaigns.⁹⁵

Unfortunately, the Supreme Court's rhetoric has grown increasingly hostile to union security arrangements in the public sector, although its legal doctrine has remained relatively stable. In *Abood v. Detroit Board of Education*,⁹⁶ the Court held that public employers and the unions representing their employees may agree to require nonmembers in the bargaining unit to pay the union a fee representing the nonmember's pro rata share of the costs of representation with respect to wages, hours and terms and conditions of employment. The Court rejected the argument that collective bargaining in the public sector is inherently political and therefore employees who express their dissent by not joining the union may not constitutionally be compelled to support the process financially. In so doing, the court regarded union security issues in the public sector to be no different from union security issues in the private sector:

The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights. Even those commentators most acutely aware of the distinctive nature of public-sector bargaining and most seriously concerned with its policy implications agree that "[t]he union security issue in the public sector... is fundamentally the same issue... as in the private sector.... No special dimension results from the fact that a union represents public rather than private employees."⁹⁷

Unfortunately, the Court's decision in *Abood* injected an ambiguity into the analysis, which did not exist in the private sector precedents on

94. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012).

95. *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310 (2010).

96. 431 U.S. 209 (1977).

97. *Id.* at 232.

which the Court relied. In *Railway Employees Department v. Hanson*,⁹⁸ the Court held that a union shop provision in a collective bargaining agreement authorized by the Railway Labor Act (RLA) did not amount to enforced ideological conformity on employees opposed to the union and therefore did not violate the First Amendment.⁹⁹ It left open the question whether the expenditure of employees' dues on political activities over the employees' objections might violate the objectors' First Amendment rights.¹⁰⁰

In *International Association of Machinists v. Street*,¹⁰¹ the Court answered the question it had left open in the affirmative. The Court recognized that expenditure of objecting employees' dues on political causes could violate the objectors' First Amendment rights of free expression but avoided the constitutional issue by interpreting the RLA to prohibit such expenditures.¹⁰² In *Abood*, the Court squarely held that its private sector precedents applied equally to the First Amendment issues raised by an agency-shop provision in a public sector collective bargaining agreement, but injected some ambiguity into the analysis. The Court wrote:

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.¹⁰³

98. 351 U.S. 225 (1956).

99. *Id.* at 231.

100. *Id.*

101. 367 U.S. 740 (1961).

102. *Id.* at 212-13.

103. *Abood*, 431 U.S. at 222 (footnote omitted). The Court has quoted this language in its subsequent agency shop decisions. See, e.g., *Locke*, 555 U.S. at 212.

I have argued that the above quoted language from *Abood*, when read in context, need not and should not be read to reflect a rejection of *Hanson's* basic premise that compelled financial support of the exclusive bargaining representative does not in any way implicate objectors' First Amendment rights, absent compelled financial support of political or ideological expenditures.¹⁰⁴ But the language can be read to mean that any compelled financial support of the exclusive representative infringes on objectors' First Amendment rights of free association with such infringement constitutionally justified with respect to compelled support of expenditures germane to collective bargaining by the government's interest in stable labor relations resulting from enabling the union to avoid free riders, i.e., employees receiving the benefits of union representation without paying for them. The Court's most recent jurisprudence in this area has adopted this latter view of *Abood*, and has turned hostile toward union security provisions in the public sector.

Thirty years after *Abood*, in upholding the constitutionality of the State of Washington's requirement that nonmember fee payers affirmatively consent to being charged for political and ideological activity before such charges may be imposed, the Court in *Davenport v. Washington Education Association*, characterized agency fee agreements as giving the union "the power, in essence, to tax government employees . . . an extraordinary power."¹⁰⁵ It further characterized the agency fee as "the union's extraordinary state entitlement to acquire and spend *other people's* money."¹⁰⁶ The Court distinguished the Washington statute's application to public sector collective bargaining agreements from its application to private sector collective bargaining agreements, observing that application to the private sector "presents a somewhat different constitutional question," but concluding that the private sector issue was not properly before the Court.¹⁰⁷

The Court's hostility to union security provisions in public sector collective bargaining agreements was magnified in *Knox v. Service Employees International Union Local 1000*.¹⁰⁸ In June 2005, Local 1000 sent its annual notice to nonmember fee payers for whom it served as exclusive bargaining representative advising them of the percentage of dues spent on activity related to collective bargaining, giving them thirty days to object and advising them that if they failed to object they would be charged

104. Malin, *supra* note 93, at 858–61.

105. 551 U.S. 177, 184 (2007).

106. *Id.* at 187.

107. *Id.* at 190.

108. 132 S. Ct. 2277 (2012).

full dues.¹⁰⁹ After the thirty-day objection window closed, Local 1000 imposed a special assessment to be used entirely to fund political activity.¹¹⁰ Fee payers who had objected during the thirty-day period to paying full union dues were required to pay a percentage of the special assessment equal to the percentage of regular dues they were being charged but fee payers who had failed to object during the thirty-day window were required to pay the full special assessment.¹¹¹ Both groups sued alleging that the compelled payments were unconstitutional.

As litigated in the lower courts, the fee payers' lawsuit raised two questions. With respect to the fee payers who had objected to being charged full dues, the suit claimed that the union could rely on its prior calculation to determine what percentage of the new assessment could be charged to objectors. The Ninth Circuit rejected this argument,¹¹² but the court did not expressly address the claim by the fee payers who had not previously objected to paying full dues that, in light of the special assessment, they were entitled to a new opportunity to opt to pay the reduced amount. It appeared to combine that issue with the issue of whether the special assessment impacted the continuing validity of the original notice sent to all fee payers.

The Ninth Circuit regarded the entire case as governed by the Supreme Court's decision in *Chicago Teachers Union Local 1 v. Hudson*,¹¹³ which mandated notice to fee payers of how the union calculated their fees, an opportunity to object to the calculation and to have the objection resolved in a reasonably prompt manner by a neutral adjudicator. *Hudson*, however, could not control the question of whether fee payers who had not objected to paying full dues following the first notice were entitled to a new opportunity to object because the union in *Hudson* did not charge any fee payers full dues regardless of objection. It charged a fee reduced by the percentage of dues spent on political and ideological activity to all fee payers and passed along to all fee payers the benefit of any further reduction resulting from any fee payer's challenge to the union's calculation.¹¹⁴

Although the Court in *Abood*, adopted its RLA precedent that fee payer dissent to union political and ideological expenditures is not to be presumed but must be communicated to the union before fee payers become

109. *Id.* at 2285.

110. *Id.* at 2285-86.

111. *Id.* at 2286.

112. *Knox v. Cal. State Employees Ass'n*, 628 F.3d 1115, 1121-23 (9th Cir. 2010), *rev'd sub nom. Knox v. Service Employees Int'l Union Local 1000*, 132 S. Ct. 2277 (2012).

113. 475 U.S. 292 (1986); *see Knox*, 628 F.3d at 1117 (describing the question presented as whether *Hudson* required a new notice in light of the special assessment).

114. *See Malin, supra* note 93, at 881-82 (discussing this aspect of *Hudson*).

constitutionally entitled to having their fees exclude those expenditures,¹¹⁵ the Court found the requirement of communicating dissent satisfied by the filing of a lawsuit,¹¹⁶ but in *Abood*, the union had not instituted procedures for fee payer objections. *Knox* thus raised the issue of whether a union may, by instituting formal objection procedures, confine fee payers to a thirty-day window for voicing their dissent.¹¹⁷

In *Knox*, the Court majority went beyond the issues presented and held not only that the fee payers were entitled to a new notice but that the special assessment could only be imposed on those fee payers who affirmatively indicated their consent to pay it. This rather extreme judicial activism was criticized harshly by four members of the Court,¹¹⁸ and has been similarly criticized by labor law and constitutional law scholars.¹¹⁹ The opinion ratcheted up the hostile rhetoric previously displayed in *Davenport*.

Without acknowledging *Abood*'s determination that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights,"¹²⁰ the *Knox* majority rejected it. The *Knox* majority wrote, "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association . . ."¹²¹ The Court added ominously, "[W]e do not today revisit whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake."¹²² It characterized authorizing union security fees to enable unions to avoid free riders as "something of an anomaly" and an analysis "generally insufficient to overcome First Amendment objections."¹²³

The Court thus signaled its receptivity to overruling *Abood* and prohibiting agency-shop and fair-share fees in the public sector. It also attacked the generally accepted principle that fee payer dissent to political and ideological expenditures is not to be presumed, characterizing the principle as an "offhand remark," that was "stated in passing" without "consider[ing] the broader constitutional implications of an affirmative opt-

115. *Abood*, 431 U.S. at 236-37.

116. *Id.* at 241 (following *Bhd. of Ry. & S.S. Clerks Freight Handlers, Exp. and Station Emp. v. Allen*, 373 U.S. 113, 119 n.6 (1963), decided under the Railway Labor Act).

117. I have urged that where unions have formal objection procedures they be allowed to insist that fee payers use them but that they not be allowed to confine fee payers to a defined time period in which to voice their dissent. Malin, *supra* note 93, at 881-83 & n.135.

118. *Knox*, 132 S. Ct. at 2297-98 (Sotomayor, J., joined by Ginsburg, J., concurring); *id.* at 2306 (Breyer, J., joined by Kagan, J., dissenting).

119. See Catherine I. Fisk & Ewin Chemerinsky, Political Speech and Association Rights After *Know v. SEIU Local 1000* (unpublished manuscript on file with author).

120. See *supra* note 97 and accompanying text.

121. *Knox*, 132 S. Ct. at 2289.

122. *Id.*

123. *Id.* at 2289-90.

out requirement."¹²⁴ The Court thus signaled that even if it does not overrule *Abood*, it may prohibit charging fee payers for political and ideological expenditures generally unless the fee payers affirmatively consent to such charges.¹²⁵

The Court's more hostile characterization of union security in the public sector is most unfortunate. Union security agreements are not the extraordinary instruments that the Court suggests. For example, they are clearly analogous to laws requiring attorneys licensed in a state to join the state's unified bar association,¹²⁶ and student activity fees imposed by state colleges and universities used to subsidize a variety of student organizations.¹²⁷

In *Knox*, the Court supported its characterization of allowing unions to prevent free riders by charging them fees as anomalous, quoting examples from a Clyde Summers book review of Sheldon Leader's *Freedom of Association: A Study in Labor Law and Political Theory*:

If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assessments are not levied on all parents. If an association of university professors has as a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.¹²⁸

The Court, however, omitted the sentences immediately preceding and the sentence immediately following the quoted portion of the book review. Those sentences state as follows (with the portion quoted by the Court indicated by my ellipses):

The author fails to discuss a more general difficulty with the free rider argument: Why is it not applicable to a wide range of private

124. *Id.* at 2290.

125. See Fisk & Chemerinsky, *supra* note 119. The prospect of the Court changing the law governing public sector union security may soon be upon us. In *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), the plaintiffs alleged that the collective bargaining agreement between the State of Illinois and the union representing home-care personal assistants in home-based Medicaid waiver programs unconstitutionally required non-members to pay fair share fees. Although the plaintiffs sought to characterize the assistants as independent entrepreneurs unconstitutionally compelled to support financially a lobbying organization, the court analyzed the facts and concluded that the assistants were employees of the state. The plaintiffs petitioned the Supreme Court for a writ of certiorari. Normally, we would expect the Court to reject a petition to review such a fact-based determination out of hand. The Court, however, has asked the U.S. government for its views with respect to the petition. *Harris v. Quinn*, No. 11-681, 2012 WL 2470091 (June 29, 2012).

126. See *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

127. See *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000).

128. *Knox*, 132 S. Ct. at 2289-90 (footnote and citation omitted).

associations? . . . The author, like most other advocates of the free rider argument, never explains why the argument should be compelling when applied to unions, but not other associations.¹²⁹

Contrary to what the Court apparently wished to convey, Summers was not indicting union security fees but was critiquing the inadequacy of Leader's defense. Summers went on to give the explanation that he considered superior to Leader's:

The tolerance of free riders is one of the hallmarks of a free market system and an inescapable condition in any complex democratic social system. I would suggest that the appeal to the free rider argument on behalf of unions has more to do with the special role unions play in our society than with conceptions of freedom of association, and the author's conceptual approach simply cannot explain why unions are, or should be, treated differently.¹³⁰

The special role that unions play in society accounts for our labor laws conferring on them the status of exclusive representative. As such, they are unlike, for example, the parent-teacher association that raises money for the school library which has no legal obligation to divert members' dues that it might otherwise spend on political activity to represent nonmember parents who claim that their children were denied library privileges. In contrast, the union that negotiates for additional personal days is legally obligated to represent nonmember employees who claim they were denied personal days in violation of the collective bargaining agreement, even though the cost of such representation may divert members' dues from funding political activities that the union has a First Amendment right to fund.

Despite the Court's characterization of agency fees in *Davenport*, a public employer's agreement with a union to include an agency fee provision in their collective bargaining agreement cannot accurately be described as conferring on the union the power to tax employees. The power of taxation is a power of sovereignty, whereas the union security arrangement is the result of a broader contract between the public employer and the union. In other words, a unit of government agrees to union security in its capacity as an employer rather than in its capacity as sovereign. The Court has long recognized that the Constitution affords government greater flexibility when it acts as employer than when it acts as sovereign.¹³¹

Union security agreements serve the same labor relations purposes in the public sector as they do in the private sector. They do not privilege unions to use the money of those opposed to their political agendas to

129. Clyde Summers, Book Review, 16 COMP. LAB. L.J. 262, 268 (1995).

130. *Id.*

131. See, e.g., *Enquist v. Ore. Dep't of Agriculture*, 553 U.S. 591 (2008); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983).

finance their political activities. They cannot be said to inappropriately advantage unions in the broader political process.

B. Dues Check-Off

Payment of union dues by payroll deduction generally requires written authorization from the employee.¹³² Consequently, dues check-off cannot be thought of as coercive; that most members authorize it as a convenient method of payment does not defeat its voluntary nature. Prohibitions on dues check-off, however, can have a devastating effect on union ability to represent employees. For example, New York's Taylor Law prohibits strikes by public employees in that state.¹³³ One penalty against a union for engaging in an illegal strike is suspension of the union's dues check-off.¹³⁴ When the United Federation of Teachers engaged in an illegal strike against the New York City Public Schools from September 9 through September 16, 1976, the New York Public Employment Relations Board (NYPERB) suspended its dues check-off. Litigation over the penalty delayed its imposition until May 1, 1982. In the first three months of the suspension, the union's revenue from dues and agency-shop fees dropped by \$1.3 million and when the cost of dues and fee collection was considered, it had lost \$2 million. Finding that the loss in income impaired the union's ability to provide necessary representational services, the NYPERB restored the dues check-off.¹³⁵

The district court's decision in *Wisconsin Education Association Council v. Walker* enjoining the prohibition on dues check-off in Wisconsin illustrates the absence of any principled basis for such action.¹³⁶ Wisconsin Act 10, among other provisions, prohibited employers from allowing union members to pay their dues by payroll deduction. The act divided public employees into general public employees and public safety employees. Public safety employees were defined as police officers, firefighters, deputy sheriffs, county traffic police officers, village police officers and

132. Some states mandate payroll deduction of agency-shop or fair-share fees. See, e.g., 5 ILL. COMP. STAT. 315/6(e) (Supp. 2012); 115 ILL. COMP. STAT. 5/11 (2006); 34 N.J. STAT. ANN. §§ 13A-5.5, 13A-5.6 (West 2006). To the extent that payroll deduction is mandated by state statute, it may be thought of as coercive but as developed above, it only coerces payment of the fee payer's pro rata share of the costs of representation in collective bargaining; it does not coerce financial support of the union's political and ideological activities.

133. N.Y. CIV. SERV. Art. 14, § 210.

134. *Id.*

135. United Federation of Teachers, Local 2, NYSUT, AFT, 15 N.Y.P.E.R.B. ¶ 3091 (1982). For additional examples of the devastating financial impact loss of dues check-off can have, see Ann C. Hodges, *Maintaining Union Resources in an Era of Public Sector Bargaining Retrenchment*, 16 EMP. RTS. & EMP. POL'Y J. 599 (2012).

136. 824 F. Supp. 2d 856 (W.D. Wis. 2012), *rev'd*, Nos. 12-1854, 12-2011 & 12-2058 (7th Cir. Jan. 18, 2013).

firefighters, state troopers, and state motor vehicle inspectors. The act prohibited dues check-off for general employees but allowed it for public safety employees.¹³⁷

The record reflected that the unions who represented the Milwaukee police and Milwaukee firefighters, the West Allis Professional Police Association, the Wisconsin Sheriffs and Deputy Sheriffs Association and the Wisconsin Troopers Association (representing troopers and motor vehicle inspectors) all had endorsed Scott Walker for governor in the 2010 campaign. In contrast, the unions representing other law enforcement and fire service employees, such as the Wisconsin Capitol Police, the University of Wisconsin Campus Police, state correctional officers, probation and parole officers, conservation wardens, fire crash rescue specialists, and state criminal investigation agents and the unions representing most other public employees in the state endorsed Governor Walker's opponent.¹³⁸ In other words, Act 10 essentially prohibited dues check-off in bargaining units whose employees were represented by unions that had opposed Governor Walker's election and allowed it in bargaining units whose employees were represented by unions that had supported the governor.

The district court found that Act 10's distinction between general and public safety employees for purposes of allowing or prohibiting dues check-off lacked any rational basis and therefore violated the Equal Protection Clause of the Fourteenth Amendment.¹³⁹ The court also found that it violated the First Amendment. The court distinguished *Ysursa v. Pocatello Education Association*,¹⁴⁰ where the Court upheld the constitutionality of Idaho's prohibition on any check-off of monies to be used for political purposes on the ground that the Wisconsin enactment did not apply across the board but instead discriminated on the basis of speaker viewpoint.

The fact that *none* of the public employee unions falling into the general category endorsed Walker in the 2010 election and that *all* of the unions that endorsed Walker fall within the public safety category certainly suggests that unions representing general employees have different viewpoints than those of the unions representing public safety employees. Moreover, Supreme Court jurisprudence and the evidence of record strongly suggests that the exemption of those unions from Act 10's prohibition on automatic dues deductions enhances the ability of unions representing public safety employees to continue to support this Governor and his party.¹⁴¹

137. *Id.* at 859.

138. *Id.* at 864-65.

139. *Id.* at 876.

140. 555 U.S. 353 (2009).

141. *Wisc. Educ. Ass'n Council*, 824 F. Supp. 2d at 873. The court also quoted Wisconsin State Senate Majority Leader Scott Fitzgerald's comments that Act 10 would deny funds to President Obama's reelection campaign. *Id.* at 875 & n.17. On appeal, the Seventh Circuit reversed. Nos. 12-

Similarly, in *United Food and Commercial Workers v. Brewer*,¹⁴² the court issued a preliminary injunction against the Protect Arizona Employees' Paychecks from Politics Act, which required unions whose members paid their dues by payroll deduction to certify that they did not use dues for political purposes or to specify the percentage of dues that they would use for political purposes. Payroll deduction of the percentage specified was prohibited unless the individual employee affirmatively consented to such deduction on an annual basis. These restrictions did not apply to unions representing public safety employees or to other groups who received money by payroll deduction, such as retirement plan administrators, charitable organizations, and insurance companies.¹⁴³ The court issued a preliminary injunction, finding that the plaintiff unions were likely to succeed on the merits because the act unconstitutionally discriminated based on speaker viewpoint.¹⁴⁴

The academic attack on dues check-off is as unprincipled as the legislative attack. McGinnis and Schanzenbach decry union political spending opposing privatization, supporting teacher tenure, and supporting increases in government services.¹⁴⁵ DiSalvo decries union support of Democratic candidates, efforts to recall Governor Walker and Republican state senators in Wisconsin, and the successful referendum overturning the Ohio statute that would have significantly curtailed public employee collective bargaining rights.¹⁴⁶ He complains that "two of the top five biggest spenders in Wisconsin's 2003 and 2004 state elections were the Wisconsin Education Association Council and the AFSCME-affiliated Wisconsin PEOPLE Conference. Only the state Republican Party and two other political action committees—those belonging to the National Association of Realtors and SBC/Ameritech—spent more."¹⁴⁷

Despite DiSalvo's assertions to the contrary, prohibitions on union security arrangements and dues check-offs do not level the political playing

1854, 12-2011 & 12-2058 (7th Cir. Jan. 18, 2012). The majority did not dispute the facts as found by the district court and detailed above. The majority, however, concluded that the facts, as a matter of law, did not establish discrimination based on viewpoint, noting, for example, that the category of public safety employees included municipal police and firefighter bargaining units represented by unions that had endorsed Governor Walker's opponent, slip. op. at 22, discounting the statement by Senate Majority Leader Fitzgerald as not necessarily reflective of the intentions of the legislature as a whole, *id.* at 25, and characterizing dues check-off as a governmental subsidy of speech and opining that governments may discriminate when they subsidize speech. *Id.* at 10-13.

142. 817 F. Supp. 2d 1118 (D. Ariz. 2011).

143. *Id.* at 1121-22.

144. *Id.* at 1124-27; see also *Bailey v. Callaghan*, 193 L.R.R.M. (BNA) 2820 (E.D. Mich. 2012), stay denied, 2012 WL 3134338 (E.D. Mich. Aug. 1, 2012) (preliminarily enjoining Michigan statute prohibiting dues check-off for public education employees).

145. McGinnis & Schanzenbach, *supra* note 69.

146. DiSalvo, *supra* note 68, at 3-5.

147. DiSalvo, *supra* note 66, at 11.

field. Rather, they clear the field so that the only major spenders on political activity are entities such as the Wisconsin Republican Party, the National Association of Realtors, and SBC/Ameritech (now AT&T). Wellington and Winter regarded the organization of workers into an effective political voice as one of the positive justifications for collective bargaining in both the private and public sectors.¹⁴⁸ The decades of experience since their classic work was published bear this out. To the extent that public sector collective bargaining furthers unions as an effective voice that counters business and commercial interests in the public debate, it furthers, rather than distorts, democracy.

IV. CONCLUSION

Public sector collective bargaining is said to distort democracy in two ways. First, it allegedly excludes competing voices from public decision-making. Second, it allegedly inappropriately advantages public employee unions in the broader political process.

The first concern has led to the narrowing of the scope of bargaining in the public sector. This is the wrong road to travel. Rather than replace collective bargaining with unilateral employer control, we should break away from the private-sector model and develop creative approaches to mandate employee voice in a broad array of matters that affect them which will not freeze out other voices.

The second concern has led to prohibitions on agency-shop and fair-share fees and to prohibitions or restrictions on dues check-off. These measures lack any principled basis and derive from their proponents' dislike of the political positions taken by public sector unions. Rather than distort democracy, to the extent that public employee collective bargaining facilitates the organization of workers and amplifies their voices in the political arena, it furthers the democratic process by balancing business, commercial, and similar interests.

148. WELLINGTON & WINTER, *supra* note 7, at 8-9, 12.