# Petting the Infamous Yellow Dog: The Seattle High School Teachers Union and the State, 1928–1931

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In 1928 a Seattle labor union appealed an adverse lower court ruling to the Washington State Supreme Court. The *Seattle Post-Intelligencer* claimed that the matter presented "probably the biggest labor question ever faced in this state."[1] This case did not involve the Industrial Workers of the World, loggers, or other traditional subjects of labor history. It involved high school teachers in the Seattle public schools. This paper will discuss this case, *Seattle High School Teachers Chap. No. 200 of the American Federation of Teachers v. Sharples*,[2] and the circumstances surrounding it. Specifically, this paper will describe the formation of the teachers' union, the school board's imposition of a "yellow dog" contract on the teachers, the union's legal battle against the yellow dog rule, and the union's political battle against the yellow dog rule. More generally, this paper will comment on the effect of labor law in the public sector on unions of government employees.

## I. THE HISTORIOGRAPHICAL OMISSION OF THE PUBLIC SECTOR

In recent years, a number of excellent books and articles have stressed the importance of labor law in understanding, among other things, the development of unions. But all these works look only at the private sector.[3] Studying the public sector provides an excellent

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* Prepared for the American Society for Legal History conference, October 1998. This paper is mostly a summary of a more detailed treatment of these events in my dissertation. *See* Joseph Slater, Down by Law: Public Sector Unions and the State in America, World War I to World War II, 131-202 (1998) (unpublished Ph.D. dissertation, Georgetown University) (available from UMI). I thank Daniel Ernst and Dorothy Brown for their invaluable work on that project, Christopher Tomlins for his careful and insightful comments on the original version of this paper, and Megan Dorsey for helping me get around Seattle and teaching me the correct pronunciation of "Sharples."

1. *Teacher Union Hearing in Superior Court Set for Tuesday*, SEATTLE POST-INTELLIGENCER, May 12, 1928, at 3.

2. 159 Wash. 424, 293 P. 994 (1930) [hereinafter *Sharples*].

3. For works specifically addressing the effect of law on unions, see, *e.g.*, WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); VICTORIA C.

opportunity for comparison because public sector unions have always been covered by different laws. The National Labor Relations Act (NLRA) has never applied to public sector unions.[4] Even before the NLRA was passed in the 1930s, while unions in the private sector had won some limited toleration of strikes and collective bargaining, such activities were strictly prohibited in the public sector.[5] Examining the public sector shows how different legal regimes have affected unions of American workers.

The omission of public sector unions from the existing scholarship is especially glaring given the unprecedented, extended rise of public sector unions. For the past thirty-five years, the rate of unionization in the public sector has grown tremendously, from about ten percent to nearly forty-five percent. At the same time, the rate in the private sector has shrunk from nearly thirty-five to about ten percent.[6]

Specifically, I contend that labor law was central to the size and character of public sector unions in the first half of the century, but that law had the opposite effect in the public sector that it had in the private. William Forbath and Victoria Hattam have argued that private sector labor law pushed unions away from politics and toward

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HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES (1993); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 (1985); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1 (1990); Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). Other works have used labor law to analyze or explain judicial decision-making, political development, gender, and other issues. *See, e.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); EILEEN BORIS, HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES (1994); DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995); Karl Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 1981 INDUSTRIAL RELATIONS L. J. 450 (1981); KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991); LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS (Christopher Tomlins & Andrew King, eds., 1992). For an overview, see Joseph Slater, *The Rise of Master-Servant and the Fall of Master Narrative: A Review of Labor Law in America*, 15 BERKELEY J. EMP. & LAB. L. 141 (1994). The lone article in this vein on the public sector studies an event of the 1980s. *See* Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, 1985 U. ILL. L. REV. 245 (1985).

4. National Labor Relations Act, 29 U.S.C. § 152(2)-(3) (1994).

5. *See, e.g.*, Annotation, *Union Organization and Activities of Public Employees*, 31 A.L.R.2D 1142 (1997); Joseph Slater, Down by Law: Public Sector Unions and the State in America, World War I to World War II, 131-202 (1998) (unpublished Ph.D. dissertation, Georgetown University) (available from UMI).

6. In 1993 almost forty-four percent of public workers were in union bargaining units and nearly thirty-eight percent were union members. EMPLOYMENT AND EARNINGS 249 (Dep't Labor GPO, 1994); WHEN PUBLIC SECTOR WORKERS UNIONIZE 374-75 (Richard Freeman and Casey Ichniowski, eds., 1988). Additional Bureau of Labor Standards statistics provided by the Public Employee Department, AFL-CIO.

"voluntarism"—using only private economic muscle to obtain their goals.[7] Public sector labor law, by denying public workers the right to strike, bargain, or even organize, created a highly political core of unions. At the same time, the law artificially repressed the size of this core, affecting the nature of the entire labor movement and, I would suggest, American politics as a whole. This paper describes the effect of the law on one particular public sector union.

This story shows a public sector union turning toward the most direct form of politics: elections. Indeed, in Seattle, the unionized workers were literally attempting to elect their employers. This union enlisted the enthusiastic aid of the Seattle American Federation of Labor (AFL) in its political campaign, showing that the AFL in this period was not as entirely "voluntarist" as the traditional picture would have it. From 1928 to 1930, at a time when the labor movement both nationally and in Seattle was supposedly at the height of its "voluntarist" period, the Seattle AFL focused intently on school board elections.[8]

This story shows that public employees, generally ignored by labor historians as well as by those who study labor law, consciously thought of themselves as workers whose place was in the union movement. The AFL matched their enthusiasm, strongly backing these workers in their fight to be part of the labor movement, even though the teachers were employed by government, occupied an arguably "professional" job classification, and even though a majority were women.[9]

Including public sector unions in labor history not only changes our picture of labor in this era, it also casts an intriguing light on the nature of the state. First, the very organization of the state itself was central to how the law developed. The highly diffused state structure in America, combined with court deference to local administrative bodies, put the effective power to make the "law" of public sector labor relations in the hands of the local employer.

This, in turn, allowed the state to be a very class conscious employer. Between the wars and beyond, public employers often barred public workers from joining AFL-affiliated unions. Indeed,

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7. *See generally* FORBATH, *supra* note 3; HATTAM, *supra* note 3.

8. For the labor movement nationally, see IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920–1933 (1960); for the decline of the once-radical Seattle AFL, see DANA FRANK, PURCHASING POWER: CONSUMER ORGANIZING, GENDER, AND THE SEATTLE LABOR MOVEMENT, 1919–1929 (1994).

9. Nearly 300 of the nearly 500 high school teachers at this time were women. Seattle School District, Record No. 24, Fiscal Year 1927–1928, 365-69 (Seattle Public School Archives and Records Management Center) [hereinafter *Board Minutes*].

courts routinely upheld bans on public workers joining unions through the 1950s, often explicitly citing fears of "divided loyalty" and "class control" of government.[10]

In fact, in Seattle, the issue was the right of high school teachers to affiliate with an AFL union, the American Federation of Teachers (AFT). The School Board imposed a ban on affiliation with labor: a "yellow dog contract." This device, one of the best known antiunion tools of the 1920s, has almost exclusively been studied as a problem of private sector employees.[11] Yet when the King County, Washington *State Labor News* observed in July 1928 that the "past year has seen more publicity on the subject of . . . 'yellow dog contracts' than ever before," it was referring to the Seattle public school teachers' battle with the School Board.[12]

The fight in Seattle pitted teachers and their allies in the labor movement against members of the Seattle School Board and their allies in the business community. The fight lasted three years, drew national attention, led to the Washington State Supreme Court decision in *Sharples*, and also caused a series of highly publicized political battles.

## II. THE BIRTH OF LOCAL 200

The Seattle chapter of the AFT, Local 200, got off to a promising start in November 1927. Florence Hanson, the National Secretary-Treasurer of the AFT, reported that the teachers "almost pushed me off the platform in their eagerness" to sign the charter petition.[13] Local 200 immediately signed up nearly half of the approximately 500 high school teachers in Seattle as members.[14]

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10. *See, e.g.*, Frederick v. Owens, 25 Ohio C.C. (n.s.) 581 (Ohio Ct. App. 1915), *error dismissed*, Owens v. Board of Educ., 116 N.E. 1085 (Ohio 1916) (ban on public school teachers joining affiliating with labor upheld); People ex rel. Fursman v. City of Chicago, 116 N.E. 158 (Ill. 1917) (teachers); McNatt v. Lawther, 223 S.W. 503 (Tex. App. 1920) (ban on union firefighters); San Antonio Firefighters' Union v. Bell, 223 S.W. 506 (Tex. App. 1920) (firefighters); Hutchinson v. Magee, 122 A. 234 (Civ. 1923) (firefighters); Congress of Industrial Organization v. City of Dallas, 198 S.W.2d 143, 145 (Tex. App. 1946) (all city employees); Mugford v. Mayor & City Council of Baltimore, 44 A.2d 745 (Md. 1945) (mostly street cleaners); City of Jackson v. McLeod, 24 So. 2d 319 (Miss. 1946), *cert. denied*, 328 U.S. 863 (1946) (police); King v. Priest, 206 S.W.2d 547 (Mo. 1947) (police); Government & Civic Employees Organizing Comm., CIO v. Windsor, 78 So. 2d 646 (Ala. 1955) (state employees); Local 201 (AFL-CIO) v. City of Muskegon, 120 N.W.2d 197 (Mich. 1963) (bar on public sector union membership upheld).

11. *See, e.g.*, Daniel Ernst, *The Yellow Dog Contract and Liberal Reform 1917-32*, 30 LAB. HIST. 251-74 (1989).

12. Reinhold Loewe, *Yellow Dog Contract Applied to Seattle Industry Quarter of a Century Ago Files Show*, WASHINGTON STATE LABOR NEWS, July 6, 1928, at 8.

13. American Federation of Labor, *Proceedings of the Forty-Eighth Annual Convention of the American Federation of Labor* 265 (1928); LABOR NEWS, Nov. 25, 1927, 1.

14. *Organization of Teachers Is Underway*, WASHINGTON STATE LABOR NEWS, Nov. 25, 1927, at 1.

The Seattle Central Labor Council, made up mostly of private sector AFL unions, warmly welcomed Local 200.[15] On the other hand, prominent businessmen denounced it on the grounds that labor affiliation would prevent teachers from being "neutral." Almost immediately after the local formed, W.C. Dawson, president of Associated Industries in Seattle, asked the School Board to fire all AFT members, as the Local allegedly would seek to "replace teachers' certificates with a union card."[16]

The law at this time prohibited public sector unions from bargaining. No statutes authorized it, and courts considered it an impermissible delegation of public power to a private body.[17] So, Local 200 lobbied the School Board for raises.[18] Pay for Seattle teachers at this time was last in the country for towns of its size.[19] In early 1928 the Board refused to make the increases that the teachers had sought.[20]

The Local therefore decided to support a candidate in the March 1928 School Board elections who was sympathetic to the teachers' cause. The Seattle AFL also strongly backed this candidate, John Shorrett.[21] Incumbent Dr. Caspar Sharples defeated Shorrett, but only by a very narrow margin: just over 1,600 votes out of nearly 85,000 cast.[22] The size of the turnout was a story in itself, as the average in the last few school board elections had only been about 20,000.[23] Commentators attributed the increased participation to publicity caused by the active participation of the Seattle AFL in the election.[24] Ebenezer Shorrock, another incumbent with no love for unions, became president of the School Board. Shorrock announced that he

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15. *See, e.g., id.*; *Teachers' Organization*, WASHINGTON STATE LABOR NEWS, Dec. 2, 1927, at 2.

16. *Shall We Have a Teachers' Union? Union States Its Aims*, SEATTLE STAR, Dec. 12, 1927, at 1, 7.

17. *See, e.g.*, Mugford v. Mayor & City Council of Baltimore, 44 A.2d 745 (Md. 1945); Nutter v. City of Santa Monica, 168 P.2d 741 (Cal. Ct. App. 1946).

18. *Board Against Salary Raise for Teachers*, WASHINGTON STATE LABOR NEWS, Jan. 20, 1928, at 1; *Why Teachers' Salaries Must Be Increased*, WASHINGTON STATE LABOR NEWS, Jan. 20, 1928, at 1; *Teachers' Salary Request Refused*, WASHINGTON STATE LABOR NEWS, Jan. 20, 1928, at 2.

19. NEA, Research Bulletin V (March 1927), at 75.

20. *Board Minutes*, *supra* note 9, at 223, 232, 241.

21. *Labor is for John Shorrett*, WASHINGTON STATE LABOR NEWS, Mar. 9, 1928, at 2; *Sharples Leading Shorrett in Close School Board Race*, SEATTLE POST-INTELLIGENCER, Mar. 4, 1928, at 1.

22. *County Vote Only 10 Pct. of Seattle's*, SEATTLE POST-INTELLIGENCER, Mar. 16, at 11.

23. American Federation of Labor, *Proceedings of the Forty-Eighth Annual Convention of the American Federation of Labor* 265 (1928).

24. Slater, *supra* note 5, at 143.

considered the election results a "public condemnation" of the activities of Local 200.[25]

Local 200 promised a further campaign for higher wages, through lobbying and future elections. The Local never wavered from its demands, which also included greater teacher control of the schools.[26]

## III. THE "YELLOW DOG" RULE

Soon after the elections, however, on May 4, 1928, the Board passed a resolution stating that membership in Local 200 "conflicted with the best interests of the schools."[27] If the Local was successful, it would mean "a determination of school policies and affairs by a class organization." The union created a "divided allegiance" for teachers; they could not be loyal to both their employer and the labor movement. Along with this resolution, the Board passed a rule requiring teachers, as a condition of employment, to sign a contract renouncing membership in the AFT.[28] Significantly, this "yellow dog" rule *only* applied to the AFL-affiliated AFT. It did *not* apply to any of the several teachers' organizations in the Seattle schools that were affiliated with the National Education Association (NEA), and thus not with the AFL.[29]

## IV. THE LAWSUIT

Local 200 and the Seattle AFL immediately sought and received a temporary restraining order against enforcement of the rule.[30] The day after the Board passed the rule was a Saturday, but that did not

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25. Sharples received 39,915 votes, 38,230 were for Shorrett. *See Labor Is for John Shorrett*, WASHINGTON STATE LABOR NEWS, Mar. 9, 1928; *Teachers Back John Shorrett*, WASHINGTON STATE LABOR NEWS, Feb. 10, 1928, at 1; *Shorett Files in Race for School Board*, SEATTLE POST-INTELLIGENCER, Feb. 4, 1928, at 2; *Dr. Sharples Victory Seen Vindication*, SEATTLE POST-INTELLIGENCER, Mar. 17, 1928, at 3.

26. Ralph C. Johnson et al., *The Program of the American Federation of Teachers Local 200, Seattle, Washington*, AMERICAN TEACHER 12, Apr. 1928, at 20-21; *Newly Organized Teachers' Union of Seattle Announces Its Program for the Coming Year*, WASHINGTON STATE LABOR NEWS, Apr. 27, 1928, at 8; *Industrial Leaders Join in Wet Drive*, SEATTLE POST-INTELLIGENCER, Apr. 23, 1928, at 1; W. Earl Miliken to Florence Hanson, Mar. 20, 1928, AFT Collection, State Federation Collection (SFC), Folder 3.

27. *Board Minutes*, *supra* note 9, at 363-64; Brief for Appellant at 5-9, Seattle High School Chap. No. 200 of the American Federation of Teachers v. Sharples, 159 Wash. 424, 293 P. 994 (1930) (Washington State Archives); *Sharples*, 159 Wash. at 426, 427; 293 P. at 995; *High Staffs Must Quit Organization*, SEATTLE POST-INTELLIGENCER, May 5, 1928, at 1-2; *Labor Answers Arbitrary Action of School Board*, WASHINGTON STATE LABOR NEWS, May 11, 1928, at 1.

28. *Id.*

29. *Id.* The NEA, then as now, was not affiliated with the AFL.

30. *School Board Must Defend Action Today*, WASHINGTON STATE LABOR NEWS, May 11, 1928, at 1.

stop the Local's lawyer, George Vanderveer. Vanderveer went to the home of state circuit court judge Charles Moriarty, found the judge mowing his lawn, and presented him with the papers. Judge Moriarty granted the TRO (presumably after putting down the mower) on the grounds that there was probable cause to believe that the Board's rule would "arbitrarily and unlawfully deny employment" to AFT members. The case was then docketed for a hearing on whether to make the injunction permanent.[31]

The case gained considerable attention, locally and nationally. Locally, the Seattle AFL was solidly behind Local 200, providing moral support, resources, and public relations in its newspaper. Across the nation, AFT leaders and prominent members such as John Dewey gave aid.[32] Even the AFL's conservative president, William Green, who had no love for the liberal and feminist national officers of the AFT, wrote in support of Local 200.[33] Labor leaders argued that teachers had a constitutional right to join a legal, private organization that represented their professional interests, just like lawyers could join the ABA.[34] This was a "fundamental principle of republican government."[35] Pointedly challenging the "class control" and "divided loyalty" allegations, labor leaders noted that the Board had not barred members of the Chamber of Commerce from acting as teachers. Labor leaders also noted that several members of the Board were also members of the local Chamber.[36]

On the other hand, business interests supported the ban on the AFT. The Seattle Chamber of Commerce passed a resolution praising the Board's stance.[37] The *Post-Intelligencer* reported that most of

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31. *Teachers in Union Enjoin Board*, SEATTLE POST-INTELLIGENCER, May 6, 1928, at 1-2; *Judge Signs Restrainer on School Board Plan*, SEATTLE DAILY TIMES, May 6, 1928, at 1.

32. Copies of Telegrams Sent to Seattle Board of Education, Local 200 folder, AFT Press Release, May 11, 1928, SFC, Folder 3; *Protests on Teacher Rule Reach Board*, SEATTLE POST-INTELLIGENCER, May 13, 1928, at 12.

33. AFT, Seattle (n.d., circa 1928), SFC, Folder 17, at 1-3, 5, 6; *Teachers' Injunction Case May Be Completed Some Time Saturday P.M. Is Opinion*, WASHINGTON STATE LABOR NEWS, May 18, 1928, at 1.

34. *Labor Answers Arbitrary Action of School Board*, WASHINGTON STATE LABOR NEWS, May 11, 1928, at 1.

35. *Id.*

36. *See, e.g., Teachers' Injunction Case May be Completed Same Time Saturday P.M. Is Opinion*, WASHINGTON STATE LABOR NEWS, May 18, 1928, at 1; *Resolution of Board Is Branded as Un-American*, SEATTLE DAILY TIMES, May 5, 1928, at 1, 3; *Labor Prepares to Answer Edict of School Board*, SEATTLE DAILY TIMES, May 9, 1928, at 10; *Teachers' Case Against Board May Be Delayed*, SEATTLE DAILY TIMES, May 10, 1928, at 5; *Labor Chief Hits Seattle School Board*, SEATTLE POST-INTELLIGENCER, May 12, 1928, at 3 (labor supporting teachers); Telegrams, SFC, Folder 5.

37. *Demurrer of Board Fails at Hearing*, SEATTLE POST-INTELLIGENCER, May 16, 1928, at 1; *School Director Declares Union Is Undesirable*, SEATTLE DAILY TIMES, May 16, 1928, at 3.

the support for the Board came "from Seattle business and professional men and large employers of labor."[38] The *Wall Street Journal* editorialized in favor of the Board, denouncing the union's attempts at "control" of the schools.[39]

Also, the NEA, which at that time was run by school managers and administrators, rejected a resolution offered in support of the Seattle teachers.[40] The NEA's decision, according to the president of Local 200, William Satterthwaite, was a victory of "*principals*" over "*principles.*"[41]

The hearings on the injunction were held before a new judge, Howard Findley. At the hearings, School Board attorney John Powell argued that unionism had "no place in the public schools," as it represented only "one class of people."[42] Powell also correctly observed that yellow dog contracts were legal in the private sector.[43] Union attorney Vanderveer insisted that the yellow dog rule was as unconstitutional as a rule barring members of a particular religion. The instant case was distinguishable from private sector precedent regarding yellow dog contracts in that there was state action.[44] Public sector unions in the first half of the century often made the argument that constitutional protections applied to public workers. Courts, however, would not embrace this theory until the 1960s.[45]

The chief witness defending the yellow dog rule at the hearing was Board member Otis B. Thorgrimson. Thorgrimson conceded that the teachers in Local 200 were competent and had created no problems in the schools thus far.[46] He accepted that the Local's con-

38. *Teacher Union Hearing in Superior Court Set for Tuesday*, SEATTLE POST-INTELLIGENCER, May 12, 1928, at 3.

39. *Id.*; *Teachers Win Point in Union Fight*, SEATTLE POST-INTELLIGENCER, May 16, 1928, at 1; *Take Your Choice*, AMERICAN TEACHER 13, Sept. 1928, at 23; *Muddying the Waters*, AMERICAN TEACHER 13, Sept. 1928, at 26.

40. William Satterthwaite, *What the N.E.A. Did for Seattle*, AMERICAN TEACHER 13, Nov. 1928, at 15-17.

41. *Id.*; AMERICAN TEACHER 13, Sept. 1928, at 5, 6 (emphasis in original).

42. *Teachers Win First Round in Union Fight*, SEATTLE POST-INTELLIGENCER, May 16, 1928, at 2.

43. *Teacher Union Decree Coming on Wednesday*, SEATTLE DAILY TIMES, May 20, 1928, at 1, 10.

44. *See Teachers Win First Round in Union Fight*, SEATTLE POST-INTELLIGENCER, May 16, 1928, at 2.

45. *Compare* Perry v. Sinderman, 408 U.S. 593 (1972) (Constitution provides due process protections for property rights in public employment), Pickering v. Board of Education, 391 U.S. 563 (1968) (First Amendment protections for public workers), *and* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (public employment cannot be predicated on relinquishing right of association) *with* CIO v. City of Dallas, 198 S.W.2d 143 (Tex. App. 1946) (First Amendment rights waived by accepting public employment); Perez v. Board of Police Commissioners, 178 P.2d 537 (Cal. Ct. App. 1947) (no property right in government employment).

46. Trial Transcript at 9-12, 14, Seattle High School Teachers Chap. 200 of the American

stitution renounced strikes. Thorgrimson testified that his "main" objection was the political power that a "class organization" would have.[47] Local 200 would have more power than other teachers' groups because of its connections to the AFL. School Board candidates would "agree beforehand to do certain things" in exchange for labor's support. This would mean "class control" of the schools. Thorgrimson feared labor's influence over the schools in general, and specifically denounced the union's goal of greater control over classrooms by individual teachers.[48]

Judge Findley dissolved the TRO on May 23, 1928. He cited the freedom of contact doctrine that courts used in yellow dog cases in the private sector, held that he must defer to the School Board, and rejected the union's constitutional arguments. Teachers had a right to join the AFT, but no right to "demand to be selected and employed . . . any more than the Board . . . had the legal right to demand that they teach for the ensuing year if they did not desire to do so." Citing private sector precedent, Findley maintained that both the employer and the employee had "the same freedom of choice to enter into and create that relationship." The teachers' terms of employment ended with each school year, and to require the Board to enter into a contract "not of its own volition . . . would violate the fundamental principles of the law of contract." Additionally, Findley held that he must defer to the Board's discretion. Teaching in the public schools was "under the absolute control of the state." Thus, the Board could determine qualifications for teachers, and the court could not review its "wisdom or lack of wisdom." In sum, the rule was within the powers the legislature had granted to the Board, and it contravened neither constitution nor statute.[49]

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Federation of Teachers v. Sharples, (Wash. Dist. Ct. May 28, 1928) (No. 209483). (Testimony of Otis B. Thorgrimson); Brief for Appellants at 11, *Sharples*, 159 Wash. 424, 293 P. 994 (1930) (No. 21436).

47. Trial Transcript at 24, 25, 28, 80, 91 (Testimony of Otis B. Thorgrimson, Washington State Archives); Brief for Appellants, at 12, *Sharples*, 159 Wash. 424, 293 P. 994 (1930) (No. 21436).

48. Trial Transcript, at 33-34, 52-53 (Testimony of Otis B. Thorgrimson, Washington State Archives); Brief for Appellants at 12, 14-16, *Sharples*, 159 Wash. 424, 293 P. 994 (1930) (No. 21436); *School Director Declares Union Is Undesirable*, SEATTLE DAILY TIMES, May 16, 1928, at 3.

49. *See* Seattle High School Teachers Chap. 200 of the American Federation of Teachers v. Sharples at 2-3, 7-8 (Wash. Dist. Ct. May 28, 1928). The Findley decision was quoted in *Injunction Against Seattle School Board Is Denied by Decision of Judge Findley*, WASHINGTON STATE LABOR NEWS, May 25, 1928, at 1; The *Injunction Over School Board Order Is Dissolved*, SEATTLE DAILY TIMES, May 23, 1928, at 1; *Court Backs Board in Union Fight*, SEATTLE POST-INTELLIGENCER, May 24, 1928, at 2; Brief for Appellants at 18-19, *Sharples*, 159 Wash. 424, 293 P. 994 (1930) (No. 21436).

The union appealed to the state supreme court, but it would not get a decision for over two and a half years. In the meantime, with no legal right to bargain, strike, or to have employed teachers as members, Local 200, with the help of the Seattle AFL, turned to political action.

## V. THE POLITICAL CAMPAIGNS

With the approval of labor leaders, almost all the teachers signed the yellow dog contracts. A skeleton group remained in the AFT, including Satterthwaite.[50] Labor now focused on upcoming local elections and began making a series of pitches for public opinion. The Seattle AFL made an issue of Judge Findley's decision in the Local 200 case in Findley's reelection campaign in the fall of 1928. Findley was sufficiently worried that he publicly asked not to be evaluated on this single opinion. Findley was reelected. But labor showed its muscle as candidates it supported won in practically all the other races in the election. This included the new state superintendent of schools, N.D. Showalter.[51]

The real political contest began with the School Board elections in March 1929. As early as the summer of 1928, the press and leaders of both sides of the dispute predicted that these elections would be a referendum on the yellow dog rule.[52]

In March 1929 three of the five slots on the School Board were being contested. The unusually high number was caused by Shorrock's death earlier in the year. Shorrock had been replaced by Dietrich Schmitz. Three opponents of the union, Schmitz, Thorgrimson, and E.B. Holmes, were all up for reelection.[53]

Labor ran candidates against all three and, in a close vote, two won: John Shorrett and Austin Griffiths. Union opponent Holmes edged out labor's other candidate, Hattie Mae Patterson. The Seattle

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50. *Report of the Delegate of California Locals to the Twelfth Annual Convention of the AFT*, AMERICAN TEACHER 13, Sept. 1928, at 31; *Teachers Sign Contracts of School Board*, WASHINGTON STATE LABOR NEWS, June 8, 1928, at 1; *All Teachers Quit Union to Take Classes*, SEATTLE POST-INTELLIGENCER, June 6, 1928, at 1-2.

51. *Criticism of Findley Hit by Speakers*, SEATTLE POST-INTELLIGENCER, Sept. 9, 1928, at 16; *King County Judge Results*, SEATTLE POST-INTELLIGENCER, Sept. 12, 1928, at 1; David Levine, *President's Column*, WASHINGTON STATE LABOR NEWS, Sept. 7, 1928, at 4.

52. LABOR NEWS, June 8, 1928, at 1 (yellow dog issue will be settled by the voters); *Seattle to Date*, AMERICAN TEACHER 13, Sept. 1928, at 5 (Local 200 will try to defeat two incumbents in March 1929 elections); *School Union Pact Seen as Armed Truce*, SEATTLE POST-INTELLIGENCER, June 7, 1928, at 7 (Shorrock complaining that teachers are "still militant").

53. *School Board Race Is Lively*, SEATTLE POST-INTELLIGENCER, Mar. 4, 1929, at 12; *The Most Important Thing, After All, Is That You Vote*, SEATTLE POST-INTELLIGENCER, Mar. 11, 1929, at 24; *Two School Directors Are Ousted*, SEATTLE POST-INTELLIGENCER, Mar. 13, 1929, at 1; *What Has Seattle Been Doing*, AMERICAN TEACHER 13, Apr., 1929, at 1.

AFL called the vote a "direct rebuke" to the yellow dog rule.[54] The *Post-Intelligencer* called it an "upset" that represented the "most extensive overhauling" of the school administration in years.[55]

Unfortunately for labor, they still only had two votes on the five-member Board. In April 1929, before Shorrett was even officially seated on the Board, the Board voted to retain the rule. The resolution explaining this action stated that it was done in part to avoid "class antagonism."[56] Caspar Sharples, now the School Board's president, led the support for the rule. Thorgrimson, even after having been voted out of office, submitted a lengthy statement to the Board denouncing the union as a "menace" and a destructive "outside influence." The outraged Seattle AFL labeled these actions "un-American."[57]

Despite this setback, labor at both the local and national levels still backed the teachers. The Seattle AFL and Local 200 promised to continue the battle both in the courts and in the electoral arena and to push for a statewide tenure law for public school teachers.[58]

Both sides now began anticipating the March 1930 School Board elections. In January 1930 Seattle School Superintendent Thomas Cole said that he would resign if these elections resulted in a Board that would rescind the yellow dog rule. Cole denounced the "affiliation by a group of teachers with any one class of society." As the controversy swirled, the *Post-Intelligencer* predicted that the March 1930 School Board election would be "one of the hottest in years."[59]

In the 1930 election, two School Board seats were contested. Griffiths, labor's ally, was up for reelection and current Board member Edward Smith, labor's opponent, was retiring. Running as antiunion candidates were Dietrich Schmitz and Frank Bayley. The Seattle AFL strongly backed Griffiths and candidate Donald McDonald.[60]

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54. *Vote Tuesday Is Rebuke to School Board*, WASHINGTON STATE LABOR NEWS, Mar. 15, 1929, at 1.

55. *Harlin, Tindall and Hill Elected*, SEATTLE POST-INTELLIGENCER, Mar. 13, 1929, at 1.

56. *Board Minutes*, *supra* note 9, at 273.

57. *Yellow Dog Clause Stays, Board Votes*, SEATTLE POST-INTELLIGENCER, Apr. 20, 1929, at 1-2; *Seattle, Local 200*, AMERICAN TEACHER 13, June 1929, at 31; *Board Minutes*, *supra* note 9, at 273; *The Teachers Case*, WASHINGTON STATE LABOR NEWS, Apr. 26, 1929, at 2.

58. *See, e.g.*, WASHINGTON STATE LABOR NEWS, Apr. 26, 1929, at 2; AMERICAN FEDERATIONIST 36, May 1929, at 559-61.

59. *Thos. R. Cole May Resign School Post*, SEATTLE POST-INTELLIGENCER, Jan. 10, 1930, at 1, 12; *Seattle*, AMERICAN TEACHER 14, Mar. 1930, at 15.

60. *Thos. R. Cole May Resign School Post*, SEATTLE POST-INTELLIGENCER, Jan. 10, 1930, at 12; David Levine, *President's Column*, WASHINGTON STATE LABOR NEWS, Feb. 28, 1930, at 1.

Bayley and Schmitz ran on an antiunion platform, opposing "union domination" and "class domination" of the schools.[61] The Seattle AFL fired back that it was ironic that Schmitz, a banker, and Bayley, a lawyer, were concerned about "class domination."[62] Labor's pressure apparently had some influence. At one candidates' forum sponsored by the Seattle AFL, the attacks on the yellow dog rule were so vociferous that Schmitz allowed that while he opposed the union, he did not necessarily support the yellow dog rule.[63] Nonetheless, the campaign centered around attitudes toward Local 200. In the final days of the campaign, Schmitz and Bayley distributed a leaflet accusing their opponents of being controlled by the powerful AFT locals in Chicago.[64]

On March 11, 1930 Schmitz and Bayley won, although again only narrowly: Bayley beat Griffiths by about 1,000 votes out of approximately 80,000 cast.[65] Still, the headline in the *Post-Intelligencer* the next day proclaimed, "Attempts to Unionize City Schools Fail."[66]

Despite this political setback, labor promised to continue the fight against the yellow dog rule, noting that the appeal to the state supreme court was still pending.[67]

## VI. THE STATE SUPREME COURT

The Washington Supreme Court initially heard arguments in Local 200's case in June 1930, but in October set the case for rehearing *en banc*.[68] The arguments before the court combined traditional, private sector labor law concerns with special issues presented in the

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61. *Group Control of School Board?*, SEATTLE POST-INTELLIGENCER, Mar. 10, 1930, at 1, 10, 13; *Political Bunk*, WASHINGTON STATE LABOR NEWS, Mar. 14, 1930, at 2.

62. David Levine, *President's Column*, WASHINGTON STATE LABOR NEWS, Mar. 7, 1930, at 1.

63. *Repudiation Comes While Charges Fly*, SEATTLE POST-INTELLIGENCER, Feb. 20, 1930, at 15.

64. *Chicago Still Balks at Aid*, SEATTLE POST-INTELLIGENCER, Feb. 13, 1930, at 3; Dietrich Schmitz, *The School Issues*, SEATTLE POST-INTELLIGENCER, Mar. 9, 1930, at 8; *The Seattle Election*, AMERICAN TEACHER 14, Apr. 1930, at 12-13.

65. Schmitz received 43,430 votes; Bayley, 38,568; Griffiths, 37,300; McDonald 37,258. A fifth candidate trailed far behind. *Here Are Vote Totals as Revised*, SEATTLE POST-INTELLIGENCER, Mar. 13, 1930, at 2.

66. *Id.* at 3.

67. *See, e.g.*, *Labor Presses School Union*, SEATTLE POST-INTELLIGENCER, Mar. 13, 1930, at 2; David Levine, *President's Column*, WASHINGTON STATE LABOR NEWS, Mar. 14, 1930, at 1; David Levine, *President's Column*, WASHINGTON STATE LABOR NEWS, Mar. 28, 1930, at 1; *Public Employees*, WASHINGTON STATE LABOR NEWS, Aug. 15, 1930, at 2; William Satterthwaite, *The Teachers' Union*, WASHINGTON STATE LABOR NEWS, Aug. 29, 1930, at 7; David Levine, *President's Column*, WASHINGTON STATE LABOR NEWS, Nov. 14, 1930, at 1.

68. Seattle High School Chap. No. 200 of the American Federation of Teachers v. Sharples, No. 21346 (Wash. filed October 14, 1930).

public sector context. For the union, Vanderveer argued first that the School Board did not have the authority to make the yellow dog rule—it was beyond the power that the state legislature had delegated to the Board.[69] Importantly, the state law allowed firing teachers only for "sufficient cause" and union membership could not constitute such cause.[70] Second, the rule violated the teachers' constitutional rights to liberty and free association.[71] Surely the Board could not bar Catholics, Rotarians, or members of a political party from teaching. Also, the rule was not a valid exercise of the police power because it had no relation to the well-being of the schools. The teachers' union created no "danger of class government." Vanderveer cited a string of cases that had struck down regulations of businesses for being beyond the police power.[72]

The Board responded that the state legislature had given the Board the power to determine the qualifications of teachers, and that this authority was not reviewable by courts. It cited two cases that had upheld bars on teachers joining the AFL on these grounds: *Fursman v. Chicago*[73] in 1917 and *Frederick v. Owens*[74] in Cleveland in 1915. Further, the Board argued that yellow dog contracts were permitted in the private sector and that public employers should have the same rights. The Board cited Justice Holmes's famous maxim from the *McAuliffe* case, decided in 1892, that a police officer had a constitutional right to speak politics, but no constitutional right to be a policeman.[75]

The Washington Supreme Court issued its decision in *Sharples* on December 2, 1930. It upheld the power of the Board to make the rule. "Seattle's long controversy over the rights of school teachers to belong to unions was settled," the *Post-Intelligencer* reported.[76] "Supreme Court Pets Infamous Yellow Dog," the AFL newspaper lamented.[77]

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69. Brief for Appellants at 20-28 and Reply Brief of Appellants at 2-9, 18-20, *Sharples*, 159 Wash. 424, 293 P.2d 994 (1930) (No. 21436).

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71. Brief for Appellants at 37-38, *Sharples*, 159 Wash. 424, 293 P.2d 994 (1930) (No. 21436).

72. Brief for Appellants at 33-34 and Reply Brief of Appellants at 25-26, *Sharples*, 159 Wash. 424, 293 P.2d 994 (1930) (No. 21436).

73. 116 N.E. 158 (Ill. 1917).

74. 25 Ohio C.C. (n.s.) 581 (1915).

75. Brief for Respondents, at 5, 6, 8-21, 25, 27, 30, 32, 38-40, 44-50, *Sharples*, 159 Wash. 424, 293 P. 994 (1930) (No. 21436) (citing, *e.g.*, *Frederick* 25 Ohio C.C. (n.s) 581; *Fursman*, 116 N.E. 158; McAuliffe v. Mayor of New Bedford, 220, 29 N.E. 517 (Mass. 1892)).

76. *Board Stand Is Upheld by High Court*, SEATTLE POST-INTELLIGENCER, Dec. 3, 1930, at 17.

77. *Supreme Court 'Pets' Infamous Yellow Dog*, WASHINGTON STATE LABOR NEWS, Dec.

Chief Justice John Mitchell wrote the opinion, from which only one of the nine justices dissented.[78] The decision focused first on judicial deference to the School Board, essentially an issue of state structure. Mitchell identified the central question in the case as whether the rule was within the powers that the legislature had granted the Board. Mitchell found that the statute governing the Board empowered it to determine qualifications for teachers, with only certain specified exceptions such as the statutory requirement of a teaching certificate. Courts did not have the power to review the Board's determination that union membership made a teacher unfit for service. Mitchell either ignored or misunderstood the problem created by the fact that the statute required "cause" for discharge. The court seemingly read the yellow dog rule to apply only to the Board's power to hire. Yet it was undisputed that the yellow dog contracts at issue stated that a teacher could not become a member of the AFT while employed, on pain of dismissal. Nonetheless, Chief Justice Mitchell continued that the Board could not banish entire classes of people from teaching, because the principle of the case only applied to hiring.[79]

The court did not stop there, however. The majority made a point of stressing the applicability of contemporary "freedom of contract" doctrine in the public sector context. The court quoted liberally from *Frederick* and *Fursman* for the principle that public employers had the same rights in this regard as those in the private sector and for their general skepticism about unions in public employment.[80] Further, Justice Mitchell concluded that, as Justice Holmes had ruled in *McAuliffe v. Mayor of New Bedford*,[81] constitutional protections did not apply to public employment. There was no constitutional right to be a teacher.[82] The court cited cases that had held that the right to set conditions of public employment did not involve the police power. Nor did the yellow dog rule violate due process. An employer's free-

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12, 1930, at 4.

78. Justices Mark Fullerton, Emmett Parker, Warren Tollman, William Millard, John Main, and Adam Beeler joined Mitchell's opinion. Justice O.R. Holcomb concurred in the result, but did not write separately. Justice Walter Beals dissented.

79. *Sharples*, 159 Wash. at 425-31, 293 P. at 994-97. The relevant statute provided that school boards had the power "[t]o employ for not more than one year, and for sufficient cause to discharge teachers" and "[t]o adopt and enforce such rules and regulations as may be deemed essential to the well-being of the schools." *Id.* at 428, 293 P. at 995. The yellow dog clause in Seattle included the promise that the teacher "will not become a member [of the AFT] during the term of this contract." *Id.* at 426, 293 P. at 994.

80. *Id.* at 433-38, 293 P. at 997-99.

81. 29 N.E. 517 (Mass. 1892).

82. *Id.* at 431, 433-36, 293 P. at 996-98 (citations omitted).

dom of contract right to refuse to hire for any reason was not a deprivation of a worker's constitutional rights.[83]

Only Justice Walter B. Beals dissented. He alone was concerned that the rule allowed the Seattle School Board to fire a teacher during the term of his or her employment for joining the union, or for lying about being a member when signing the contract. The state statute required "sufficient cause" for firing teachers, and Justice Beals was unsure if union membership met that test.[84] *Fursman* and the other cases cited by the majority only dealt with hiring, not with prohibitions on current employees.[85] Beals also distinguished between the Board's discretion in contracting with individuals and its discretion in making a blanket rule about groups. It was troubling to exclude a class of people for reasons having nothing to do with their moral or physical characteristics, qualifications, or ability, especially given that union membership was not illegal. Could the Board bar all teachers taller than six feet? Could it *require* membership in the AFT?[86] At a minimum, Beals concluded, ordering that teachers agree not to join the union during the term of their contracts was *ultra vires*, beyond the power of the Board.[87]

## VII. THE BOARD DROPS THE YELLOW DOG RULE

Somewhat surprisingly, the *Sharples* decision did not end the matter. On January 2, 1931—only a month after the Supreme Court opinion and less than a year after the victories of antiunion candidates in the School Board elections—the Seattle School Board voted to drop the yellow dog rule. The Board's only explanation was that "conditions which seemed to make [the rule] necessary no longer exist." The *Post-Intelligencer* took this to mean that Local 200 now existed "only on paper." But this had been true for two and a half years, since June 1928. Shorrett, Local 200's old ally, became president of the Board.[88]

Satterthwaite reported to the national AFT that the Board's decision was based on the Board's fear of the union's strength in future election. In fact, Satterthwaite claimed, in the past half year, the

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83. *Id.* at 431-32, 293 P. at 996 (citing, *e.g.*, Jahn v. Seattle, 120 Wash. 403, 207 P. 667 (1922) (police power); WASH. CONST., art. I, § 3 (due process)).

84. *Sharples*, 159 Wash. at 438-40, 293 P. at 999 (Beals, J., dissenting). *See* note 79, *supra*.

85. *Id.* at 440, 293 P. at 999 (Beals, J., dissenting).

86. *Id.* at 440-41, 293 P. at 999 (Beals, J., dissenting).

87. *Id.* at 441, 293 P. at 999 (Beals, J., dissenting).

88. *Yellow Dog Rule Dropped; Shorett Named President*, SEATTLE POST-INTELLIGENCER, Jan. 3, 1931, at 1; *John B. Shorett New President of School Board*, SEATTLE DAILY TIMES, Jan. 3, 1931, at 7; David Levine, *President's Column*, WASHINGTON STATE LABOR NEWS, Jan. 9, 1931, at 1; Seattle School District, Record No. 27, Fiscal Year 1930-31, Seattle Public School Archives and Records Management Center, 188-89.

Board had granted most of the union's requests. It appears that Board members did not relish future elections revolving around this issue, but it also knew that the union had become weaker.[89]

Local 200 was grievously wounded, but not dead. The local barely existed in 1935. It had fifty-seven members by the end of 1936, and ninety-seven by the end of 1937. Still, it was not until 1946 that the local had as many members as it did in 1928. Even today, the NEA is much stronger in Seattle than the AFT, which is unusual for urban centers.[90]

## VIII. THE SIGNIFICANCE OF THE PUBLIC SECTOR

Meanwhile, *Sharples* stayed on the books as precedent, and courts would continue to uphold bans on AFL-affiliated public sector unions for decades to come.[91] The Norris-LaGuardia Act of 1932[92] prohibited yellow dog contracts in the private sector, but such rules would be legally permissible and used in the public sector through the 1950s. They continued to haunt teachers' unions, and local political battles over such rules often decided whether AFT locals survived or died.[93]

More broadly, including public sector unions in labor and legal history shows the following. First, it changes the look of the U.S. labor movement. The peaks and valleys of membership are different. The types of activities in which unions engage are different. Labor historians should note how politically active the AFL was during this "voluntarist" period, as well as how class-conscious the state was as an employer. Further, many public sector unions survived, and public sector labor law created a significant core of highly political unions in the labor movement. At the same time, the law kept the size of this core artificially low during the decades when labor in the private sector was largest and most powerful.

This political activity was not the sort of avowedly socialist or social-democratic party-building in which European unions often engaged. Yet the law drove a wide variety of public sector unions into

89. Letter from Walter Satterthwaite to Henry Linville (Jan. 11, 1931) (Local 200 Folder).

90. *Monthly Report to the Secretary-Treasurer* (for various dates) (Local 200 Folder).

91. Cases citing *Sharples* as precedent include City of Los Angeles v. Los Angeles Building and Trades Council, 210 P.2d 305 (Cal. Ct. App. 1949).

92. 47 Stat. 70 (1932), codified at 29 U.S.C. §§ 101-115 (1994).

93. For descriptions of fights over yellow-dog rules in various cities, see *Important Gains Consolidated; Several Boards Go on Union-Bushing Rampage*, AMERICAN TEACHER 19, May-June, 1936, at 5-9; *For the Right to Organize St. Louis Locals Wages a Winning Fight*, AMERICAN TEACHER 21 May-June 1937, at 17; *The AFT Makes the Headlines . . . and Wins a Victory in San Antonio*, AMERICAN TEACHER 22, Nov.-Dec. 1937, at 14-15; *Yellow Dog Clause Removed in Oklahoma City*, AMERICAN TEACHER 29, Feb. 1945, at 7-8; Slater, *supra* note 5, at 200-01.

many different forms of political activity when much of the rest of labor often seemed opposed to any dealings with the state at all. This raises interesting questions about what labor's role in politics might have been if the rise of public sector unions had occurred earlier.[94]

For legal scholars, the ultimate reversal of the Seattle School Board's position is another example of how law on the books can be different from the law on the ground. The case is also another instance of how conceptions of fundamental rights can vary significantly among different groups in society. It demonstrates how law can affect the size and nature of social movements. It is an interesting study in finding where "the law" is actually made. In public sector labor relations, given the deference that courts gave to public officials, the law was made by the actual employers. Indeed, this story shows how the very structure of the state itself affects the development of law and, by extension, politics.

There are even lessons for the practicing labor lawyer of today. Granted, courts now strike down yellow dog rules in the public sector as unconstitutional. Also, since the 1960s about half the states have passed collective bargaining or related laws allowing public sector unions some rights. But about half of the states have not. In such states, public sector unions still must rely very heavily on politics. Understanding how the old legal regime worked and how unions dealt with legal restrictions can be quite helpful in the modern world.

94. For a further exploration of these questions, see Slater, *supra* note 5.