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Opting in, opting out

James Kilpatrick, Universal Press Syndicate
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Viewed in one way, the two union labor cases now awaiting argument in the Supreme Court are much ado about mighty little. Viewed from another angle, the cases involve a principle as fundamental as the Eighth Commandment. The Eighth is the one that says we shall not steal. Both cases involve efforts by the schoolteachers' union in the state of Washington to extract "contributions" from non-union teachers. The Washington Education Association, i.e., the union, won a less than resounding victory in the Supreme Court of Washington last March. Sometime within the next few weeks, the other Supreme Court - the one in Washington, D.C. - will hear the appeal of Gary Davenport, Martha Lofgren and others.

The facts are not much in dispute. The teachers' union enjoys a closed-shop contract with the state. Under the contract, the union must represent non-union members of the bargaining unit - those who have opted out - just as it represents its own members. Everyone pays the same equal dues. The non-members do not seriously object to this quid pro quo - not so long as their money is spent on such relevant purposes as negotiating contracts.

The conflict arose at some point in the distant past when the union began to spend a small but significant fraction of the non-members' dues for political purposes - that is, for purposes clearly unrelated to collective bargaining. The first case arose in August 2000, when the State Public Disclosure Commission received a complaint that the union had diverted part of the dues of non-consenting members to political purposes. Eventually this suit led to a judgment of nearly $600,000 against the union. The Davenport/Lofgren case, brought against the union by five dissident teachers, arose seven months later.

Eventually the two suits came together. The union lost in the trial court, but won on appeal to the state Supreme Court. From that defeat, the protesting teachers and the state itself have appealed.

The opposing positions are abundantly clear. Davenport, Lofgren and other non-union members of the bargaining unit would like to recover their diverted money. The teachers' union, once having latched onto the loot, is understandably unwilling to let go. The plaintiffs are talking biblical principle. The union is talking cash.

Justice Faith Ireland, sitting by appointment, spoke last March for the majority in a 6-3 division of the Washington State Supreme Court.

At the outset of a long opinion in the union's favor, she noted that if the trial court were affirmed, the 3,500 non-union plaintiffs would be entitled to individual rebates ranging

only from $44 to $76 a year. If it were not for the principle of the thing, she implied, it would scarcely be worth the trouble.

The principle is important. The case is governed mainly by the state law on agency fees (the fees paid by non-union workers for obligatory union services). The law says that unions may not divert any part of these fees to political purposes "unless affirmatively authorized by the individual." In the two consolidated cases, opponents had not authorized any check-offs at all.

What is the meaning of "affirmative authorization"? This "plain language," said Judge Ireland, "seems to indicate" that non-members must provide an expression of positive authorization. Again, "affirmative authorization seems to indicate that the member must say 'yes,' instead of failing to say 'no.'" Members have a First Amendment right to spread a political message. "On the other hand, equally protected, is a person's right not to be compelled to support political and ideological causes with which he or she disagrees." Such well-known cases in labor law as "Hudson" and "Ellis" affirm the political rights of dissenting members.

On the other hand, again, a requirement of affirmative authorization imposes an "obvious, significant expense" upon the union. A union expert testified that it would double the complexity of the dues collection system. To escrow any part of the challenged funds would impact the timeliness of the union's political speech. It would "significantly burden the union's right of expressive association."

Three members of the court dissented. Speaking through Justice Richard B. Sanders, they quoted Justice Hugo Black: "Our government has no more power to compel individuals to support union programs than it has to compel the support of political programs. And the First Amendment, fairly construed, deprives the government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against."

Black was writing in dissent more than 50 years ago, but he spoke for the ages.

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