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Inter-Union Competition and Workplace Freedom:

Ending Exclusive Representation

by Eric Fruits, Ph.D.

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Executive Summary

Labor unions exist to improve compensation and working conditions for union membership. Consequently, unions act to increase their own members' wages and benefits. While unions benefit from increased membership, workers themselves see varied levels of benefit from the services provided by a union. Workers recognize the tradeoff between wage gains, benefits, employment opportunities, working conditions, and the nature of the political activities in which the union engages. The one-size-fits-all nature of a collective bargaining agreement, along with the take-it-or-leave-it vote to approve the agreement, means that many employees are covered by contracts that do not reflect their preferences. The exclusive representation by a single union in collective bargaining unjustly reduces freedom of speech and association for workers and stifles individuals' ability to negotiate employment agreements in both parties' economic interests.

Under current collective bargaining practices, employment arrangements are negotiated between an employer and a union acting as exclusive representative for the workers. As a condition of exclusive representation, the union has a duty to fairly represent all workers subject to the collective bargaining agreement. The benefit all employees theoretically gain from this duty of fair representation has been invoked to justify the imposition of agency fees on non-union employees. Janus, however, prohibits public sector unions and employers from collecting agency fees from non-union employees.

Unions could avoid the duty and costs associated with representing members and non-members alike by giving up exclusive representation and allowing additional unions to compete for members. Since each union would represent its own members' interests, individual unions would escape the obligation to represent the varied interests of other unions' members or non-union employees. Individual workers would have the freedom to join any one of several competing unions or negotiate directly with his or her employer.

- Research indicates unions exert greater effort to attract and retain members when they are competing with other unions. Competition and the threat of membership "raids" provides an incentive for union leadership to be more responsive to its members' demands.

- Because of the moderating effect on wages, inter-union competition is expected to be associated with increased employment.

- Evidence points to ambiguous effect of inter-union competition on union membership. In the United States, competition was associated with increased union membership. In New Zealand, the introduction of competition along with the ability for workers to negotiate directly with their employers was associated with decreased union membership.

Empirical analysis indicates states with compulsory collective bargaining in the public sector have higher per-person government spending. This suggests that mandatory collective bargaining may drive up the costs of government. Thus, the elimination of mandatory collective bargaining and the introduction of inter-union competition and freedom of association for public employees may slow the growth of state and local spending.

Inter-union competition and workplace freedom of choice can be implemented via several avenues, including lawsuits challenging exclusive representation on First Amendment grounds, the voiding of "no raiding" pacts, or the implementation of state-level legislation such as Tennessee's Professional Educators Collaborative Conferencing Act.

Inter-Union Competition and Workplace Freedom:

Ending Exclusive Representation

The labor movement grew out of the difficult working conditions of the Industrial Revolution. The founders of the labor movement saw industrial corporations as monopolistic sellers of goods and monopolistic buyers of labor. Unions were seen as a way to achieve a countervailing monopoly power over the supply of labor and to prevent corporations from exploiting workers. This us-versus-them worldview included a belief that labor and capital were opposed to one another, with workers and owners competing to divide the profits they mutually created. Labor leaders sought monopoly bargaining power as leverage to obtain a bigger share of those profits. In the private sector, the National Labor Relations Act gave majority unions the right to exclusive representation of all workers covered by a collective bargaining agreement. Most state legislation gave public sector unions the right to exclusive representation.

Workers, however, have a wide range of varying preferences regarding the services provided by a union. Workers recognize there is a tradeoff between wage gains, benefits, employment opportunities, working conditions, and the nature of the political activities in which the union engages. The one-size-fits-all nature of the collective bargaining agreement along with the take-it-or-leave-it vote to approve the agreement means that many employees are covered by contracts that do not reflect their preferences. Exclusive representation reduces workplace freedom of speech and association for workers and stifles the ability of workers to independently negotiate employment agreements that better represent both parties' economic interests.

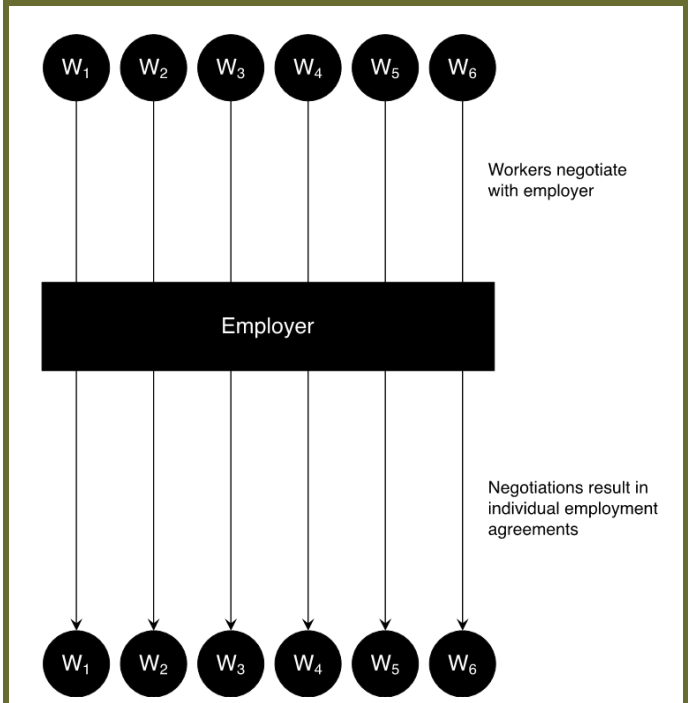
Inter-union competition fosters workplace freedom and would improve economic outcomes for many workers. With competition, unions seeking to attract and retain members must respond to workers' desires. Otherwise, rank-and-file members can vote with their feet and select the union they believe best represents their individual interests. Alternatively, workers can negotiate directly with their employers.

The following section explains the consequences of union exclusive representation and how the recent U.S. Supreme Court Janus decision has chipped away at the rationale for exclusive representation. Section 2 describes two types of inter-union competition. Section 3 identifies some of the effects of competition among unions. Section 4 provides empirical estimates of the costs of compulsory collective bargaining on state and local governments. Section 5 identifies some models for implementing inter-union competition and workplace freedom.

1. Exclusive representation, fair representation, and agency fees

Most employment agreements in the U.S. are individually negotiated individually between an employer and employee. Conceptually, each employee at a workplace can have a unique arrangement regarding wages, benefits, hours worked, scheduling, training, decision-making, dispute resolution, and many other issues (Figure 1).

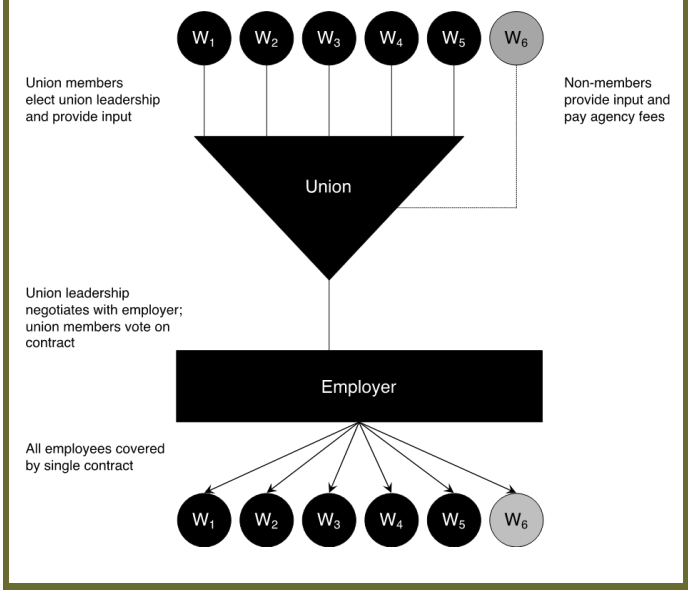
Figure 1: Employment bargaining in the absence of unions



In contrast, under collective bargaining employment arrangements are negotiated between a union and an employer (Figure 2). The agreement is then submitted to union membership for take-it-or-leave-it approval by a vote of the union members. If approved, the negotiated arrangements apply to all employees subject to the collective bargaining agreement.

In the private sector, the Taft-Hartley Act authorizes the National Labor Relations Board to conduct elections among groups of employees to determine whether a union, by obtaining a majority vote, shall be the exclusive representative of any given group of employees for the

Figure 2: Employment bargaining with exclusive representation by a union



purposes of collective bargaining with their employer. Since the Act only requires a majority, and not unanimity, nearly half the employees in a designated unit may have a collective bargaining representative imposed upon them which they not only do not want, but which they may oppose. The union designated by a majority of the relevant employees not only negotiates collective bargaining contracts on behalf of the employees who opposed it, but is also the exclusive agent of those opposition employees in settling their individual grievances with the employer.

The National Labor Relations Act gave certified unions exclusive representation power.[1] When a union is selected to represent employees in a specific unit of workers, that union alone has the legal authority to represent and negotiate on behalf of all employees—including those who neither voted for nor joined the union. Workers in a bargaining unit must accept the union's representation or quit their jobs. The NLRA does not apply to public sector workers, but many states have their own laws that provide a union exclusive representation for collective bargaining. For example, Oregon's law states:[2]

> A labor organization certified by the Employment Relations Board or recognized by the public employer is the exclusive representative of the employees of a public employer for the purposes of collective bargaining with respect to employment relations. Nevertheless any agreements entered into involving union security including an all-union agreement or agency shop agreement must safeguard the rights of nonassociation of employees, based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular union dues and initiation fees and assessments, if any, to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the representative of the labor organization to which such employee would otherwise be required to pay dues. The employee shall furnish written proof to the employer of the employee that this has been done.

The Supreme Court, in *Janus*, identifies several of the benefits conferred on unions that are designated as exclusive representatives.[3]

> No union is ever compelled to seek that [exclusive representative] designation. On the contrary, designation as exclusive representative is avidly sought. Why is this so?
>
> Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union.
>
> In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees … and having dues and fees deducted directly from employee wages. [Citations and footnotes omitted.]

In the U.S., union membership is voluntary and cannot be a condition of employment. The Taft–Hartley Act outlawed the closed shop and the union shop was ruled illegal by the Supreme Court in *Pattern Makers v. NLRB*.[4]

With voluntary membership and exclusive representation, non-union workers could be subject to unequal or unfair treatment by the union or the employer. For example, in *Steele v. Louisville & N. R. Co.* a black railroad employee was a member of the Brotherhood of Locomotive Firemen and Enginemen, a majority white union.[5] The union, without notifying any of the black employees, including Steele, gave the employer a notice that it wished to amend the collective agreement to exclude black staff members so that only white firemen would be promoted and assigned to permanent jobs. The eventual agreement between the union and the railroad was that no more than 50 percent of firemen staff should be black. Steele, who had worked in a desirable "passenger pool" job, lost his position and was forced to

shift to a worse job with lower pay. He complained the union broke its duty to fairly represent all employees, white and black. The Supreme Court held that under the Railway Labor Act, as an exclusive bargaining representative a union was obliged to represent all employees without discrimination, in the same way the Constitution requires equal protection by the legislature of every citizen. There is a duty to represent minorities—by considering their requests and views, by giving notice of the union's actions, and by providing an opportunity for hearing about the union's actions.

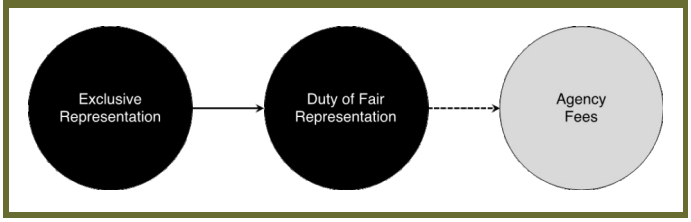
Out of injustices such as those identified in *Steele* and other cases came the duty of fair representation. In the private sector, the duty of fair representation arose as a federal common law doctrine that has been incorporated into labor law. For state and local public employees, however, the duty may also be created by statute, often as part of a state's public employment relations act. The duty is intended to ensure fair treatment to all employees in a bargaining unit who are represented by an exclusive bargaining agent. It seeks to ensure that unions and employers are responsive to individual rights and interests of those not in the majority. The duty of fair representation forbids a union's acts or omissions that are arbitrary, discriminatory, or in bad faith. In other words, the union must treat equally all employees subject to exclusive representation by the union, regardless of whether the employees are members of the union.

With exclusive representation giving rise to the duty of fair representation, union leaders reasoned that non-union employees represented by the union should contribute to the costs of negotiating, monitoring, and enforcing collective bargaining agreements as well as the costs associated with the union representing non-union employees in disputes with the employer. Unions argued that non-members who did not contribute financially were "free riding" on the union's efforts and expenses.

Agency fees or "fair share dues" were imposed as a way to deal with alleged free riding by non-union workers. Under this arrangement, workers who are not union members must pay an "agency fee" equal to normal union dues, as a condition of employment. Right-to-work states prohibit unions and employers from negotiating such agreements. Since the *Janus* Supreme Court decision, public sector unions and employers are prohibited from imposing agency fees on employees who are not members of the union.[6]

In summary, exclusive representation resulted in discriminatory behavior by unions, which led courts to impose a duty of fair representation on unions with exclusive representation. The duty of fair representation, in turn, has been invoked to justify the imposition of agency fees on non-union employees subject to the union's collective bargaining agreement. *Janus* prohibited public sector unions and employers from collecting agency fees from non-union employees.

Figure 3: Relationship between exclusive representation, duty of fair representation, and agency fees



In *Janus*, the court concluded that agency fees are not a necessary condition for exclusive representation and the duty of fair representation. The court notes the federal government and 28 states with laws prohibiting agency fees have millions of public employees represented by unions that effectively serve as the exclusive representatives of all employees subject to the collective bargaining agreements.

While *Janus* concludes that agencies are not a necessary consequence of the duty of fair representation, the court indicates that the duty of fair representation is a necessary consequence of exclusive representation.

> What does this mean when it comes to the negotiation of a contract? **The union may not negotiate a collective bargaining agreement that discriminates against nonmembers**, see *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, 202–203 (1944), but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, **it is questionable whether the Constitution would permit a public sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers**. See id., at 198–199, 202 (analogizing a private-sector union's fair representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); cf. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 69 (2006) (recognizing that government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive"). **To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous.** It is noteworthy that neither respondents nor any of the 39 amicus briefs supporting them—nor the dissent—has explained why the duty of fair

representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements. [Emphasis added.]

Because exclusive representation and the duty of fair representation are linked, one way unions can avoid the duty and costs associated with representing both members and non-members would be to allow unions to compete for members. With each union representing its own members' interests, individual unions would be under no obligation to represent other union members' or non-union employee's interests. The following section describes some of the potential consequences of inter-union competition and freedom of association for workers.

2. Inter-union competition: union rivalry and multi-unionism

Inter-union competition can be separated into two categories: rival unionism and multi-unionism. Rival unionism, "is the coexistence of two or more unrelated labor organizations actively competing for the control of the workers employed … within a trade or organization."[7] Multi-unionism is the presence of two or more trade unions within a single workplace, organization, or industry. In either case, unions compete for members and workers have an opportunity to affiliate with an organization that best fit their desires, or to be non-affiliated.

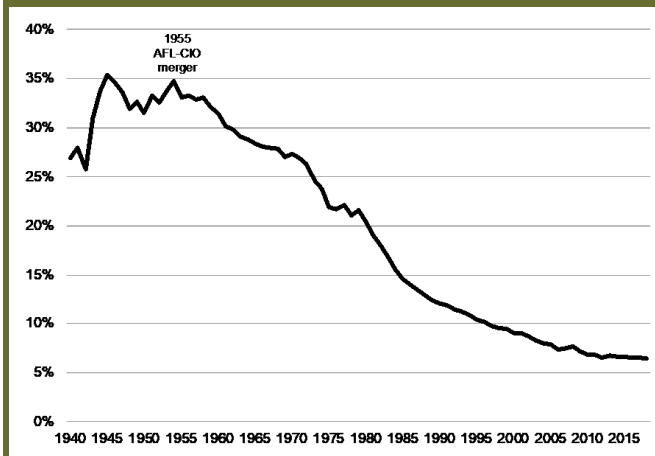
Union rivalry is rare in the U.S. private sector. Only 2.4 percent of the National Labor Relations Board representation elections conducted in 2018 included more than one union on the ballot.[8] In contrast, in 1955—the year the AFL and the CIO merged— 20.9 percent of NLRB representation elections had at least two unions on the ballot.[9]

The decline in union rivalry can be attributed to two key factors:

1. While the National Labor Relations Act enshrines the right to unionize, its regulation of workplace elections meant unions had to organize each new factory or firm individually rather than organize by industry. As a result, during the post-World War II years of rapid job growth, union efforts could not keep pace with the increasing number of workplaces to organize. The "tremendous" power of exclusive representation conferred on a union which obtained a majority of votes rendered minority unions powerless, diminishing the attraction of minority unions.

2. As part of the merger the AFL and CIO completed in 1955, the two organizations agreed to a no-raiding pact and developed a framework to lessen competition among the unions for unorganized workers.

Figure 4: U.S. union membership as a share of non-farm employment



Source: Mayer (2004), Hirsch & Macpherson (2019)

There is some evidence that competition between the AFL and CIO was associated with *increased* union membership. The CIO was founded as rival to the AFL in 1935. In the five years prior to the formation of the CIO (1930-1935), union membership as a share of total employment grew by one percentage point. In the five years following the founding of the CIO (1935-1940), union density more than doubled from 8.5 percent of employment to 18.3 percent.[10]

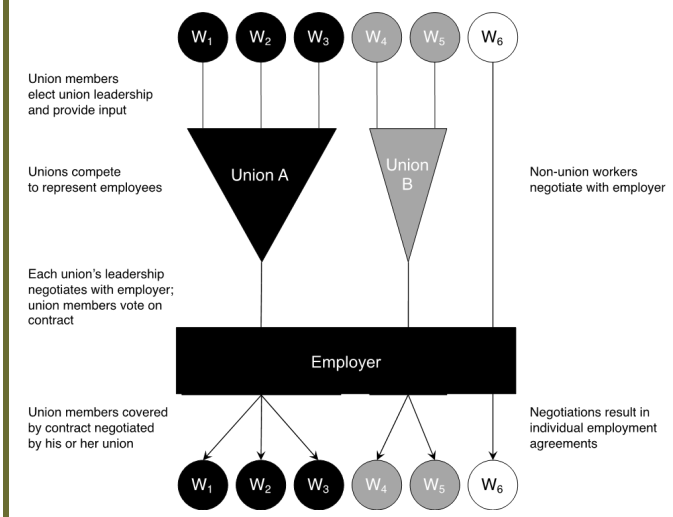
Similarly, there is evidence that the AFL-CIO merger was associated with a *decrease* in union membership. Figure 4 shows that 1954—the year prior to the merger—was the post-war peak in U.S. union membership. Since the merger, union membership has been on a steady decades-long decline. Research has found a similar pattern of decreased union density with the 1956 merger of the AFL and CIO in Canada.[11]

Multi-unionism is a relatively common feature of industries throughout the world, including the European Union and New Zealand.[12] In Belgium, workers can choose from among socialist, liberal, or Christian unions. In the U.K., unions are organized by occupation and commonly compete at the plant level. New Zealand legislation allows multiple unions to represent their members in the same workplaces for collective bargaining and grievance matters. But as previously noted, the implementation of exclusive representation under the NLRA and many state laws makes multi-unionism virtually impossible in the U.S.

To see why the distinction between single- and multi-

unionism is important, consider some of the costs and benefits of multi-unionism.

Figure 5: Employment bargaining with multi-union competition



When unions compete to organize the same pool of workers, they are likely to organize workers who are substitutes in production. Consider a hypothetical multi-union example of a school district with school bus drivers represented by both the Teamsters and the National Education Association.[13] School bus drivers organized by the Teamsters would be substitutes for school bus drivers organized by the National Education Association. Competition between the two unions would likely lead to a moderation in wages across the two unions. If the Teamsters negotiated above-competitive wages for its drivers, the demand for Teamsters would decrease while the demand for NEA drivers would increase. Knowing this, each union would moderate its wage demands to minimize substitution away from its members. On the other hand, the need to attract members motivates each union to demonstrate its ability to negotiate higher wages. This balancing act between the benefits and costs of demanding higher wages would tend toward a competitive wage rate.

Multi-unionism also allows workers with a variety of preferences regarding services provided by a union to self-select into the union that best fits their preferences, or select no union at all. Workers recognize there is a tradeoff between wage gains, benefits, employment opportunities, working conditions, and the nature of the political activities in which the union engages. Acknowledging this allows unions to specialize and provide better and fairer representation to the employees they represent.

The preferences of union leaders and rank-and-file members may be different. While ordinary members may seek higher wages and job security, the leadership typically seeks to increase its power and influence both in and outside the union. Additionally, the preference of more senior members may differ significantly from junior members. Because job security is often based on seniority, more senior members are more likely to pursue wage increases even if those higher wages lead to reduced employment among junior members. Multi-unionism allows rank-and-file members who may believe these conflicts are causing unions to underrepresent their interests to vote with their feet and select another union or method of representation.

It is possible that that multi-unionism would incur excessive bargaining costs for employers dealing with more than one union. A fragmented bargaining structure wherein each union negotiates a separate agreement forces both the firm and the unions to face the costs of negotiating, monitoring, and enforcing each contract. Fragmented bargaining also provides an opportunity for the employer to pit competing unions against each other, to pursue whipsawing strategies in bargaining, or to apply divide-and-rule tactics. However, a survey of New Zealand union leaders found that multi-unionism was not associated with any significant inter-union conflicts regarding negotiations.[14] This suggests that a fragmented bargaining structure may not significantly increase the cost of negotiating.

Research indicates there is a greater incidence of strikes under a fragmented bargaining structure.[15] These costs are reduced with single table bargaining in which employers and competing unions agree to jointly negotiate a collective bargaining agreement.[16]

In 2011, Tennessee eliminated collective bargaining for teachers in the state with the Professional Educators Collaborative Conferencing Act (PECCA). The act replaced the state's collective bargaining law with interest-based negotiations referred to as “conferencing.” PECCA limits negotiations to seven specific topics and excludes from negotiations broader policies such as tenure, merit pay, and seniority, which are instead determined by a mixture of state law and the rules and regulations set by the Tennessee State Board of Education. The conferencing process produces a legally binding memorandum of understanding that must be ratified by the school board to take effect. In the case of impasse, no mediation or arbitration is allowed, and striking is unlawful.

The MOU covers all full-time teachers employed by the school district, regardless of whether they belong to the union or any other organization.

PECCA eliminates exclusive representation for the union and creates a multiorganizational form of negotiations. Under the act, school boards appoint a committee to discuss teacher pay and workplace conditions. Employee organizations, such as unions or professional associations,

receive proportional representation based on a poll of employees in the district.

- Teachers interested in conferencing have a one-month window to submit a petition of interest to the school board signed by a minimum of 15 percent of the school district's teachers.

- Upon receiving the petition, the school board creates a committee to oversee a secret ballot election. In the election, the teachers vote on two questions: (1) Do you want to engage in collaborative conferencing? (2) Which organization do you wish to represent you for the purpose of collaborative conferencing?

- The school board is compelled to conference with teachers if more than half of all teachers who are eligible to vote in the election answer "yes" to the first question.

- Organizations representing teachers earn a number of seats on the conferencing team in proportion to the total number of votes they receive, providing they obtain at least of 15 percent of the vote.

- The law requires matching teams of seven to eleven persons based on representation, with one team representing the school board and the other team representing teachers.

A professional association named Professional Educators of Tennessee has emerged as an alternative to the Tennessee Education Association union. PET promotes itself as a non-partisan, member-governed association with lower dues than the TEA. In the first year of PECCA, TEA saw its membership decline by 24 percent and PET membership increased by 10 percent, demonstrating a demand among workers for a choice in who represents them or whether to be represented at all.[17]

3. Potential effects of multi-unionism

Research indicates that competition impels unions to exert greater efforts to attract and retain members and that unions fear losing to another union more than they fear losing in negotiations with workplace management.[18] Other research finds that the number of competitive union elections declined from the 1950s through the 1980s, resulting in less organizing and outreach activity per election.[19] Pawlenko (2006) provides an example from competition between the AFL and CIO to represent auto workers:

> Walter Reuther's campaign platform for a thirty-hour workweek at forty-hour pay was undertaken because of the challenge posed by the UAW-AFL. … [O]nce the UAW-CIO was certified as the exclusive bargaining representative, and the threat from the UAW-AFL eliminated, Reuther abandoned the campaign for a shorter workweek. Had the competition not been eliminated, Reuther may have delivered on his promises.

Competition and the threat of membership "raids" provides an incentive for union leadership to be more responsive to its members' demands. Sociologist Seymour Lipset concludes "the existence of two unions with similar jurisdictions serves to make each of them more responsive to the membership wishes."[20] For example, in Portland, Oregon, 911 dispatchers left AFSCME to join the Portland Police Association.[21] Unsatisfactory wage increases, working conditions, and management turnover were issues the dispatchers believed would be better represented by the police union than by AFSCME.

In general, economic theory indicates that as the number of sellers in a market increases, the total quantity bought and sold in the market will increase even though the sales of an individual seller decreases. In a labor market, this suggests that moving from a monopoly supplier of labor (exclusive representation by a single union) toward a more competitive market with multiple unions and unrepresented employees would be associated with increased total employment.

Figure 6: Effect of union exclusive representation on employment wages

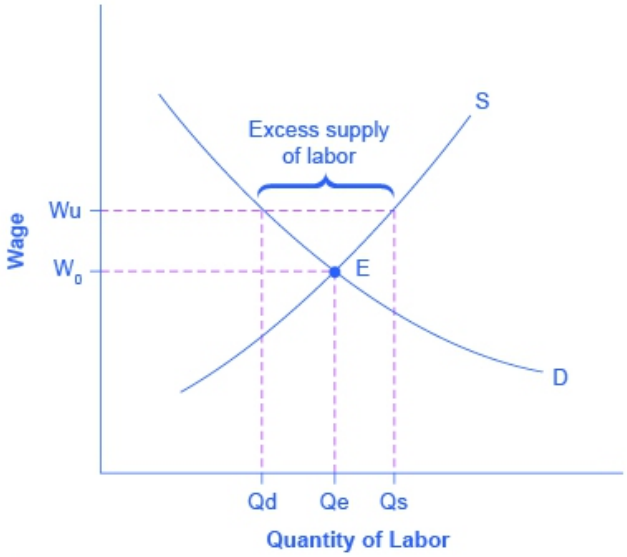


Figure 2. Union Wage Negotiations. Without a union, the equilibrium at E would have involved the wage We and the quantity of labor Qe. However, the union is able to use its bargaining power to raise the wage to Wu. The result is an excess supply of labor for union jobs. That is, a quantity of labor supplied, Qs is greater than firms' quantity demanded for labor, Qd.

Figure 6 provides a simplified illustration from an economics textbook.[22] The figure shows that a monopoly union results in a surplus of labor (Qs > Qd) as the wage rate (Wu) is above the competitive equilibrium (W0). With competition among unions, the wage premium shrinks so the negotiated wage rate approaches the competitive wage. This competition reduces the surplus of labor, thereby increasing employment.

Basic economic theory of supply and demand suggests that increased competition among unions which serve members' interests would be associated with increased total union membership. However, if the costs of union membership exceed the benefits, union membership would decline. The majority in *Janus* provides a vivid distinction between a "free rider on a bus headed for a destination that he wishes to reach" and "a person shanghaied for an unwanted voyage." This distinction is highlighted by two observations:

- Competition between the AFL and CIO before their merger was associated with relatively rapid growth of union membership, and union density more than doubled in the five years following the founding of the CIO (1935-1940) as a competitor to the AFL.

- When New Zealand allowed for multi-unionism and voluntary membership of unions, union membership "plummeted from approaching 50 percent to below 20 percent."[23] Epstein (2001) argues that many workers viewed the unions as "expendable middleman" unable to deliver on members' demands.

In 1991, the New Zealand parliament passed the Employment Contracts Act which, among other things, allowed workers to choose which union represented them or to negotiate directly with their employers.[24] Epstein (2001) reports the law was associated with increased employment and wages.

> [B]etween 1991 and 2000 overall, around 300,000 new jobs were created, which counts as a huge increase in a country of only 3,600,000 people. Unemployment rates dropped from 11 percent in early 1992, shortly after passage of the ECA, to 6 percent in 2000. That expansion in labor force participation is rendered still more impressive in light of the fact that overall wage levels moved up during this period. To be sure, during the first two years after the passage of the ECA, about 10 percent of workers received lower pay than before. But that is just what should be expected, for workers who had commanded large monopoly advantages under the older order could not preserve them in a more competitive environment. By the same token, once the initial corrections had been made overall wage levels went up, typically by between 2 and 5 percent under collective agreements.

Evidence that wages increased across the board comes from research on income distribution in New Zealand. After the ECA, the growth in income inequality slowed. In the five years from 1985 to 1990, the Gini coefficient measuring income inequality increased 5.6 basis points; and in the five years from 1990 to 1995, the index increased by less than one basis point.[25]

Research published by the New Zealand parliament indicates the ECA was associated with improved employment and labor productivity.[26]

- Employers reported increased employment because of the Act. Econometric analysis attributed one-sixth of New Zealand's employment growth from 1991 to 1995 to the ECA.

- Employment contracts were changed to provide more flexible work practices, increased use of performance pay, and reduced rates for overtime pay. Employers making these changes reported increased labor productivity.

4. Collective bargaining and government spending

Because there is little variation in exclusive representation among state and local public sector unions in the states, it is impossible to quantitatively evaluate the effects of competition among unions in the states. However, evaluating the extent to which compulsory collective bargaining affects state and local expenditures is one way to get an indication of the impact.

Collective bargaining employment arrangements are negotiated between a union and an employer. The agreement is then submitted to union membership for take-it-or-leave-it approval by a vote of the union members. If approved, the negotiated arrangements are applied across all employees subject to the collective bargaining agreement. Because collective bargaining agreements are often in place for several years and changes must be approved by a majority of covered employees, many aspects of collective bargaining reduce the flexibility of employers and employees to adjust changing workplace and market conditions.

Some states have compulsory collective bargaining for state and local public employees, some states make collective bargaining optional, some states have no law compelling collective bargaining, and some states have opted for meet-and-confer requirements. Meet-and-confer and collective bargaining are similar, but differ in significant ways. Collective bargaining results in a contract in which disputes are resolved by a court or arbitrator. Meet-and-confer negotiations result in a memorandum of understanding

(MOU), with disputes resolved by local officials or agencies. Strikes, lockouts, and other means to interrupt services are not permitted under these MOUs.

This section measures the relationship of compulsory collective bargaining on direct expenditures by state and local governments. It is a comprehensive study that covers all 50 states and spans a 39-year period from 1972 through 2011.

The study employs regression analysis, a widely used econometric technique. It measures the relationship between state and local direct expenditures and the explanatory variables—including right-to-work status and the ability for public employees to strike—in each of the various states. The dependent variables for each state and each year are:

- Direct expenditures, state government, per capita in natural logarithm reported by the U.S. Census Bureau; and
- Direct expenditures, state and local governments combined, per capita in natural logarithm reported by the U.S. Census Bureau.

The independent variables include the following:

- A time trend;
- The Consumer Price Index for all urban consumers, in natural logarithm;
- Personal income per capita for each state in each year reported by the U.S. Bureau of Economic Analysis, in natural logarithm;
- Employment in each state in each year as a share of population, reported by the U.S. Bureau of Labor Statistics, in natural logarithm;
- An indicator variable for compulsory collective bargaining for all state and local employees, equal to 1 for each year a state has a law in effect mandating collective bargaining reported by Lawrence, et al. (2016).[27]

The study uses a panel of the 50 states and the District of Columbia pooled for the years 1972 through 2011 with state-level fixed effects.[28] Peer-reviewed academic research identifies the benefits and other considerations related to panel data.[29] In particular, a panel allows for variation across states and for variation over time within each state. As a result, it is possible to measure coefficients that more accurately demonstrate causation.

Table 1 presents regression results for per capita state andlocal direct expenditures, broken out by state and local combined and state only direct expenditures. The R-squared statistic indicates that 99 percent of the variation in direct expenditures are explained by the independent variables. The regression results indicated that states with compulsory collective bargaining for all state and local governments have state-level spending that is 4.6 percent higher than states without compulsory collective bargaining. Combined state and local spending is 1.4 percent higher in states with compulsory collective bargaining.

5. Models for implementing inter-union competition and voluntary union representation

While there are several strong economic arguments supporting inter-union competition and voluntary union representation, much of the progress toward workplace freedom and choice has centered on First Amendment free speech and freedom of assembly concerns regarding exclusive representation in public sector unions.

Table 1: Regression results, state and local direct expenditures, per capita

	State and Local				State			
Variable	Coeff.	Std. Err.	t-Stat.	Prob.	Std. Err.	t-Stat.	Prob.	Prob.
Intercept	3.153	0.097	32.44	0.00 ***	3.180	0.126	25.19	0.00 ***
Trend	0.012	0.001	13.78	0.00 ***	0.009	0.001	8.49	0.00 ***
Consumer Price Index	0.442	0.033	13.35	0.00 ***	0.366	0.043	8.51	0.00 ***
Personal income, per capita	0.606	0.036	16.85	0.00 ***	0.686	0.046	14.77	0.00 ***
Share of population employed	-0.153	0.033	-4.65	0.00 ***	0.170	0.043	3.98	0.00 ***
Compulsory collective bargaining	0.014	0.009	1.53	0.13	0.046	0.012	3.76	0.00 ***
R-squared	0.99				0.99			
Adjusted R-squared	0.99				0.99			
Obs.	1,700				1,800			

The majority opinion in Janus notes that laws requiring a union to serve as the exclusive representative for all employees are "a significant impingement on associational freedoms that would not be tolerated in other contexts." Since *Janus*, several lawsuits have asked federal courts to end mandated exclusive representation as a violation of workers' First Amendment right to freedom of association. Two of these cases have been appealed to the U.S. Supreme Court, but the Court has denied the petitions to review the cases.

In *Uradnik v. Inter Faculty Organization*, a public university professor in Minnesota objected to a state law that authorizes a union to speak as her exclusive representative.[30] Uradnik claimed she disagrees with many positions the union takes and would prefer to speak for herself. She argued that it violates the First Amendment to appoint a labor union to represent and speak for public-sector employees who have declined to join the union. If the Court had reviewed her case, it could have ended exclusive representation for all public employees nationwide.

Bierman v. Walz, another Minnesota case, involved eight parents who receive financial assistance through a state-run Medicaid program to take care of their severely disabled children.[31] Though the parents are not government employees, a state law authorizes a union to act as their exclusive representative. The parents challenged the union's exclusive representation. They argued that even if the government may appoint an exclusive representative to speak for its employees, the government cannot appoint representatives to speak for citizens who are not government employees. If the Court had reviewed the parents' case, it could have presented a challenge to exclusive representation for workers paid with public funds, if not all public employees.

Outside of the courts, Pawlenko (2006) suggests a repeal of the AFL-CIO's "no raiding" pact, implemented in Articles XX and XXI of the organization's constitution. This would affect AFL-CIO affiliates working in both the private sector and the public sector.

Tennessee's PECCA provides a model for other states. Prior to passage in 2011, Tennessee law authorized union exclusive representation for bargaining over public school teachers and other K-12 instructional employees. Under certain conditions, the PECCA allows independent educator organizations to serve on a committee involved in contract discussions.

6. Conclusion

Labor unions exist to improve the compensation and working conditions for the union membership. Consequently, unions act to increase their own members' wages and benefits. As organizations, unions benefit from increased membership and from federal and state mandates requiring employment arrangements to be negotiated between an employer and a union acting as an exclusive representative for workers. In exchange for exclusive representation, the union has a duty to fairly represent all workers subject to the collective bargaining agreement.

Unions may avoid the duties and costs associated with the "free rider" problem by participating in a competitive labor market which would encourage unions to compete for members. With each union representing its own members' interest, individual unions would be under no obligation to represent other union members' or non-union employees' interests. Individual workers would have the freedom to join any one of several competing unions to represent his or her interests, or to negotiate directly with his or her employer.

Inter-union competition would lead to unions exerting more efforts to attract and retain members. Competition and the threat of membership "raids" provides an incentive for union leadership to be more responsive to its members' demands. In addition, because of the moderating effect on wages, inter-union competition is expected to be associated with increased employment.

Empirical analysis indicates mandatory collective bargaining drives up the costs of government. Thus, the elimination of mandatory collective bargaining and the introduction of inter-union competition and freedom of association for public employees may slow the growth of state and local spending.

Inter-union competition and workplace freedom of choice can be implemented via several avenues, including lawsuits challenging exclusive representation on First Amendment grounds, the voiding of "no raiding" pacts, or state-level legislation such as Tennessee's Professional Educators Collaborative Conferencing Act.

ENDNOTES

1. 29 USC 159.

2. 2017 ORS 243.666(1).

3. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

4. 473 U.S. 95, 126 (1985).

5. 323 U.S. 192 (1944).

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ENDNOTES

28. No government expenditure data are available for 1973–1976. Local government direct expenditures are not available for the years 2001 and 2003.

29. See, for example: Cornwell, C. and Trumbull, W. N. (1994). Estimating the economic model of crime with panel data. *Review of Economics and Statistics*, 76(2):360–366 and Levitt, S. D. (2001). Alternative strategies for identifying the link between unemployment and crime. *Journal of Quantitative Criminology*, 17(4):377–390.

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31. *Bierman v. Walz*, 900 F.3d 570, (8th Cir. 2018), cert. denied, ___ U.S. __ (U.S. May 13, 2019) (No. 18-766).