

Restoring Equity in Right-to-Work Law

Catherine L. Fisk & Benjamin I. Sachs*

Introduction	857
I. Reading Section 14(b)	860
II. A Genuine Right to Be Nonunion	866
III. Removing the Obligation to Represent Nonmembers for Free	874
Conclusion	879

INTRODUCTION

Under United States labor law, when a majority of employees in a bargaining unit choose union representation, all employees in the unit are then represented by the union and the union must represent all of the employees equally.¹ Twenty-four states, however, have enacted laws granting such union-represented employees the right to refuse to pay the union for the services the union is legally obligated to provide.² Although the name prompts strong objection from union supporters, these laws are known as “right-to-work” laws.

Right-to-work laws have been around for decades,³ but they have come to national prominence again as another round of states has enacted the legislation. Michigan—a state with relatively high levels of union density⁴—enacted a right-to-work statute in 2012, and Indiana became a right-to-work state in 2010.⁵ As a

* The authors are, respectively, Chancellor’s Professor of Law, University of California, Irvine School of Law, and Kestnbaum Professor of Labor and Industry, Harvard Law School. Professor Fisk thanks Daniel Schieffer, and Professor Sachs thanks Ani Gevorkian for excellent research assistance.

1. National Labor Relations Act § 9, 29 U.S.C. § 159(a) (2012).

2. *Right to Work Resources*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/labor/right-to-work-laws-and-bills.aspx> (last visited Sept. 7, 2013).

3. *See id.*

4. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNION MEMBERSHIP IN MICHIGAN—2012 (2013).

5. *See* IND. CODE. § 22-6-6-8 (West, Westlaw through 2014 2d Reg. Sess.); 2012 Mich. Pub. Acts No. 348 (private sector), codified at M.C.L. 423.1, 423.2, 423.8, 423.14, 423.17, 423.22; 2012 Mich. Pub. Acts No. 349 (public sector), codified at M.C.L. 423.201, 423.209, 423.210, 423.214, 423.215. An effort is also underway in Canada to adopt the so-called right-to-work principle, which to date Canada has not had. *See* Daphne Gottlieb Taras & Allen Ponak, *Mandatory Agency Shop Laws as an Explanation of Canada-U.S. Union Density Divergence*, 22 J. LAB. RES. 541, 544 (2001) (describing that no form of union security agreement is prohibited in Canada); *see also* PATHS TO PROSPERITY: FLEXIBLE

result, unions with preexisting 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 their intersection with federal labor law. As is well understood, federal labor law implements a regime of exclusive representation.⁶ 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.⁷ Importantly, although the union represents all of the workers in a bargaining unit, no worker need actually become a member of the union.⁸ This is true both in right-to-work states and in non-right-to-work states: everywhere in the United States, unions operate under a regime of exclusive representation; nowhere in the United States may any worker be compelled to become a union member.⁹ 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.¹⁰ The duty extends not just to collective bargaining—in which the union cannot bargain terms that favor members over nonmembers—but to disciplinary matters as well.¹¹ The union must grieve and arbitrate on behalf of nonmembers just as zealously (and as expensively) as it does 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 section 8(a)(3) of the National Labor Relations Act (NLRA), 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

LABOUR MARKETS: AN ONTARIO PC CAUCUS WHITE PAPER (2012) (proposing adoption of right-to-work law in Ontario), available at <http://timhudakmpp.com/wp-content/uploads/Flexible-Labour-Markets.pdf>; Sunny Freeman, *Bill 85, Saskatchewan Employment Act, Erodes Union Power, Sets New Tone for Labour Relations in Canada*, HUFFINGTON POST CANADA (Apr. 9, 2013, 6:31 AM), http://www.huffingtonpost.ca/2013/04/09/bill-85-saskatchewan-employment-act_n_3039850.html. Professor David Doorey has analyzed the proposed right-to-work regime in Canada on his blog: David Doorey, *Some Implications of a Canadian "Right to Work" Law*, LAW WORK (Oct. 16, 2013), <http://lawofwork.ca/?p=7011>.

6. 29 U.S.C. § 159; *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 64 (1975).

7. See 29 U.S.C. § 159.

8. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 743–45 (1963).

9. *Id.*

10. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202–03 (1944).

11. See *Vaca v. Sipes*, 386 U.S. 171, 186 (1967).

bargaining and contract administration functions.¹² 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 creates an inequity in U.S. labor law that calls for resolution. 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 nonpaying nonmember.

We see three potential approaches to remedying the inequity in current law. First, and most straightforwardly, we believe that the best reading of section 14(b) of the NLRA—the provision in the federal statute that allows states to pass right-to-work laws¹³—suggests that federal law does not in fact permit states to ban *all* mandatory payments from workers to unions—something that many right-to-work laws, including Michigan’s, do.¹⁴ 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 go 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 unions, 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 proposal constitutes a win-win. Workers who do not want to be union could now genuinely be nonunion—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 involvement. 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

12. See 29 U.S.C. § 158(a)(3).

13. See *id.* § 164(b).

14. See 2012 Mich. Pub. Acts No. 348 (private sector), codified at M.C.L. 423.1, 423.2, 423.8, 423.14, 423.17, 423.22; 2012 Mich. Pub. Acts No. 349 (public sector), codified at M.C.L. 423.201, 423.209, 423.210, 423.214, 423.214.

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 National Labor Relations Board (NLRB or Board) 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 section 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 union's representation generally.¹⁵ We believe that in right-to-work states, it ought to be within a union's discretion to charge nonpaying nonmembers if those nonmembers wish to have the union represent them in disciplinary matters. Unlike the NLRB, we do not believe that charging an employee the fair price of a union service coerces that person, within the meaning of section 8(b)(1)(A), to become a union member or restrains his or her ability to refuse to support the union.

I. READING SECTION 14(b)

When a union bargains a collective agreement with an employer, the benefits of the agreement—including, for example, wage and benefit gains, enhanced job security, and improved mechanisms for voice at work—extend to all of the employees covered by the agreement.¹⁶ Current law, moreover, requires unions to negotiate collective bargaining agreements on behalf of *all* of the employees in a particular bargaining unit.¹⁷ This implies that whatever benefits the union secures through the collective agreement will accrue to every employee in the unit. This in turn presents a classic threat of free riding: the risk is that workers in the unit will seek to receive the benefits of the union's collective actions without contributing resources necessary to secure those benefits. Indeed, Mancur Olson used the union context to describe what he saw as the quintessential collective action problem.¹⁸

Unions have attempted to respond to this free rider problem through a variety of mechanisms that have evolved over time, but that all share the same central feature: they require employees who benefit from a collective agreement to

15. Furniture Workers Div., Local 282, 291 N.L.R.B. 182, 183 (1988); Columbus Area Local, Am. Postal Workers Union, 277 N.L.R.B. 541, 543 (1985); Int'l Ass'n of Machinists & Aerospace Workers, Local Union No. 697, 223 N.L.R.B. 832, 835 (1976).

16. See 29 U.S.C. § 159(a).

17. *Id.*

18. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 66–97 (1965 & 1971).

share in the costs of securing those benefits. Prior to 1947, unions and employers often required employees to be members of the union at the time of hiring.¹⁹ In 1947, the Taft-Hartley Act prohibited these “closed shop” agreements, but continued to allow other so-called union security agreements that require employees to become union members after hiring.²⁰ The amended statute continues to provide, however, that employment may not be conditioned on union membership if such membership is “denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”²¹

When Congress banned the closed shop, however, it also added section 14(b) to the statute, giving states some latitude to legislate in the union security area. Thus, although the federal statute permits unions and employers to bargain contract clauses that require employees to pay dues and fees to the union, section 14(b) of the statute allows states to proscribe some such agreements. In particular, section 14(b) dictates 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 is prohibited by State or Territorial law.”²² By its terms, then, section 14(b) allows states to prohibit agreements that require “membership” in a union.

The question is how to read section 14(b)’s use of the term “membership.” A strictly literal reading of the section would 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 would be preempted by the NLRA. After all, section 14(b) only allows states to prohibit “membership”; it says nothing about whether states can prohibit payment of fees for services that federal law compels unions to provide.

But the Supreme Court has held that section 14(b)’s definition of “membership” is broader than its literal construction. In its *NLRB v. General Motors Corp.* decision, the Court was faced with the question of whether section 8(a)(3) of the statute allowed unions to require the payment of dues and fees even from those who did not become members of the union.²³ The union had proposed a collective bargaining agreement provision that required nonmember employees to pay the union a fee for the services the union provided (generally

19. 29 U.S.C. § 158(a)(3).

20. As amended by Taft-Hartley, section 8(a)(3) expressly allows employers and unions to agree “to require as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment.” *Id.*

21. *Id.*

22. 29 U.S.C. § 164(b).

23. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 735 (1963).

known as an “agency fee” provision).²⁴ The employer insisted that the only form of union security device that the NLRA authorized was a union shop provision that requires employees actually to become union members after the date of hire.²⁵ The Court rejected the employer’s argument and held that Congress had, with the 1947 Taft-Hartley amendments, changed the “meaning of ‘membership’ for the purposes of union-security contracts.”²⁶ Unions and employers, the Court reasoned, could agree to union security devices that require employees to do *less* than is required by a union shop.²⁷ 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.”²⁸ Thus, “‘membership’ as a condition of employment is whittled down to its financial core.”²⁹ This, the Court explained, “serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent.”³⁰

Then, in *Retail Clerks International Ass’n, Local 1625 v. Schermerhorn*, the Court extended the *General Motors* section 8(a)(3) analysis to the section 14(b) context.³¹ *Schermerhorn* holds that although section 8(a)(3) and section 14(b)—which both turn on a definition of “membership”—may not be “perfectly coincident,” they nonetheless “overlap to some extent.”³² 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 [section] 8(a)(3) . . . [and] is the ‘practical equivalent’ of an ‘agreement requiring membership in a labor organization.’”³³ Since an agency shop agreement that requires payment of the full amount of union dues is the practical equivalent of membership within the meaning of section 8(a)(3), and because section 8(a)(3) and section 14(b) overlap at least to some extent, the Court concluded that agency shop agreements also require membership within the meaning of section 14(b).³⁴ Thus, under *Schermerhorn*, collective bargaining provisions that require all employees to pay the same dues and fees as members pay may be prohibited by state law, even though actual “membership” is not required by the collective bargaining agreement.³⁵

24. *Id.*

25. *Id.* at 741–43.

26. *Id.* at 742.

27. *Id.* at 741–42.

28. *Id.* at 742.

29. *Id.*

30. *Id.* at 744.

31. *See Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 756–57 (1963).

32. *Id.* at 751.

33. *Id.*

34. *See id.* at 751–52.

35. *See id.*

But the *Schermerhorn* Court was careful to express an important caveat. Although agency fee agreements that required the same payments from nonmembers as were required from members could be prohibited by section 14(b), that did *not* imply that “less stringent union-security arrangements” could also be prohibited.³⁶ 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.³⁷ In particular, the *Schermerhorn* agreement “confine[d] the use of nonmember payments to collective bargaining purposes alone and forb[ade] their use by the union for institutional purposes unrelated to its exclusive agency functions.”³⁸ In *General Motors*, by contrast, nonmembers were required to pay the same dues and initiation fees required of union members *and* to share with members the cost of “strike benefits, educational and retired member benefits, and union publications and promotional activities.”³⁹

The *Schermerhorn* Court went to some lengths—several pages in the *United States Reports*, in fact—to reject the union’s argument, but for reasons that affirm our key contention.⁴⁰ 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.⁴¹ There is, the Court wrote, “no ironclad restriction imposed upon the use of nonmember fees.”⁴² 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”⁴³—the fee requirement would look more like a *membership* requirement than a fee-for-service arrangement.⁴⁴ 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.”⁴⁵ 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.⁴⁶

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

36. *See id.* at 752.

37. *See id.*

38. *Id.*

39. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 737 (1963).

40. *Schermerhorn*, 373 U.S. at 752–54.

41. *See id.* at 752–53.

42. *Id.* at 752.

43. *Id.*

44. *See id.* at 752–53.

45. *Id.* at 753.

46. *See id.* at 754.

arrangements that are outside the scope of section 14(b). If it were the case that *all* mandatory payments could be banned by section 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, *Schermerhorn* 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, *Schermerhorn* did not hold or suggest that states can ban agreements that require nonmembers to pay *less* than what members pay.

One final Supreme Court opinion requires attention. In *Communications Workers of America v. Beck*, the Supreme Court held that section 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.⁴⁷ That is, the "membership" that can be required under section 8(a)(3) 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.

To sum up the discussion thus far, then, *General Motors*, *Schermerhorn*, and *Beck* together imply that the definition of "membership" relevant to both section 8(a)(3) and section 14(b) is as follows: membership means the financial requirement of paying dues and fees equivalent to the share of member dues and fees that fund the union's collective bargaining and contract administration functions. The definition of membership that emerges from the Court's opinions is thus far broader than the literal "membership" to which section 14(b) refers, but not so broad as to cover all forms of mandatory payments from employees to unions. Indeed, 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 matters—but nothing more—would not "require membership" within the meaning of section 14(b).⁴⁸ 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. As we have seen, "membership" means the same thing in section 14(b) as it does in section 8(a)(3).⁴⁹ This ought to imply, the objection goes, that if states cannot ban clauses

47. See *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988).

48. See *id.* at 762–63; *Schermerhorn*, 373 U.S. at 752; *NLRB. v. Gen. Motors Corp.*, 373 U.S. 734, 743–44 (1963).

49. See *Schermerhorn*, 373 U.S. at 751.

requiring nonmembers to pay less than full membership dues (because those clauses do not require the equivalent of “membership”), then such clauses should be impermissible under section 8(a)(3) (allowing unions and employers to condition employment only on union “membership”). But, the objection concludes, because unions and employers clearly *could* enforce a union security agreement that required payment of less than full membership dues, we must be wrong to conclude that states cannot ban such clauses.

This objection to our argument fails, though, and for an important reason. It is true that, in our view, membership means the same thing under section 14(b) and section 8(a)(3). 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.⁵⁰ But, for reasons we will explain immediately below, section 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 section 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.⁵¹ Under this provision of the NLRA, unions and employers have the authority to negotiate enforceable labor agreements that condition employment on an employee’s willingness to comply with the financial requirements of “membership,”⁵² as construed by the Court.⁵³ Section 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.⁵⁴ Thus, collective bargaining agreements can require that employees pay the “dues and . . . fees uniformly required as a condition of acquiring or retaining membership” in the union,⁵⁵ 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.⁵⁶ But because section 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 section 8(a)(3) because it is less exacting than what section 8(a)(3) permits.

50. See *Beck*, 487 U.S. at 758–69.

51. See National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3)(2012).

52. *Id.*

53. See *id.*

54. See *id.*

55. *Id.*

56. See *Retail Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 754 (1963).

Like section 8(a)(3), section 14(b) determines the outer bounds of the authority it grants—but rather than limiting the authority of unions and employers to enter agreements, it sets the outer bounds of what states may prohibit consistent with the NLRA.⁵⁷ Thus, state right-to-work 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. So, 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 section 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,”⁵⁸ a state does not have authority to ban it, even though such a provision is permissible under section 8(a)(3).⁵⁹

In sum, we have argued that under a proper reading of section 8(a)(3), section 14(b), and the Supreme Court’s cases interpreting those sections of the federal statute, states can ban compulsory union membership and union security clauses that require nonmembers to pay the same amount that union members pay in dues for collective bargaining and contract administration functions. States cannot, however, prohibit agreements under which nonmembers are compelled to pay less than this amount. For example, states may not ban agreements that require nonmembers to pay only the proportion of membership dues that cover representation in disciplinary matters. To adopt our proposal, moreover, would require no change in Supreme Court law or statutory language, but only a careful reading of the statute and the Court’s cases on point.

II. A GENUINE RIGHT TO BE NONUNION

Our first proposal would thus clarify the scope of federal preemption in a manner that would limit the permissible types of state right-to-work laws. An alternative approach to reconciling right-to-work laws with exclusive representation and the union’s duty of fair representation would leave state right-to-work laws untouched, but would change the union’s obligations in those states by relaxing the requirements of exclusivity. Put simply, this proposal would implement a members-only bargaining regime in right-to-work states.

Right-to-work laws reject the notion that all employees in a bargaining unit should be required to provide financial support to the union selected by the

57. See 29 U.S.C. § 164(b).

58. See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 762–63 (1988).

59. See 29 U.S.C. § 164(b). At least one case challenging a new right to work law in Indiana should therefore determine that section 14(b) preempts the state law to the extent that the law invalidates contract provisions requiring employees to pay anything less than what union members pay in dues for collective bargaining and contract administration. *Sweeney v. Pence*, No. 13-1264 (7th Cir. argued Sept. 12, 2013).

majority.⁶⁰ There is, accordingly, a tension between state right-to-work regimes and the federal rule of exclusive representation, under which the union has an obligation to represent equally all employees in the bargaining unit.⁶¹ In brief, federal law requires unions to represent all employees in the unit while state right-to-work laws give workers the right to refuse to contribute to that representation. As such, the current state of affairs in right-to-work states can be analogized to a political world in which anyone whose party lost an election could still go to public schools, drive on public highways, and benefit from public security without having to pay taxes to support those public goods.

A principled approach to addressing this tension 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. Those workers who wish to join a union and bargain collectively in right-to-work states should thus be permitted to construct a bargaining unit that includes only those workers willing to pay for union representation. Such a change in the law would simply take the right-to-work concept to its logically consistent and fair conclusion. It would allow workers who do not want to be union to genuinely be nonunion: 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. Unions, for their part, would no longer be obligated to represent those workers who do not desire such representation and who do not wish to pay for it. And workers who wish to unionize would no longer be required to subsidize representation for their nonmember coworkers who do not desire unionization.⁶²

60. See IND. CODE, § 22-6-6-8 (West, Westlaw through 2014 2d Reg. Sess.); 2012 Mich. Pub. Acts No. 348 (private sector), codified at M.C.L. 423.1, 423.2, 423.8, 423.14, 423.17, 423.17; 2012 Mich. Pub. Acts No. 349 (public sector), codified at M.C.L. 423.201, 423.209, 423.210, 423.214, 423.215.

61. See 29 U.S.C. § 159.

62. Although our proposal is novel, it is not unprecedented. Tennessee, for example, recently abolished exclusivity for teachers' unions and adopted a complex system of members-only bargaining. See Martin H. Malin, *Sifting Through the Wreckage of the Tsunami that Hit Public Sector Bargaining*, 16 EMP. RTS & EMP. POL'Y J. 533, 551–52 (2012). It is still too soon to know how unions will negotiate and administer contracts, whether significant numbers of teachers will exercise their rights to join unions or to refrain from doing so, and how school districts, unions, and individual teachers (or groups of nonunion teachers) will navigate a regime in which some teachers are covered by a union contract and others are not. See *id.* (explaining Tennessee's new public sector labor relations law and considering its implications). But, whatever the outcome, Tennessee will offer some experimental evidence on the effects of a proposal like the one we are offering. See Martin H. Malin, *Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?*, 96 MARQ. L. REV. 623, 650–51 (2012) (discussing examples of members-only agreements in Tennessee). Furthermore, Florida and Nebraska allow members-only contract administration in the public sector. See Dennis O. Lynch, *Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida's Public Sector Labor Law*, 37 U. MIAMI L. REV. 573, 575–76 (1983) (explaining the operation of the Florida system); see also Neb. Rev. Stat. § 48-838 (2012). In Nebraska, for example,

Any employee may choose his or her own representative in any grievance or legal action regardless of whether or not an exclusive collective bargaining agent has been certified. If

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.⁶³ For present purposes, it is enough to note, first, that although the Board has never held that the statute requires members-only bargaining, there is significant support for that proposition in the structure of the statute and in the Supreme Court's jurisprudence.⁶⁴ Second, 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 section 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. In our view, whatever the arguments for members-only bargaining in *non*-right-to-work states, there are substantially stronger arguments for the Board to conclude that section 8(a)(5) requires members-only bargaining in right-to-work states.

Nothing in section 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.⁶⁵ Moreover, nothing in section 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.⁶⁶ The law currently allows members-only representation.⁶⁷ In *Consolidated Edison Co. v. NLRB*, a 1938 decision arising out of a dispute between two unions seeking to represent the same group of employees, the Supreme Court explicitly recognized the right of a

an employee who is not a member of the labor organization chooses to have legal representation from the labor organization in any grievance or legal action, such employee shall reimburse the labor organization for his or her pro rata share of the actual legal fees and court costs incurred by the labor organization in representing the employee in such grievance or legal action.

NEB. REV. STAT. § 48-838 (West, Westlaw through 2014 Reg. Sess.). And the Supreme Courts of New Hampshire and Rhode Island both concluded that requiring a nonunion public sector employee to pay the reasonable costs of contract administration did not violate state right-to-work statutes or similar provisions prohibiting public sector unions from encouraging or requiring union membership. *Nashua Teachers Union v. Nashua Sch. Dist.*, 707 A.2d 448, 451 (N.H. 1998); *Town of N. Kingstown v. N. Kingstown Teachers Ass'n*, 297 A.2d 342, 346 (R.I. 1972).

63. CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005). Many of the responses were sympathetic to Morris's 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 EMP. RTS. & EMP. POL'Y J. 383 (2005) (book review).

64. See 29 U.S.C. § 157.

65. See *id.*

66. See *id.* § 159.

67. 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).

union to bargain on behalf of its own members only.⁶⁸ The employer in that case had agreed to recognize one of the unions as the representative of its own members and had entered an agreement governing their terms of employment.⁶⁹ The Board held the contract invalid because the union had not been certified under section 9(a) as the exclusive representative.⁷⁰ The Court rejected the Board's position.⁷¹ Although it did not have occasion to hold that an employer is obligated by section 8(a)(5) to bargain on a members-only basis (because no section 8(a)(5) charge had been pressed, since the employer had agreed to the contract), the Court insisted, in dictum, that members-only bargaining is necessary to protect the section 7 rights of union members absent a majority union.⁷²

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 section 9.⁷³ The Court also explained that members-only bargaining was entirely consistent with the policies of the NLRA:

[I]n the absence of . . . 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.⁷⁴

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.⁷⁵

Although members-only bargaining is permissible under the NLRA if the employer agrees to engage in it, the NLRB has held that it is not required of employers. That is, the Board to date has declined to hold that an employer violates section 8(a)(5) if it refuses to negotiate with a union on a members-only basis.⁷⁶ In *Dick's Sporting Goods*, a minority of employees formed the Dick's

68. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 237 (1938).

69. *See id.* at 218.

70. *Consol. Edison Co.*, 4 N.L.R.B. 71, 94 (1937).

71. *See Consol. Edison Co.*, 305 U.S. at 238.

72. As the Court wrote:

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.

Id. at 236 (footnote omitted).

73. *See id.* at 238.

74. *Id.* at 237. The Board cited *Consolidated Edison* with approval of its endorsement of members-only bargaining in *Dana Corp.*, 356 N.L.R.B. No. 49, 4 (Dec. 6, 2010).

75. *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29 (1962).

76. *Dick's Sporting Goods Advice Memorandum* from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, Office of the Gen. Counsel, NLRB, to Gerald Kobel, Reg'l Dir.,

Employee Council and sought recognition from the employer on behalf of its members only.⁷⁷ When management declined to recognize or bargain with the Council, the employees filed a section 8(a)(5) charge, but the NLRB General Counsel refused to issue a complaint, stating simply that the law leaving an employer free to refuse to bargain on a members-only basis is “well settled and is not an open issue.”⁷⁸ The Board has thus far refused repeated invitations to adopt a rule, either through rulemaking or in adjudication, requiring members-only bargaining.⁷⁹

The Board has also held that an employer does not violate section 8(a)(1) by refusing to meet with groups of workers for purposes of adjusting particular grievances. In *Charleston Nursing Center*, the Board held that an employer did not violate section 8(a)(1) when it refused to meet with a group of nurses, but offered to meet with each nurse individually.⁸⁰ The Board has also held that an employer did not violate the duty to bargain under section 8(a)(5) or the prohibition on discrimination under section 8(a)(3) when, during the term of an agreement negotiated on a members-only basis, it unilaterally subcontracted out work to a nonunion contractor and laid off union members who had done the subcontracted work.⁸¹ Moreover, the Board has held that an employer did not

Region 6, NLRB 13 (June 22, 2006), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d45800da97d>.

77. *Id.* at 2.

78. *Id.* at 1.

79. Fisk & Tashlitsky, *supra* note 67, at 3. The statutory support for an argument for limiting the employer's obligation to bargain to a majority union is section 8(a)(5)'s statement that an employer commits an unfair labor practice if it refuses “to bargain collectively with the representatives of [its] employees, subject to the provisions” of section 9(a). National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (2012). 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.” *Id.* § 159(a). 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, without the intervention of the bargaining representative.” *Id.* The debate over whether employees enjoy a right to members-only bargaining has focused on whether the “subject to the provisions of Section 159(a)” language of section 8(a)(5) limits the duty to bargain to a majority union that enjoys exclusivity. *See* Fisk & Tashlitsky, *supra* note 67, at 5–10 (summarizing the literature). The debate also focuses on 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. *See id.* at 15.

80. *Charleston Nursing Ctr.*, 257 N.L.R.B. 554, 555 (1981); *see also* *Swearingen Aviation Corp.*, 227 N.L.R.B. 228 (1976), *enforced in part and denied in part*, 568 F.2d 458, 461, 464 (5th Cir. 1978) (resolving that although an employer violates section 8(a)(1) by discharging employees who ask to meet as a group to resolve grievances, the employer does not violate section 8(a)(1) by refusing to meet with them as a group if there is no bargaining representative selected by a majority).

81. *Mendenhall, Inc.*, 194 N.L.R.B. 1109, 1110 (1972). The Board acknowledged that while it had never “ruled squarely on the legality *per se* of a members-only contract, the insufficiency under the Act of such recognition has been well established.” *Id.* (citation omitted). The Board also stated that a violation of the duty to bargain “requires as a predicate . . . that the employee representative has been

violate sections 8(a)(2) or 8(a)(5) by withdrawing recognition of one union, with which it had long bargained on a members-only basis for a group of employees, and granting exclusive recognition to another union, with which it had long bargained for all its employees, including the minority.⁸² But no Board decision, in either a group grievance case like *Charleston Nursing Center* or in a members-only bargaining case like *Dick's Sporting Goods*, has explained why the regime premised on majority rule and exclusivity is the *only* basis upon which employers are 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.⁸³

While the Board's decisions make clear that members-only bargaining is not required by the NLRA, they do not prohibit it if the employer and union voluntarily agree to bargain on a members-only basis, and such agreements are enforceable. Most importantly, the Board has never addressed the proposal we make: that a union have the right to demand that an employer engage in members-only bargaining in right-to-work states. Whatever the legal and policy arguments in favor of requiring employers to engage in members-only bargaining in every state, the legal and policy arguments in favor of members-only bargaining in right-to-work states are stronger. The principle of exclusivity assumes that because all benefit from collective representation, all must share in the costs in order to avoid free riding.⁸⁴ But if right-to-work laws prohibit cost sharing, unions are burdened with the costs of representing employees who do not wish it and will not pay for it. Where employees can opt out of contributing anything to union representation, the union ought to have the option to construct a bargaining unit consisting only of those who will contribute to the union enterprise. This is a good and principled reason to relax the rules of exclusivity in right-to-work states. Allowing members-only bargaining in these settings advances the preferences of workers who wish not to be in the union, the interests of unions who wish not to represent free-

designated or selected as the exclusive representative of the employees. It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms." *Id.*

82. Mfg. Woodworkers Ass'n, 194 N.L.R.B. 1122, 1123 (1972). The Board explained:

[A] history of collective bargaining on a "members only" basis does not provide an adequate basis for representation nor the appropriateness of a bargaining unit such as the statute contemplates. The Board has traditionally refused to give weight to such a bargaining history, or to require its continuance, and we will not do so here. Under these circumstances, we cannot find that the Respondent association was obligated to continue to recognize the Painters as the exclusive bargaining representative either for all wood finishers, as provided in previous contracts, or for an alleged unit of wood finishers comprising association shops in which members of the Painters are employed. In view of the Carpenters' status as the actual representative of a majority of production employees of all association members, including the wood finishers, we find that the General Counsel has not established that the actions of the association in recognizing and bargaining with the Carpenters constituted illegal assistance to the Carpenters.

Id. (citations omitted).

83. See *Charleston Nursing Ctr.*, 257 N.L.R.B. 554, 555 (1981); *Dick's Sporting Goods Advice Memorandum* from Barry J. Kearney, *supra* note 76, at 4.

84. See 29 U.S.C. § 159(a); *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 741 (1963).

riding workers, and the interests of union members in not subsidizing the representation of their objecting coworkers.

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 could continue to be such. Given the lack of experience that unions, employers, and workers have with members-only unionism—at least in the modern context⁸⁵—we think that a permissive and experimental approach is appropriate. At this stage, that is, the Board would give unions an additional option: if unions wish to engage in members-only bargaining, they would be entitled to do so, and the employer would then be obligated to bargain with the union on behalf of its members only. If the employer and the union negotiated an agreement covering only members, any employee who wished to get the benefit of the agreement could, of course, join the union and thereby the bargaining unit. Any employee who did not wish to be covered by the agreement could simply decline to join the union. If, instead, a union insisted on exclusivity, the parties would then simply be in the same position they are in under current law.

To accept our position would also require rethinking the contours of section 8(a)(3) and section 8(b)(2). We conclude that an employer would not discriminate, within the meaning of section 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 to establish, but the concept is not novel in the law.⁸⁶ Under existing constitutional equal protection and Title VII disparate treatment law, it is not unlawful to treat groups of people differently so long as the different treatment is not motivated by race, gender, or another

85. See Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 197 (1993) (noting that “the tradition of American ‘trade unions’ throughout the nineteenth and the early twentieth century was to bargain only for their members”).

86. In one case, the Board stated that an employer encouraged union membership by discriminating against nonmembers, violating section 8(a)(3), by refusing to grant nonunion employees the same wages and benefits offered to union members under a members-only agreement. *Reebie Storage & Moving Co.*, 313 N.L.R.B. 510, 510, 512 (1993), *enforcement denied*, 44 F.3d 605 (7th Cir. 1995). The Board in *Reebie* did not decide that differences in pay, benefits, or conditions in a members-only bargaining situation always (or ever) constitute discrimination for or against union members, because in that case, the record was unclear about whether the basis of the section 8(a)(3) charge was refusing to extend the contract terms to the formerly nonunion employees once they joined the union, failing to make contributions to the union benefits funds for nonmembers, or regarding other efforts to discourage employees from joining the union. *Id.* at 540. The principal focus of the Board’s analysis was whether the General Counsel properly issued a complaint charging discrimination against nonunion members when the charge had alleged discrimination against union members and failure to provide information to the union. *Id.* at 513. It is fair to say that Board law remains unclear as to the circumstances when a members-only agreement violates section 8(a)(3) if its terms are different than those offered nonmembers.

protected trait.⁸⁷ 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 what the collective bargaining agreement 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*.⁸⁸ Of course, paying nonunion workers less than their union counterparts might have the *effect* of encouraging union membership, just as paying nonunion workers more would have the effect of discouraging union membership. But what section 8(a)(3) makes unlawful is not disparate treatment, but disparate treatment for the purpose of encouraging or discouraging membership.⁸⁹ If the employer has legitimate business reasons for the differential pay rates, the requisite unlawful intent would be lacking.⁹⁰

We have proposed that the NLRB change its rule to allow members-only bargaining in states that have enacted right-to-work legislation. The proposal is logically consistent with the premise of right-to-work legislation in that it allows employees to avoid all the burdens of union representation. Nothing in the NLRA or in the decisions of the Supreme Court is inconsistent with our proposal. Indeed, the Court has recognized since 1938 that members-only bargaining is necessary to protect section 7 rights in the absence of a certified or recognized majority union,⁹¹ and has held members-only bargaining agreements enforceable under section 301.⁹² Thus, the Board is free to adopt—by rulemaking or in an adjudication—a rule requiring an employer to engage in members-only bargaining

87. See *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (holding that city's use of an at-large electoral system did not violate equal protection, even though no blacks were elected in a city with a substantial black population, and despite the city's long history of racial discrimination, because there was insufficient evidence that the electoral system was adopted with a discriminatory purpose); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 278–79 (1979) (holding that state law that gave employment preference to veterans, when ninety-eight percent of veterans in the state were male and the state knew its veterans preference would disadvantage women, did not violate equal protection because there was no discriminatory purpose).

88. This is analogous to the courts' approach to cases involving discrimination in pay for work of comparable worth. If the labor market results in school teachers or nurses or other predominantly female occupations being paid less than garbage collectors or truck drivers or other predominantly male occupations, courts have generally held that the unequal pay scales are not sex discriminatory. See Daniel R. Fischel & Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891, 894 (1986) (surveying literature and law and arguing that comparable worth is never appropriately used); George Rutherglen, *The Theory of Comparable Worth as a Remedy for Discrimination*, 82 GEO. L.J. 135, 145–46 (1993) (surveying literature and case law and arguing that comparable worth theory is appropriately used as a remedy).

89. See 29 U.S.C. § 158(a)(3) (prohibiting discrimination in terms of employment “to encourage or discourage membership in any labor organization”).

90. See *id.*

91. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 238 (1938).

92. *Retail Clerks Int'l Ass'n v. Lion Dry Goods*, 369 U.S. 17, 29 (1962).

where employees demand it in states that have enacted laws prohibiting a union from requiring nonmembers to pay for the services the union provides.

III. REMOVING THE OBLIGATION TO REPRESENT NONMEMBERS FOR FREE

As the previous section explains, we believe that one principled response to the 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 there is a more modest possibility for resolving the conflict as well. 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 generally, and from charging fees to nonmembers for grievance services in particular. The first is section 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 section 7.⁹³ Those section 7 rights, of course, include the right to refrain from joining or assisting a union.⁹⁴ 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.⁹⁵ 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.⁹⁶ 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 nonmembers⁹⁷ and, more to the point here, from treating members and nonmembers differently with respect to representation in disciplinary matters.⁹⁸

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.⁹⁹ In those states, again, unions can negotiate collective bargaining provisions that require nonmembers to pay dues and fees equivalent to

93. See 29 U.S.C. § 158(b)(1)(A).

94. See *id.* § 157.

95. Furniture Workers Div., 291 N.L.R.B. 182, 183 (1988); Columbus Area Local, Am. Postal Workers Union, 277 N.L.R.B. 541, 543 (1985); Int’l Ass’n of Machinists & Aerospace Workers, Local Union No. 697, 223 N.L.R.B. 832, 835 (1976).

96. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

97. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

98. See, e.g., *Wallace Corp. v. NLRB*, 323 U.S. 248, 255–56 (1944); *Int’l Ass’n of Machinists*, 223 N.L.R.B. at 834.

99. See, e.g., *Housing Auth. v. Serv. Emps. Int’l Union, Local 557*, 885 S.W.2d 692, 697 (Ky. 1994).

those paid by members, and these dues and fees can be used to cover the costs of representation.¹⁰⁰ In right-to-work states, on the other hand, unions are precluded from bargaining such provisions and, without more, are in fact obligated to provide representational services for free.¹⁰¹ 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.¹⁰²

But in a series of cases, the NLRB has held that a union violates section 8(b)(1)(A) if it charges nonmembers a fee to cover the costs of disciplinary representation.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

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.

More importantly, the Board's rule is also wrong as a matter of law: 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 does not.

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.¹⁰⁷ 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

100. See, e.g., *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 816–17 (7th Cir. 2009).

101. See, e.g., *Am. Fed'n of State, Cnty. & Mun. Emps. Local 2384 v. City of Phoenix*, 142 P.3d 234, 244 (Ariz. Ct. App. 2006).

102. See, e.g., *Cone v. Nev. Serv. Emps. Union/SEIU Local 1107*, 998 P.2d 1178, 1181–82 (Nev. 2000).

103. See, e.g., *NLRB v. North Dakota*, 504 F. Supp. 2d 750, 757 (D.N.D. 2007); *Columbus Area Local, Am. Postal Workers Union*, 277 N.L.R.B. 541, 543 (1985).

104. See, e.g., *Int'l Ass'n of Machinists & Aerospace Workers, Local Union No. 697*, 223 N.L.R.B. 832, 834 (1976).

105. *NLRB*, 504 F. Supp. 2d at 757.

106. See *id.* at 758.

107. See The Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).

tickets to people who declined to pay, while agreeing to issue tickets to all who agreed to pay, the airline would not be guilty of gender discrimination even if only women declined to pay. The basis for the disparate treatment would be wholly legitimate.¹⁰⁸

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 must, under *General Motors*, give the nonmember the opportunity to pay for representation without the obligation to become a member.¹⁰⁹ 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—man or woman—pay for airline tickets 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 member's annual dues.¹¹⁰ 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 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 end up facing discipline and needing union-funded representation are 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

108. See *id.*

109. See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 743–44 (1963).

110. See *Hughes Tool Co.*, 104 N.L.R.B. 318, 319–20 (1953).

in other insurance markets.¹¹¹ The most obvious analogue is health insurance. Everyone who has health insurance pays premiums, and those who end up going to the doctor pay less than they would have paid 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 be¹¹²—then there is no discrimination on the basis of union membership.¹¹³

It is worth pointing out that although the Board, to date, has not adopted this analysis, we are not alone in believing that requiring nonmembers to pay for representation in grievance and arbitration proceedings does not constitute 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 for individual representation.¹¹⁴ Whereas members' dues payments covered all representation fees, nonmembers who wished to receive union representation paid a minimum of sixty dollars per hour for grievance consultation, fifty percent of the fee charged by hearing officers and arbitrators, and one hundred percent of the fees charged by union attorneys, up to two hundred dollars per hour.¹¹⁵ 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.¹¹⁶ Nonetheless, the

111. See *Insurance 101*, INS. INFO. INST., <http://www.iii.org/article/insurance-101/> (last visited Sept. 13, 2013).

112. See *Columbus Area Local, Am. Postal Workers Union*, 277 N.L.R.B. 541, 543 (1985).

113. Of course, in order to be nondiscriminatory, the quality of representational services that the union provides to members must be equivalent to the quality of services that the union provides to (paying) nonmembers. See *Vaca v. Sipes*, 386 U.S. 171, 190, 194 (1967). We are grateful to Jim Brudney for emphasizing this point.

114. See *Cone v. Nev. Serv. Emps. Union/SEIU Local 1107*, 998 P.2d 1178, 1180 (Nev. 2000).

115. See *id.*

116. See *id.* at 1182.

Supreme Court of Nevada dismissed a challenge to Local 1107's fee policy.¹¹⁷ 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 “[there is] no discrimination or coercion . . . in requiring nonunion members to pay reasonable costs associated with individual grievance representation.”¹¹⁸

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 preclude the union from charging nonmembers for representation.¹¹⁹ 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 a union member would have paid over that time span to cover representational costs. Thus, for example, if dues are ten dollars per year and twenty percent of dues goes to representational activity, then a member pays two dollars per month to cover representational expenses. If a nonmember receives representation at the end of her fifth year (or sixtieth 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.

One final point bears mention. A collective bargaining agreement that requires union members to pay for grievance and arbitration services, but allows nonmembers to get the same services for free, quite plainly *discourages* union membership. Generally, of course, federal labor law frowns on terms in collective bargaining agreements that distinguish between employees based on union membership,¹²⁰ and federal law makes illegal many actions that intend to discourage membership in labor unions.¹²¹ But the Board's current rule prohibiting unions from charging for representational services would seem to *require* collective bargaining agreements in right-to-work states to discourage union membership. While the employer intent necessary for a finding of illegal

117. *Id.* at 1183.

118. *Id.* at 1182; *cf.* *Nashua Teachers Union v. Nashua Sch. Dist.*, 707 A.2d 448, 451 (N.H. 1998) (rejecting the argument that requiring nonmembers to pay their fair share of the cost of contract negotiation and administration coerces them in their exercise of the right not to join a union or encourages union membership).

119. *See* Int'l Ass'n of Machinists & Aerospace Workers, Local Union No. 697, 223 N.L.R.B. 832, 836–37 (1976) (Murphy, Chairman, concurring in part and dissenting in part).

120. *See* *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

121. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2012).

discrimination may be absent here,¹²² the Board's rule certainly is inconsistent with the general intent of the NLRA to avoid terms of employment that discourage membership in labor unions.

CONCLUSION

The interaction of state right-to-work laws and the federal regime of exclusive representation creates a tension in American labor law: federal law requires unions to represent all employees equally, but right-to-work laws allow employees who are not union members to receive that representation for free while union members must pay. We see three ways to alleviate this tension. First, we have argued that, under a proper reading of the NLRA, states can ban compulsory payment of dues equivalent to what union members pay for collective bargaining and contract administration. But states may not prohibit *all* compelled payments from workers to unions. To the contrary, under a proper reading of section 14(b), all states must permit agreements that require objecting employees to pay the pro rata share of membership dues that go to grievance and arbitration expenses.

Second, we have argued for members-only bargaining in right-to-work states. In states where employees are free to decline to pay for union representation, 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, the law should protect their right to reject representation without compelling other workers, who wish to have a union, to subsidize services for them.

Our third alternative proposal is that the NLRB abandon its rule forbidding unions from charging a nonmember a fee for representation services that the union provides directly and individually to the nonmember. As we have shown, and as experience in some states with right-to-work laws confirms,¹²³ a fair reading of the intersection of the union's duty of fair representation, and the rights of workers to refrain from joining or paying fees to a union, compels the conclusion that unions have no obligation to provide representational services to employees who do not pay for them. A rule that absolves the union of the duty to process grievances unless an employee has paid, or is willing to pay, her pro rata share of the cost of grievance processing is consistent with the general principles underlying contracts for professional services and does not discriminate within the meaning of the NLRA against those who do not pay fees to the union.

122. See 29 U.S.C. § 158(a)(3) (prohibiting discrimination in terms of employment "to encourage or discourage membership in any labor organization").

123. See, e.g., *Cone v. Nev. Serv. Emps. Union/SEIU Local 1107*, 998 P.2d 1178, 1181–82 (Nev. 2000).

The stakes of the right-to-work debate have always been high, in large measure because unions find it unaffordable to operate in states where employees can secure the benefits of unionization without incurring any of its costs.¹²⁴ But with an intensification of the drive to extend right-to-work laws into new states, the time has come to rectify a longstanding inequity in American labor law and alleviate the tension between the federal statute's mandate of exclusive representation and the operation of state right-to-work laws.

124. See William J. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445, 463 (1998), for a study that concludes that right-to-work laws have encouraged free riders, decreased union density, and lowered the union's chance of success.