
Protecting the Right to Remain Silent in the Workplace

In *Knox v. SEIU*, the Supreme Court protected the expressive rights of workers.

BY TIMOTHY SANDEFUR

Labor unions have long been a major force in American politics. Although precise figures are unobtainable, some experts estimate that unions now contribute \$800 million annually on political campaigns, including “in-kind contributions”—dispatching people to hand out flyers or man phone banks. In the 2008 presidential election, the Service Employees International Union (SEIU) alone devoted more than \$33 million to independent political expenditures. Like most union political money, this went almost entirely to the Democratic Party, despite the fact that many union members are politically conservative and differ with union leadership on many political issues.

This money comes not only from dues paid by members, but also from the special legal privilege that state laws give to unions: they are allowed to harvest “agency fees” directly from the paychecks of nonmembers regardless of the nonmembers’ wishes. For more than 50 years, the Supreme Court has allowed this on the theory that nonmembers benefit from union collective bargaining because the law forbids unions from negotiating for benefits that apply only to their members. This creates a “free rider” problem: nonmembers might enjoy the rewards of union negotiations without paying for them unless they are forced to contribute toward those negotiations.

Whatever the merits of this theory, it generates serious problems when a union devotes money to political activism with which

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some nonmembers disagree. Since people have a First Amendment right not to subsidize political expression of which they disapprove, the Supreme Court has been forced in a long series of decisions to navigate a narrow channel between enforcing the mandatory deduction of agency fees and protecting the First Amendment rights of those who have chosen not to join the union. In the 1977 case of *Abood v. Detroit Board of Education*, for example, Justice Potter Stewart quoted Thomas Jefferson: “[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical’... These principles prohibit a State ... 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.”

Yet the Court never employed its strongest method of protecting the free speech rights of nonmembers. First Amendment rights are typically reviewed under the legal theory of “strict scrutiny,” which requires judges to presume any restriction on expressive rights to be unconstitutional unless the government provides a strong justification for it. This contrasts with the more lenient “rational basis” scrutiny, under which a judge presumes a law to be constitutional until proven otherwise. Similarly, the Court has emphasized that judges should not presume that a person intends to give up important constitutional guarantees: “To preserve the protection of the Bill of Rights for hard-pressed defendants,” the justices wrote in a 1942 case, “we indulge every reasonable presumption against the waiver of fundamental rights.” In 1999, they reiterated that they would “not presume acquiescence in the loss of fundamental rights.” Nevertheless,

the *Aboud* decision took the opposite tack. “Dissent is not to be presumed,” wrote Justice Stewart. Instead, workers must “affirmatively [make] known to the union their opposition to political uses of their funds,” and unions can comply with the First Amendment by providing a refund procedure. In other words, the courts would presume that nonmembers—precisely those workers who have resisted workplace pressure and chosen not to join the union—are willing to waive their expressive right not to subsidize union political activism.

Protecting Workers

The practical consequence of this contradictory presumption

against dissent was to force workers who did not want to donate to union political activities to proceed through a labyrinthine refund process. This created an obvious incentive for unions to formulate expensive and time-consuming procedures for workers who wanted to protect their First Amendment rights. For example, in *Chicago Teachers’ Union v. Hudson* (1986), the Court reviewed an especially complicated three-step refund procedure set up by a Chicago teachers union. Nonmembers, given no opportunity to object before money was deducted from their paychecks, had to write to the union’s president within 30 days of the first withholding. Their objections would then be considered by a union committee, which had another 30 days to issue a decision, whereupon members

were given another 30 days to appeal to another union committee. If that committee rejected the appeal, the worker was forced to go through arbitration. Unsurprisingly, the union’s committees rarely found in favor of nonmembers and union leaders never gave dissenters a full accounting of the moneys withheld. Worst of all, because agency fees are typically only a little less than the full cost of union membership, the more complicated the objection procedure, the more likely it is that nonmembers will not bother complaining. In the Chicago case, union members were charged \$17.35 per month for dues and nonmembers were charged \$16.48. The union claimed that only 5 percent of this total was devoted to political campaigning, meaning that objecting nonmembers would have to go through the byz-



antine refund process to obtain about 82 cents per month.

The Court ruled against the union in *Hudson*, holding that these rules were so complicated as to essentially deprive dissenters of their right to a refund. But unions continued to implement complicated refund rules and other obstruction tactics, forcing workers to go to court repeatedly to vindicate their rights. In a 2000 case, a union issued rules that forced dissenting workers to specify the exact amount of fees they thought were wrongly withheld and what they thought the money had been spent on, treating any imprecision as a waiver of rights. In another case, the Fifth Circuit Court of Appeals ruled that the International Association of Machinists and Aerospace Workers violated workers' rights by forcing them to object in writing within a 30-day window each year; at one point, the union even moved its headquarters and refused to honor objections sent to its old address. "It seems to us that the unduly cumbersome annual objection requirement is designed to prevent employees from exercising their constitutionally-based right of objection," the judges declared,

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"and serves only to further the illegitimate interest of the [union] in collecting full dues from nonmembers."

Aside from the cost and hassle of complying with union refund procedures, nonmembers often face intense peer pressure at the hands of their unionized coworkers. A rule that forces objectors to attract attention—and possibly retribution—by objecting to union practices can effectively silence dissent. In *NAACP v. Alabama* (1958), similar concerns weighed heavily on the Supreme Court, which invalidated Alabama's effort to force the National Association for the Advancement of Colored People to publish its supporters' names. "Compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as actual censorship, said the Court. "Privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Even where intimidation is not a factor, mere inertia can unfairly aid unions in cases where workers just don't have time to fill out the paperwork and engage in a complex hearing and appeal process. The power of that inertia became clear in 1992 when Washington state voters approved a "paycheck protection" initiative that barred unions from financing political campaigns with money taken from nonmembers "unless affirmative authorized by the individual." Unsurprisingly, replacement of the "opt-out" requirement with an "opt-in" requirement caused a

dramatic fall in the amount of money workers were "willing" to devote to political expenditures. About 85 percent of the "contributions" that the union had claimed as "voluntary" under the prior rule disappeared, according to Bob Williams of the Evergreen Freedom Foundation. Evidently many nonmembers had been stifling their objections or saw little point in seeking refunds.

What of Union Rights?

The Washington Education Association challenged the constitutionality of that law before the Supreme Court in a case called *Davenport v. WEA*. They argued that by adding to the unions' "administrative expenses," the "opt-in" requirement infringed on *the union's* First Amendment rights. The Court disagreed. Unions have no constitutional right to dock nonmembers' paychecks; they are given that power only as a privilege under state law, which must respect First Amendment boundaries. But while the justices allowed the state

to replace an "opt-out" rule with an "opt-in" requirement, they refused to reconsider the longstanding presumption against dissenters. Moreover, shortly after the Court upheld the Washington opt-in requirement, the state legislature effectively repealed it by redefining "expenditures" in a technical way that once

again allowed unions to spend money obtained from nonmembers on political campaigns.

In July 2005, the SEIU announced a "temporary assessment," under which it would garnish the wages of both members and nonmembers in order to campaign against two California ballot initiatives—one of which, like the Washington initiative, would have imposed an opt-in rule on unions. The union did not notify nonmembers of their right to object, however, reasoning that it already issued such notices at the beginning of each year. But a group of workers filed suit, arguing that the union's failure to renew the notice of their objection rights was unconstitutional. Although they won at the trial level, the Ninth Circuit Court of Appeals reversed, holding that the union's actions gave sufficient protection to the rights of dissenting workers. Courts must balance "the right of a union ... to require nonunion employees to pay a fair share of the union's costs" with "the First Amendment limitation on collection of fees from dissenting employees for the support of ideological causes," wrote Judge Sidney R. Thomas. He and Judge David Thompson concluded that the notice issued at the beginning of each year struck an appropriate balance between the union's rights and the rights of dissenting workers. In dissent, Judge Clifford Wallace objected to the notion of a "balancing test" between the individual worker's right to free speech and the union's special privilege to tax nonmembers. "The Union's interest in this case is not a 'right' to nonmembers' funds," he wrote.

“The Union has no legitimate interest ... in collecting agency fees from nonmembers to fill its political war-chest.”

Restoring Worker Rights

When the Supreme Court agreed to review the case, most observers did not expect the justices to revisit the question of “opt-in,” since the narrower question involved the propriety of the SEIU’s failure to issue a second notice when it imposed the emergency assessment. But at the urging of a friend-of-the-court brief filed by the Pacific Legal Foundation, Cato Institute, and other organizations, the justices addressed the deeper matter of the presumption against dissent.

In a 5-4 decision, the Court declared that the “opt-out” procedure that the SEIU used was unconstitutional. Forcing a dissenting worker to opt out of funding union campaigning, wrote Justice Samuel Alito, gives unions “a remarkable boon.” The presumption against dissent, which “appears to have come about more as a historical accident than through the careful application of First Amendment principles,” endangered the traditional protection of expressive freedom. “Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union’s political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn’t the default rule comport with the probable preferences of most nonmembers?” Placing the burden on dissenters instead of unions “creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree.” That risk is exacerbated by the difficulty that workers face when they try to defend their rights—not only in terms of the expense and delay involved in any attempt to navigate the refund procedure, but also the threat of reprisals that dissenters face in the unionized workplace. By presuming against dissent, the existing legal precedents effectively silenced the large number of people who would refuse to contribute to union activism if given a fair chance, but who acquiesce rather than run the risk of retribution. As a result, wrote Justice Alito, the existing precedents “approach, if they do not cross, the limit of what the First Amendment can tolerate.”

The Court threw out the Ninth Circuit’s notion of “balancing” the rights of unions and workers. “As we noted in *Davenport*, unions have no constitutional entitlement to the fees of nonmember-employees.... Far from calling for a balancing of rights or interests, [court decisions have] made it clear that any procedure for exacting fees from unwilling contributors must be carefully tailored to minimize the infringement of free speech rights.” More importantly, whatever burden an opt-in rule might impose on unions, that argument could not outweigh the importance of the traditional First Amendment presumption in favor of free speech. As the Court explained in *Stanley v. Illinois* (1972), “the Constitution recognizes higher values than speed and efficiency.” The Constitution was “designed to protect the fragile values of a vulnerable citizenry from the

overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”

These considerations persuaded the Court that the Constitution requires opt-in, instead of opt-out. “Public-sector unions have the right under the First Amendment to express their views,” the justices concluded, “[b]ut employees who choose not to join a union have the same rights.... Therefore ... the union ... may not exact any funds from nonmembers without their affirmative consent.”

Workers and shareholders | Soon after the decision was announced, the SEIU and its supporters objected that the Court was treating unions differently from corporations. Requiring unions to ask nonmembers’ consent before taking their money for political campaigns was evidence of an “attack on the right of public sector workers to act collectively,” declared the union. “The U.S. Supreme Court has affirmed the right of corporations to put millions of dollars into the political system. Yet shareholders currently have no right to object to the spending of that money against their political or ideological beliefs.” Liberal stalwart Erwin Chemerinsky, too, complained that it was “ironic” for the Court to require opt-in for unions but not for corporate boards that can spend corporate funds on political campaigns. But these criticisms ignored the basic point of the case: *Knox* involved money that unions legally snatched from nonmembers *against their will*. A corporation, by contrast, has no legal power to spend the money of non-shareholders, and those shareholders who dislike a company’s political lobbying are always free to sell their shares. People who chose—often in the face of hostile peer pressure—not to join the SEIU were given no comparable choice when that union forced them to subsidize a political campaign.

The real irony is that the SEIU was demanding the right to seize the earnings of people who had chosen not to join, in order to run a campaign against a California ballot proposition that would have implemented an opt-in requirement to protect the rights of those very people. It was once a mainstay of liberal constitutional theory—memorialized in the famous Footnote Four of *United States v. Carolene Products*—that laws that warp the democratic process in this way should be regarded skeptically by courts. But because the opt-out rule benefitted labor unions, many left-wing spokesmen shrugged at the way it undercut the expressive rights of workers.

To be precise, *Knox v. SEIU* only requires an opt-in rule in cases that involve a special mid-year assessment designated for political purposes. But as Justice Stephen Breyer noted in his dissent, it “seems in logic to apply ... to ordinary yearly fee charges as well.” Future litigation will resolve whether labor unions can continue to leverage their power to force dissenting workers to subsidize political campaigns. The many workers who feel themselves silenced by the monopolistic power of politically privileged unions can only hope that such cases will take care to protect their right to remain silent. R