RESTORING EQUITY IN RIGHT TO WORK: MEMBERS-ONLY BARGAINING IN RIGHT-TO-WORK STATES

Benjamin Sachs & Catherine Fisk

The authors are, respectively, Professor of Law, Harvard Law School, and Chancellor's Professor of Law, University of California, Irvine

Restoring Equity in Right to Work:
Members-Only Bargaining in Right-to-Work States

Paper for
Labour Law Research Network Conference, Faculty of Law, Pompeu Fabra University, Barcelona
Version of 30 April 2013

Benjamin Sachs & Catherine Fisk*

Introduction

Under United States labor law, a union is generally the exclusive representative of the employees in a bargaining unit for purposes of negotiating and enforcing a collective bargaining agreement governing terms of employment. Although no employee can be compelled by law or contract to *join* a union, when a majority of employees choose union representation, all employees in the unit are represented by it. In about half of the states, laws have been enacted providing that union-represented employees have the right to refuse to pay the union for the services the union is legally obligated to provide. These laws have been inaccurately labeled by their supporters as "right-to-work" laws and have been derided by union supporters as protecting only the "right to work for less." A right-to-work law rejects the notion that all employees in a bargaining unit in which a majority have selected union representation should be compelled to provide financial support to the union selected by the majority even where they receive free legal services in the form of contract negotiation or administration. Right-to-work laws reject the concept of exclusive representation based on majority rule.

Right-to-work laws have been around for decades, but they have come to national prominence recently in the U.S. as another round of states has enacted the legislation. Most notably, Michigan – a state with relatively high levels of union density – enacted a right-to-work statute last year.[1] An effort is underway in Canada to adopt the so-called right-to-work principle. As a result, unions with pre-existing and extensive memberships must now operate under the peculiar rules that such legislation imposes. In particular, these unions must now represent equally – with respect to both collective bargaining and administration – those workers who exercise their state-law rights to pay exactly nothing for the union's representation.

From our perspective, the problem with right-to-work laws derives from the intersection between federal labor law and the state laws. As is well understood, federal labor law implements a regime of exclusive representation. A union that wishes to establish a right to collective bargaining must secure support from a majority of the workers in a given bargaining unit; when it does so, the union then represents all of the workers in the unit for collective bargaining purposes. Importantly, although the union represents all of the workers in a bargaining unit, no worker need actually become a member of the union. This is true both in right-to-work states and in non-right-to-work

* The authors are, respectively, Professor of Law, Harvard Law School, and Chancellor's Professor of Law, University of California, Irvine.
[1] *See* 2012 Mich. Pub. Acts <180>.

states: everywhere in the U.S., unions operate under a regime of exclusive representation; nowhere in the U.S. may any worker be compelled to become a union member. With exclusive representation, moreover, comes a judicially crafted duty of fair representation. Under this duty, the union is required to represent all workers in the bargaining unit equally, and may not discriminate between those who become union members and those who do not. The duty extends not just to collective bargaining – where the union cannot bargain terms that favor members over nonmembers – but to disciplinary matters as well. The union must grieve and arbitrate on behalf of nonmembers just as zealously (and, more to the point, as expensively) as they do on behalf of members.

In *non*-right-to-work states, federal law enables unions to require that nonmembers pay for the services they receive. Under § 8(a)(3) of the National Labor Relations Act, unions and employers can agree to provisions in collective bargaining agreements that require all employees in a bargaining unit, as a condition of employment, to pay to the union dues and fees that are the equivalent of what members pay to support the union's collective bargaining and contract administration functions.[2] Thus, in *non*-right-to-work states, the union has a duty to represent nonmembers, but the nonmembers can be required to pay for that representation. In right-to-work states, on the other hand, the union still bears the same federal duty to represent nonmembers, but state law precludes a requirement that the nonmembers pay for that representation. This, we contend, is a confluence of federal and state rules that – taken together – makes no sense. If state law is to allow workers to decline union membership *and* to decline to pay for union representation, federal law ought not require that the union nonetheless provide equal representation to the non-paying nonmember.

We see three potential approaches to remedying what, in our view, is an indefensible status quo. First, and most straightforwardly, we believe that the best reading of § 14(b) of the NLRA – the provision in the federal statute that allows states to pass right-to-work laws[3] – suggests that federal law does not in fact permit states to ban *all* compelled payments from workers to unions – something that many right-to-work laws, including Michigan's, do.[4] Under a proper reading of the statute, states can ban compulsory union membership, and they can ban any agreement that makes it a condition of employment that workers pay dues and fees equivalent to what members pay to support the union's collective bargaining and contract administration functions. But states cannot, consistent with federal law, prohibit agreements under which nonmembers are compelled to pay dues and fees *lower* than those required of members. Thus, for example, an agreement that requires all members to pay the pro-rata share of membership dues that goes to grievance and arbitration costs must be legal everywhere in the United States.

Second, in any state where employees are permitted to avoid paying anything to the union, federal law ought to relax the requirement of exclusive representation and allow unions to organize, bargain on behalf of, and represent only those workers who affirmatively choose to become members. In brief, if workers exercise their right not to be represented by a union and not to pay for the union's services, federal law ought to allow the union to construct a bargaining unit that does not include those workers. The

[2] *See* National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3)(2006).
[3] *See* National Labor Relations Act § 14(b), 29 U.S.C. § 164(b)(2006).
[4] *See* 2012 Mich. Pub. Acts <180>.

proposal constitutes a win-win. Workers who do not want to be union, could now genuinely be non-union – they would owe nothing to the union, they would not be covered by the collective bargaining agreement, and they would pursue interactions with the employer without union interference. For the unions' part, they would no longer be obligated to represent those workers who do not desire such representation and who do not wish to pay for it. Put simply, this proposal would implement a members-only bargaining regime in right-to-work states.

Our third, and perhaps slightly more circumscribed, proposal would maintain the principle of exclusive representation in right-to-work states but change slightly the union's duties with respect to nonmembers in those states. In particular, we propose that the NLRB abandon its rule forbidding unions from charging nonmembers a fee for representation services that the union provides directly and individually to the nonmember. Under the Board's current rule – which is dictated neither by statute nor judicial interpretation – a union violates §8(b)(1)(A) of the federal law if it insists that nonmembers pay for representation in disciplinary matters, even in right-to-work states where the nonmember has a right not to pay for the representation.[5] We believe that in right-to-work states, it ought to be within a union's discretion to charge non-paying nonmembers if those nonmembers wish to have the union represent them in disciplinary matters. Unlike the NLRB's current position, we do not believe that charging someone the fair price of a union service coerces that person, within the meaning of § 8(b)(1)(A), to become a union member or restrains their ability to refuse to support the union.

I. Reading § 14(b)

Federal labor law is broadly preemptive of state and local intervention, containing perhaps the broadest regime of preemption known to federal law. In general, states and cities are precluded from legislating in the areas of union organizing, collective bargaining, and labor-management relations. This is all true with one specific exception. Although the federal statute permits unions and employers to bargain contract clauses that require employees to pay dues and fees to the union, §14(b) of the statute gives states the latitude to proscribe some such agreements. In particular, §14(b) states that nothing in the federal statute "shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application in prohibited by State or Territorial law."[6] By its terms, then, § 14(b) allows states to prohibit agreements that require "membership" in a union. A strictly literal reading of the section would thus allow states to forbid collective bargaining clauses that required, as a condition of employment, that a worker actually become a member of a union. On this reading, state right-to-work laws that prohibited compulsory payment of dues and fees – not just compulsory membership – would be preempted by the NLRA.

But the Supreme Court has held that §14(b)'s definition of "membership" is broader than this literal construction. In its *General Motors* decision, the Court was faced with the question of whether § 8(a)(3) of the statute allowed unions to require the

[5] Furniture Workers Div., 291 N.L.R.B. 182 (1988); Columbus Area Local, Am. Postal Workers Union, 277 N.L.R.B. 541 (1985); Int'l Ass'n of Machinists, Local 697, 223 N.L.R.B. 832 (1976).
[6] 29 U.S.C. § 164(b).

payment of dues and fees even from those who did not become members of the union.[7] The Court held that Congress had, with the 1947 Taft-Hartley amendments, changed the "meaning of 'membership' for the purposes of union-security contracts."[8] In particular, the Court held that "[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues."[9] Thus, "'membership' as a condition of employment is whittled down to its financial core."[10]

Then, in *Schermerhorn*, the Court extended *General Motors*' § 8(a)(3) analysis to the §14(b) context.[11] *Schermerhorm* holds that although §8(a)(3) and §14(b) – which, after all, both turn on a definition of "membership" – may not be "perfectly coincident," they nonetheless "overlap to some extent."[12] In particular, the Court held that the type of agency shop agreement that was at issue in *General Motors* – one in which all employees in the bargaining unit are required to pay the equivalent of the dues and fees paid by members – "imposes on employees the only membership obligation enforceable under § 8(a)(3) . . . [and] is the practical equivalent of an agreement requiring membership in a labor organization."[13] Since an agency shop agreement is the practical equivalent of membership within the meaning of §8(a)(3), and because §8(a)(3) and § 14(b) overlap at least to some extent, the Court concluded that agency shop agreements also require membership within the meaning of §14(b).[14] Thus, under *Schermerhorn,* collective bargaining provisions that require employees to pay the equivalent dues and fees that members pay may be prohibited by state law, even though actual "membership" is not required by the collective bargaining agreement.[15]

But the *Schermerhorn* Court was careful to express an important caveat. Although agency fee agreements could be prohibited by §14(b), that did *not* imply that "less stringent union-security arrangements" could also be prohibited.[16] Indeed, the union in *Schermerhorn* argued that its agreement was distinguishable from the agency shop clause at issue in *General Motors* because the *Schermerhorn* agreement was less exacting of nonmembers. In particular, that agreement "confine[d] the use of nonmember payments to collective bargaining purposes alone and forbids their use by the union for institutional purposes unrelated to its exclusive agency functions."[17] The Court went to some lengths – several pages in the U.S. Reports, in fact – to reject the union's argument, but for reasons that affirm our key contention.[18] As the Court explained, first, there was no support in the record for the union's argument that its clause was distinct from a full agency shop agreement.[19] There is, the Court wrote "no ironclad restriction imposed

[7] N. L. R. B. v. Gen. Motors Corp., 373 U.S. 734 (1963).
[8] *Id.* at 742.
[9] *Id.*
[10] *Id.*
[11] *See* Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746 (1963).
[12] *Id.* at 751.
[13] *Id.*
[14] *See id.* at 751–52.
[15] *See id.*
[16] *See id.* at 752.
[17] *Id.*
[18] *See id.* at 752–54.
[19] *See id.* at 752–53.

upon the use of nonmember fees."[20] This mattered because if the union could use nonmember fees for purposes other than funding the costs of representing the nonmembers – for what the Court called "institutional purposes"[21] – the fee requirement would look more like a *membership* requirement than a fee for service arrangement.[22] Second, even had the *Schermerhorn* agreement explicitly restricted the use of nonmember payments to "bargaining costs" the fact that nonmembers paid exactly the same amount as members would render this fact "of bookkeeping significance only rather than a matter of real substance."[23] This is true because of the fungibility of money. Thus, if members and nonmembers pay the same amount, but nonmember money may only go to collective bargaining expenses, the union can simply reallocate some portion of member dues to non-collective bargaining expenses and not see any change in its actual budget.[24]

Two points are important here. First, and most generally, none of this analysis would matter unless there were, in fact, some types of mandatory dues arrangements that are outside the scope of §14(b). If it were the case that *all* mandatory payments could be banned by §14(b), it would have been simple enough to say so; that the Court went through this analysis indicates clearly that this was not its position. Second, and more particularly, the *Schermerhorn* analysis makes clear that states can ban agreements that require nonmembers to pay what members pay: again, if members and nonmembers pay the same thing, the union cannot in any meaningful sense ensure that the nonmembers' money covers only the actual costs of representation. But, by the same token, there is nothing in the *Schermerhorn* holding suggesting that states can ban agreements that require nonmembers to pay *less* than what members pay.

One final Supreme Court opinion requires attention. In *Beck*, the Supreme Court held that §8(a)(3) permits a collective bargaining agreement to require nonmembers to pay mandatory dues or fees to support only the union's collective bargaining and contract administration functions; an agreement may not require nonmembers to fund the union's political operations.[25] That is, to say that membership is whittled down to its financial core means that membership is whittled down to a requirement that the nonmember pay to the union whatever share of membership dues and fees are used for collective bargaining and contract administration functions, and for those functions alone. Taking *General Motors*, *Schermerhorn*, and *Beck* together, then, implies that this is the definition of "membership" that matters for both §8(a)(3) and §14(b): membership is reduced to the financial requirement of paying dues and fees necessary to fund the union's collective bargaining and contract administration functions.

While this definition of membership is far broader than the literal "membership" to which §14(b) refers, it is not so broad as to cover all forms of mandatory payments from employees to unions. For example, the Court's opinions suggest that a provision in a collective bargaining agreement requiring all employees in a bargaining unit to pay the proportion of membership dues that cover members' representation in disciplinary

[20] *Id.* at 752.
[21] *Id.*
[22] *See id.* at 752–53.
[23] *Id.* at 753.
[24] *See id.* at 754.
[25] *See* Communications Workers of Am. v. Beck, 487 U.S. 735, 762 (1988).

matters – but nothing more – would not "require membership" within the meaning of §14(b). In general terms, so long as the required payments are less than what members pay to support collective bargaining and contract administration functions they do not constitute the equivalent of membership and thus may not be prohibited.

There is perhaps an obvious objection to our argument thus far: if "membership" means the same thing in § 14(b) as it does in §8(a)(3), then we must be arguing that a union security clause that required nonmembers to pay less than full membership dues is an unfair labor practice. Since states can't ban such clauses, neither can unions and employers enforce them. But, since everyone knows that unions and employers *could* enforce such a union security agreement, we must actually be wrong to conclude that states cannot ban such clauses.

This argument fails, though, and for an important reason. Membership, in our view, does mean the same thing under §14(b) and §8(a)(3): again, membership as the Court has construed it means the financial requirement of paying the equivalent of the dues and fees necessary to fund the union's collective bargaining and contract administration functions. But, for reasons we will explain immediately below, §8(a)(3) allows unions and employers to enforce union security clauses that are less exacting of nonmembers than full compliance with the financial requirements of membership, while at the same time §14(b) prohibits states from banning anything less exacting than the full financial requirements of membership.

Section 8(a)(3) contains a statutory grant of authority to unions and employers.[26] Under this provision of the NLRA, unions and employers have the authority to negotiate enforceable labor agreements that condition employment on an employees' willingness to comply with the financial requirements of "membership,"[27] as construed by the Court.[28] §8(a)(3), moreover, determines the outer bounds of the authority granted to unions and employers – the outer bounds of what collective bargaining agreements may require of nonmembers.[29] Thus, collective bargaining agreements can require that employees pay the "dues and . . . fees uniformly required as a condition of acquiring or retaining membership"[30] in the union, but they may not require *more* of nonmembers – they may not, for example, require actual membership nor may they require that nonmembers pay more than members. But because §8(a)(3) charts the limits of union and employer authority, the provision allows unions and employers to require *less* of nonmembers than payment of dues and fees "uniformly required" of members. Thus, to return to our example, a provision in a collective bargaining agreement requiring all employees in a unit to pay the proportion of membership dues that cover members' representation in disciplinary matters – but nothing more – would be permissible under §8(a)(3) because it is less exacting than what §8(a)(3) permits.

On the other hand, §14(b) is a grant of authority to states.[31] Like § 8(a)(3), §14(b) determines the outer bounds of the authority granted to states – in particular, the outer bounds of what states may prohibit consistent with the NLRA.[32] Thus, state right to work

[26] *See* National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3)(2006).
[27] *Id.*
[28] *See id.*
[29] *See id.*
[30] *Id.*
[31] *See* National Labor Relations Act § 14(b), 29 U.S.C. § 164(b)(2006).
[32] *See id.*

laws can ban collective bargaining agreements that "require membership" in a union – including the financial equivalent of membership as the Court has defined it – but they cannot ban *more* than that without exceeding the authority granted to them by federal law. Thus, when a state bans payments to a union that do not rise to the level of membership – again, as defined by the Court – they exceed the authority granted them under § 14(b). Because a provision in a collective bargaining agreement requiring employees to pay the proportion of membership dues that cover members' representation in disciplinary matters would not "require membership"[33] a state does not have authority to ban it, even though such a provision is permissible under §8(a)(3).

II. A Genuine Right to be Non-Union

A right-to-work law rejects the notion that all employees in a bargaining unit in which a majority have selected union representation should be compelled to provide financial support to the union selected by the majority even where they receive free legal services in the form of contract negotiation or administration. Right-to-work laws reject the concept of exclusive representation based on majority rule. Because federal law allows states to adopt such laws, the only principled approach is to relax the requirement of exclusive representation and allow unions to organize, bargain on behalf of, and represent only those workers who affirmatively choose to become members. If workers exercise their right not to join a union or to pay for the union's services, federal law ought not force upon them any form of union representation. Those workers who wish to join a union and bargain collectively in such states should be permitted to construct a bargaining unit that does not include those who refuse to pay. Workers who do not want to be union could now genuinely be non-union – they would owe nothing to the union, they would not be covered by the collective bargaining agreement, and they would pursue interactions with the employer without union interference. Workers who do wish to join a union would not have their own § 7 rights compromised by being forced to pay for collective bargaining and contract administration for their co-workers who do not wish to have it. For the unions' part, they would no longer be obligated to represent those workers who do not desire such representation and who do not wish to pay for it. Put simply, this proposal would implement a members-only bargaining regime in right-to-work states.

The fundamental principle of a right-to-work law is that the majority rule and exclusivity principles of § 9(a) coerce those workers who prefer to remain nonunion. Right-to-work laws insist that requiring the minority of workers to provide any support to the union chosen by the majority infringes their rights to determine their own conditions of work. Right to work advocates reject the analogy between workplace democracy and political democracy; they refuse to concede that the representative selected by a majority in an electoral unit has the right to make rules to govern everyone and insist that the majority representative has no right to impose taxes on those who object for services provided to all. Current federal labor law rejects the right-to-work idea that union representation based on majority rule coerces union opponents: even in a right to work state, the union still has the power to bargain for an agreement setting terms for all employees in the unit and, as we have explained, has the duty to do so fairly. Federal law

[33] *See id.*

does, however, accept the right-to-work position on the power of the majority to impose costs: the union has no power to collect from dissenters the costs of providing the services that law obligates it to provide. To continue with the political democracy analogy, the current law of right to work is as if Congress had the power to enact laws governing the entire populace, and the duty (that does not currently exist) to avoid discrimination against those who did not vote for the majority party, but had no power to collect taxes except from those who voted for the elected representatives. It is as if anyone whose party lost the election could still go to public schools, drive on public highways, and benefit from national security without having to pay to support those services.

The right-to-work approach to minority rights imposes significant costs on the rights of the majority. In right-to-work states, those who reject union representation have the right to demand legal services from the union in the form of contract negotiation and enforcement and toforce their union coworkers to shoulder the costs. As we will explain in more detail below, current law under §8(b)(1) holds that a union discriminates if it refuses to provide services to a nonmember who refuses to pay or charges for the services that the nonmember requests. But in our view the current law discriminates against union supporters by forcing them to pay not only for their own contract negotiation and administration but also for the cost of what their nonunion coworkers demand. That is, only nonunion members get union representation for free; union members have to pay for it.

Our proposal is simply to take the right-to-work concept to its logically consistent and fair conclusion: remove from union supporters the obligation to subsidize the services received by nonmembers, and remove from union opponents both the obligation to accept a union or a collective bargaining agreement they oppose and the right to receive services for which they do not pay. If a union chooses to reject exclusivity, nonunion workers would not be represented by a union they reject, and they would receive neither the benefits nor the burdens of union representation. Union members would be freed of their obligation to fund services for their coworkers who refuse to pay for them.

Although our proposal is novel, it is not unprecedented. At least two states with right-to-work laws have experimented with variations of members-only representation under their public sector labor relations laws. In Nebraska, where teachers are not obliged to pay a union anything, some teachers' unions have negotiated contracts allowing nonmembers who pay no fees to process their own grievances. Anecdotal evidence suggests teachers overwhelmingly choose to join the union or pay fees covering contract administration, perhaps because they believe that the union provides better and more cost-effective representation in grievances than they could obtain by hiring and paying for a lawyer. Tennessee recently abolished exclusivity for teachers' unions and adopted a complex system of members-only bargaining, and evidence is still being compiled about its effect on teachers' unions.

We briefly summarize the law on the issue of members-only unionization below. Professor Charles Morris has written a book-length argument that members-only bargaining is consistent with the language, intent, purpose, and policy of the NLRA, and

it is not necessary to rehearse his arguments or the responses to it here.[34] For present purposes it is enough to note that neither the Board nor the courts nor labor law scholars have addressed the slightly different question we discuss here: whether a union should have the right to select members-only bargaining in a state that has exercised its authority under §14(b) to prohibit unions from requiring those who benefit from its services under the exclusivity principle to pay their pro rata share of the costs.

Nothing in § 7 – which grants employees the rights "to self-organization" and "to bargain collectively through representatives of their own choosing" – limits these rights to workplaces where a majority of employees choose one union. Moreover, nothing in § 9 (which provides a mechanism for choosing a union that enjoys the power of exclusive representation) limits the ability of a group to bargain on a members-only basis. The law currently allows members-only representation.[35] In a 1938 decision arising out of a dispute between an AFL-affiliated union and a CIO-affiliated union, both of which sought to represent the same group of employees, *Consolidated Edison Co. v. NLRB*, the Supreme Court explicitly recognized the right of a union to bargain on behalf of its own members only.[36] The employer had agreed to recognize the AFL affiliate as the representative of its own members and had entered an agreement governing their terms of employment. The Board held the contract invalid because the union had not been certified under § 9(a) as the exclusive representative. The Court rejected the Board's position. Although it did not have the occasion to hold that an employer is obligated by § 8(a)(5) to bargain on a members only basis (because no § 8(a)(5) charge had been pressed since the employer had agreed to the contract), its dictum insists members-only bargaining is necessary to protect the § 7 rights of union members absent a majority union. The Court explained:

> The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The … employees who were members of the Brotherhood and its locals … had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining.[37]

The Court explained that the employees' rights to form a union and bargain collectively gave them the right to do so on a members-only basis unless or until a union was certified under § 9 and that members-only bargaining was entirely consistent with the policies of the NLRA:

> Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other

---

[34] CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005). Many of the responses to it were sympathetic to Morris' argument although less than entirely convinced by it. *See, e.g.*, Joseph E. Slater, *Do Unions Representing a Minority of Employees Have the Right to Bargain Collectively? A Review of Charles Morris*, The Blue Eagle at Work, 9 EMPLOYEE RTS. & EMP. POL'Y J. 383 (2005).

[35] *See* Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain With Minority Unions*, 27 A.B.A. J. LAB. & EMP. L. 1, 5-6 (2011).

[36] 305 U.S. 197, 237 (1938).

[37] *Id.* at 236.

> selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree.[38]

The Court later held that members-only agreements are enforceable under section 301 and again rejected the idea that members-only bargaining is inconsistent with the law and policy of the NLRA.[39]

Although members-only bargaining is permissible under the NLRA if the employer agrees to engage in it, it is not required of employers. The NLRB has, to date, declined to hold that an employer violates § 8(a)(5) if it refuses to negotiate with a union on a members-only basis.[40] The statutory argument for limiting the employer's obligation to bargain to a majority union is § 8(a)(5)'s statement that an employer commits an unfair labor practice if it refuses "to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)." Section 9(a) does not explicitly limit bargaining to a union chosen by a majority. It says that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." It does not say that such unions are the *only* type that an employer must recognize. Section 9(a), as amended by Taft-Hartley, also provides that "a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, with the intervention of the bargaining representative." The debate over whether employees enjoy a right to members-only bargaining has focused on whether the "subject to the provisions of section 9(a)" language of section 8(a)(5) limits the duty to bargain to a majority union that enjoys exclusivity and whether the right of a group of employees to have their "grievances" adjusted contemplates only the adjustment of particular grievances or whether it is a more general right to group bargaining.

The Board has held that an employer does not violate §8(a)(1) by refusing to meet with groups of workers for purposes not of establishing a bargaining relationship but for purpose of adjusting particular grievances. Thus, in *Charleston Nursing Center*, an employer that refused to meet with a group of nurses but offered to meet with each nurse individually was held not to violate the employees' rights to engage in concerted activity.[41] No Board decision in either a group grievance adjustment case like *Charleston Nursing Center* or in a members-only bargaining case like *Dick's Sporting Goods* has explained why majority rule and exclusivity are the only bases upon which employers are

---

[38] *Id.* at 238.
[39] Retail Clerks Int'l Ass. v. Lion Dry Goods, 369 U.S. 17, 29 (1962).
[40] Dick's Sporting Goods, Office of the General Counsel, NLRB Advice Mem. GC 07-02 (June 22, 2006).
[41] 257 NLRB 554 (1981); *see also* Swearingen Aviation Corp., 227 NLRB 228 (1976), *enforced in part and denied in part*, 568 F.2d 458 (5th Cir. 1978) (although employer violates §8(a)(1) by discharging employees who ask to meet as a group to resolve grievances, the employer does not violate §8(a)(1) by refusing to meet with them as a group if there is no bargaining representative selected by a majority).

required to bargain with employees; in all of these cases the Board has simply assumed the rule rather than justified it on the basis of statutory analysis or policy.

Neither the Board nor the courts, however, have addressed the proposal we make that a union has a right to demand an employer to engage in members-only bargaining to protect the § 7 rights of employees in right to work states. Because nothing in the NLRA nor in the decisions of the Supreme Court is inconsistent with our proposal, and because the Court has recognized since 1938 that members-only bargaining is necessary to protect § 7 rights in the absence of a certified or recognized majority union and has held such agreements enforceable under § 301, the Board is free to adopt – by rulemaking or in an adjudication – a rule requiring an employer to engage in members-only bargaining where employees demand it at least in states that have enacted laws prohibiting a union from requiring nonmembers to pay for the services the union provides.

One question our argument raises is whether members-only bargaining would be the only option in right-to-work states or whether a union that wished to be the exclusive representative would continue to be such. A strategic question for unions (and employers) would be whether exclusivity is better or worse for unions, even with the free-rider problem.

To accept our position would also require rethinking the contours of section 8(a)(3) and 8(b)(2). We conclude that an employer would not discriminate, within the meaning of § 8(a)(3), by negotiating different terms with the union than it does with unrepresented employees, unless it could be shown that the employer did so for the purpose of encouraging or discouraging union membership. Proof of such an intent may be difficult, but the concept is not novel in the law. Under existing constitutional equal protection and Title VII disparate treatment law, it is not unlawful to treat white and black people differently so long as the different treatment is not motivated by race. If the employer can get employees to work for less than the collectively bargained minimum, it would not be discriminating *for the purpose of encouraging or discouraging union membership* by paying them less, but rather would just be paying what the labor market would allow. If the employer decided to pay nonmembers more than the collective bargain required, because it thought that nonunion workers were more productive, or because its ability to fire them at will meant that their labor costs on average were lower even if their wages were higher, then it would not be discriminating for the purpose of *encouraging or discouraging* union membership. Of course, paying nonunion workers more than their union counterparts might have the *effect* of discouraging union membership, but what §8(a)(3) makes unlawful is not disparate treatment but disparate treatment for the purpose of discouraging the exercise of § 7 rights.

III. Removing the Obligation to Represent Nonmembers for Free

As the previous section explains, we believe that the most principled response to a conflict between the federal principle of exclusive representation and state right to work laws is relaxing the requirement of exclusive representation in right to work states. But if this suggestion proves unattainable, there is a more modest possibility for resolving the conflict. In particular, we suggest that so long as unions in right to work states operate

under a regime of exclusive representation they ought to be able to charge nonmembers for the costs of individual representation in grievance and arbitration procedures.

Two components of federal labor law currently operate to preclude unions from discriminating between members and nonmembers. The first is §8(b)(1)(A) of the statute, which makes it an unfair labor practice for a union to "restrain or coerce employees in the exercise of the rights guaranteed in § 157."[42] Those §7 rights, of course, include the right to refrain from joining or assisting a union.[43] As is relevant here, the Board has held that if a union provides more or better representation to members than to nonmembers, the differential treatment, by making membership in the union more appealing than nonmembership, restrains the nonmembers' right *not* to join the union.[44] The second is the duty of fair representation, a judicially crafted doctrine that requires unions to represent all employees in a bargaining unit fairly and on an equal basis, irrespective of the employees' status as member or nonmember. Both the courts and the Board have held that the duty of fair representation forbids a union from bargaining contract terms that favor members over nonmembers and, more to the point here, from treating members and nonmembers differently with respect to representation in disciplinary matters.[45]

In non-right-to-work states, the obligation to represent nonmembers equally does not generally obligate the union to provide representation services to employees free of charge. In those states, again, unions can negotiate collective bargaining provisions that require nonmembers to pay dues and fees equivalent to those paid by members, and these dues and fees can be used to cover the costs of representation. In right-to-work states, on the other hand, unions are precluded from bargaining such provisions and, without more, would in fact be obligated to provide representational services for free. To avoid this problem, unions in right-to-work states have attempted to charge nonpaying nonmembers the cost of providing representation in grievance and arbitration proceedings.

But, in a series of cases, the NLRB has held that a union violates §8(b)(1)(A) if it charges nonmembers a fee to cover the costs of disciplinary representation. Why? According to the Board, to charge nonmembers a fee for such representation, but not to charge members the same fee, is to discriminate on the basis of membership.[46] And, by discriminating against nonmembers in this way, the union restrains them in their exercise of the right not to join or assist labor unions. Indeed, the Board has gone so far as to argue that a state right-to-work rule that permits unions to charge a fee for representation is preempted by the federal statute.[47]

In our view, the Board's rule is wrong as a matter of policy: if unions in right-to-work states are obligated to provide representational services to nonmembers, the union ought not have to do so for free. Indeed, it is difficult to come up with any reasonable defense for a regime that obligates the union to provide representational services directly to individual workers but precludes them from recovering the costs of those services.

---

[42] *See* National Labor Relations Act § 8(b)(1)(A), 29 U.S.C. § 158 (b)(1)(A)(2006).
[43] *See* National Labor Relations Act § 7, 29 U.S.C. § 157.
[44] Furniture Workers Div., 291 N.L.R.B. 182 (1988); Columbus Area Local, Am. Postal Workers Union, 277 N.L.R.B. 541 (1985); Int'l Ass'n of Machinists, Local 697, 223 N.L.R.B. 832 (1976).
[45] *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967).

[46] *See, e.g.*, Int'l Ass'n of Machinists, Local 697, 223 N.L.R.B. 832, 834 (1976).
[47] *See* N.L.R.B. v. North Dakota, 504 F. Supp. 2d 750 (2007).

But, more importantly, the Board's rule is also wrong as a matter of law. The basic reason for this is that if a union decides to offer representational services to employees who pay for them, and to deny such services to employees who do not pay for them, the union is not discriminating on the basis of membership. Instead, the union is discriminating on the basis of who pays and who doesn't.

This distinction would be obvious in any other context. Take, for example, a hypothetical from the context of gender discrimination. An airline, as a common carrier, could not refuse service to women and insist on transporting only men. But this prohibition on gender discrimination does not imply that women are entitled to fly on the airline *for free*. To the contrary, if the airline declined to issue tickets to women who declined to pay, while agreeing to issue tickets to all the men who agreed to pay, the airline would not be guilty of gender discrimination. The basis for the disparate treatment would be wholly legitimate.

What a union cannot do is refuse to represent nonmembers because they are nonmembers: if the nonmember pays for representation, she must receive it. The union, of course, must also give the nonmember the opportunity to pay for representation without the obligation to become a member. But a policy that requires everyone – member or nonmember – to pay for representational services does not discriminate on the basis of membership status, just as a policy that everyone pay for airline tickets – men and women – does not discriminate on the basis of gender.

But this basic point does not resolve our question. If a union charges nonmembers the actual costs of representation in grievance and arbitration matters, the cost paid by the nonmember would likely exceed the cost borne by members. In one Board case, for example, the actual cost of representation in an arbitration proceeding was about thirty times the cost of a members' annual dues.[48] The question, accordingly, is whether a union discriminates against nonmembers when it charges nonmembers *more* than members for representational services.

Our view is that it does not, so long as the amount the union charges nonmembers does not exceed the actual cost of representation. This is true because, in this context, dues payments function as a type of insurance – they are a way that workers pool the risk that any individual will be subject to discipline and will need representation in grievance and arbitration proceedings. Each month, dues-paying employees make a form of premium payment to the union, some portion of which funds the union's representational expenses. The great majority of employees never face discipline, and, so, these employees do not recoup this portion of their dues through representation provided by the union. On the other hand, the minority of employees that ends up facing discipline and needing union-funded representation is subsidized by the dues payments made by other employees. As a result of the risk pooling, these employees thus pay less than the actual cost of the representational service the union provides.

Critically, those employees who do not make payments to the union have chosen not to participate in the risk pooling. If they never face discipline, they will have saved considerably. But if they do face discipline, they have no legitimate basis to assert that they should then pay only what they would have paid had they participated in the risk pool in the first place. This, of course, is no different than other insurance markets. The most obvious analogue is health insurance. Everyone who owns health insurance pays

[48] *See* Hughes Tool Co., 104 N.L.R.B. 318 (1953).

premiums, and those who end up going to the doctor pay less than they would had they not bought insurance. When, on the other hand, an individual does not buy health insurance, she will have to pay the full cost of the doctor's services when she gets sick. If an individual does not buy the insurance, she may not claim that she should only have to pay what people who did buy the insurance actually paid for their premiums.

As such, if a union were to charge nonmembers the cost of representation in grievance and arbitration, and allow members to receive those services in exchange for dues payments, the nonmember who actually faced discipline would pay more for representation than a member would pay in dues. But this is simply the cost structure faced by any individual in any insurance market. To say that such a cost structure discriminates against nonmembers is, again, incorrect. The cost structure simply benefits those who decided to take part in the risk pooling that the union offers. As long as that risk pooling is open to members and nonmembers on an equal basis – which it must be – then there is no discrimination on the basis of union membership.

It is worth pointing out that although the Board – to date – has not adopted this analysis, we are not alone in rejecting the idea that requiring nonmembers to pay for representation in grievance and arbitration proceedings constitutes discrimination or coercive pressure to join the union. Indeed, at least one state – in interpreting analogous provisions of its labor laws – has held precisely this. *Cone v. SEIU Local 1107* involved a public sector union in Nevada that charged nonmembers a fee schedule for individual representation.[49] Whereas members' dues payments covered all representation fees, nonmembers who wished to receive union representation paid a minimum of $60 per hour for grievance consultation, 50% of the fee charged by hearing officers and arbitrators, and 100% of the fees charged by union attorneys up to $200 per hour.[50] Nevada law, like federal law, prohibits unions from discriminating between members and nonmembers, and it also prohibits "restraint and coercion" in the exercise of the right not to join unions.[51] Nonetheless, the Supreme Court of Nevada dismissed a challenge to Local 1107's fee policy. Rejecting the idea that charging nonmembers for individual representation constituted an unfair labor practice – even though such charges clearly would exceed the cost of dues – the court held that "[w]e see no discrimination or coercion . . . in requiring nonunion members to pay reasonable costs associated with individual grievance representation."[52]

Finally, even should the Board hold that a union may not charge nonpaying nonmembers more for disciplinary representation than the amount union members pay in dues, this would not foreclose the union from charging nonmembers for representation.[53] To the contrary, a union could implement a policy requiring nonmembers who receive union representation in disciplinary matters to pay the same amount that members pay to receive the same benefit. Although several approaches are possible, one would be as follows: The union would first calculate the proportion of regular dues payments that are used to fund representational activity. It would then determine the number of months the nonmember employee has been in the bargaining unit. It would then calculate how much

[49] *See* Cone v. SEIU Local 1107, 116 Nev. 473 (2000).
[50] *See* id. at 475.
[51] *See* id. at 479.
[52] *Id*. at 479 (2000).
[53] *See IAM Local 697*, 223 NLRB at 836-37 (Chairman Murphy, concurring in part and dissenting in part).

a union member would have paid over that time span to cover representational costs. Thus, for example, if dues are $10 per year and 20% of dues goes to representational activity, then a member pays $2 per month to cover representational expenses. If the nonmember receives representation in at the end of her fifth year (or 60th month) of employment in the unit, she would owe the union $120 for the disciplinary representation – precisely what a member would have paid. Again, charging nonmembers what members pay cannot in any meaningful sense be considered discriminatory and it cannot be said to coerce nonmembers into joining a union.

Conclusion

We have argued that under a proper reading of the National Labor Relations Act, states can ban compulsory union membership, but they cannot prohibit agreements under which nonmembers are compelled to pay the pro-rata share of membership dues that goes to grievance and arbitration costs. In the alternative, we have argued for members-only bargaining in right to work states. In any state where employees are permitted to avoid paying anything to the union, we have argued that the NLRB can and should relax the requirement of exclusive representation and allow unions to organize, bargain on behalf of, and represent only those workers who affirmatively choose to become members. If the heart of the argument for right-to-work laws is that exclusivity coerces those workers who do not want to be represented by a union, we think the law should protect that right without compelling those workers who wish to have a union to subsidize services for them. Workers could now genuinely be non-union – they would owe nothing to the union, they would not be covered by the collective bargaining agreement, and they would pursue interactions with the employer without union interference. Our third alternative proposal is that the NLRB abandon its rule forbidding unions from charging nonmembers a fee for representation services that the union provides directly and individually to the nonmember.