Union Made: Labor's Litigation for Social Change

Charlotte Garden

Follow this and additional works at: https://digitalcommons.law.seattleu.edu/faculty

Part of the Labor and Employment Law Commons, and the Litigation Commons

Recommended Citation
https://digitalcommons.law.seattleu.edu/faculty/355

This Article is brought to you for free and open access by the Faculty Scholarship at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Seattle University School of Law Digital Commons.
Union Made: Labor’s Litigation for Social Change

Charlotte Garden*

Unions are key repeat players before the United States Supreme Court. Their involvement goes beyond what one might expect (labor) and extends to key cases involving federalism, discrimination, affirmative action, the First Amendment, and workplace health and safety, among others. Though scholars have documented the effects of other union activity, like collective bargaining, on nonunion workers, the role and impact of union participation in nonlabor litigation has largely been ignored in both the public debate over unions in America and in the academic literature about what unions do. This Article focuses on unions’ Supreme Court litigation that arises outside of the context of traditional labor law in order to show how union-made law affects interests beyond those of the labor movement, its members, and unionized employers. It reveals how union-made law has significantly affected the structure of American government and society.

This Article first describes the many areas in which union Supreme Court litigation has had important social effects extending far beyond core labor interests and explains why, as a practical matter, unions are well-situated to bring or fund these cases. Next, the Article explores three characteristics that have the potential to shape unions’ litigation positions: first, unions are more likely than other social movement litigators to litigate defensively as well as offensively; second, unions operate based on majority rule; and third, unions may use litigation as a part of a bargaining strategy. The Article shows how these dynamics have played out in past cases.

* © 2013 Charlotte Garden. Assistant Professor, Seattle University School of Law. For their suggestions, encouragement, and other assistance, I am grateful to Matthew Bodie, Robert Chang, Brooke Coleman, Owen Davies, Michael Fischl, Steven H. Goldblatt, Nancy Leong, Marley Weiss, and the participants in the University of Iowa College of Law Faculty Speaker Series, the Democracy and the Workplace symposium held at UNLV School of Law, and the 2012 Law and Society annual conference. This Article was selected for inclusion in the New Voices in Labor and Employment Law Program at the 2013 meeting of the Southeastern Association of Law Schools. I am particularly grateful for feedback from Anthony Baldwin, Michael Z. Green, and Paul Secunda during that program. In addition, Paige Hardy and Holly Scott provided invaluable research assistance. Finally, I thank the editors of the Tulane Law Review for their careful work on this Article.
I. INTRODUCTION

What do unions do? Most people would probably say that they represent workers’ interests at the bargaining table and in grievance proceedings and that they participate in electoral politics. But this Article explores an additional way that unions create change within American society, through their litigation—particularly of cases that reach beyond traditional labor law—before the United States Supreme Court. Supreme Court litigation therefore provides a heretofore unexplored route for unions to be agents of social change.

Unions litigate and facilitate others’ Supreme Court litigation in a number of ways. Most obviously, and most like their employer counterparts, unions litigate over naturally arising disputes with others. However, at other times, unions litigate more like social movement groups, shaping impact cases designed to achieve change through the courts, or they provide counsel for employees seeking to vindicate workplace rights. Additionally, labor unions and federations collectively have a thriving amicus practice. Through these various
channels, unions have litigated key cases in the areas of federalism, discrimination, affirmative action, and the First Amendment, among others.

This Article begins by describing key areas in which unions' Supreme Court litigation has had important social effects extending far beyond core labor interests and explains why, as a practical matter, unions are well situated to bring or fund these cases. Next, the Article explores three characteristics that can shape unions' litigation positions: first, unions are more likely than other social movement litigators to litigate defensively as well as offensively, meaning that they cannot always choose their litigation vehicles; second, unions operate based on majority rule, and the interests of different groups of members may be in opposition in particular cases; and third, unions may use litigation to facilitate success at the bargaining table. Ultimately, the Article concludes that the importance of unions' nonlabor litigation has been underestimated and that while unions do not litigate precisely like other left-leaning social movement groups, these groups should generally welcome unions' intercessions in the Supreme Court. Finally, the Article proposes that unions' Supreme Court litigation is most likely to succeed as a social change strategy where it occurs in coalition with other groups and recommends that unions should better communicate with their members about the scope and content of their litigation efforts, particularly before the Supreme Court.

II. UNIONS AND THE SUPREME COURT

Justified or not, the Supreme Court has a kind of sacred status in American life.

This Part begins with a brief discussion of the evolution of unions' participation in Supreme Court litigation. The purpose is twofold: first, to discuss several foundational Supreme Court cases in which labor played a key role, and second, to describe how courts' and legislatures' views of labor's Supreme Court work has changed over time. Specifically, it shows that whereas the historical record reveals some early hostility toward union-sponsored litigation, modern doctrine permits unions to take a variety of different roles in litigation. Following this discussion, I create a taxonomy of subject areas that

have prompted union Supreme Court litigation. This discussion both illuminates the scope of unions’ influence through litigation and provides necessary background for Part III, where I describe three dynamics that can inform the positions that unions take before the Supreme Court.

Before beginning this discussion, though, it is worthwhile to address two preliminary questions. First, why focus on the Supreme Court, when so few cases end up there? And second, why focus on non-labor law cases? The answers to both questions can be found in this Article’s objective, which is to analyze an important way in which unions influence the lives of nonmembers—which is to say, the vast majority of Americans. In addition, unions’ Supreme Court work offers a high-profile window into how unions view specific challenges facing workers.

Accordingly, I focus on Supreme Court litigation in part because of its precedential value, but also because of the money and expertise required of those who appear regularly in the Supreme Court. Professor Richard Lazarus has observed that Supreme Court work is increasingly done by a small group of elite lawyers. Their expertise gives them a leg up in obtaining the best possible outcomes for their clients at both the certiorari and merits stages. However, the vast majority of these attorneys work primarily for for-profit clients; only a relatively small number of nonprofits can afford for lawyers to devote the large amount of time necessary to become expert Supreme Court litigators. And, while some private lawyers also perform pro bono work, they do not take on pro bono clients whose interests might conflict with those of the lawyers’ paying clients. Thus, Lazarus observed, “[A]lmost all of the [specialty Supreme Court] practices


3. Press Release, Bureau of Labor Statistics, Union Members—2011, U.S. DEP’T OF LABOR 1 (Jan. 27, 2012), http://www.bls.gov/news.release/archives/union2_01272012.pdf (“In 2011, the union membership rate—the percent of wage and salary workers who were members of a union—was 11.8 percent, essentially unchanged from 11.9 percent in 2010.”).

4. See Richard J. Lazarus, Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar, 96 GEO. L.J. 1487 (2008).

5. Id. at 1515, 1540; Richard J. Lazarus, Docket Capture at the High Court, 119 YALE L.J. ONLINE 89, 90-91 (2009) (showing an increasing percentage of successful petitions for certiorari filed by “expert Supreme Court advocates”).


7. Id. at 1501 (noting that most nonprofit organizations lack in-house Supreme Court expertise, with a few exceptions, such as Public Citizen and the ACLU).
refuse to provide . . . help to plaintiffs involved in employment discrimination, tort, and environmental pollution control cases.  

Against this backdrop, the labor movement is exceptional in its capacity to advocate before the Supreme Court in a broad range of issue areas, including those eschewed (at least on the plaintiff side) by other Supreme Court experts. A number of labor lawyers have substantial Supreme Court experience. In particular, Laurence Gold—former general counsel of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and current of-counsel at the union-side labor firm Bredhoff & Kaiser, PLLC—stands out. He is among the twenty lawyers who have argued the most Supreme Court cases during the twentieth century, and he has developed an enviable reputation as an expert Supreme Court litigator; in the words of one Supreme Court justice: “Whenever I get a brief signed by Larry Gold, I read it—even if it is an amicus brief—with particular care.” Thus, as compared to other social movement groups, labor unions have uncommon institutional capacity to litigate before the Supreme Court. And this capacity is often deployed in employment and even environmental cases, precisely the areas where private Supreme Court practitioners are unlikely to provide pro bono assistance and other nonprofits’ resources may be stretched thin.

This Article focuses on cases that arise outside of labor law because those are the cases that have the most readily apparent effects on the lives of nonunion members. This is not to say that labor law does not affect nonunion members—assuredly, it does. For example,

8. *Id.* at 1560.
9. For example, before her appointment to the United States Court of Appeals for the Ninth Circuit, Marsha Berzon argued at least five cases before the Supreme Court. Michael Gottesman, now a professor at Georgetown University Law Center, argued seventeen cases. *Oyez*, http://www.oyez.org (last visited Oct. 27, 2013) (search for Berzon and Gottesman to view a list of cases each argued).
11. Lazarus, supra note 4, at 1492-93 & n.29.
13. This is not to say that unions are the only nonprofits with significant Supreme Court practices. Groups like the NAACP LDF and the ACLU have significant Supreme Court practices. In addition, the United States Chamber of Commerce also participates in Supreme Court litigation on a regular basis and on a wide range of cases. See Nat’l Chamber Litig. Ctr., *About*, U.S. CHAMBER OF COMMERCE, http://www.chamberlitigation.com/about (last visited Oct. 27, 2013); Jeffrey Rosen, Supreme Court Inc., N.Y. TIMES MAG. (Mar. 16, 2008), http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?pagewanted=all&rr=0.
some employees who are covered by a union contract are not union members, and labor law protects concerted activities undertaken by nonunion workers. However, the observation that labor unions litigate cases about labor law is hardly a surprising one. In contrast, unions’ nonlabor litigation both reveals key labor movement priorities and has more potential to influence society as a whole. Yet it has been largely ignored.

In sum, unions’ nonlabor Supreme Court litigation represents a major investment of union resources in cases with effects that reach far beyond unions, union members, and unionized workplaces. In the next Subpart, this Article recounts a brief history of union Supreme Court litigation, emphasizing the evolving role of unions in litigation and providing several early examples of seminal cases litigated by the labor movement and its adherents.

A. Unions’ Paths to the Supreme Court

“For my friends, anything—for my enemies, the law.”

Labor unions’ decades-long history of Supreme Court litigation predates the advent of federal labor statutes like the National Labor Relations Act (NLRA). However, early appearances before the Supreme Court rarely provided unions with cause for celebration. Employers and government lawyers successfully argued that labor union activism was illegal under a range of antitrust and criminal law

---

14. Workers who are covered by a union contract cannot be required to join a union or pay the full amount of union dues; rather, they can at most be required to pay the “agency fee,” which represents the costs of bargaining, grievance administration, and a few other union activities. In “right to work” states, workers covered by union contracts need not pay even the agency fee, though they are still covered by the union contract. See Charlotte Garden, Citizens, United and Citizens United: The Future of Labor Speech Rights?, 53 WM. & MARY L. REV 1, 34, 36-37 (2011).


16. There are a few exceptions. E.g., Jaime Eagan, Making an Impact: The Labor Movement’s Use of Litigation To Achieve Social and Economic Justice, SSRN 21 (June 18, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1866844 (“Few sources . . . mention labor’s involvement in social justice impact litigation.”). Scholars have done empirical studies of the frequency with which unions, among other groups, file Supreme Court amicus briefs. E.g., Paul M. Collins, Jr. & Lisa A. Solowiej, Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court, 32 LAW & SOC. INQUIRY 955 (2007); Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. PA. L. REV. 743, 752 (2000). However, those studies do not discuss the types of cases in which unions file amicus briefs or the substance of the briefs themselves.

17. This phrase has been attributed to former Brazilian President Getúlio Vargas. Robert Plummer, Ruses That Spring from Brazil’s Woes, BBC NEWS (Dec. 14, 2005), http://news.bbc.co.uk/2/hi/business/4468042.stm.
theories." On several occasions, these disputes reached the Supreme Court. For example, in *Loewe v. Lawlor*, the well-known *Danbury Hatters* case, the Court held that the Sherman Antitrust Act prohibited a union secondary boycott, subjecting individual strikers (who were named defendants) to treble damages. A series of other cases reinforced this conclusion, even after Congress exempted core union activity from antitrust liability in the Clayton Act. At the same time, the *Lochner*-era Court repeatedly applied the Due Process Clause of the Fourteenth Amendment to strike down state statutes aimed at protecting labor activity.

During the same period, labor activists litigated important First Amendment cases, including *Abrams v. United States*, *Debs v. United States*, and *Whitney v. California*. Each of these cases began with the defendant's criminal conviction for labor-related political activities: Abrams's circulation of flyers calling on the "Workers of the World" to unite against capitalism by going on a general strike; Debs's public speech extolling the virtues of socialism and denouncing war; and Whitney's participation in the Communist Labor Party, which had called for "the organization of the workers into "revolutionary...


22. *See, e.g.*, *Truax v. Corrigan*, 257 U.S. 312 (1921) (striking down a state law protecting picketing activity); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down a state law prohibiting employers from requiring employees to sign "yellow dog contracts," in which the employee agreed to refrain from joining a union).


industrial unions."26 The Supreme Court upheld all three convictions, but Abrams and Whitney also offered occasions for Justices Holmes and Brandeis to articulate—albeit in a dissent and concurrence27—their "profoundly influential,"28 "seminal"29 theories of the First Amendment, which continue to undergird our understanding of free speech today.

The passage of the NLRA improved unions' fortunes before the Supreme Court and also led to one of the most influential federalism cases in Supreme Court history. NLRB v. Jones & Laughlin Steel Corp. began with what would now be considered a run-of-the-mill unfair labor practice charge, in which a labor union alleged that the company had discriminated against union members.30 The company argued that Congress lacked the constitutional authority to regulate manufacturing and production, citing "[a]n unbroken line of decisions under the commerce clause."31 In response, Justice Owen Roberts made his famous "switch in time," creating a five-vote majority in favor of expanded federal authority and setting the stage for the survival of other components of the New Deal.32

Even after labor unions were legitimated by the NLRA, federal and state governments periodically manifested discomfort with the idea that labor unions might drive litigation. This discomfort manifested in reform of the Fair Labor Standards Act (FLSA). Unions had seized on the FLSA when it was enacted in 1938, filing "collective actions" against employers who were alleged to have violated wage-and-hour requirements.33 This practice drew congressional disapproval of suits filed by "outsiders" who were "desirous of stirring up litigation

27. Id. at 372 (Brandeis, J., concurring); Abrams, 250 U.S. at 624 (Holmes, J., dissenting).
30. 301 U.S. 1, 22 (1937).
31. Brief for Jones & Laughlin Steel Corp. at 27, 64, Jones & Laughlin, 301 U.S. 1 (No. 419), 1937 WL 34884, at *27, *64; see also Jones & Laughlin, 301 U.S. at 25.
32. Steven G. Calabresi & Nicholas Terrell, The Number of States and the Economics of American Federalism, 63 FLA. L. REV. 1, 20 (2011). Scholars debate the accuracy of the phrase "switch in time" as applied to the 1937 Court. Daniel E. Ho & Kevin M. Quinn, Did a Switch in Time Save Nine?, 2 J. LEGAL ANALYSIS 69, 71 (2010). However, the resolution of that debate is not necessary here; it is sufficient that Jones & Laughlin is today regarded as a critical moment in Supreme Court history.
without being an employee at all." Accordingly, Congress amended the FLSA in 1947, prohibiting employees from allowing designated representatives to sue on theirbehalves, and instead requiring them to sue in their own names. This limit still applies today, although, as this Article discusses below, unions continue to educate workers about their FLSA rights and to fund FLSA cases, including some resulting in major federalism-related holdings.

States, too, have at times sought to prevent unions from encouraging their members to pursue legal claims. Ironically, these statutes led to major union victories in court. The Supreme Court has on four occasions rejected state prohibitions on the provision of free legal advice or attorney referrals by associations; three of these cases involved unions. In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, the Court overturned a state court's order enjoining the Brotherhood's legal referral plan, which was aimed at workers who had been injured on the job, and held that the Brotherhood had a First Amendment right to make legal referrals. Relying on *NAACP v. Button,* decided the previous year, the Court described the legal referral system as integral to the practice of trade unionism: "The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel." Additionally, the Court observed that the Brotherhood's efforts were targeted in part at enforcing legislation for which the union had lobbied, including the Safety Appliance Act and the Federal Employers' Liability Act. As the Court put it, the statutes could not fulfill their intended purpose if injured trainmen lacked meaningful access to the courts.

34. *Id.* (quoting 93 Cong. Rec. 2182 (1947)).
36. *Id.*
37. See discussion *infra* Part II.B.1.
38. 377 U.S. 1, 2, 5-6 (1964).
39. 371 U.S. 415, 442 (1963) (holding that the First Amendment protected the NAACP's practice of holding meetings of parents and children to solicit potential plaintiffs for school desegregation cases and concluding that Virginia's interest in regulating the legal profession by prohibiting solicitation by lawyers had to give way to the NAACP's interest in employing "constitutionally privileged means of expression to secure constitutionally guaranteed civil rights").
41. *Id.* at 3.
Three years later, the Court addressed another union's legal assistance plan in *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n.* There, the United Mine Workers "had employed a licensed attorney on a salary basis to represent any of its members who wished his services to prosecute workmen's compensation claims before the Illinois Industrial Commission." As in *Brotherhood of Railroad Trainmen,* the Court held that the program was protected by the First Amendment, noting that it had arisen out of the union's perception that the Illinois Workmen's Compensation Statute was at risk of failing to fulfill its promise due to lack of competent enforcement. Finally, in *United Transportation Union v. State Bar of Michigan,* the Court again overturned state bar sanctions imposed on a union for referring its members to attorneys who agreed to a particular fee arrangement. The Court stressed that *Button, Mine Workers,* and *Trainmen* were to be read broadly to establish that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment," including actions designed to help members afford counsel.

Thus, unions were instrumental in establishing that the First Amendment protects associations' rights both to make attorney referrals and to encourage members to enforce their rights through litigation, including by providing legal counsel. Importantly, many advocacy groups advancing a wide range of interests today rely on this principle in order to bring cases designed to spur social change.

In the union context, funding of members' litigation sometimes occurs on a case-by-case basis—for example, a union, believing that an employee has been fired, underpaid, or otherwise mistreated in contravention of federal law, may decide to fund that worker's suit against the employer. However, it can also occur in a more routinized

---

42. 389 U.S. 217 (1967).
43. Id. at 218.
44. Id. at 223-24.
45. 401 U.S. 576, 584-86 (1971) ("[T]he Union sought to protect its members from excessive legal fees by securing an agreement from the counsel it recommends that the fee will not exceed 25% of the recovery, and that the percentage will include all expenses incidental to investigation and litigation.").
46. Id. at 585.
48. E.g., Catherine L. Fisk, *Union Lawyers and Employment Law,* 23 BERKELEY J. EMP. & LAB. L. 57, 59 (2002) ("Unions and their lawyers have represented store clerks seeking back wages for uncompensated overtime work; Thai garment workers who were held
fashion, as when a labor union provides access to attorneys as a benefit of union membership. For example, since 1978, the United Auto Workers' (UAW) collective bargaining agreement with auto manufacturers has provided active workers, retirees, and workers' spouses with access to free civil legal services in a range of subject areas (Plan).\footnote{See The Plan, UAW LSP, http://www.uawlsp.com/theplan.asp (last visited Oct. 27, 2013) (describing eligibility criteria for the Plan and listing subject areas in which Plan attorneys will provide assistance). Notably excluded from the Plan's coverage are lawsuits that name the beneficiary worker's employer or union as a defendant. The legal services provided under the Plan are "free" in the sense that members availing themselves of those services do not pay a per-service or hourly fee. However, the Plan is funded in part by union dues, which all members pay. The Plan's Web site asserts that these costs are low: "With efficient practices, the Plan has kept costs down, generally costing approximately $6 per month for each member[—]much less than the cost of just about any other type of benefit." Statement from the Director, in Legal Services Plan Opening New Cases Through the End of 2013, UAW LSP, http://www.uawlsp.com/default.asp (last visited Oct. 27, 2013). Further, the Plan's Web site indicates that about 75% of eligible union members take advantage of the Plan at some point in their tenure.) The Plan was sacrificed in the most recent round of bargaining between the UAW and the major auto companies—a loss that made the front page of the \textit{Detroit Free Press}\footnote{See Brent Snavely, \textit{GM-UAW Deal Would End Free Divorces, Legal Help}, DETROIT FREE PRESS, Sept. 24, 2011, at A1.} and will stop taking new cases at the end of 2013.\footnote{Legal Services Plan Opening New Cases Through the End of 2013, supra note 49 ("Under the terms of the tentative 2011 contract between the UAW and GM, Ford and Chrysler, the Plan will continue to accept new cases on the same basis we have in the past, until December 31, 2013. We will handle all the cases that come in, and continue to handle the cases that have been opened by the end of 2013 until they are completed.").} However, for the last twenty-five years, the Plan, which bills itself as "the largest pre-paid legal services program in the country,"\footnote{About Us, UAW LSP, http://www.uawlsp.com/about.asp (last visited Oct. 27, 2013).} has assisted workers with divorces, personal bankruptcies, and other issues.\footnote{In 2008, the Plan's attorneys assisted over 9,000 workers with bankruptcy matters, nearly 7,000 workers with divorces, and nearly 3,000 workers with foreclosures. Brent Snavely, \textit{UAW Fights To Keep Free Legal Services}, DETROIT FREE PRESS, Feb. 17, 2009, at A12.} And, of particular note for purposes of this Article, cases handled by Plan attorneys occasionally reach the United States Courts of Appeals and, on at least one occasion, even the Supreme Court: in \textit{Till v. SCS Credit Corp.}, attorneys from the UAW-DaimlerChrysler Legal Services Plan successfully represented two bankruptcy petitioners arguing that they should be entitled to pay a lower "formula rate" of interest on a loan...
secured by a $4000 truck, instead of the much higher rate sought by the creditor.\footnote{54}

In addition, the Supreme Court has recently allowed unions and other groups a third, hybrid method of litigating in members' interests, termed "associational standing."\footnote{55} Associational standing permits groups to litigate on their members' behalfs provided three conditions are met: (1) at least one member has been or will be injured, (2) that member could sue individually, and (3) "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause."\footnote{56} This allows unions to enforce members' rights with relatively little participation by the members themselves, a dynamic that can "provide[] for greater and more effective access to the courts," but that also presents risks, including that there may be conflicting interests among the union's membership.\footnote{57}

Finally, labor unions and federations appear as amici in a wide range of cases, many of which concern subjects other than labor law. This long-standing practice began in earnest in 1948,\footnote{58} when future Supreme Court Justice Arthur Goldberg was appointed general counsel of the CIO and "given a free hand to select labor cases to take to the Supreme Court and to file amicus briefs in cases already

\footnote{54. 541 U.S. 465 (2004).}

\footnote{55. This principle was first established by the Supreme Court in a decision allowing the UAW to seek a declaratory judgment ensuring that members who had been laid off from work received full trade readjustment benefits. UAW v. Brock, 477 U.S. 274, 286-87 (1986). Then, in United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., the Supreme Court expanded Brock to permit a union to sue for damages under the Worker Adjustment and Retraining Notification (WARN) Act on behalf of its members. 517 U.S. 544 (1996).}

\footnote{56. Warth v. Seldin, 422 U.S. 490, 511 (1975).}

\footnote{57. Nathaniel B. Edmonds, Comment, Associational Standing for Organizations with Internal Conflicts of Interest, 69 U. Chi. L. Rev. 351, 351 (2002). Additionally, the Brown Group Court identified two other risks: a potential lack of "adversarial intensity" and that "the damages recovered by the association [could] fail to find their way into the pockets of the members on whose behalf injury is claimed." 517 U.S. at 556.}

\footnote{58. Before 1948, labor federations filed amicus briefs only sporadically, generally in labor or employment law cases, as well as a handful of high-profile civil rights cases. E.g., Brief of AFL, Amicus Curiae, Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) (No. 970), 1946 WL 50088 (veterans' reemployment and superseniority); Brief for AFL, Consol. Edison Co. of N.Y. v. NLRB, 305 U.S. 197 (1938) (No. 19), 1938 WL 39360 (NLRB jurisdiction and procedure); Application for Leave To File Brief Amicus & Brief Amicus Curiae on Behalf of CIO & Certain Affiliated Organizations, Shelley v. Kraemer, 334 U.S. 1 (1948) (No. 72), 1947 WL 44164 (racially restrictive housing covenants).}
scheduled for Supreme Court review.\textsuperscript{59} Goldberg interpreted this mandate as an invitation to file briefs that would, in his view, "safeguard[] the interests of the entire labor movement and, indeed, the public interest generally."\textsuperscript{60} This was before it became common practice for interest groups to file amicus briefs in the Supreme Court; one study showed that a grand total of 531 amicus briefs were filed during the ten-year span from 1946 to 1955, as compared to 4,907 amicus briefs filed between 1986 and 1995.\textsuperscript{61} Thus, while the CIO was not the only institution to engage regularly in amicus practice in the late 1940s, it was among a relatively small group that did so.

Under Goldberg's leadership, the CIO filed briefs not only in labor cases, but also in civil rights and First Amendment cases. Among them were amicus briefs filed in several cases challenging racial segregation in education\textsuperscript{62} and public accommodations.\textsuperscript{63} In those cases, the CIO described its interest in defeating "the power of the states to compel segregation," which "directly affect[s] the efforts of the CIO to build a non-segregated trade union movement in the United States."\textsuperscript{64} Similarly, the CIO fought discriminatory laws enacted in the wake of World War II, including Hawaii's English-only education law\textsuperscript{65} and California's statutory denial of fishing licenses to Japanese immigrants.\textsuperscript{66} Additionally, during this period, the CIO filed briefs in three cases presenting issues related to the First Amendment rights of protest groups. These cases involved the extent to which the

\begin{footnotes}
\item[60] \textit{Id.} at 160.
\item[61] Kearney & Merrill, supra note 16, at 752.
\item[63] Motion for Leave To File Brief & Brief of CIO \textit{Amicus Curiae}, Henderson v. United States, 339 U.S. 816 (1950) (No. 25), 1949 WL 50336 (challenging segregation in railroad dining cars).
\item[64] Brief for the CIO as Amicus Curiae, \textit{McLaurin}, supra note 62, at 2.
\item[65] Brief of CIO, Amicus Curiae at 2-3, Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949) (No. 52), 1948 WL 47231, at *2-3 (challenging on the dual grounds that the law would "augment existing racial, religious and nationalistic discord" and discriminate against non-English speaking teachers).
\item[66] Brief of CIO \textit{Amicus Curiae}, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (No. 533), 1948 WL 47436.
\end{footnotes}
government could prohibit communists from leading labor unions, the right to picket stores in order to encourage them to hire racial minorities, and the availability of civil remedies under the Ku Klux Klan Act to individuals who were systematically assaulted by groups of private citizens.

After the 1955 merger of the AFL and CIO, the newly combined federation continued filing Supreme Court amicus briefs. While the federation's amicus participation has ebbed and flowed over time, the AFL-CIO today remains a prolific filer of amicus briefs. For example, from the five-year period beginning with the October 2007 Supreme Court Term and ending with the October 2011 Term, the AFL-CIO filed fifteen amicus briefs, eleven of which did not concern labor law. Some of these briefs were filed in high-profile cases, like National Federation of Independent Business v. Sebelius or Arizona v. United States, where the AFL-CIO was one of dozens of amici. Others came in cases that received far less amicus attention, like Kasten v. Saint-Gobain Performance Plastics Corp., in which the Court considered whether an oral complaint was sufficient to trigger the FLSA; there, the AFL-CIO filed one of only six amicus briefs.

Other AFL-CIO amicus briefs filed during that period came in cases

70. Westlaw and Lexis reveal twenty-eight AFL-CIO amicus briefs filed in nonlabor cases between 1971 and 1980, sixty filed between 1981 and 1990, twenty-eight between 1991 and 2000, and thirty-five between 2001 and the present. (List of cases on file with author.) By contrast, the late 1950s and 1960s saw the AFL-CIO file relatively few amicus briefs in cases that did not concern labor law.
71. Many of these briefs are discussed in this Article. In addition, it is telling that Professors Joseph Kearney and Thomas Merrill selected the AFL-CIO as one of three institutional litigators with a history of filing Supreme Court amicus briefs to study the efficacy of that practice. Kearney & Merrill, supra note 16, at 750.
72. A Westlaw search conducted on September 29, 2013, in the “U.S. Supreme Court Briefs” database for documents filed on dates corresponding to the October 2007 Term to the October 2011 Term that contain “AFL-CIO” or “American Federation of Labor” in the title returns fifteen amicus briefs filed by the AFL-CIO.
75. 131 S. Ct. 1325 (2011).
76. Brief of the AFL-CIO as Amicus Curiae in Support of Petitioner, Kasten, 131 S. Ct. 1325 (No. 09-834), 2010 WL 2565286.
concerning international law, the viability of a Title VII class action, the First Amendment, the Uniformed Services Employment and Reemployment Rights Act, consumer arbitration, separation of federal powers, and the Equal Protection Clause of the Fourteenth Amendment. And, while the efficacy of any particular amicus strategy is beyond the scope of this Article, there is some empirical evidence that AFL-CIO amicus briefs are successful.

The AFL-CIO files amicus briefs far more frequently than the other major American labor federation, Change to Win. Change to Win filed Supreme Court amicus briefs in only six cases (five of which did not concern labor law) between the 2007 and 2011 Terms. This relatively low amicus participation rate is perhaps unsurprising given Change to Win's pledge to devote three-quarters of its operating


budget to funding new organizing efforts, leaving fewer resources available for expensive Supreme Court litigation. Interestingly, though, the briefs that Change to Win did file suggest that it has a somewhat different amicus strategy than the AFL-CIO. In particular, Change to Win, along with the Change to Win Investment Group, filed briefs in two securities litigation cases. (By contrast, the AFL-CIO did not participate in any Supreme Court securities litigation cases during the same time period.) In these cases, Change to Win sought to expand liability for securities fraud and make it easier for plaintiffs to bring securities cases. This focus goes hand in hand with Change to Win's organizing and advocacy model, which includes shareholder activism.

This Subpart has outlined the primary avenues through which unions engage in Supreme Court advocacy. This is not to suggest that these are the only avenues. In addition, unions may facilitate litigation in less formal ways, for example, by helping workers identify potential violations of their workplace rights and providing attorney referrals.

---

87. The inaugural chair of Change to Win, Anna Burger, described that federation's goals like this: "Strategic, smart, organizing is our core principle-our North Star .... We will put our money where our mouth is, with three-quarters of our resources going to a groundbreaking organizing crusade." New Labor Federation Pledges To Carry Out Most Aggressive Organizing Campaign in 50 Years, CHANGE TO WIN (Sept. 27, 2005), http://www.changetowin.org/news/new-labor-federation-pledges-carry-out-most-aggressive-organizing-campaign-50-years (internal quotation marks omitted); see also Hodges, supra note 85, at 893.

88. The Change to Win Investment Group works with union-sponsored pension funds to engage in shareholder activism because

[the long-term health of these pension plans, and the retirement security of the workers and families who rely upon them, are threatened by conflicts of interest on Wall Street and in the boardroom, a corporate backlash that seeks to weaken the accountability of executives to shareholders, and outright corporate fraud.]


89. Brief for Change to Win & the CtW Investment Group as Amici Curiae in Support of Petitioner, supra note 86, at 4-6.

90. Brief of Amici Curiae Change to Win & the Change to Win Investment Group in Support of Respondents, supra note 86, at 3-5.

91. Sanford M. Jacoby, Finance and Labor: Perspectives on Risk, Inequality, and Democracy, 30 COMPR. LAB. & POL'Y J. 17, 48 (2008) ("As compared to the [Change to Win] unions, the AFL-CIO's national unions are less likely to engage in capital-market activities [in support of organizing].").

92. Increasingly, unions help fund workers' centers to assist workers in nonunion workplaces. Workers' center staff provide advice on issues like wage and hour violations and immigration law and therefore are a particularly promising avenue through which unions can help nonunion workers assert their rights. E.g., Victor Narro, Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers, 50 N.Y.L. SCH. L. REV. 465, 467 (2005-2006) (describing workers' center strategies, including providing
Additionally, they may recruit named plaintiffs for class actions or urge workers to opt into FLSA collective actions. The next Subpart will briefly describe some of the many substantive areas in which labor unions facilitate in litigation.

B. Subjects of Unions' Supreme Court Litigation

*The focus was . . . on shaping the law so that it would benefit the labor movement (and hence America!) over the long run.*

In this Subpart, I illustrate the range of Supreme Court cases in which unions participate as parties or amici. I have grouped these cases into six categories. First, and most prevalent, are cases that concern conditions of employment. These work law cases cover topics like employment discrimination, wage-and-hour law, workplace health and safety, and the Employee Retirement Income Security Act (ERISA). Second, there are democracy-related cases that concern the political process, access to government, and civic engagement more generally, including First Amendment rights to protest. Third, there are cases related to the structure of government—either the relationship between the federal government and the states or the relationship between the branches of the federal government. Fourth, there are cases about civil practice and procedure. Fifth, there are cases about issues of community concern, such as the availability of affordable housing or the protection of the environment. Sixth, and finally, there are industry-specific issues in which unions become involved because they represent workers in the relevant industry.

Three caveats are in order. First, many cases will fall into multiple categories; often, the reason a client decides to sue is substantially different from the reason the Supreme Court agrees to hear the case. To take just one example, unions litigated both *Alden v. Maine* and *Garcia v. San Antonio Metropolitan Transit Authority*—
key federalism cases that are regularly featured in constitutional law textbooks— to enforce the FLSA against state governments. Because the underlying wage and hour issues that gave rise to these cases in the first place were relatively ordinary, I group these and similar cases in category three (structure of government), rather than category one (work law). However, this is not to underplay the importance of unions' expensive and time-consuming litigation of work law issues in the Supreme Court.

Second, this is not an exhaustive list of all the cases, or even the categories of cases, in which unions have participated as parties, provided legal representation, or filed amicus briefs. For example, this Subpart generally does not discuss union participation in antitrust or securities cases. Instead, it offers example cases to illustrate the breadth of issues in which unions are involved, as well as to provide a sense of the extent to which unions' litigation positions might align with or diverge from those of other social movement groups.

Third, although the Article sometimes refers to the views of the "labor movement," I do not mean to imply that the labor movement has a monolithic view of the importance or the substantive correctness of particular cases. Where different unions or federations take different views before the Court, I flag them. However, where only one union perspective is advanced before the Court, I do not discuss the likelihood that other unions or federations (or their members) held, but did not express to the Court, other views.

1. Work Law

Unsurprisingly, the largest category of unions' nonlabor Supreme Court work falls under the general heading of work law. I include

---

97. E.g., Erwin Chemerinsky, Constitutional Law 178, 303 (3d ed. 2009).
98. Alden, 527 U.S. at 712 (holding that Congress cannot compel states to hear suits relating to violations of federal law in state courts; the plaintiffs were represented by AFL-CIO attorneys); Garcia, 469 U.S. at 555-56 (holding that Congress has the power under the Commerce Clause to compel state employers to pay federally mandated minimum wage). Garcia was represented by union lawyers, including the AFL-CIO General Counsel Laurence E. Gold and Amalgamated Transit Union General Counsel Earle Putnam. Id. at 529.
99. See discussion supra Part II.A.
Unions play a role in the development of employment law in both union and nonunion workplaces. In unionized workplaces, the connection is obvious: unions often either provide counsel to bargaining unit members or sue in their own names (often alongside individual employees) to enforce members’ workplace rights. In nonunion workplaces, the connection is perhaps less clear, but present nonetheless. First, labor lawyers sometimes represent nonunionized workers directly, often (but not always) in connection with an organizing campaign. Second, even if they do not provide representation, they may provide advice and attorney referrals through a workers’ center or similar organization. Conversely, unions themselves employ significant numbers of employees, and they sometimes also play a gatekeeping role in employment by operating hiring halls. Thus, unions are sometimes named as defendants in employment-related litigation as well.

As a result, labor unions have been parties to a significant number of work law cases that have reached the Supreme Court; of these, discrimination cases comprise the bulk. Accordingly, this Subpart begins with a discussion of unions’ participation in discrimination cases and then turns to other types of work law cases, such as those concerning the constitutional rights of public employees.

102. See discussion infra Part III.
105. E.g., AT&T Corp. v. Hulteen, 556 U.S. 701 (2009); Johnson Controls, 499 U.S. 187. The Communications Workers of America were a party in the Title VII gender discrimination suit. AT&T Corp., 556 U.S. 701.
106. Fisk, supra note 48, at 59-60 (noting that some courts construe the provision of legal services immediately before a union election as a violation of the NLRA).
Unions have appeared before the Supreme Court both to prosecute Title VII cases and to defend against them. For example, shortly after the enactment of the Civil Rights Act of 1964, unions litigated a series of cases in which they were named as defendants because of the discriminatory impact of union-negotiated seniority systems. These cases involved not only liability issues, but also difficult questions about how to provide remedies to workers who were excluded from desirable jobs because seniority systems entrenched the effects of prior (legal) discrimination. In addition, a handful of other Supreme Court cases arising under employment discrimination statutes involved intentional race discrimination by labor unions. For example, in Local 28, Sheet Metal Workers' International Ass'n v. EEOC, the local union defendant unsuccessfully fought a district court's directive that it remedy its history of "particularly egregious" discrimination against nonwhite workers seeking admission to the union by achieving 29% nonwhite membership and creating a fund to be used to recruit minority participants. Then, in Goodman v. Lukens Steel Co., a Steelworkers' local unsuccessfully attempted to defend its policy of declining to process grievances raising race discrimination or harassment based on employer opposition to such claims. Finally, a third case involved discrimination against white employees: in McDonald v. Santa Fe Trail Transportation Co., a Teamsters local unsuccessfully argued that neither Title VII nor 42 U.S.C. § 1981 prevented employers from choosing to fire white employees who had stolen from the company, while retaining black employees accused of the same conduct. However, the Teamsters'

---

position was undermined by an AFL-CIO amicus brief that successfully argued that both statutes should apply to white workers.16

Then, in United Steelworkers of America v. Weber17 and Johnson v. Transportation Agency,18 unions defended negotiated affirmative action plans designed to correct “manifest imbalances” in workforce composition.19 After the Court upheld both plans, the AFL-CIO carefully sought to preserve these holdings by distinguishing the negotiated affirmative action plans at issue in those cases from more ad hoc measures taken by employers in other cases.20 For example, the controversial21 case of Taxman v. Board of Education arose when a school district terminated a white teacher instead of a minority teacher with identical seniority and qualifications in order to maintain racial diversity among the teachers within Taxman’s department.22 Once the Supreme Court granted certiorari, civil rights groups—fearing that the Rehnquist Court would interpret Title VII so as to gut affirmative action programs—financed most of a settlement that removed the case from the Supreme Court docket just days before argument.23

116. Motion for Leave To File Brief & Brief for the AFL-CIO as Amicus Curiae, McDonald, 427 U.S. 273 (No. 75-260), 1975 WL 173858.


119. The Johnson plaintiff named only his employer in his suit, which charged that he was passed over in favor of a female employee in violation of Title VII. However, the union, which had agreed to the county’s affirmative action plan, intervened in the case as a defendant. Brief of Respondent SEIU Local 715 at *1, *2, Johnson, 480 U.S. 616 (No. 85-1129), 1986 WL 728167, at *1, *2.

120. In addition, in Weber itself, the Steelworkers contrasted cases involving government-imposed quotas to plans that were voluntarily adopted by private employers, arguing that the legislative history of Title VII did not reveal a congressional intent to forbid the latter. However, making that case meant showing that Congress did intend to preclude governmental quotas. Professor Deborah Malamud has argued persuasively that this theory was influential in achieving a win in Weber. Deborah C. Malamud, United Steelworkers of America v. Brian Weber, in EMPLOYMENT DISCRIMINATION STORIES 173, 176 (Joel Wm. Friedman ed., 2006). However, the Steelworkers’ strategy threatened to alienate the union from the civil rights community. See id. at 182-86.

121. E.g., Nat Hentoff, A Case of Spin in Piscataway, WASH. POST, Dec. 20, 1997, available at 1997 WLNR 7325093. Even many years later, the case remained a flash point, as evidenced by the fact that it was discussed in reference to the Supreme Court nominations of both Samuel Alito, who ruled in favor of Taxman as a judge on the United States Court of Appeals for the Third Circuit, and Elena Kagan, who as a lawyer in the Clinton White House had a role in shaping the administration’s position on the case. The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 818, 823-24 (2010) (testimony of Peter N. Kirsanow); Daniel H. Pollitt, Veto Alito!, INDY WK. (Jan. 4, 2006), http://www.indyweek.com/indyweek/veto-alito/Content?oid=1196395.

122. 91 F.3d 1547, 1551 (3d Cir. 1996), cert. dismissed, 522 U.S. 1010 (1997).

123. Leandra Lederman, Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?, 75 NOTRE DAME L. REV. 221, 244-45 (1999);
Apparently sharing this apprehension, the AFL-CIO devoted much of its amicus brief to distinguishing the school district’s decision to lay off Taxman from the negotiated plans in *Weber* and *Johnson*, rather than to defending the school district’s actions.\textsuperscript{124} Thus, while the brief implicitly criticized the school district’s actions (and the brief was filed in support of neither party),\textsuperscript{125} it was evidently designed to preserve affirmative action to the extent realistically possible, rather than to limit it.\textsuperscript{126}

Unions have also fought to expand protections against sex and gender discrimination in employment discrimination. A leading union in this effort, the International Union of Electrical, Radio, and Machine Workers (UE) inaugurated “the modern beginning of the organized pay equity movement in this nation.”\textsuperscript{127} As part of its work in this vein, UE filed a series of cases charging that employer-sponsored insurance plans violated Title VII when they excluded pregnancy from coverage,\textsuperscript{128} reaching the Supreme Court in *General Electric Co. v. Gilbert*.\textsuperscript{129} UE did not prevail in *Gilbert*, but Congress later legislatively overruled it with the Pregnancy Discrimination Act.\textsuperscript{130} However, another electrical workers’ union—the International Brotherhood of Electrical Workers—successfully challenged an employer policy that required female employees to make larger

---

Editorial, *Affirmative Action: Sooner or Later, High Court Will Have To Decide*, WORCESTER TELEGRAM & GAZETTE, Dec. 19, 1997, available at 1997 WLNR 6532399 (“The prospect of an adverse ruling prompted civil rights groups to provide the major share of a $433,500 settlement that the school board was required to pay Taxman as the result of trial and appeals court rulings.”)


125. *Id.*

126. Similarly, the AFL-CIO’s brief in *Minnick v. California Department of Corrections* both sought to distinguish *Weber* and *Johnson* and—like the state—successfully urged the Court to hold that it lacked jurisdiction to decide the case because there was not yet a final judgment from the lower courts. Brief for the AFL-CIO as Amicus Curiae, Minnick v. Cal. Dep’t of Corr., 452 U.S. 105 (1981) (No. 79-1213), 1980 U.S. Ct. Briefs LEXIS 2193.


128. Brief of International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, as Amicus Curiae at 3-4, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185751, at *3-4 (listing other cases challenging similar insurance policies filed by UE and groups of woman workers and listing UE’s efforts to achieve coverage for pregnancy-related health needs at the bargaining table).


contributions to a pension fund than their male counterparts.\textsuperscript{131} And the union in \textit{UAW v. Johnson Controls, Inc.}, working with a coalition of advocacy groups,\textsuperscript{132} prevailed in its challenge to an employer policy precluding women who could become pregnant from working at jobs involving potential lead exposure.\textsuperscript{133} Unions’ frequent litigation of sex discrimination cases continues to this day.\textsuperscript{134} In addition, unions have filed proemployee briefs in cases involving other antidiscrimination statutes, such as the Americans with Disabilities Act.\textsuperscript{135}

Finally, the AFL-CIO, Change to Win, and individual labor unions filed briefs in both \textit{United States v. Windsor} and \textit{Hollingsworth v. Perry}, cases concerning the constitutionality of the federal Defense
of Marriage Act and the California constitutional amendment limiting marriage to unions consisting of one man and one woman.\textsuperscript{136} In both briefs, the unions and federations highlighted a list of work-related burdens resulting from discrimination against same-sex couples.\textsuperscript{137}

Turning from discrimination cases, unions also frequently litigate cases regarding the constitutional rights of public sector employees. These cases have arisen under the First and Fourth Amendments, as well as the Due Process Clause of the Fifth and Fourteenth Amendments. The National Treasury Employees Union (NTEU), a union that represents employees in thirty-one federal agencies,\textsuperscript{138} has been particularly active in this area, litigating both First and Fourth Amendment issues affecting employees of the federal government. For example, in \textit{United States v. NTEU}, the union successfully challenged a subsection of the Ethics in Government Act that prohibited federal employees from accepting compensation for giving speeches or writing articles.\textsuperscript{139} That case is one of a string of cases concerning the rights of public employees to exercise their First Amendment rights both in and outside the workplace, many of which featured amicus participation by the AFL-CIO and individual unions.\textsuperscript{140} Then, in \textit{NTEU v. Von Raab}, the Court rejected the union's attempt to limit drug testing of certain public employees;\textsuperscript{141} that case was decided on the same day as another case presenting a similar issue, brought by unions representing railway employees.\textsuperscript{142} These are just a few of the


\textsuperscript{137} Brief of the AFL-CIO et al. as \textit{Amici Curiae} Supporting Respondent Edith Schlain Windsor \& Suggesting Affirmance, \textit{supra} note 136, at 3-5 (describing higher costs and taxes, denial of access to health care benefits, and deprivation of governmental retirement and financial assistance as effects of discrimination against same-sex married couples); Brief of AFL-CIO \& Change to Win as \textit{Amici Curiae} Supporting Respondents \& Suggesting Affirmance, \textit{supra} note 136, at 2-4 (same).


\textsuperscript{139} 513 U.S. 454, 457, 478-80 (1995).

\textsuperscript{140} Brief of the AFL-CIO as \textit{Amicus Curiae} in Support of Respondent, \textit{supra} note 79; Brief of the AFL-CIO as \textit{Amicus Curiae} in Support of Respondent, Garcetti v. Ceballos, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1767122; Brief for the NTEU as \textit{Amicus Curiae} Supporting Respondent, Garcetti, 547 U.S. 410 (No. 04-473), 2005 WL 1749167.

\textsuperscript{141} 489 U.S. 656, 679 (1989).

2. Political Participation and Protest

A second set of issues that unions frequently litigate concerns their rights to speech and assembly, including participation in the political process through protest, petitioning, and electioneering.

As discussed above, labor activists often raised First Amendment defenses in response to early criminal prosecutions for labor-related speech and assembly. While these early defenses were unsuccessful, unions' fortunes later improved. Thus, for example, the Court first held that the First Amendment protects picketing in *Thornhill v. Alabama*, in which it overturned a local union president's criminal conviction under an antipicketing and loitering statute. *Thornhill* set the stage for the Court's later decisions robustly protecting picketing and other protests by other social movement groups, including civil rights protesters. Importantly, it was also the first case in which the Court sustained a facial challenge to a statute on overbreadth grounds, giving rise not only to a substantive right, but also a powerful and far-reaching litigation strategy.

Likewise, cases involving labor activists were critical in the development of the freedom of assembly. The Court first overturned a criminal conviction based on the freedom of assembly, simultaneously incorporating the right of assembly against the states, in *De Jonge v.*

---


144. *See* discussion *supra* Part II.A.


De Jonge was part of a Communist Party meeting advertised as “a protest against illegal raids on workers’ halls and homes and against the shooting of striking longshoremen by Portland police.” The Court further articulated the scope of this right in two subsequent labor cases: *Hague v. CIO*, in which the Court established that streets and parks were public fora, available to labor organizers who wished to educate listeners about the virtues of the relatively new NLRA, and *Thomas v. Collins*, in which the Court overturned the Texas conviction of UAW President R.J. Thomas for publicly soliciting members without a permit, announcing that restrictions on First Amendment rights must be “justified by clear public interest, threatened . . . by clear and present danger.” Like freedom of speech, freedom of assembly was soon applied to other groups, and the public forum doctrine took on a life of its own in the development of First Amendment jurisprudence.

In recent years, the labor movement has consistently filed amicus briefs in support of protestors. In some instances, this has placed the labor movement in opposition to its traditional allies. For example, in *Scheidler v. National Organization for Women, Inc.*, the AFL-CIO argued that the Hobbs Act should not reach certain antiabortion protest activities, even if they involved violence or threats of violence.

Labor’s litigation of campaign finance cases has also been controversial. In particular, labor unions and the AFL-CIO have sometimes fought campaign finance restrictions, which have generally

---

151. 307 U.S. 496, 502, 515-16 (1939). The Justices in *Hague* did not agree on the rationale for incorporating the First Amendment against the states—Justices Roberts, Black, and Hughes relied on the Privileges and Immunities Clause, while Justice Stone rested on the Due Process Clause, citing De Jonge, among other cases. Id. at 510-12, 518-19, 532.
152. 323 U.S. 516, 530 (1945).
applied to corporations and unions. For example, unions litigated some of the earliest campaign finance cases, challenging the Taft-Hartley Act’s ban on union and corporate expenditures in connection with federal elections. More recently, the AFL-CIO was one of a list of plaintiffs (alongside such varied groups as the National Rifle Association, the National Right to Life Committee, the American Civil Liberties Union (ACLU), national- and state-level political parties, and elected representatives) that challenged portions of the Bipartisan Campaign Finance Reform Act in *McConnell v. FEC*. And the AFL-CIO filed an amicus brief in support of the petitioners in *Citizens United v. FEC*, along with other campaign finance cases, challenging restrictions on electioneering communications.

On voting rights cases, by contrast, unions are generally aligned with other progressive social movement groups. Thus, for example, in 2008, labor groups were aligned with a long list of other progressive amici on the side of petitioners challenging a state voter photo identification requirement. Similarly, individual unions and the AFL-CIO filed an amicus brief in *Arizona v. Inter Tribal Council of Arizona, Inc.*, arguing that federal law preempted a state requirement that registering voters show proof of citizenship. The brief cited the unions’ “support of nationwide activities to register eligible voters

---

156. I have argued elsewhere that labor unions may be better served by seeking to uphold limits on electioneering, even if those limits cover unions themselves. See Garden, *supra* note 14, at 13-14.


161. Electioneering communications are communications that mention a candidate by name temporarily close to an election. In particular, unions have expressed concern that electioneering communications bans will make it difficult for unions to lobby incumbent politicians, even if that lobbying is unrelated to an election. See Charlotte Garden, *Unions and Campaign Finance Litigation*, 14 NEV. L.J. (forthcoming 2014).


through organized voter registration programs and [removal of] barriers to voters casting their ballots in federal, and state, elections. These cases offer a particularly clear illustration of how union litigation of democracy-related cases helps shape the infrastructure in which unions’ (and other groups’) other political activity occurs.

3. Structure of Government

In a series of cases concerning the structure of American government, labor unions have argued in favor of a strong federal government vis-à-vis the states, as well as for separation of powers principles that insulate congressional lawmaking and Executive Branch officials from outside political pressure.

As stated above, unions have litigated key federalism cases regarding the FLSA’s application to state government employees. Although unions could not bring these cases under their own names, their behind-the-scenes participation is evident. For example, Larry Gold argued *Garcia v. San Antonio Metropolitan Transit Authority* on behalf of Garcia, and the case was briefed by Gold and several other prominent labor lawyers, including the general counsel of the union that represented the transit authority’s employees. Plainly, it is usually beyond the reach of city employees to hire Supreme Court experts to represent their interests before the Supreme Court, and furthermore, the lawyers did not recoup their fees from the transit authority, despite the United States District Court for the Western District of Texas’s observation that “[Garcia] may have been instrumental in arguing the position which the Supreme Court ultimately adopted.” Likewise, albeit less successfully, Gold and other union lawyers briefed and argued two Eleventh Amendment cases about whether state employees can subject their employers to suit in order to enforce federal law: *Alden v. Maine,* another FLSA case,

---

164. *Id.* at 2.
165. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. L**A**W. 311, 313-14 (2005) (suggesting that the percentage of individuals who both fall within the putative class and consent to join the action (the “opt-in” rate) may be higher in union-backed FLSA cases than in cases without union support).
168. 527 U.S. 706 (1999) (holding that states are immune from suit in their own courts).
and *Kimel v. Florida Board of Regents*, an Age Discrimination in Employment Act (ADEA) case.

In addition, unions have filed numerous amicus briefs in other federalism cases involving the application of employee-protective federal law to states. Perhaps the most surprising of these was the union’s position in *White v. Massachusetts Council of Construction Employers, Inc.*, a dormant commerce clause challenge to a Boston mayoral executive order requiring that city-funded projects be staffed by at least half Boston residents. The AFL-CIO appeared in the case on the side of the employers, along with several employer trade groups and the Chamber of Commerce, arguing for the order to be struck down. While one might have expected local unions from surrounding localities to weigh in, the national AFL-CIO’s apparent calculation that unions had more to lose than to gain from such requirements is striking, particularly considering the strong link between urban density and union density and the relative ease of organizing workers who live near each other, compared to workers who are scattered throughout sprawling suburbs.

---


171. 460 U.S. 204, 205 n.1 (1983). The local labor requirement was added to lessen racial tensions that may have resulted from additional requirements that women and people of color be hired.


Unions have also brought key separation of powers cases. For example, unions were among the plaintiffs in both *Bowsher v. Synar*[^174] and *Clinton v. City of New York*[^175]. In both cases, unions successfully argued that the statutes at issue—the Gramm-Rudman-Hollings Act and the Line Item Veto Act, both of which decreased federal spending, harming governmental employees in the process—violated separation of powers principles.[^176] And the AFL-CIO argued in *Morrison v. Olson* that Congress’s ability to impose “good cause” limitations on the President’s removal of Executive Branch appointees was critical “to insulate executive officers entrusted with the responsibility of administering a particular statutory mandate from immediate political pressures.”[^177] As the AFL-CIO pointed out in its brief, such limitations also protected NLRB members, as well as members of the Federal Trade Commission, Federal Energy Regulatory Commission, and many others.[^178]

4. Civil Practice and Procedure

Civil procedure cases often raise social justice and court access issues. Yet, because the underlying issue is often the one that is of concern to the litigating union, it can be difficult to predict which side of the issue the union will support.

Take, for example, the seminal case of *Conley v. Gibson*, which announced the now-defunct[^179] pleading requirement that a complaint need only “set forth a claim upon which relief could be granted.”[^180] *Conley* began as a duty of fair representation case in which a group of black railway employees alleged in their complaint that their union had failed to take any action when their employer replaced them with white employees and had maintained segregated local unions.[^181] In response, the union argued for an interpretation of the Federal Rules of Civil Procedure that would have required the employees to set out detailed factual allegations in their complaint—a position that would have


[^176]: *id* at 420-25; *id* at 449-53 (Kennedy, J., concurring); *Bowsher*, 478 U.S. at 717-19, 722-27.


[^178]: *id* at 20.

[^179]: *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).


[^181]: *id* at 42-43.
made it more difficult for plaintiffs to survive motions to dismiss. More recently, the union defendant in *Devlin v. Scardelletti* also sought to limit court access by precluding a class member-objector from appealing the district court's approval of a settlement agreement in an ERISA case. In contrast, unions have sought to facilitate access to the civil justice system when they or their members are plaintiffs suing employers, as in cases discussed above, in which unions sought to appear on behalf of their members under principles of associational standing.

In the amicus context, however, unions have regularly sought to enlarge court access for plaintiffs. Thus, the Service Employees International Union (SEIU) and AFL-CIO recently argued in *Rent-A-Center, West, Inc. v. Jackson* that employees should be entitled to have courts decide whether arbitration agreements signed as a condition of employment are unconscionable. Likewise, both labor federations and the United Food and Commercial Workers (UFCW)—a frequent Wal-Mart opponent outside of the courts—argued in *Wal-Mart Stores, Inc. v. Dukes* in favor of a relatively relaxed view of the "commonality" requirement of the Federal Rules of Civil Procedure. Finally, unions have also argued against the expansion of removal jurisdiction (and therefore in favor of plaintiffs' right to have their cases heard in plaintiff-friendly state courts) and requirements that would-be appellants post bonds before proceeding with appeals.

183. 536 U.S. 1, 4 (2002) (concerning the legality of a pension plan's decision to eliminate cost of living adjustments for covered active workers but not retirees).
184. See supra note 55 and accompanying text.
186. See, e.g., *Warehouse Workers Deliver 20,000 Signatures to Bay Area Walmart Board Members*, UFCW (Mar. 1, 2013), http://www.ufcw.org/2013/03/01/warehouse-workers-deliver-20000-signatures-to-bay-area-walmart-board-members/ (describing UFCW efforts to gather signatures petitioning the working conditions in Wal-Mart's supply chain).
In recent years, then, unions have mostly argued in favor of expanding access to courts and counsel, and this advocacy has most often occurred in cases of substantive importance to the labor movement. However, because unions are also sometimes named as defendants in lawsuits, they have at other times made arguments that would limit court access for plaintiffs.

5. Community Concerns

Unions have participated in a significant number of cases raising social justice concerns of importance to their members, as well as to similarly situated nonmembers. For example, the AFL-CIO has drafted amicus briefs supporting laws designed to ensure an adequate supply of affordable housing and health care and to protect the procedural due process rights of government benefits recipients. It has also focused on education and immigration, two examples that I describe in more detail in the remainder of this Subpart.

Unions have participated in relatively few immigration cases before the Supreme Court, but the cases in which they have participated reveal an evolving relationship to immigrant communities. The source of this ambivalence is the perceived effect of immigrant workers on wage rates: a ready supply of workers from outside the country can drive down wages, and further, undocumented workers are especially vulnerable to violations of their workplace rights, meaning

190. See discussion infra Part III.A.
193. Brief for the AFL-CIO as Amicus Curiae at 4-7, Califano v. Yamasaki, 442 U.S. 682 (1979) (No. 77-1511), 1979 WL 199673, at *4-7 (advocating that social security beneficiaries be entitled to request a hearing before the government begins recoupment proceedings); Brief for the AFL-CIO, & for the Plaintiffs in Green, et al. v. Weinberger, et al. (D.D.C. No. 2219-73) as Amici Curiae at 23, Mathews v. Eldridge, 424 U.S. 319 (1976) (No. 74-204), 1975 WL 173413, at *23 (arguing that disability recipients should be entitled to a pretermination hearing); Motion for Leave To File a Brief as Amicus Curiae & Brief for the AFL-CIO as Amicus Curiae at 18-20, Ind. Emp't Sec. Div. v. Burney, 409 U.S. 540 (1973) (No. 71-1119), 1972 WL 135822, at *18-20 (arguing state law unemployment compensation termination procedures were inadequate because of the absence of a pretermination hearing); Brief for the AFL-CIO as Amicus Curiae, Cal. Dep't of Human Res. Dev. v. Java, 402 U.S. 121 (1971) (No. 507), 1971 WL 133378 (arguing the California procedure for appealing an award of unemployment benefits impermissibly burdens the unemployed).
that statutory protections may not be sufficient to keep wages up and maintain improved working conditions. These tensions were on display in *Saxbe v. Bustos*, a 1974 case brought by the United Farm Workers (UFW) Organizing Committee to challenge the practice of allowing "alien commuters"—those who work in the United States but commute back to homes in Canada or Mexico on a daily or seasonal basis—to be treated as lawful permanent residents.\(^\text{194}\) The AFL-CIO's amicus brief argued:

> Commuters are a major causitive [sic] factor of the adverse situation facing domestic workers in border areas. For example, a 1961 Department of Labor survey of Laredo and El Paso, Texas showed that "a large number of unemployed American workers had the same occupational skills as the employed alien commuters." In one instance two garment firms employed 88 commuters as sewing machine operators. At this same time, the files of the "Texas Employment Commission contained applications from 156 unemployed American workers with the same occupation." The survey also found that the wages paid by firms employing only American workers were 38% higher than those paid by firms employing alien commuters and that "there were cases where a single firm employing both commuters and Americans would pay the commuters less than the Americans similarly employed."\(^\text{195}\)

Similar concerns—but a more proactive and progressive vision—were reflected in the AFL-CIO's recent amicus brief challenging Arizona's punitive immigration law. Specifically, the federation opined that immigration law "should include an improved employment authorization mechanism and operational control of the border between the United States and Mexico as well as an opportunity for the current undocumented population to earn lawful status in the United States."\(^\text{196}\) This reflects the modern labor movement's stance that immigrant workers who are already in the country should be granted citizenship or permanent legal status in order to decrease employers' leverage over these workers.\(^\text{197}\)


\(^{195}\) Brief for the AFL-CIO as Amicus Curiae at 3, *Saxbe*, 419 U.S. 65 (Nos. 73-300, 73-480), 1974 WL 185649 (citations omitted) (quoting 115 CONG. REC. 7733, 7740 (1969)).


\(^{197}\) See, e.g., Exec. Office of the President, *Fixing Our Broken Immigration System*, WHITE HOUSE 7 (July 2013), http://www.whitehouse.gov/sites/default/files/uploads/ag-rural-report-07292013.pdf ("[F]armworkers who have been working without legal status have been performing vital and challenging work . . . while, in many cases, earning barely subsistence wages."); Press Release, *Give Us a Vote on a Path to Citizenship Now!*; UNITED FARM
Another controversial advocacy area is the legality of affirmative action in education. Unions' advocacy in the area of race and education goes back decades. For example, the CIO argued an English-only education statute was unconstitutional in *Stainback v. Mo Hock Ke Lok Po*[^198] and against segregation in *Brown v. Board of Education*,[^199] and then the National Education Association argued for strong remedies to fight school segregation in *Swann v. Charlotte-Mecklenburg Board of Education.*[^200] Around the same time, unions also argued that state educational funding mechanisms that resulted in dramatically different per-pupil expenditures in different school districts were unconstitutional, though that argument was rejected by the Supreme Court without even holding argument.[^201]

More recently, labor federations and teachers' unions have argued that affirmative action policies in education satisfy strict scrutiny because "opportunities for students to interact with their peers from other races in the educational process—opportunities that are fostered by [affirmative action] policies...—have substantial, positive impacts that make them better citizens in our democracy and in the workplace."[^202] This argument tracks similar arguments made by unions in *Parents Involved in Community Schools v. Seattle School District No. 1,*[^203] and *Grutter v. Bollinger.*[^204] However, this is not to say that

[^202]: Brief Amicus Curiae of the National Education Ass'n, et al., in Support of Respondents at 1 & n.2, 3, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) 2012 WL 3540398, at *1 & n.2, *3 (brief of the National Education Association; twenty-seven state affiliates; the AFL-CIO; the American Federation of Teachers; the American Federation of State, County & Municipal Employees; the SEIU; and the People for the American Way Foundation).
[^203]: Brief Amicus Curiae of the National Education Ass'n, et al., in Support of Respondents at 8, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2927085, at *8 ("Racial classifications continue to
labor unions and federations have always argued in favor of the legality of affirmative action in education: one much earlier exception came in DeFunis v. Odegaard,\textsuperscript{205} where the AFL-CIO opposed (though the National Education Association supported)\textsuperscript{206} the University of Washington's program of affirmative action in law school admissions—a strategy that the state attributed to the AFL-CIO's desire to "achieve reversal of Courts of Appeals' decisions upholding affirmative action programs in the construction trades."\textsuperscript{207}

These two examples reveal shifting priorities over time, but also highlight that the current American labor movement is generally a strong ally of other progressive groups on issues involving race.

6. Industry-Specific Litigation

Finally, unions sometimes litigate issues of importance to the specific industries in which unionized workers are employed. While this is a smaller category than the others discussed herein, it nonetheless covers a range of subjects. One particularly high profile—if idiosyncratic—example is the Major League Baseball Players Association's encouragement and funding of Curt Flood's failed attempt to invalidate professional baseball's reserve system on antitrust grounds.\textsuperscript{208} While Flood lost, his case "heightened awareness among

---

\textsuperscript{205} Brief Amicus Curiae of AFL-CIO in Support of Respondents at 2, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 536743, at *2 (arguing that "the challenged policies will reduce employment discrimination" and that reducing employment discrimination is a compelling state interest).


\textsuperscript{207} Brief of the National Organization for Women Legal Defense & Education Fund, Inc., & the National Education Ass'n as Amici Curiae, DeFunis, 416 U.S. 312 (No. 73-235), 1974 WL 185631.

\textsuperscript{208} Brief of Respondents in Opposition to Amicus Curiae Briefs of the Anti-Defamation League of B'nai B'rith & the AFL-CIO at 4, DeFunis, 416 U.S. 312 (No. 73-235), 1974 WL 185628, at *4.

his fellow players to the point that they too were willing to fight over the issue” and helped lead owners to agree to a system of grievance arbitration.209

Similarly unusual from the perspective of the labor movement as a whole was the involvement of National Writers Union then-president Jonathan Tasini210 in a case in which the Court rejected publishers’ claims that they could reprint articles in databases without the permission of their freelance authors.211 Before that, the journalist involved in Bartnicki v. Vopper also won his case,212 though there, the union was on the other side; the Bartnicki Court held that the First Amendment protected the disclosure of an illegally recorded union negotiator’s phone call, a copy of which had been anonymously delivered to Vopper, a radio commentator.213

Unions also litigate issues that affect the viability of the industries in which they operate, such as regulatory or trade issues.214 This type of litigation yields great potential for collaboration (and conflict) with other social movements and within the union movement itself. For example, in Department of Transportation v. Public Citizen, the International Brotherhood of Teamsters and environmental groups jointly sought to compel the Federal Motor Carrier Safety Administration (FMCSA) to evaluate and regulate the impact of cross-border operations of Mexico-domiciled trucking companies under the National Environmental Policy Act and the Clean Air Act.215 While the Teamsters may well care genuinely about environmental issues,216 it

213. Id. at 535.
214. E.g., Air Courier Conference of Am. v. Am. Postal Workers Union, 498 U.S. 517, 519 (1991) (determining whether a union had standing to challenge the Postal Service’s decision to allow private couriers to engage in international remailing).
215. 541 U.S. 752, 756 (2004). That suit challenged a pilot program commenced by FMCSA under President George W. Bush, which was subsequently ended.
216. In a recent press release addressing the same issue, Teamsters President Jim Hoffa observed, “FMCSA [sic] is recklessly ignoring the true environmental impact Mexican trucks will have if permitted to travel without restrictions throughout our country.” Teamsters, Sierra Club: FMCSA Fails To Protect Environment from Mexican Trucks, TEAMSTERS (Aug. 15, 2011), http://www.teamsters.org/content/teamsters-sierra-club-fmcsa-fails-protect-environment-mexican-trucks. Likewise, the California Teamsters vocally opposed an energy industry-backed proposal to delay enforcement of the Global Warming Solutions Act. Margot Roosevelt, Global Warming Ballot Initiative: Teamsters and Cities Weigh In, L.A.
would strain credibility to suggest that the union was not also considering the effects of increased competition and resulting downward pressure on wages that would occur if Mexican-domiciled trucking companies could compete freely with U.S.-based companies.217

This Part has outlined several categories of cases in which labor unions have litigated in the Supreme Court. In the following Part, I will turn to the various substantive positions that unions take in these cases. In particular, I will explore characteristics of labor unions that might cause them to support particular substantive positions in litigation that are either similar to or divergent from other institutional litigants.

III. Unions' Perspectives in Litigation

*Our labor unions are not narrow, self-seeking groups.*218

It goes nearly without saying that parties and attorneys are not interchangeable—the identities of each have tremendous influence on the direction a case takes.219 Under the American adversarial style of litigation, parties and attorneys constantly make substantive and procedural choices that control a case's direction.220 Parties will decide
whether to litigate at all and what substantive goals to pursue; they will also make certain decisions about litigation strategy. At a more granular level, attorneys decide to articulate arguments in particular ways, to advance or downplay particular legal theories, and even to cite certain cases. And when an advocacy organization or union participates in a case, it will undoubtedly attempt to make these decisions so as best to advance the group's cause, to win the case, but also to win via a decision written in a way that best protects the group's larger interests.

These dynamics, coupled with the extent of unions' participation in a wide range of non-labor law cases, raise questions about what factors shape unions' litigation positions. This Part begins to answer those questions by exploring three factors that appear to have influenced unions' positions in particular cases.

A. Unions as Plaintiffs and Defendants

"Which side are you on?"

In recent decades, labor unions and federations have increasingly modeled themselves as members of a social justice-oriented movement, rather than as a collection of economic actors dedicated to

serves a legitimizing function, creating an impression of fairness that may lead to societal acceptance of court judgments").

221. For example, in his important article Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, Derrick Bell argued that some NAACP LDF attorneys prioritized the views of clients who favored busing as a remedy in school desegregation cases over clients who favored other strategies for improving their children's education, such as winning increased funding for their existing schools. Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976). Undoubtedly, one could make a similar argument with respect to other impact litigators. Accordingly, the purpose of this Part is not to suggest that litigants other than unions might bring a more "neutral" perspective to litigation. Rather, it is to explore the particular lenses through which labor unions might view their non-labor law cases.

222. Many of these decisions occur once a case has reached the Supreme Court. But there are also antecedent decisions that can affect the likelihood of a case reaching the Supreme Court in the first place. For example, by paying for others' litigation, unions have direct influence over what cases are brought, and the existence of free representation can alleviate pressure to settle attributable to mounting litigation costs, allowing a party to litigate a case to judgment or to pursue an appeal or a petition for certiorari.

223. "This line is said to come from a song written by Florence Reese in support of a miners strike in 1932. The song goes: 'They say in Harlan County, there ain't no neutrals there, you'll either be a union man, or a thug for J.H. Blair. Which side are you on? Which side are you on?"' Robert J. Rabin, The Role of Government in Regulating the Workplace, 13 LAB. LAW. 1, 5 n.30 (1997).
acquiring financial rewards for members. This move away from “bread and butter” unionism is reflected in labor’s growing invocation of social justice issues during organizing campaigns. But when unions go to court, do they litigate like social movements, or are employers the better analogy? And what barriers face unions seeking to achieve social justice-oriented change through litigation?

One key difference between unions and other social movement litigators is the greater likelihood that a union will be dragged into court against its will as a defendant. In this Subpart, I first explore the structural reasons for this difference and then turn to some of its likely effects.

Social movement organizations are today rarely hailed into court as defendants. While it is not inconceivable that groups like the National Association for the Advancement of Colored People Legal Defense Fund (NAACP LDF), the American Civil Liberties Union (ACLU), or Public Citizen could be sued—for example, a business that has come in for criticism could file a defamation case, or a mistreated employee could bring suit under Title VII—such cases are relatively uncommon. Further, to the extent lawsuits against these groups arise directly out of the groups’ core advocacy efforts, as when a target of protest resorts to the courts for relief, the lawsuit might galvanize the group’s own constituency.

225. Id. at 1785.
226. There is some question whether litigation “meets the definition of a social movement activity.” Catherine Albiston, The Dark Side of Litigation as a Social Movement Strategy, 96 IOWA L. REV. BULL. 61, 76 (2011) (describing the skepticism that some scholars express toward this view). However, that question is beyond the scope of this Article; I treat litigation pursued by social movement groups as social movement activity.
228. These examples should be differentiated from those in which a social movement group deliberately engages in conduct designed to elicit a lawsuit. For example, when the Thomas More Law Center “searched for a school district willing to adopt an alternative curriculum [that taught “intelligent design” theories], knowing it would lead to litigation,” it was choosing the case that it would litigate just as much as if it were drafting and filing a complaint. Douglas NeJaime, Winning Through Losing, 96 IOWA L. REV. 941, 979 (2011).
Instead, many of the cases in which these groups participate are those that they have affirmatively chosen and often even designed from the ground up. 230 Consider Public Citizen founder Ralph Nader’s characterization of a “public interest lawyer” as “a lawyer without clients,” one “whose goal would be . . . advancing the public good.” 231 To be sure, Article III’s “case or controversy” requirement 232 means Nader’s public interest lawyer does not operate literally without clients. However, the lawyer can decide, in consultation with other professional advocates and subject matter experts, to target a particular issue and then set about locating an appropriate and willing client. Once located, the client would direct at least some aspects of the litigation, 233 with clients who are themselves advocacy groups or subject matter experts likely playing a more significant role. 234 However, the initial decision to bring the case would have been driven by movement goals, and a lawyer working in the Ralph Nader model would refuse to file a proposed lawsuit that seemed to carry significant potential downsides. This does not mean that a refused potential client will be unable to find another attorney to file a complaint, but the advocacy group will have preserved its name, credibility, and resources for a preferred case.

In contrast, unions are frequent defendants. Unions may be sued for failing to discharge the duty of fair representation that they owe to members 235 or for violating the statutory rights of members or their

230. The NAACP LDF’s school desegregation campaign is probably the paradigmatic example of controlled and disciplined litigation strategy designed by movement lawyers. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994). This is not to say that the NAACP was the only organization to attempt to pursue a detailed litigation plan in pursuit of social change. For example, one feminist campaigner recommended the development of a litigation strategy “to litigate women’s rights under the Fourteenth Amendment,” which “sought to emulate the success of organizations like the NAACP Legal Defense Fund in winning rights through organized litigation.” See, e.g., Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 CALIF. L. REV. 755, 763-64 (2004). However, disagreement between factions of the women’s movement about whether to pursue a Fourteenth Amendment-based litigation strategy, passage of the Equal Rights Amendment, or both persisted for decades. Id. at 756-69.


233. See MODEL RULES OF PROF’L CONDUCT R. 1.2 (2013); cf. Bell, supra note 221 (discussing the impact of clients’ views on litigation strategies on school desegregation).


own employees. Likewise, they are often sued by employers, government entities, and even other unions on a variety of theories. This litigation can create precedent on issues that the union would not have affirmatively chosen to pursue and that sometimes call for litigation positions that advance a union’s chances in court, even if it would otherwise reject those positions outside of litigation. Avoiding this conundrum means weakening one’s litigation position—the disadvantages of which are obvious—or settling. Settlement bears its own risks, though, including the possibility of demonstrating to other potential plaintiffs that filing a complaint will result in early capitulation.

An array of reasons accounts for this difference between unions and other social movement litigators. First, there is the likelihood of bad publicity associated with suing a venerated social movement group, along with the possibility that the complaint will be dismissed (and attorneys’ fees assessed) under an anti-SLAPP statute. Second, various legal principles protect advocacy groups from liability arising from their work. Third, social movement groups other than labor unions do not owe their members a statutory duty of fair representation, and they are not statutorily required to choose their leadership democratically. Relatedly, when a majority of employees in a bargaining unit vote to be represented by a union, the union becomes

237. See Catherine Albiston, The Rule of Law and the Litigation Process: The Paradox of Losing by Winning, 33 LAW & SOC’Y REV. 869, 877 (1999) (noting that in the context of Family and Medical Leave Act cases, repeat employer players may choose to “settle cases they expect to lose and litigate those they expect to win” in order to cultivate desirable precedent).

One recent example in which a union attempted to force a settlement in order to avoid adverse Supreme Court precedent came in Knox v. SEIU, Local 1000, 132 S. Ct. 2277 (2012). In that case, the local union defendant attempted—unsuccessfully—to moot the case by giving the plaintiff everything that it could have achieved through continued litigation. Id. at 2287-88. However, it took this step too late—after the case had already reached the merits stage in the Supreme Court. Counsel for the local union stated at oral argument that the move was taken because “the officers of the union . . . thought about the situation and came to the realization that they have no stake in the procedures that are at issue here.” Transcript of Oral Argument at 26, Knox, 132 S. Ct. 2277 (No. 10-1121).

238. See Shannon Hartzler, Note, Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant, 41 VAL. U. L. REV. 1235, 1242 (2007) (“Common features of anti-SLAPP laws include a mechanism for early procedural review and a mandatory award of attorney’s fees for a party whose motion to dismiss under the statute is successful.”).
239. E.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that the First Amendment protects secondary consumer boycotts by civil rights groups); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (holding that the NAACP was entitled to keep its membership list confidential).
the bargaining representative of all the employees in the unit, including those employees who do not want the representation. These employees may be particularly unlikely to give the union the "benefit of the doubt" when it comes to deciding whether to sue. Fourth, there is the sheer number and size of labor unions to consider—there are simply more opportunities for litigation. Finally, labor unions are involved in their members' lives in a far more direct way than most advocacy groups, in that they are partially responsible for setting the terms and conditions of their members' employment. Thus, whereas disappointment in the actions of a group like the ACLU may lead to membership resignation, disappointment with one's union is more likely to lead to litigation.

Significantly, then, labor unions have less control than other social movement litigators over the cases in which they become involved. Moreover, at any given time, two unions litigating different cases may take opposing litigation positions on an issue. For example, in the employment discrimination context, unions or union-funded attorneys often prosecute suits alleging employer discrimination; but at the same time, unions are sometimes named as defendants in discrimination cases. By the time a case has reached the courts of appeals or the Supreme Court, international unions and labor federations can play a larger role in attempting to rationalize litigation positions (such as by urging settlement), but the earlier litigation cannot be erased, potentially undermining union credibility. This may be so particularly in a context like employment discrimination, where historical incidents of serious race discrimination by the labor movement are well-known.

However, just as the control exercised by other movements over litigation strategy should not be exaggerated, the extent to which unions' choice of litigation vehicle is constrained by exigency and circumstance should not be overstated. In at least some instances, unions, like other social movement groups, plan litigation from the ground up. In fact, Michael Gottesman, describing his early years in practice as a labor lawyer, suggests that was a regular occurrence at his firm:

240. 29 U.S.C. § 159(a) (2006). In about half of states, this influence extends to the authority to require that even the unwilling pay fees to the union. Even in "right to work" states, labor unions bargain and process grievances on behalf of the unwilling.

We had a mandate from our clients to [shape the law so that it would benefit the labor movement], and thus did not have to compromise the long view for immediate tactical victories. Ideas percolated that could not be deployed in the case under discussion, but they would be "filed away," to be invoked in future cases that came down the pipeline—cases that we would then be on the lookout to find.  

For example, take *UAW v. Johnson Controls*. There, union lawyers framed and filed a complaint challenging the employer's "fetal protection policy," which excluded women who were pregnant or capable of becoming pregnant from jobs that involved exposure to lead. The union not only brought the case, but also ensured that it was the first named plaintiff, so that its participation would be evident to anyone looking at the case caption. Among the other named plaintiffs were both male and female employees—women who had been excluded from well-paying jobs under the employer's policy or had undergone sterilization to avoid such exclusion, and men who had been denied transfers to other departments, which they requested in order to avoid lead exposure because of threats to their own reproductive health. The class definition included "all past, present and future production and maintenance employees' in United Auto Workers bargaining units at nine of Johnson Controls' plants 'who have been and continue to be affected by [the employer's] Fetal Protection Policy implemented in 1982.'" This class definition, along with the selection of the named plaintiffs, made clear to the courts that the issue was important to both male and female workers. Additionally, it also had potential to build solidarity among bargaining unit members by showing why the employer's policy was not simply a "women's issue."

Even when they are named as defendants—and thus dragged into court unwillingly—unions can sometimes nonetheless shape a litigation strategy that pursues labor movement goals beyond just winning in court. This may be easy to do when the plaintiff is a traditional adversary of labor—an employer, for instance, whose behavior can provide a flash point for advocacy in and out of court. Far more challenging are cases in which unions are sued by bargaining

245. *Id.*  
246. *Id.* at 192-93 (quoting UAW v. Johnson Controls, Inc., 680 F. Supp. 309, 310 (E.D. Wis. 1988) (alteration in original)).
unit members. Take, for example, *International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, in which Dortha Guy, a black employee, sued her employer and union for racial discrimination after she was fired.\(^{247}\) The United States District Court for the Western District of Tennessee dismissed the case on timeliness grounds,\(^{248}\) refusing to toll the time in which Guy was required to file a charge with the Equal Employment Opportunity Commission (EEOC) while the union grievance proceeding was pending.\(^{249}\) After Guy's loss in the district court, she and the union evidently managed to resolve their differences, because the union switched sides to appeal the timeliness issue alongside Guy in a parallel case. The United States Court of Appeals for the Sixth Circuit affirmed the district court, and the Supreme Court granted certiorari in both appeals, consolidating them for argument. Before the Supreme Court, union lawyer Winn Newman\(^{250}\) and NAACP lawyers representing Guy\(^{251}\) successfully convinced all nine Justices that an amendment to Title VII that provided a longer time to file a charge with the EEOC applied retroactively.\(^{252}\) Thus, the union was able to turn a case that began in a defensive posture into an opportunity to advocate for stronger federal court remedies for workers.

Finally, unions and labor federations sometimes signal through their amicus advocacy that positions taken by individual unions are not representative of the views of the larger labor movement. For example, in *McDonald v. Santa Fe Trail Transportation Co.*, the AFL-CIO flatly disagreed with both positions taken by the defendant-respondent local union. Whereas that union argued that white employees were not covered by 42 U.S.C. § 1981 and that Title VII does not protect employees who are accused of stealing from their employers,\(^{253}\) the AFL-CIO argued the opposite.\(^{254}\) Less obvious was


\(^{248}\) *Robbins & Myers*, 429 U.S. at 232-33.

\(^{249}\) *Guy*, 1974 WL 212, at *3.

\(^{250}\) *Robbins & Myers*, 429 U.S. at 230 (listing counsel). Winn Newman has been called the “grandfather” of pay equity litigation. *McCann, supra* note 127, at 61.


\(^{252}\) *Robbins & Myers*, 429 U.S. at 241.

Local 28 of the Sheet Metal Workers’ International Ass’n v. EEOC, in which the AFL-CIO simply remained silent—a stance that itself suggests disagreement, given how rarely the AFL-CIO fails to file an amicus brief in support of a labor union litigant in the Supreme Court.255

Thus, although labor unions enjoy somewhat less ability to shape their litigation agendas than do other social movement groups, labor unions still successfully pursue strategies to bring their litigation strategies in particular cases into line with the larger interests of workers.

B. Labor Solidarity and the Possibility of Divided Loyalties

“An injury to one is an injury to all.”256

In this Subpart, I explore how the fact that labor unions are subject to majority rule—they are elected and then face the threat of decertification by their members, and their officers are subject to regular elections257—might affect the positions they take in court. In other words, given that litigation usually involves winners and losers, how can unions seek to preserve solidarity if union members are divided? And how do unions navigate members’ divergent views when shaping their own stances before the Supreme Court?

There are at least four possible approaches available to a union or federation facing such a scenario. First, it might try to avoid any litigation that might divide members. Second, it might simply adopt the position taken by, or in the apparent interest of, a majority of represented workers. Third, it might try to find a “third way” solution that protects the interests of all union members, and instead imposes

254. Motion for Leave To File Brief & Brief for the AFL-CIO as Amicus Curiae, supra note 116, at 5-6.

255. 478 U.S. 421 (1986). However, two local unions, each of whom was “presently involved in litigation concerning the legitimacy of court-ordered or governmentally imposed racial quotas in the employment context” filed a shared amicus brief in support of Local 28. Brief of Local 542, International Union of Operating Engineers & Local 36, International Ass’n of Firefighters, AFL-CIO, as Amici Curiae in Support of Petitioners at 1, Local 28, 478 U.S. 421 (Nos. 84-1656, 84-1999), 1985 WL 670076, at *1. In the next Subpart, I discuss another situation in which the AFL-CIO may not participate in Supreme Court litigation involving unions: cases in which union members are among both the plaintiffs and the defendants. However, that was not the situation in Local 28.

256. This is an old Knights of Labor saying. Eric Tucker, Who’s Running the Road? Street Railway Strikes and the Problem of Constructing a Liberal Capitalist Order in Canada, 1886-1914, 35 LAW & SOC. INQUIRY 451, 455 (2010).

257. 29 U.S.C. § 481(a) (2006) (“Every . . . labor organization . . . shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.”).
costs on outsiders, like employers or unrepresented workers. And fourth, it might adopt a position in the interest of a minority of represented workers, either after persuading the rest of the membership or by simply ignoring their views and instead allowing union lawyers or officers to shape litigation positions. In fact, unions’ and federations’ record before the Supreme Court reveals examples of each of these strategies at work.

As discussed in the preceding Subpart, unions cannot always avoid unwanted litigation. However, where litigation is optional—for example, amicus practice—unions and federations sometimes simply avoid taking positions in cases involving union members on each side, even where a union is inextricably linked to the facts of the case. This occurred in *Ricci v. DeStefano*, a case challenging New Haven officials’ decision to disregard the racially skewed results of a test that was to be used to determine which firefighters would be promoted to lieutenant and captain. All the test takers were represented by the International Association of Firefighters Local 825, and the weighting of the test—which both an expert and representatives of a black firefighters’ association said could have produced an adverse impact—was negotiated by the union and mandated by a collective bargaining agreement. Furthermore, the local union had supported the white test takers who wanted to have the test results certified by filing a lawsuit of its own against the city. (That suit was later dismissed in light of the district court’s concerns about the union’s ability to litigate on behalf of its members, given that “the interests of a significant subset of the Union’s members are diametrically opposed to the interests of another significant subset.”) In light of all this, the fact that neither the International Association of Firefighters (IAFF) nor the AFL-CIO, of which IAFF is an affiliate, filed a Supreme Court amicus brief creates the inescapable appearance that these bodies

---

261. *Id.* at 2.
263. *Id.* at *2-4* (denying the union’s associational standing because of the need for individual firefighters to participate in the litigation, in light of the conflict between union members).
simply concluded that silence was preferable to taking a position that might appear to favor one group of union members over another.\footnote{264}{There were, however, other labor voices in the case; associations of African American and Hispanic firefighters filed briefs supporting New Haven, and other groups of firefighters and an association of police unions filed briefs in support of the white firefighters. Amicus Curiae Brief of Bridgeport Firefighters for Merit Employment, Inc. in Support of Petitioners, \textit{Ricci}, 557 U.S. 557 (Nos. 07-1428, 08-328), 2009 WL 526198; Amicus Brief of the Concerned American Firefighters Ass'n, Philadelphia Chapter, in Support of Petitioners, \textit{Ricci}, 557 U.S. 557 (Nos. 07-1428, 08-328), 2009 WL 507010; Brief of the National Ass'n of Police Organizations as Amici Curiae in Support of Petitioners, \textit{Ricci}, 557 U.S. 557 (Nos. 07-1428, 08-328), 2009 WL 2809358.}

A closely related strategy was pursued by the union in \textit{East Texas Motor Freight System, Inc. v. Rodriguez}.\footnote{265}{431 U.S. 395 (1977).} There, East Texas Motor Freight and its employees' representative, Teamsters Local 657, were both sued by truck drivers of Mexican ancestry who were disadvantaged by collectively bargained seniority rules that made it difficult for "city drivers" to transfer to better-paid "line driver" positions.\footnote{266}{\textit{Id.} at 397-98.} As a named defendant, the union argued that it simply had no ability to change the seniority provisions:

The reply of Petitioner Local 657 is that it is not responsible for the hiring practices of the employers, and that in the applicable collective bargaining proceedings, it has followed the instructions of its affected membership relative to the negotiation of their contractual rights to seniority and transfer between jobs . . . .

This Petitioner also says that it cannot singularly make changes in National and Regional collective bargaining agreements that would affect other local unions and their members, because multi-employer, multi-union agreements, as regulated by the National Labor Relations Act, require the concurrence of the employer and other local unions involved . . . .\footnote{267}{Brief for the Petitioner Teamsters Local Union 657 at 3-4, \textit{Rodriguez}, 431 U.S. 395 (No. 75-651), 1976 WL 194248, at *3-4 (citations omitted).}

That union's decision to undertake the legal equivalent of throwing up its hands stands in contrast to far more proactive efforts undertaken by other unions to manage potential rank-and-file disagreement about litigation positions, including in cases involving discrimination and seniority systems. Before discussing these union strategies, it is useful first to describe briefly the operation of union-negotiated seniority systems and explain why they have the potential to divide union members.
Negotiated seniority protections are generally facially neutral and constructed without discriminatory intent. These systems can govern competitive seniority—which “determines priorities for job security, promotion, transfer, prerogative in scheduling, training opportunities and ‘entitlement[] to . . . scarce benefits among competing employees’”—and benefits seniority, which determines “entitlement to certain types of fringe benefits without regard to the status of other employees.”

Even well-intentioned systems of competitive seniority can serve to reinforce discriminatory hiring and promotion decisions by making it impossible for discrimination victims to “catch up” to employees hired or promoted before them—that is, unless a court orders retroactive competitive seniority. In such a scenario, then, unions represent (in bargaining) both discrimination victims who are morally and legally entitled to make-whole remedies and the workers who will be displaced even if they played no active role in (or did not even know about) the earlier discrimination and who will feel that they have a vested right to their existing working conditions. Complicating the picture, unions have a strong interest in protecting the integrity of hard-won seniority systems, which provide valuable protections for union members who have invested much in their workplaces and who command relatively high wages because of their many years of service. And the most senior workers will often be the most influential within their unions, with less senior workers most likely to

268. See, e.g., Brief for Petitioner International Brotherhood of Teamsters at 27-28, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (Nos. 75-636, 75-672), 1976 WL 181352, at *27-28 (describing the development of the seniority system at issue in that case). Many seniority systems qualify for the Civil Rights Act’s carve out for “bona fide seniority or merit system[s].” 42 U.S.C. § 2000e-2(h) (2006) (“Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .”).


270. Martha R. Mahoney, *What’s Left of Solidarity? Reflections on Law, Race, and Labor History*, 57 BUFF. L. REV. 1515, 1571 (2009) (“When race discrimination at work became illegal in the 1960s, the previous legal regime had left minority workers with disproportionately low seniority and union leadership disproportionately white.”).

271. See Zimmer, supra note 269, at 80 (“Labor has been the strongest proponent of seniority.”).

272. Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, 72 MINN. L. REV. 1379, 1380 (1988) (“Because [the most senior] workers tend to form the core of union...
be disadvantaged in the event of seniority integration.\textsuperscript{273} Thus, the most influential members of a bargaining unit may feel that they have a less personal stake in the effect of discrimination remedies, but also be very committed to the seniority system for other reasons.

As a result, unions that seek both to promote nondiscriminatory workplaces and preserve seniority protections face a conflict in the event of an allegation of systemic discrimination. Despite this, unions have generally argued that Title VII remedies should include make-whole seniority, though they have also argued for limits on who is eligible for this remedy.\textsuperscript{274} For example, in \textit{Franks v. Bowman Transportation Co.},\textsuperscript{275} in which the Court held that Title VII called for retroactive seniority to be awarded to black truck drivers who had been refused line driver jobs, the Steelworkers union representing the employees took the position that drivers who could prove they had been discriminated against (but not those who could not) were entitled to a make-whole remedy of retroactive seniority.\textsuperscript{276} In so arguing, the union forcefully made the case for the importance of seniority, arguing that an employee hired in 1972 instead of 1970 would have an "inferior" career involving fewer fringe benefits (such as vacation days and insurance benefits), less protection from layoffs, fewer promotional opportunities, and less entitlement to desired shifts or particular vacation dates.\textsuperscript{277} The union also argued that a make-whole retroactive seniority remedy existed in other contexts, such as when employees were laid off in violation of the collective bargaining agreement.\textsuperscript{278} Thus, the union framed its argument in terms of the integrity of union values that benefitted all union members, implicitly making the case that an illegitimate seniority system—one that was infected with race discrimination—was a weak seniority system.

\begin{footnotesize}
\textsuperscript{273} Humphrey v. Moore, 375 U.S. 335, 346-47 (1964) ("[Competitive status] [s]eniority [is] of overriding importance, and one of its major functions is to determine who gets or who keeps an available job.").

\textsuperscript{274} E.g., \textit{Zipes v. Trans World Airlines, Inc.}, 455 U.S. 385, 390-91 (1982) (noting the union argument that a make-whole remedy was available to only 30 employees and that the claims of about 400 other employees were time-barred).

\textsuperscript{275} 424 U.S. 747 (1976).

\textsuperscript{276} Brief for Respondent United Steelworkers of America, AFL-CIO, & for AFL-CIO, as Amicus Curiae at 7, \textit{Franks}, 424 U.S. 747 (No. 74-728), 1975 WL 173441, at *7.

The union distinguished these drivers from those seeking "preferential" relief, which would have benefitted plaintiffs who had not been personally discriminated against, arguing that Congress intended to permit only the former. \textit{Id.}

\textsuperscript{277} \textit{Id.} at 24-26.

\textsuperscript{278} \textit{Id.} at 26.
\end{footnotesize}
The Steelworkers union was not the only union that participated in *Franks*. UAW Local 862, which was then a party to other Title VII cases, including one in which a petition for certiorari was pending, filed an amicus brief that pursued a different strategy designed to reconcile the competing concerns of discrimination victims and union members who stood to lose relative seniority. The UAW began by characterizing the interests of both groups of workers as legitimate and understandable: the workers who had benefitted from the seniority system were “blameless citizens” who, like “wronged minorit[ies],” had “fair seniority claims.” In making that claim, the UAW focused on the fact that the employer, rather than the employees, had the discriminatory intent, arguing, “[T]he incumbent employees are in no way at fault for the employer's Title VII violation.” The UAW had good cause to be concerned about the effect of possible layoffs following seniority integration—the national unemployment rate reached 9% the year *Franks* was decided, and the auto industry had been hit especially hard. The first three months of 1975 saw 300,000 permanent or temporary layoffs in the auto industry, representing 40% of the industry’s production workforce.

The UAW’s proposed solution avoided pitting discrimination victims against workers who had unwittingly benefitted from discrimination by forcing employers to either keep both groups or else provide “front pay” to laid-off workers. That plan, which the UAW called the “front-pay save-harmless” remedy, would “require[] the wrongdoing employer to hold [incumbent workers and newly hired discriminatees] harmless from layoff losses in work reduction situations.” More specifically, the UAW proposed that “following reinstatement of discriminatees the offending employer hold harmless against layoff losses both the discriminatees and [an equal number of]
his incumbent employees hired between the discriminatees' original rejection and their ultimate hiring. The UAW devoted the remainder of its brief to explaining why the impact of the "front-pay save-harmless" scheme on employers would be relatively small, showing that in other contexts employers had found productive uses for workers whom they were required to pay regardless.

The benefits to unions and unionized workers of such a scheme are plain. For union leadership, the adoption of the plan would mean that the union could put its full weight into fighting employment discrimination without facing opposition from members fearing for their own jobs. This would be of particular importance in industries enduring economic difficulties, where minority employees are often especially vulnerable to layoffs. The scheme would also enlarge the ranks of union membership, increasing the union's power and influence within the company.

Additionally, the union may have been able to leverage the position it had taken in court—that the company owed benefits to both the job applicants against whom they had discriminated and incumbent employees—into increased solidarity between those two groups.

---

287. Id. at 4. The UAW explained its proposal in an elaborate hypothetical involving the facts of another case to which it was a party. That case involved thirty-five discriminatees who had been hired by a Ford plant in Kentucky pursuant to the district court's order. In relevant part, the union explained:

In a layoff situation of, for example, 35 persons which reaches into but not beyond the ranks of employees with seniority dates between the discriminatees' rejection of 1969 and their hiring in 1974, the first 35 persons (excluding persons hired more recently than the discriminatees) affected would be held harmless. If the remedy should go to the 35 discriminatees, they are in effect given the wage and fringe benefit protection they would have had if they had not been wrongfully rejected when they applied in 1969. If it goes to 35 incumbents, they in turn are protected against any loss caused by the grant of retroactive seniority to the discriminatees. In other words, in any contingency the discriminatees are restored fully to the job protection they would have had but for the employer's violation of their rights, without prejudicing or diminishing the earned layoff seniority of the incumbent work force.

Id. at 7 (footnote omitted).

288. Id. at 5-11.


290. Interestingly, while the UAW's plan was not adopted by the Court, the union later managed to achieve similar protections for members through negotiation. In 1984, GM agreed in union negotiations to create the "jobs bank," a program providing retraining benefits for displaced workers, as well as 95% of former wages for laid off employees who had at least one year of seniority, until a new position was found. Sharon Silke Carty, Labor Talks May Tip Toe Around Jobs Bank, USA TODAY (July 27, 2007, 1:46 PM), http://usatoday30.usatoday.com/money/autos/2007-07-23-uaw-talks-jobs-bank_N.htm; Erik de Gier, Paradise Lost Revisited: GM and the UAW in Historical Perspective, CORNELL UNIV.
other words, by making the employer the common enemy against whom both groups were seeking full employment, the union may have been able to build ties between the two groups, lessening the negative effects of perceived competition between them.291

Finally, some unions have made explicit appeals to rank-and-file solidarity in order to win support for litigation designed to eliminate discrimination. This work has sometimes played out behind the scenes, as in United Steelworkers of America v. Weber:292 There, the union initially sought the support of reluctant rank-and-file members for negotiated affirmative action plans by invoking the possibility of a future adverse court decision that would result in a remedy of the court’s own devising. The union argued that it was better for the union and employer to work out a plan to deal with the effects of past discrimination in advance, to avoid ceding control to unpredictable judges.293 To be sure, the Steelworkers’ appeal could be viewed as a somewhat cynical attempt to generate support from whites based on

---

291. In their famous work, The Robbers Cave Experiment: Intergroup Conflict and Cooperation, Muzafer Sherif and his colleagues showed that friction between two groups, which had been created through “conditions of competition and rivalry,” could be reduced if the two groups had to work together to achieve a superordinate goal. MUZAFER SHERIF ET AL., THE ROBBERS CAVE EXPERIMENT: INTERGROUP CONFLICT AND COOPERATION 198 (1988).


293. Malamud, supra note 120, at 205 (“[T]he threat of seniority lawsuits—and not ideology—that had been the leadership’s source of leverage against recalcitrant whites.”).
interest convergence. However, it occurred in the context of efforts undertaken by union leadership both in court and at the bargaining table to undo the effects of past discrimination, suggesting that even if the appeal was merely strategic, the union's leadership held a broader commitment to racial equality.

More public, but also perhaps more problematic, was the union’s statement in *International Brotherhood of Teamsters v. United States;* in a brief arguing against the expansion of the retroactive seniority principles developed in *Bowman.* “Teamsters early understood that employers played off black against white to undercut the wages and conditions the unions were attempting to establish. Accordingly, IBT unions have made special effort to organize minorities, and are color blind with respect to participation in union affairs and application of collective bargaining contracts.” In other words, unlike the Steelworkers’ approach to winning over reluctant white rank-and-file members, the Teamsters’ invocation of solidarity was deployed as a post-lawsuit defense against charges of discriminatory behavior.

In sum, unions have pursued a variety of strategies to attempt to respond to the divergent interests of members. The most promising of these in terms of promoting long-term solidarity between white workers and workers of color are those that seek to change members’ perceptions of the source of the conflict (for example, shifting their focus from competition between discrimination victims and unwitting beneficiaries of discrimination to a discriminating employer), or to persuade members either to consider social justice, or, at a minimum, take a more nuanced and strategic view of their own interests.

In the next Subpart, I turn to another concern relevant to unions’ litigation positions: whether the case supports or threatens unions’ freedom or ability to bargain.

**C. Valuing Freedom To Bargain**

*Get it through industrial organization . . .*  

294. Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 524 (1980) (arguing that school desegregation was achieved when it became pragmatically desirable to powerful white interests).


Because one primary function of unions is to bargain on behalf of groups of employees, one might expect that they are uniquely sensitive to cases that either limit the scope of their bargaining authority or else decrease their bargaining strength by undermining existing agreements. Conversely, unions may support litigation efforts that would bolster their bargaining power by mandating wages or benefits typically sought through bargaining. Indeed, unions’ Supreme Court litigation positions suggest union concern with both issues.

Unions have explicitly invoked freedom to bargain in Supreme Court briefs. For example, consider Metropolitan Life Insurance Co. v. Massachusetts, in which the Court reviewed a state law requiring that certain health insurance plans cover minimum mental health care benefits. One may expect unions to have supported this law—unions often support laws strengthening the social safety net both because of their social justice commitments and because they can increase their leverage at the bargaining table by improving workers’ alternatives to a collectively bargained agreement. Yet both the AFL-CIO and a New Hampshire-based local union opposed the law, arguing that it was preempted by ERISA. Both unions cited their desire to be free to bargain away mental health benefits (or other benefits that might be required under similar state laws) in exchange for pay or other benefits. As the AFL-CIO stated, “[S]tate laws of the type at issue here make [collective bargaining] more, rather than less, difficult by substituting for private decision-making a state-imposed requirement . . . regardless of whether the employees desire such benefits or would prefer other benefits (or higher wages) instead.”

A similar focus on freedom to bargain played out much differently in 14 Penn Plaza LLC v. Pyett. Pyett dealt with labor unions’ abilities to waive members’ rights to pursue discrimination claims in federal court and instead require them to pursue the negotiated grievance procedure, culminating with arbitration. Unlike in Metropolitan Life, the AFL-CIO and Change to Win argued that unions flatly lacked the authority to strike such a deal with employers.

299. Brief of the AFL-CIO as Amicus Curiae in Support of Appellants at 2, Metro. Life Ins. Co., 471 U.S. 724 (Nos. 84-325, 84-356), 1984 WL 565632, at *2. Similarly, the local union argued, “Such laws frustrate the ability of such plans to provide the benefits requested by their members, and increase both the cost of the plans themselves and of their administration.” Brief Amicus Curiae of the International Brotherhood of Electrical Workers Local 421 Health & Welfare Fund et al., in Support of Appellants at 2, Metro. Life Ins. Co., 471 U.S. 724 (Nos. 84-325, 84-356), 1984 WL 565644, at *2.
On closer inspection, however, the unions' reasoning in *Pyett* was entirely consistent with *Metropolitan Life*. As the federations explained:

The ADEA claims advanced by the Plaintiff-Employees in this case challenge an employment action that Local 32BJ agreed to in advance . . . . The Union only agreed to that substitution after receiving assurances that the new provider of security services would not undermine the area wage rates. Local 32BJ decided not to arbitrate the ADEA claims challenging that action based on its view that the agreement the Union had made with Temco in this regard was not discriminatory. If that agreement could be attacked by the adversely affected employees through the contractual grievance-arbitration procedure, it would most certainly undermine "the employer's confidence in the union's authority."301

In other words, the federations feared that waiving employees' rights to go to court would actually impair unions' abilities to negotiate meaningfully with employers, because it would cede their control over which grievances reach arbitration.

The AFL-CIO's argument in *Metropolitan Life* would have meant that no Massachusetts employer—union or nonunion—would be required to provide mental health coverage under the statute. However, in other cases, unions have argued for special treatment based on their status as employees' bargaining representatives. That is to say, unions sometimes argue that unions and employers can agree to do things together that would be illegal if done by employers on their own. For example, in *USAirways v. Barnett*, the union distinguished seniority systems contained in collective bargaining agreements from employer created seniority systems, arguing that only collectively bargained seniority systems could trump accommodation of an employee in need of reassignment because of a disability.302 Similarly, the AFL-CIO has argued:

[E]mployers and labor organizations should be, and are, free—under the ADEA—to negotiate health insurance plans that favor older workers. And, it is our position that this reading of the ADEA protects


the interests of all workers in this regard by giving necessary play to the collective bargaining process.\textsuperscript{303}

And finally, as discussed above, the Steelworkers argued in \textit{Weber} that a negotiated affirmative action plan was lawful, while a government-imposed plan would exceed the scope of the Civil Rights Act.\textsuperscript{304}

So far, this Subpart has focused on cases in which unions litigate with an eye toward preserving union and employer freedom to bargain over particular benefits. However, in other cases, unions have supported increased substantive protections for employees instead of the flexibility to take or leave particular benefits. For example, the AFL-CIO argued in favor of a Maine law requiring employers to offer a severance payment to employees affected by plant closings\textsuperscript{305} and a New York law forbidding pregnancy discrimination in employee benefits and requiring employers to offer paid sick leave to pregnant and disabled employees.\textsuperscript{306} The difference may be explained by a combination of factors, including the leverage the union is likely to have at the bargaining table, how frequently unions bargain for the benefits at issue, and the union's political commitments. Thus, it is relevant both that union leverage is likely at its nadir when a plant is shutting down and that unions have a particularly strong track record of advocating for equal pay for women and against pregnancy discrimination.

Thus, the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers explained in \textit{Geduldig v. Aiello} that its efforts to litigate pregnancy discrimination cases supported its repeated attempts to win insurance coverage for pregnancy-related issues during bargaining.\textsuperscript{307} Likewise, in its amicus brief in support of the Affordable Care Act, the AFL-CIO explained:

\begin{itemize}
  \item[304.] See \textit{supra} note 120 and accompanying text.
  \item[307.] Brief of the International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, as Amicus Curiae, \textit{supra} note 128, at 4-5 ("As collective bargaining agent, the IUE has during the past two years been engaged in negotiations with approximately 400 employers for the purpose of securing for female employees the right to all the same benefits as other disabled employees for periods of disability due to childbirth or the complications of pregnancy.").
\end{itemize}
[It] has an interest in this issue because the collective bargaining agreements negotiated by its affiliated unions almost universally provide for employment-based health insurance for covered employees and their immediate families. The system of employment-related health insurance has come under tremendous pressure from the steadily increasing costs of health insurance coverage. The Affordable Care Act addresses the problem of increasing insurance costs in part by encouraging universal coverage, and the minimum coverage provision is essential to the Act’s plan for achieving that purpose.308

And, during the 2013 Term, Change to Win and the AFL-CIO filed a joint amicus brief in Hollingsworth v. Perry, the case challenging California’s Proposition 8. The unions first explained that their interest in the case stemmed from the fact that unions commonly “bargain and advocate for domestic partner benefits in union contracts” and then argued that Proposition 8 harmed workers with same-sex partners.309

Evidently, then, unions’ litigation positions are influenced by their bargaining goals. However, context matters: Unions’ perceptions of their own bargaining strength and the desirability of the benefit at issue determine whether unions seek flexibility or certainty.

IV. UNION LITIGATION AS SOCIAL GOOD

“The law will never make men free; it is men who have got to make the law free.”310

This Part discusses some of the strategic benefits that labor’s model of Supreme Court litigation might provide to the larger progressive social movement community and suggests ways that unions could more effectively further the goals of social movement unionism through Supreme Court advocacy.

The Part begins by discussing a critique of litigation-based social change efforts and the “law and organizing” model of social movement litigation. It suggests that unions are inherently well-suited to bundle their litigation efforts with other forms of advocacy and that


many unions adhere to the law and organizing model virtually by
default. Next, I turn to the benefits and drawbacks of coalition work in
the Supreme Court, focusing on what unions might gain from
litigating in coalition with other social movement groups and vice
versa. Finally, I suggest that greater publicity of unions' Supreme
Court work, including their amicus practice, could benefit both unions
and their members.

A. Collective Action and Litigation

"Don’t Mourn, Organize!" 311

Critics of litigation-focused reform efforts have charged that the
pursuit of social change through court decisions “can narrow issues
and atomize collective grievances, undermining broader collective
action.” 312 Additionally, they argue that the opportunity costs of
spending precious time and resources on litigation, rather than other
types of activities, may be too great—particularly when “favorable
judicial decisions without similarly favorable outcomes on the ground”
are relatively frequent occurrences. 313

However, other scholars have argued that litigation can be an
important component of a broader organizing strategy. Derrick Bell
observed that a litigation campaign is more than the sum of the
resulting decisions: “Litigation can and should serve lawyer and client
as a community-organizing tool, an educational forum, a means of
obtaining data, a method of exercising political leverage, and a rallying
point for public support.” 314 More recently, adherents of the law-and-
organizing model have urged attorneys to “supplement conventional
litigation strategies with community education programs, link the
provision of legal services with membership in organizing groups, and
become directly involved in organizing campaigns.” 315 This way, even
unsuccessful litigation can yield beneficial results if it spurs other

---

311. Michael E. Tigar, Crisis in the Legal Profession: Don’t Mourn, Organize!, 37 OHIO N.U. L. REV. 539, 540 & n.2 (2011) (“Joe Hill, alias of Industrial Workers of the World organizer Joseph Hillstrom, was executed in Utah in 1915. ‘Don’t Mourn, Organize’ is a paraphrase from his last letter.” (citing PHILIP S. FONER, THE CASE OF JOE HILL 96 (1965))).

312. Albiston, supra note 226, at 63 (describing criticisms of the use of litigation as a social reform strategy).

313. NeJaime, supra note 228, at 943.

314. Bell, supra note 221, at 513.

forms of collective action. As Douglas NeJaime has persuasively reasoned: "Litigation loss may, counterintuitively, produce winners. When savvy advocates lose in court, they may nonetheless configure the loss in ways that result in productive social movement effects and lead to more effective reform strategies."

Unions are particularly well situated to mix litigation with other advocacy strategies; in fact, the law and organizing model itself "hails back to a more militant era of labor activism—of 'protests, illicit strikes, and pickets.'" In fact, the Supreme Court itself recognized this connection in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* and subsequent decisions regarding the legality of union legal referral plans that recognized that unions had a legitimate interest in ensuring that workers were able to enforce their rights under statutes that the unions had lobbied for in the first place.

Today, union tactics—even if less militant—still go hand in hand with traditional litigation efforts. For example, in *Lawyers, Unite*, Scott Cummings and Ingrid Eagly tell the story of the Workplace Project, an organization created to help Latino workers on Long Island enforce their rights at work. In one case, the Workplace Project "represented two workers owed several thousand dollars in back wages by their employer." That representation entailed filing a lawsuit, alongside which the Workplace Project also engaged in a traditional union tactic—picketing outside the defendant-employer's store. The

316. NeJaime, *supra* note 228, at 954 & n.57 ("[P]roductive indirect effects of litigation [include] raising consciousness, driving fundraising, legitimizing a cause, and influencing other state actors.").

317. *Id.* at 945.

318. Jesse Newmark, *Legal Aid Affairs: Collaborating with Local Governments on the Side*, 21 B.U. PUB. INT. L.J. 195, 293 (2012) (quoting Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 956 (2007)); see also Cummings & Eagly, *supra* note 315, at 470 & n.114 ("Labor lawyers are important precursors to the current generation of law and organizing practitioners, who focus on enforcing legal rights enacted as a result of the labor movement.... As advocates committed to the goal of advancing workplace organizing campaigns, labor lawyers continue to merit recognition as important examples of practitioners working within the law and organizing model.").

319. 377 U.S. 1, 5-6 (1964).

320. *See discussion supra* Part II.A.


322. *Id.*

323. *Id.*
project achieved a quick settlement on behalf of the workers, which it attributed to the picketing.\textsuperscript{324}

While Supreme Court litigation may feel more distant from on-the-ground organizing efforts than the case described in \textit{Lawyers, Unite}, it can still be usefully integrated into a broader organizing strategy. For example, as discussed in the previous Part, unions often simultaneously seek benefits for workers both in the courts and at the bargaining table—union amicus participation in \textit{Perry v. Hollingsworth} offers only the most recent of many examples.\textsuperscript{325} Then, when unions win before the Court, they not only improve workers’ lives, but they may also win another leverage point—if employers subsequently violate the law, then unions can sue on behalf of aggrieved employees. Even when unions lose before the Court, they may, as NeJaime has suggested, nonetheless ultimately succeed in whole or in part. For example, after their loss in \textit{Alden}, Maine union activists were able to persuade the state to provide “most, but not all, of the protections and benefits that they would have received without sovereign immunity,”\textsuperscript{326} including some of the back pay they had unsuccessfully argued before the Court they were owed.\textsuperscript{327} Likewise, after losing \textit{General Electric Co. v. Gilbert},\textsuperscript{328} a coalition of unions and other groups succeeded in lobbying Congress to pass the Pregnancy Discrimination Act, and then unions helped ensure employer compliance with the new law through bargaining, grievances, and lawsuits.\textsuperscript{329}

A final example reveals the fluidity between unions’ Supreme Court litigation and their organizing efforts. In \textit{Citizens United v. FEC}, the AFL-CIO filed an amicus brief arguing that prohibitions on unions’ electioneering communications were unconstitutional.\textsuperscript{330} However, the Court’s decision went farther than the AFL-CIO hoped

\begin{thebibliography}{99}
\bibitem{324} \textsuperscript{id}; see also Scott L. Cummings & Ingrid V. Eagly, \textit{After Public Interest Law}, 100 NW. U. L. REV. 1251, 1269-70 (2006) (reviewing JENNIFER GORDON, \textit{SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS} (2005)) (discussing the Workplace Project’s picketing tactics and success).
\bibitem{325} \textit{See supra} Part III.B.1.
\bibitem{326} CHRISTOPHER SHORTELL, \textit{RIGHTS, REMEDIES, AND THE IMPACT OF STATE SOVEREIGN IMMUNITY} 137 (2008).
\bibitem{327} \textit{Id}.
\bibitem{330} Brief of the AFL-CIO as \textit{Amicus Curiae} in Support of Appellant, \textit{supra} note 159, at 3-4.
\end{thebibliography}
striking down the Bipartisan Campaign Reform Act’s limits on corporate and union independent expenditures as well. In response, the federation called for a constitutional amendment to limit corporate (though not union) political expenditures. At the same time, the 2012 presidential election saw unions—which were significantly outspent by business interests—take advantage of the *Citizens United* ruling by creating a “Super-PAC” to fund door-to-door canvassing efforts that leveraged unions’ abilities to mobilize their members.

In sum, unions’ Supreme Court advocacy is often linked to other forms of organizing that may take place before, during, or after litigation. These linkages can be cumulative, with litigation and organizing efforts reinforcing each other. Further, successful organizing efforts can lead to more litigation opportunities, creating a procyclical relationship between law and organizing. Thus, union litigation in pursuit of social change is particularly promising because even where the union loses in court, it may be able to pursue its desired result effectively through its “boots on the ground.”

**B. Coalitions In and Outside the Labor Movement**

> You are never strong enough that you don’t need help.

Unions may litigate with or without the support of their members, other unions, and outside groups. In this Subpart, I discuss the opportunities that Supreme Court litigation can provide for unions to form or strengthen relationships with all of these constituencies.

Labor’s history of working hand in hand with other social movement groups has been mixed. Some of the burgeoning identity-based movements of the 1960s and 1970s viewed the white working class as “‘bought off’ by their affluence and ‘white privilege’... too economically comfortable and benefited too much from racism, imperialism, sexism and homophobia to be allies in struggle.” Likewise, some unions’ support of the Vietnam War did little to endear

---

them to other progressive causes. On the other hand, two UAW lawyers were on hand at the inaugural meeting of the National Organization for Women, and they played a role in shaping that organization's approach to the cause of women's equality. Likewise, many unions have long enjoyed close relationships with civil and immigrants' rights groups.

Supreme Court litigation presents opportunities for unions and other groups to work together on either a long-term or a more temporary basis—"strange bedfellow" coalitions can form for the limited purpose of arguing a particular point of law or more long-lasting alliances can manifest. For example, effective Supreme Court advocates will typically coordinate amicus briefs so that they do not overlap and instead show a range of policy and doctrinal reasons that one party's position is correct. Here, labor unions and federations will often have special insights into the particular work-related effects of an issue. These briefs can be especially powerful in cases in which the connection between the issue presented and American workers is not initially obvious. For example, in Grutter v. Bollinger, the AFL-CIO was seemingly alone among a long list of amici in arguing that diversity in higher education was important because of its impact on


337. Mayeri, supra note 230, at 790. While the UAW lawyers supported women's equality, they argued against pursuing it via the Equal Rights Amendment (ERA), citing concerns that the ERA would invalidate a host of labor and employment laws designed to protect women workers. Testifying before the United States Senate, Myra K. Wolfgang, who was then vice president of the Hotel and Restaurant Employees and Bartenders International Union and secretary-treasurer of its local in Detroit, argued:

There are various kinds of protection for women workers provided by State laws and regulations: (1) minimum wage; (2) overtime compensation; (3) hours of work, meal and rest period; (4) equal pay; (5) industrial homework; (6) employment before and after childbirth; (7) occupational limitations; and (8) other standards, such as seating and washroom facilities and weight-lifting limitations. It would be desirable for some of these laws to be extended to men, but the practical fact is that an equal rights amendment is likely to destroy the laws altogether rather than bring about coverage for both sexes. Those State laws that are outmoded or discriminatory, should be repealed or amended and should be handled on a case-by-case basis.


338. Garden & Leong, supra note 241, at 1160, 1205-06.

workplace discrimination. Conversely, input from other groups can legitimate positions taken by labor unions and federations by helping to assure judges that the union's position has not been skewed by the dynamics described in Part III.

A second question concerns relationships within the union movement: to what extent should union officers and labor lawyers seek input from other unions or union members in shaping their litigation positions? This question is particularly salient in the amicus context, where the decision as to whether to file at all, as well as what position to take, is entirely within a union's or federation's discretion. Yet it is the amicus context in which union members have traditionally had the least input, beginning with Arthur Goldberg's "free hand to select labor cases to take to the Supreme Court and to file amicus briefs in cases already scheduled for Supreme Court review." While this approach is of course expedient, and union and federation officers are elected in part to make decisions in the interest of membership, one may view this model as a lost opportunity to foster communication between union members and union leadership about movement priorities and long-term goals.

V. CONCLUSION

There is scarcely an issue that has not been, and is not, influenced by labor's organized efforts or lack of them.

Labor unions and federations have an extensive record of Supreme Court litigation covering a vast array of substantive areas. Yet, inexplicably, this litigation has escaped the attention of scholarly and other audiences, even as a national debate about the appropriate role of labor unions has taken place. This inattention is especially surprising because Supreme Court litigation is a significant channel through which unions can affect the lives of nonunion members and the structure of American government more generally. Attention to the scope of unions' Supreme Court practice is particularly timely in light of the persistent decline over the last several decades in American

340. David B. Wilkins, From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar, 117 Harv. L. Rev. 1548, 1610 n.260 (2004) ("[I]t is telling that, to my knowledge, the only amicus brief filed in Grutter that made continuation of widespread racial discrimination and stereotyping against black Americans in employment the centerpiece of its argument was that of the AFL-CIO.... Significantly, no lawyer from a major corporate law firm participated in the drafting of that brief.").

341. Stone, supra note 59, at 159.

labor union membership; in 2012, only 11.3% of wage and salary workers were union members.\textsuperscript{343} Therefore, with membership levels reflecting an existential threat to the American labor movement, it is especially important that policy debates focusing on whether to attempt to revive unions or to undercut them take place against the backdrop of a complete picture of what unions do, including through litigation.