Putting Union Security Clause First Amendment Law in a Broader Context: Charlotte Garden's Meta Rights

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Charlotte Garden, *Meta Rights*, 83 **Fordham L. Rev.** 855 (2014).

Meta Rights is a thought-provoking article that addresses concerns about labor law rules governing agency fee payments in public-sector employment by comparing these rules to doctrines in analogous situations in other areas of law. Specifically, after the Supreme Court decided Knox v. SEIU Local 100 in 2012, 132 S.Ct. 2277 (2012), many felt that the Supreme Court was primed to change the default rule for agency payers from "opt-out" (an employee covered by a union security agreement would have to affirmatively state a preference not to pay dues for activities deemed "not related to collective bargaining") to an "opt-in" system (unions could not require such dues absent specific, individual consent). Many in the field also noted that Harris v. Quinn, 134 S.Ct. 2618 (2014), looming but not yet decided when this article was written, could result in the Supreme Court mandating the "opt-in" system (I thought that was the most likely result in *Harris*). This is a very important issue in labor law and policy and for the labor movement as a whole. Although these cases explicitly covered only public-sector unions, such unions make up about half the total membership of all unions in the U.S.

Professor Garden could have written an article solely about whether "opt-in" rules were good or bad labor policy, or the extent to which constitutionally mandating such a system would be consistent with previous precedent (*e.g.*, Abood v. City of Detroit, 431 U.S. 209 (1977)). Instead, she wrote a more interesting article by casting her net much more widely, describing when, in other contexts, courts have required Party A to give notice to Party B that Party B has certain constitutional rights. This takes her well beyond labor and employment law, and indeed beyond civil law (*e.g.*, by discussing *Miranda* rights). Showing that such "meta rights" are relatively rare (*e.g.,* public schools need not give notice to students that they have a First Amendment right to abstain from reciting the Pledge of Allegiance), Professor Garden provides a strong, principled, and broad-based critique of "opt in" rules.

Of course this type of analysis only works if the author has a solid knowledge of the other areas of law she is contrasting. Happily, Professor Garden does. In addition to *Miranda* warnings and Pledge of Allegiance cases, she analyzes an impressive variety of legal doctrines: procedural due process rights (both *Matthews v. Eldridge* rules and rules regarding notice to members of class actions); cases involving mandatory dues to bar associations; mandatory subsidies for agricultural advertising; the right to refrain from speaking (*e.g.*, through license plates with the "live free or die" motto); and other areas. She persuasively demonstrates that "meta rights"—notice of the substantive right—are rarely required.

Using these comparisons, Professor Garden makes several points effectively. First, courts have never articulated an overarching principle as to when "meta rights" are required (or, when they are, what the precise contours of those rights should be). Second, doctrines in this area are troublingly inconsistent: it is difficult to justify why, for example, school children have no right to be informed of their substantive right to refrain from reciting the Pledge, while adult members of union bargaining units have extensive, detailed, and expensive (for the unions providing them) "meta rights" regarding the share of their dues that go to activities deemed "not related to collective bargaining." She also draws effective comparisons to *Citizens United*, and raises intriguing questions about the entire area of "compelled speech" First Amendment law.

Further, Professor Garden offers an original and (at least to me) persuasive framework to help determine whether and to what extent meta-rights are owed: the degree to which individuals must overcome significant barriers to self-help. She describes factors to balance within this framework. These include: costs (financial and otherwise) to the parties; ability to get information from other sources; extent of the burden on constitutional rights of the parties; potential for coercion; and vulnerability of the parties. When she applies this framework to the agency fee issue, she adds some observations about the significance of "default" rules (opt-in vs. opt-out). Her conclusion that an opt-in regime for union dues payers should not be required may not be surprising, but it is very well-supported.

I had very few and very small nitpicks. First, I would have liked to have heard even more discussion about public employee due process rights under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Second, some might argue that she understates the potential for "coercion" in the agency fee context, and I would have liked to hear her take on the more aggressive claims from that side. But it's a good sign when an article leaves you wanting to hear just a bit more.

Overall, this is a terrific article by an excellent scholar that makes a significant contribution to the field. I have written a casebook chapter on the rules regarding union agency fees in both the public and private sectors, and this article gave me some important new insights into this area. I liked it a lot, and I highly recommend it.

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