The State of Unions

In his address to Congress on January 12, 2016, President Barack Obama asserted he was confident that "the State of our Union is strong." He was of course referring to the Union of the United States. But by a curious coincidence the state of trade unions in the US and in the UK are undergoing controversial consideration, legal and political, that may change their power, effectiveness and relations to political organizations.

The U.S. Supreme Court is now considering a case, *Friedrichs v. California Teachers Association*, brought by ten teachers in California, concerning the First Amendment to the Constitution. The teachers oppose the requirement forcing public sector workers to support unions. They want the Court to overrule the 1977 case, *Abood v. Detroit Board of Education* that allows unions to levy charges on non-members of unions. Some 23 states, mostly Democratic, and the District of Columbia allow such charges to occur.

The objection of the California teachers, is based on two factors: opposition to the political position that unions take; and simple refusal to join a union if inclined to see unions as unnecessary or irrelevant. California law requires that public employees who do not want to join a union must pay union dues, what is called a "fair share service fee," or "agency fee." This is supposed to cover the cost of activities, including lobbying, for collective bargaining.

The conflict is simple if provocative. Unions and the state of California argue that all workers benefit directly or indirectly by union collective bargaining and therefore the fee is justified. Therefore, they hold that non-members of unions should pay their fair share of the cost of collective bargaining. In contrast, the non-union members who sometimes disagree with the union decisions on academic and political

issues, refuse to pay the fee. In particular, unions tend for the most part to support Democratic candidates, and the non-union members may not want to pay to support them.

Abood, narrowly decided 5-4 in 1977, held that government employees could be required to pay fees to unions for representing them, even if they disagreed with the positions of the union. One of the bases for the decision was to prevent so-called "free riding" because unions have a legal duty to represent all workers.

The crux of the issue is whether it is unconstitutional for a non-member of the unions to be made to pay for union activities that, among other things, involve not only activities that benefit the non-member, such as negotiating for higher wages and benefits, but in addition involve activities that may be abhorrent to the non-member. The latter involves the First Amendment: should individuals be forced to contribute to avocation of positions with which they disagree?

In the Abood case, the Supreme Court made a fine line distinction. On one hand, it held that it was a violation of the First Amendment for unions to make non-members pay for political activities. On the other hand, it was constitutional for union to obtain a fee from non-members to help pay for collective bargaining activities.

Abood has since been qualified in a number of cases. In a limited ruling on June 30, 2014, in *Harris v. Quinn, Governor of Illinois,* the Court narrowly held, 5-4, that partial public employees, such as homecare aides who are paid by Medicaid, cannot be required to contribute to union fees.

Similarly, political actions have limited union powers and funds. The Michigan right to work law of March 2013 prohibited new contracts from requiring union dues as a condition of employment, and another Michigan law prohibits school districts from deducting union dues for salaries of teachers.

The impact was immediate. Union membership fell by 50,000 in one year.

The effect of these laws is particularly telling because about half of all union members in the U.S., whose numbers have been falling steadily since the 1950s and presently total 11 per cent of the population , are government workers. About one-third of public sectors employees belong to unions compared to six per cent of private sector employees.

In rendering its decision on *Friedrichs,* the Supreme Court might consider the British experience with unions, even if some members of the Court have reservations about looking at the legal decisions of foreign jurisdictions.

Since 1913, trade unions in Britain can maintain political funds. Many trade unions are "affiliated" to the Labour Party, and there has been a historic connection for over a century between the two. Trade unions provide about 20 per cent of the funding of the Party. Among a number of other ties, for a long time individual unions sponsored between 30 and 40 per cent of Labour Members of Parliament.

Affiliation means that unions pay an annual fee to the Labour Party, and are thus affiliated members of the Party. However, union members could "contract out" of the affiliation and therefore not pay the fee. Those who do not "contract out," cannot decide on the use of their individual contribution. The use of political funds is a matter of union policy.

The system was changed as result of the General Strike in 1927. Parliament passed the Trade Disputes and Trade Union Act that replaced opting or contracting out with "contracting in," meaning that those who wanted to contribute to affiliation had to make a positive decision in favor of it.

The result was a catastrophic drop in union membership. In 1947, the Labour Government reintroduced the "contracting out" requirement, with the predictable result that affiliation of

union membership increased from 39 per cent to 60 per cent within two years. In 2016 there are 14 unions affiliated to the Labour Party and more than 80 per cent of members, 4.9 million, pay the political levy, and 1.3 million do not pay.

The British Parliament today is currently debating the issue of requiring “contracting in” or “opting in” to pay the levy to the Labour Party. The decision is important because of the sustained decline in union membership from 13.2 million in 1979 to 7.5 million today. Only 30 percent of employees belong to a union: 60 per cent of those in the public sector and less than 20 per cent in the private sector.

There is of course a difference between rights and obligations, and the issue of free speech, in Britain and in the U.S. In Britain the legal decision on non-members of unions is directly related to a political one, support for one specific political party. In the U.S. the issues are more problematic due to the rights granted by the Bill of Rights and the First Amendment. From early hearings it is likely that the Supreme Court in *Friedrichs* will again narrowly decide this major issue. But one may predict that, whatever the decision, union membership in the U.S. will decline as it has done in Britain.