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Harris v. Quinn: What We Talk About When We Talk About Right-to-Work Laws

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Who could oppose a right to work? What could anyone find objectionable in the recent declaration by the State of Michigan that it, like twenty-three others, is a right-to-work state?[1]

It turns out that it depends on what the meaning of a "right to work" is. If a right to work means, as it would in common usage, a right to get and keep a job assuming satisfactory qualifications and performance, opponents abound. They include academics espousing the benefits of unregulated markets[2] and the United States Chamber of Commerce, which argues that restrictions on an employer's freedom to discharge employees at-will hinders job growth.[3] And the opponents of this right to work have prevailed.

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1. *See* Elizabeth Hartfield, *Michigan Governor Signs Right to Work Bill Into Law*, ABC NEWS (Dec. 11, 2012), http://abcnews.go.com/Politics/michigan-governor-signs-work-bill-law/story?id=17934332.

2. *See generally, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will,* 51 U. CHI. L. REV. 947 (1984).

3. U.S. CHAMBER OF COMMERCE, THE IMPACT OF STATE EMPLOYMENT PRACTICES ON JOB GROWTH: A 50-STATE REVIEW 13–15 (2011), *available at* https://www.uschamber.com/sites/default/files/legacy/reports/201103WFI_Sta

In every state, with the exception of Montana,[4] employers are generally free "to discharge or retain employees at will for good cause or for no cause, or even for bad cause."[5] This rule of at-will employment is the bedrock principle of American employment law.

In American labor law, by contrast, "right to work" has a very different meaning. It has, and this is not hyperbole, "nothing whatsoever to do with granting anyone a right to get work or protecting those who have a job from losing it."[6] Instead, right-to-work laws permit employees in the private sector who are covered by a collective bargaining agreement that is negotiated and administered by a union to refuse to pay for the union's services.[7] Under the National Labor Relations Act ("NLRA"), in states without right-to-work laws, non-members covered by a collective bargaining agreement can be required under that agreement to pay their fair share for those services.[8] The Supreme Court has determined that this NLRA provision permits objectors to refuse to pay for union "political activity," an interpretation, the Court has continued to explain, that avoids a difficult First Amendment question.[9] Labor lawyers refer to provisions in collective bargaining agreements that require lawful payments by non-members as "union-security clauses."[10]

The proponents of union-security clauses explain that without them,

> individual workers can easily become "free riders," taking the benefits of collective representation without paying their fair share of the costs. Not only dissenters but any

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4. *See* Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2013) (making it unlawful for an employer to discharge an employee without good cause).

5. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 518 (1884), *overruled in part by* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).

6. Rick Ungar, Op-ed, '*Right-to-Work' Laws Explained, Debunked And Demystified*, FORBES (Dec. 11, 2012, 2:37 P.M.), http://www.forbes.com/sites/rickungar/2012/12/11/right-to-work-laws-explained-debunked-demystified/.

7. *See* 29 U.S.C. § 164(b) (2012).

8. *Id.* § 158(a)(3).

9. Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 762–63 (1988).

10. *See, e.g.*, Samuel Estreicher, Op-ed, *'Right to Work' is a Misnomer*, NAT'L L.J. & LEGAL TIMES, Jan. 7, 2013, at 31, 31; Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 813 (2012).

> employee who wants to save a buck can "free ride." The net result may be that the union cannot afford to represent workers effectively, and everyone suffers.[11]

To put a finer point on it, a union has a duty to represent all members of the bargaining unit fairly, without making distinctions between members and non-members.[12] Thus, in a right-to-work state an employee could take any pay raise negotiated on her behalf by the union but refuse to pay any of the costs associated with the union's negotiating operation.

Right-to-work proponents make several arguments against enforcement of union-security clauses. Some are based on notions of individual liberty and freedom from coercion. As the National Right to Work Committee puts it, no "American[ ] . . . should ever be forced to affiliate with a union in order to get or keep a job."[13] There are economic arguments as well. The standard economic case for right-to-work laws goes something like this: unionization is harmful because it artificially increases the wages of union labor and decreases the wages of non-union workers. Right-to-work laws make it harder for unions to organize workers. Therefore, right-to-work laws are good for the economy. Moreover, if firms choose to locate in areas where the risk of unionization is lower, right-to-work laws are particularly good for those local economies.[14]

The situation in the public sector is more complicated. The private sector is governed by one body of law—the NLRA[15]—but each state has its own public sector labor law. And those laws are

11. Cynthia Estlund & William E. Forbath, Op-ed, *The War on Workers*, N.Y. TIMES (July 2, 2014), http://www.nytimes.com/2014/07/03/opinion/the-supreme-court-ruling-on-harris-v-quinn-is-a-blow-for-unions.html; *accord* Estreicher, *supra* note 10, at 31 ("[A] right to free ride on union representation . . . deprive[s] unions of a justifiable funding mechanism so that they no longer can play a useful collective-bargaining role in our society.").

12. *See* Craig Becker, *The Pattern of Union Decline, Economic and Political Consequences, and the Puzzle of a Legislative Response*, 98 MINN. L. REV. 1637, 1645 (2014).

13. *About NRTWC*, NAT'L RIGHT TO WORK COMM., http://nrtwc.org/about-2/ (last visited Nov. 6, 2014).

14. *See* Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and its Implications for Public Policy,* 70 U. COLO. L. REV. 871, 933–34 (1999).

15. 29 U.S.C. §§ 151–169 (2012).

quite variable.[16] Some states prohibit public employees from engaging in collective bargaining altogether; some states have public sector labor laws that look much like the NLRA; and other states give public sector unions more power than their private sector counterparts.[17] Some states, most importantly for our purposes, permit public sector unions to negotiate union-security clauses.[18] That brings us, almost, to *Harris v. Quinn*.[19]

Many have argued that the balance struck by the Court and Congress with respect to enforcement of union-security clauses in the private sector should not be transferred to the public sector. In the public sector, they argue, the First Amendment rights of objectors are more acute. To force a public school teacher, for example, to pay for the services of a union that teacher opposes forces that teacher to support the union's political positions. Bargaining with a public body—e.g., a school board—the argument goes, necessarily requires a union to take positions on public policy, even if that union is simply negotiating for a wage increase.[20] In short, negotiations with a public body about resources are inescapably political.

This issue came before the Court in 1977 in *Abood v. Detroit Board of Education*.[21] Under Michigan law at that time, local government employees had rights to organize and engage in collective bargaining, and union-security provisions were enforceable, under which every employee represented by a union, even though not a union member, was required to pay a service fee equal in amount to union dues.[22] A union selected by a majority of the public school teachers in Detroit negotiated, as part of a comprehensive collective bargaining agreement with the

16. *See, e.g.*, Vijay Kapoor, *Public Sector Labor Relations: Why It Should Matter to the Public and to Academia*, 5 U. PA. J. LAB. & EMP. L. 401, 409 (2003).

17. *See, e.g.*, Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States,* CENTER FOR ECON. & POL'Y RESEARCH, Mar. 2014, at 1, 4–5, *available at* http://www.cepr.net/documents/state-public-cb-2014-03.pdf.

18. *See* Martha H. Good, Comment, *The Expansion of Exclusive Privileges For Public Sector Unions: A Threat to First Amendment Rights?*, 53 U. CIN. L. REV. 781, 785 (1984).

19. 134 S. Ct. 2618 (2014).

20. *See generally id.*

21. 431 U.S. 209 (1977).

22. *Id.* at 211.

Detroit Board of Education, a union-security provision.[23] A group of teachers thereafter filed suit, alleging that their First Amendment rights would be violated by enforcement of the provision—both because they opposed collective bargaining in the public sector, and because the provision would require them to pay for union political expenditures unrelated to collective bargaining.[24]

The Court first reviewed existing precedents, which, as summarized above, permit enforcement of union-security provisions in the private sector so long as the provisions do not require objectors to pay for union political activity.[25] The Court described those cases as holding that the objector's First Amendment interests in withholding any and all financial support from the union were outweighed by "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[26] Adhering to those cases, the Court acknowledged, would require validation of the Michigan scheme so long as the service charges obtained from objectors were used exclusively "to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment."[27]

However, the Court then took the time to consider whether application of those precedents was appropriate, given the "very real differences" between private and public sector collective bargaining.[28] The Court reasoned that the State's interests in the public benefits of union-security provisions were identical in the private and public sectors.[29] It also found that private and public sector objectors had equally important First Amendment rights at stake when being forced to financially support organizations to which they objected.[30] Thus, the Court held that the constitutional balance should be the same in the private and

23. *Id.* at 211–12.
24. *Id.* at 212–14.
25. *Id.* at 217–20 (citing Machinists v. Street, 367 U.S. 740 (1961); Railway Emps.' Dep't v. Hanson, 351 U.S. 225 (1956)).
26. *Id.* at 222.
27. *Id.* at 225–26.
28. *Id.* at 230.
29. *Id.* at 232.
30. *Id.* at 230–31.

public sectors.[31] The Court held that Michigan's authorization of union-security provisions in the public sector did not violate the First Amendment rights of objectors, except that objectors could not constitutionally be required to pay for union spending unrelated to its duties as exclusive bargaining representative, such as spending to support political candidates or express political views.[32]

This is where the law stood when *Harris v. Quinn* came along. When the Court granted *certiorari*[33] the case had a relatively low profile. *Harris* appeared to present an issue involving a rather arcane aspect of public sector labor law and Medicaid in-home personal care providers. On the other hand, as some observers began to point out, *Harris* could serve as a vehicle for the Court to consider whether to overrule *Abood*.[34] At oral argument it became quite clear that the petitioners were asking the Court to overrule *Abood* and prohibit union-security provisions in the public sector on First Amendment grounds[35]—an argument that the Court took quite seriously. Therefore, by the time the Court issued its decision, interest in the case had increased dramatically.

The plaintiffs in *Harris* provided in-home personal care services in Illinois to individuals who qualified under the federal Medicaid program.[36] Under the program, Illinois, subsidized by federal Medicaid funds, paid these "personal assistants," but the assistants were hired and under the control of the individual Medicaid-eligible patients.[37]

Under Illinois law, state employees were authorized to form unions and engage in collective bargaining.[38] In addition, union-security provisions in any resulting agreement were enforceable.[39]

31. *Id.* at 232.

32. *Id*. at 230–37.

33. *See* Petition for Writ of Certiorari, Harris v. Quinn, 134 S. Ct. 2618 (2014) (No. 11-681), 2011 WL 6019918.

34. *See, e.g.*, Will Baude, Harris v. Quinn *and the Future of* Abood, VOLOKH CONSPIRACY (Oct. 1, 2013, 9:51 P.M.), http://www.volokh.com/2013/10/01/harris-v-quinn-future-abood/ (referring to *Harris* as a "sleeper").

35. *See* Transcript of Oral Argument, *Harris*, 134 S. Ct. 2618 (No. 11-681), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-681_8mj8.pdf.

36. 134 S. Ct. at 2626.

37. *Id.* at 2624.

38. *Id.* at 2625; *see also* 5 ILL. COMP. STAT. ANN. 315/6(a), (c) (2008).

39. *Harris*, 134 S. Ct. at 2625; *see also* 5 ILL. COMP. STAT. ANN 315/6(e).

When the Service Employees International Union ("SEIU") sought to organize the personal assistants, the Illinois Labor Relations Board concluded that the assistants were not employed by the State and, therefore, were not eligible to organize and engage in collective bargaining with the State.[40]

However, the Illinois legislature amended the law to provide that the personal assistants were public employees solely for the purposes of coverage under the Illinois Public Labor Relations Act.[41] Thereafter, a majority of the personal assistants voted for representation by the SEIU, and the union entered into an agreement with the State of Illinois that contained a union-security provision.[42] The plaintiffs did not support the union and claimed that enforcement of the provision would violate their First Amendment rights.[43] Ultimately, the Court concluded, by a classic 5–4 vote (Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas in the majority) that the plaintiffs' claim had merit, but not because union-security provisions were unenforceable in the public sector.[44]

The constitutional infirmity the majority found in the Illinois scheme was that it required personal assistant objectors to pay for union representation vis-à-vis the State when, in fact, the personal assistants were employed by their Medicaid-eligible patients.[45] This meant that the power of the union to negotiate with the State was circumscribed—essentially the union was limited to negotiating with the State over payment rates.[46] The Court refused to "extend" *Abood* to a situation where the union could not offer the personal assistants it represented the benefits of increased bargaining power with regard to all terms and conditions of employment.[47] *Abood*'s rationale, the Court explained, "is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law."[48] The personal assistants, by contrast, were

40. *Harris*, 134 S. Ct. at 2625–26.
41. *Id.* at 2626; *see also* 20 ILL. COMP. STAT. ANN. 2405/3(f) (2001).
42. *Harris*, 134 S. Ct. at 2626.
43. *Id.*
44. *Id.* at 2634-37.
45. *Id.*
46. *Id.* at 2634–36.
47. *Id.* at 2637 n.18, 2638.
48. *Id.* at 2626.

explicitly deemed by Illinois law to be "public employees solely for the purpose of unionization and the collection of an agency fee."[49]

The Court's narrow rationale for ruling for the personal assistant objectors; the rather unique labor law regime created in Illinois for the personal assistants; and the distinctive work relationship between the personal assistants, the Medicaid-eligible clients, and the State of Illinois do not, however, make *Harris v. Quinn* a non-event. *Harris* seems to foreshadow the demise of *Abood*.

Before explaining its narrow holding, the majority spent approximately seven pages explaining why *Abood* should be overruled.[50] First, explained the Court, *Abood* was "something of an anomaly" because free-rider arguments are generally insufficient to justify interfering with legitimate First Amendment interests.[51] Second, the Court characterized the private-sector cases upon which the *Abood* Court relied in rejecting the broad constitutional challenge to union-security provisions in the public sector as "thin," "narrow," and "remarkable."[52] It therefore criticized the *Abood* Court for relying so heavily on those cases and ignoring important differences between private and public sector collective bargaining.[53] In the latter instance, explained the Court, the objectors' First Amendment interests are heightened because issues such as wages, pensions, and benefits are important *political* issues.[54] Moreover, as a consequence, the line between chargeable and non-chargeable union activities in the public sector is extraordinarily difficult to demarcate, and it is the objector's burden to limn the two categories.[55] Finally, the Court explained that there was no necessary relationship between a union's ability to effectively negotiate on behalf of all members of a bargaining unit and the requirement that all those members financially support the union's activities.[56]

When the majority was done with *Abood*, the 1977 case was

49. *Id.* at 2627.
50. *See id.* at 2627–34.
51. *Id.* at 2627 (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2290 (2012)) (internal quotation marks omitted).
52. *Id.* at 2627–30.
53. *Id.* at 2631–33.
54. *Id.* at 2631–32.
55. *Id.* at 2633.
56. *Id.* at 2640–41.

bruised and bloodied—all but dead. As Justice Kagan wrote in her dissent, "[t]oday's majority cannot resist taking potshots at *Abood*."[57] She commended, but refused to applaud, the majority for stopping short of overruling *Abood*.[58]

I am much less sanguine. The majority opinion in *Harris* reads like *Abood's* obituary, and it seems only a matter of time before a majority, maybe even this majority, will finish the job. These are not good times for unions. Private sector union density is now below seven percent.[59] And unions in the public sector have become the target of considerable criticism and political attacks. Some have speculated that Justice Alito, who wrote the majority in *Harris*, thought he had five votes to overrule *Abood*, which explains the extensive language essentially eviscerating the decision.[60] Whether or not that is true, there is little left for a majority to do to conclude that the First Amendment provides for a right-to-work law in the public sector.

57. *Id.* at 2645 (Kagan, J., dissenting); *see also id.* at 2652–53 ("Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so.").

58. *Id.* at 2645.

59. *See* Dave Jamieson, *Union Membership Ticks Up In The Private Sector*, HUFFINGTON POST (Jan. 24, 2014, 12:46 P.M.), http://www.huffingtonpost.com/2014/01/24/union-membership-2013_n_4659586.html.

60. *See, e.g.,* Laurence H. Tribe, *In attacking unions, the Roberts court forgets a key lesson of the New Deal*, SLATE (June 30, 2014, 3:04 P.M.), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_harris_v_quinn_forgets_the_lesson_of_the_new_deal.html.