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CAMPAIGN FINANCE REFORM, UNION DUES, AND THE FIRST AMENDMENT: THE COLLISION OF POLITICS AND RIGHTS

*Mark L. Adams**

INTRODUCTION

There has long been a close connection between labor organizations and politics. In fact, the trade union movement was born out of political protest related to working conditions.¹ Samuel Gompers, the first president of the American Federation of Labor, spoke of rewarding labor's friends and punishing its enemies.² Labor's deep involvement in the political process stems from the direct relationship between the conditions of trade union members and working people in general.³ As Justice Frankfurter noted:

[t]o write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation. Suffice it to recall a few illustrative manifestations. The AFL, surely the conservative labor group, sponsored as early as 1893 an extensive program of political demands calling for compulsory education, an eight-hour day, employer tort liability, and other social reforms. The fiercely contested Adamson Act of 1916 . . . was a direct result of

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1. *See Labor Movement*, HIST., <https://www.history.com/topics/19th-century/labor> (Mar. 31, 2020).

2. *See* Press Release, Nat'l Lab. Rels. Bd., Campaign Finance Reform of the Union Dues Dispute Under Beck, (Oct. 8, 1997) (on file with author).

3. *See* HIST., *supra* note 1.

railway union pressures exerted upon both the Congress and the President.⁴

Labor unions continue to be actively involved in political activity.⁵ Union activity includes engaging in legislative lobbying, endorsing individual candidates, providing in-kind assistance to candidates, and financial assistance through political action committees.⁶ In-kind assistance includes providing campaign workers, telephone banks, equipment, and union mailing lists to candidates and political organizations.⁷ It has been estimated that “in-kind union contributions to campaigns—such as mailing endorsement statements to members and providing workers to help out in campaigns—may be worth up to \$300 million annually.”⁸ Almost all of the money raised by union political action committees comes directly from its members’ contributions through dues and fees.⁹ Because of labor’s close ties to the Democratic Party, labor unions have been described as a “major weapon” of the Democratic Party.¹⁰

Despite this nexus between labor and politics, a fundamental aspect of American labor law is that the government regulates only the process of collective bargaining, thus leaving the terms of the collective bargaining agreement to the parties.¹¹ Most collective bargaining agreements

4. See *Int’l Ass’n of Machinists vs. Street*, 367 U.S. 740, 800-01 (1961) (Frankfurter, J., dissenting) (citations omitted).

5. See H.R. REP. NO. 105-397, at 29-31 (1997); *Hearing on Mandatory Union Dues: Hearing on H.R. 1625 Before the Subcomm. on Employer-Employee Rels. of the Comm. on Educ. and the Workforce*, 105th Cong. 70-79 (1997) (statement of James B. Coppess, Associate General Counsel, Communications Workers of America) (noting that labor has utilized the political process to make advances such as “enactment of the minimum wage and the forty-hour workweek.”); see also *Int’l Ass’n of Machinists*, 367 U.S. at 814-15 (Frankfurter, J., dissenting) (stating, “It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor.”).

6. See John Thomas Delaney, *The Future of Unions as Political Organizations*, 12 J. LAB. RSCH. 373, 374 (1991).

7. See *id.* at 374.

8. Labor Relations Week, *Latest McConnell Hearing Examines Union’s Use of Dues for Political Activities*, Bloomberg Law (Apr. 20, 2000).

9. See John Thomas Delaney & Marick F. Masters, *Union Characteristics and Union Political Action*, 42 LAB. L. J. 467, 469 (1991).

10. See *id.* at 468; Richard L. Berke, *Bush Fires a Shot at Union Political Spending*, N.Y. TIMES, Apr. 19, 1992, at E. 3.

11. See *H.K. Porter Co. v. NLRB*, 90 S. Ct. 821, 826 (1997) (citation omitted) (“One of the[] fundamental policies [of the NLRA] is freedom of contract. While the parties’ freedom . . . is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.”); Archibold Cox, *The Right to Engage in Conservative Activities*, 26 IND. L. J. 319, 322 (1951) (“The Wagner Act became law on the floodtide of the belief that the conflicting interests of management and worker can be adjusted only by private negotiation, backed, if

contain a union security clause, which requires all employees to provide a specified level of financial support to the union as a condition of employment, but does not compel employees to become full members of the union.¹² A union does not violate its duty of fair representation by negotiating a union security clause that follows the language of § 8(a)(3) of the National Labor Relations Act (hereinafter “NLRA”).¹³ In *Communications Workers of America v. Beck*,¹⁴ the Supreme Court held that employees can only be required to be “financial core members,” so a union security agreement may only require the payment of union fees as a condition of employment.¹⁵ Such “financial core members” may request a refund of their fee payment that is used for purposes other than collective bargaining.¹⁶ Thus, “membership in a union is completely voluntary. There is no such thing as that oft-repeated canard ‘compulsory unionism.’”¹⁷ Instead, the Court has sought to create a balance between an individual’s right to object to the use of dues for non-collective bargaining activities, and the union’s ability to require every employee to contribute to the costs associated with collective bargaining.¹⁸

The issue of *Beck* rights and providing notice to covered employees has generated controversy and been described as “political hot potato.”¹⁹ Following the Court’s decision in *Beck*, an issue arose with regard to a union’s duty to provide employees covered by a union security clause with notice of their *Beck* right to pay less than full dues and fees, determining the appropriate process for an employee to request a refund, delineating the proportion of dues refundable to an objecting employee, and determining a method to enforce employees’ *Beck* rights with appropriate

necessary, by economic weapons, without the intervention of law.”); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1390 (1982) (“The basic philosophy of the Wagner Act was that labor problems would be resolved by a private process of negotiation and contracting, backed up by the threat or use of self-help measures to secure bargaining advantage.”).

12. NLRB v. Gen. Motors Corp., 373 U.S. 734, 742-43 (1963) (stating that “membership” may be “conditioned only upon payment of fees and dues.”).

13. *Marquez vs. Screen Actors Guild*, 525 U.S. 33, 48 (1998).

14. *See Commc’ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

15. *Id.* at 745.

16. *Id.* at 740.

17. *See The Constitution and Campaign Reform: Hearings Before the Comm. on Rules and Admin.*, 106th Cong. 411 (2000) (statement from Laurence E. Gold, Associate General Counsel, AFL-CIO); Labor Relations Week, *supra* note 8.

18. Campaign Finance Reform and the Union Dues Dispute under *Beck*, *supra* note 2.

19. *See* H.R. REP. NO. 105-397, at 59 (1997) (statement of Alison Beck, General Counsel, Int’l Ass’n of Machinists and Aerospace Workers); Robert L. Rose & Glenn Burkins, *Unions Win Partial Victory in Case on Dues*, WALL ST. J., Jan. 30, 1996, at A3.

remedies.²⁰ In the past, several states have considered legislation or referendums requiring employee consent before unions can spend dues and fees on political causes.²¹ Congress has also considered similar measures.²² Passage of these state and federal initiatives could have a devastating impact on organized labor's ability to contribute financially to political campaigns, in particular the Democratic Party.²³ For example, during the 1980's, it has been estimated that labor political action committees (hereinafter "PACs") directed close to ninety percent of their contributions to the Democratic Party.²⁴ If the Campaign Reform Initiative had passed in California, it was predicted that unions would have experienced a decline in funds that would have been directed towards political causes.²⁵ The Court's formula for calculating the expenditures unrelated to collective bargaining, contract administration, and grievance adjustment prevents a union from charging dissenting employees for organizing and political activities, a union's largest expenditures that cannot be charged, estimated at fifteen percent for organizing for the average private sector union.²⁶

In support of these measures, many Republicans have argued that it is difficult, if not impossible, as a practical matter for employees to avoid joining the union or paying fees used for political purposes.²⁷ In response, William Gould, former Chairman of the National Labor Relations Board, has severely criticized the requirement of a union providing notice to

20. See *Hearings on H.R. 3850, The Worker Right to Know Act Hearings Before the S. Comm. on Employer-Employee Rel. of the Comm. on Econ. & Educ. Opportunities*, 104th Cong. 4-5 (1996) (statement of Marshall J. Breger, Visiting Professor of Law, Columbus School of Law, the Catholic University of America).

21. See, e.g., S. 650, 1997 Leg., 89th Sess. (Mich. 1997); S. 480, 1998 Leg. 412th Sess. (Md. 1998).

22. See, e.g., H.R. REP. NO. 105-397, at 3, 4 (1997) (Worker Paycheck Fairness Act); Paycheck Protection Act, S.9, 105th Cong. § 2 (1997); Campaign Finance Reform Act of 1996, H.R. 3820, 104th Cong. § 402 (1996).

23. See Thomas Stratmann, *How Reelection Constituencies Matter: Evidence from Political Action Committees' Contributions and Congressional Voting*, 39 J.L. & ECON. 603, 631-32 (1996).

24. See *id.* at 604 (stating that "Labor PAC's" gave approximately ninety percent of their contributions to the Democratic Party); see also LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS*, 53 (1st ed. 1996) (stating that labor unions gave "close to 100%" of their money to the Democratic Party).

25. See D. Wilson & D. Mark Wilson, *California's Proposition 226: What It Means For Union Members and Their Family Budgets*, THE HERITAGE FOUND. (Apr. 20, 1998), <https://www.heritage.org/jobs-and-labor/report/californias-proposition-226-what-it-means-union-members-andtheir-family#>.

26. See Jan W. Henkel & Norman J. Wood, *Limitations on the Uses of Union Shop Funds after Ellis: What Activities are "Germane" to Collective Bargaining?*, 35 LAB. L.J. 736, 736, 744-45 (1984).

27. See generally Labor Relations Week, *supra* note 8.

members of their right to become non-members because it promotes anti-unionism in the workplace.²⁸ Senator Charles Schumer (D-NY) has argued that rather than protecting individual workers, Republican support for paycheck protection measures has been in reaction to labor's overwhelming support for Democratic candidates, charging that such measures amount to a "poison pill" designed to insure that campaign finance reform legislation will not be enacted.²⁹ Furthermore, much of the litigation challenging union security agreements has been supported by the National Right to Work Legal Defense and Education Foundation, an organization founded and supported largely by employer interests.³⁰ In reply to such claims, supporters of the Worker Paycheck Fairness Act³¹ have asserted that Democratic opposition to the legislation is motivated not by a concern for protecting individual rights, but rather that a generous source of political funds may dry up.³² As evidence, they point out that the trade union movement has endorsed every Democratic Party candidate for President since 1952 except for George McGovern in 1972.³³ In addition, they assert that there is overwhelming support for such measures by the general public as well as union members.³⁴

28. See Campaign Finance Reform and the Union Dues Dispute under Beck, *supra* note 2.

29. See Labor Relations Week, *supra* note 8 (referring to the suggestions made by Sen. Charles Schumer).

30. Samuel F. Wright, *Clipping the Political Wings of Unions: An Examination of Existing Law and Proposals for Change*, 5 HARV. J. L. & PUB. POL'Y 1, 34 n.203 (1982); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Inc. v. Nat'l Right To Work Legal Def. & Educ. Found., Inc., 781 F.2d 928, 929 (D.C. Cir. 1986); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., & its Locs. 1093, 558 & 25 v. Nat'l Right To Work Legal Def. & Educ. Found., Inc., 590 F.2d 1139, 1142-43 (D.C. Cir. 1978).

31. See *infra* Section II.A.

32. See *Hearings on H.R. 3580, The Worker Right to Know Act*, *supra* note 20, at 213, 235 (statement of Charles W. Baird, Professor of Economics and Director, Smith Center for Private Enterprise Studies, California State University) (stating that "[p]oliticians who are generously supported by union political cash and in-kind contributions are afraid that unions might have significantly fewer donations to make" following enactment of such laws).

33. See Campaign Finance Reform and the Union Dues Dispute under Beck, *supra* note 2.

34. Poll results show "overwhelming public support" for requiring members of a union to consent in order to deduct union dues for political purposes. See *GOP Push on Labor Gaining Opposition*, LAS VEGAS SUN (Jan. 29, 1998), <https://lasvegassun.com/news/1998/jan/29/gop-push-on-labor-gaining-opposition/>. In an April 1996 survey by Luntz research, 78% of union members indicated that they were unaware of their right to a refund of dues and fees for the portion spent on political activities, and once made aware of the right, 20 percent indicated that they would "definitely" and 20 percent indicated they would "most likely" request a refund of dues spent on the AFL-CIO's 1996 political campaign. See *Abuse of Worker Rts. and H.R. 1625, Worker Paycheck Fairness Act Hearing Before the Subcomm. on Employer-Employee Rels. of the Comm. on Educ. and the Workforce*, 105th Cong. 6-7 (1998) (statement of Robert P. Hunter, Director of Public Policy, Mackinac Center for Public Policy). The survey also asked whether union leaders should be required to disclose "exactly how they spend union dues," and eighty-four percent responded affirmatively. See *id.*

This article will first examine union security agreements and discuss the various “Paycheck Protection” efforts at the state and federal levels.³⁵ In addition, the article will analyze the First Amendment rights of individual employees and unions as organizations, and the relationship between union dues, union security clauses, union membership, and politics.³⁶ Finally, the article will recommend revisions to section 8(a)(3) of the National Labor Relations Act to provide for clarity and balance between the interests of labor organizations and individual employees.³⁷

I. UNION SECURITY AS A CONDITION OF EMPLOYMENT

Since the beginning of the labor movement in the United States, union security agreements have been an important goal of labor organizations.³⁸ At first, union security agreements were held to be illegal and subject to criminal sanctions as an unlawful conspiracy.³⁹ Following a decision in Massachusetts in 1842 that unions were not unlawful conspiracies,⁴⁰ most jurisdictions permitted union security agreements, although some states enacted laws outlawing certain forms of union security, specifically the closed shop.⁴¹

Unions sought the availability of union security agreements for primarily three reasons. First, because employees under a union security agreement were required to provide support for the union through membership and financial contributions with a closed or union shop, or solely through financial contributions with an agency shop as a condition of employment, the union was provided with a measure of control over the

35. See *infra* Section II.

36. See *infra* Section III.

37. See *infra* Section IV.

38. Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion In Beck*, 27 HARV. J. ON LEGIS. 51, 81 (1990); see generally FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* 27-28 (2d ed. 1955).

39. See generally Leon M. Despres, *The Collective Agreement for the Union Shop*, 7 U. CHI. L. REV. 24, 31-33 (1939); Francis Bowes Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 686, 695-97 (1930); Dau-Schmidt, *supra* note 38, at 81.

40. See Dau-Schmidt, *supra* note 38, at 81 n.193; *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 134 (1842).

41. See Dau-Schmidt, *supra* note 38, at 81 n.194; see, e.g., *Jacobs v. Cohen*, 183 N.Y. 207, 214-15 (1905); *J.F. Parkinson Co. v. Bldg. Trades Council of Santa Clara Cnty.*, 98 P. 1027, 1028 (Cal. 1908); *Gasaway v. Borderland Coal Corp.*, 278 F. 56, 61 (7th Cir. 1921); *Kemp v. Divis.* 241, *Amalgamated Ass'n of Sheet and Elec. Ry. Emps.*, 99 N.E. 389, 390 (Ill. 1912); *Harper v. Elec. Workers Loc. 520* 48 S.W.2d 1033, 1034 (Tex. Civ. App. 1932); see also 1 LUDWIG TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING* § 170 (1940); Despres, *supra* note 39, at 54 (noting that only five states (California, Colorado, Louisiana, Maryland, and Nevada) had statutes in 1939 which prohibited compulsory unionism); 2 RESTATEMENT OF THE LAW OF CONTS. ch. 18, topic 2, § 515(c), illus. 18 (AM. L. INST. 1932).

makeup of the employer's workforce.⁴² Unions have used this control over the employer's workforce to exclude careless or poorly trained workers,⁴³ employees who were disloyal to the union,⁴⁴ or employees who violated specific union rules such as failing to pay dues, engaging in a wild-cat strike, or crossing a picket line.⁴⁵ This power over the workforce was also used to establish membership rules that denied some workers the right to employment on the basis of race, gender, religion, or nationality.⁴⁶

Second, the union security clause provides a steady source of financial support and potential loyalty, which eliminates free riders who benefit from union representation but do not wish to pay for it.⁴⁷ By requiring financial support, under a union-shop or closed-shop agreement, the union is provided with resources that assist the union in organizing, lobbying elected officials, supporting strikes, and negotiating and enforcing collective bargaining agreements.⁴⁸ Doing a better job in these areas also serves to protect the union from challenges from employees or rival unions, as well as the efforts of employers to avoid or eliminate unionization of the workforce.⁴⁹

Finally, dues and fees are used to support the union's efforts in the negotiation and administration of the collective bargaining agreement, including the grievance arbitration process, as well as expenditures for maintaining union facilities, union publications, conventions, and the maintenance of a strike fund.⁵⁰ Unions also regularly make political contributions in an effort to promote workers' interests, which include lobbying efforts for legislation such as pension or occupational safety measures, and supporting candidates and political parties that are sympathetic to the

42. See Dau-Schmidt, *supra* note 38, at 82-83.

43. *Id.* at 83; DULLES, *supra* note 38, at 27.

44. Dau-Schmidt, *supra* note 38, at 83; BENJAMIN J. TAYLOR & FRED WHITNEY, LABOR RELATIONS LAW 409 (6th ed. 1991).

45. Dau-Schmidt, *supra* note 38, at 83; see ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 639 (1976).

46. Dau-Schmidt, *supra* note 38, at 83; see e.g., Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 193-95 (1944); Oliphant v. Bhd. of Locomotive Firemen & Enginemen, 156 F. Supp. 89, 90, 93 (N.D. Ohio 1957).

47. Dau-Schmidt, *supra* note 38, at 84; see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GOODS 15-16 (1971); see also HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 705-07 (8th ed. 2010).

48. Dau-Schmidt, *supra* note 38, at 84.

49. See *id.* at 84-85 n.208 (stating that the desire of unions to exert some level of control over the makeup of the workforce has long been a recognized goal of the labor movement, and during the nineteenth and earliest twentieth centuries, employees who worked in an organized shop but refused to join the union were referred to as "rats," with unions seeking union security agreements to avoid association with such employees and to protect the union from such free riding.).

50. See Norman L. Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61, 62 (1983).

interests of workers and labor organizations.⁵¹ On occasion, unions also make contributions to causes or charities that promote general interests common to the labor movement or union public relations.⁵² Furthermore, union expenditures may also provide benevolent assistance to workers through pension or recreational funds.⁵³

Considered a mandatory subject of bargaining under section 8(a)(5) of the NLRA, a “union security agreement” is an agreement between a union and an employer that requires all employees to provide a specified level of financial support for the union as a condition of employment.⁵⁴ Various types of union security arrangements are possible. Prohibited under the Taft-Hartley Act, a “closed-shop” agreement requires union membership and the payment of union dues as a condition of gaining and retaining employment, thus only permitting the hiring of union members and requiring all employees to maintain membership and pay union dues as a condition of employment.⁵⁵ A “union shop” agreement requires all employees to join the union as members and begin paying union dues within a specified period of time after the commencement of employment.⁵⁶ An “agency shop” is a form of union security agreement in which all employees are required to make agency fee payments to the union within a specified period of time after accepting employment and to continue making such payments for the term of their employment.⁵⁷ Traditionally, agency fees are equivalent to union dues paid under a “union-shop” clause.⁵⁸ But in contrast to a union shop, under an agency-shop agreement, employees are not required to become members of the union, but must pay an agency fee for “services rendered by the union to employees within the bargaining unit as the employees’ ‘agent’ in negotiating and administering their labor contract.”⁵⁹ Similar to an agency-shop, a “maintenance-of-membership” agreement specifies that if an employee joins the union during the term of employment, the employer agrees to require continuation of the employee’s membership and the payment of dues as a condition of employment.⁶⁰

51. *Id.*

52. *Id.*

53. *Id.* at 63.

54. GORMAN, *supra* note 45, at 639-41.

55. *Id.* at 641-42.

56. *Id.* at 642.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 641-42.

A. *The Railway Labor Act and National Labor Relations Act*

Under the NLRA, the union that acquires the support of a majority of the employees in a bargaining unit serves as the exclusive bargaining representative for those employees.⁶¹ By serving as the exclusive bargaining representative for all employees in a bargaining unit, the union has a duty of fair representation for both members and non-members of the union.⁶² This duty requires the union to represent all employees fairly in negotiation and enforcement of the collective bargaining agreement.⁶³

Two federal labor statutes, section 2, Eleventh of the Railway Labor Act (RLA) and section 8(a)(3) of the NLRA, authorize union security agreements.⁶⁴ Language in the two statutes authorizing union security agreements has been deemed “in all material respects identical.”⁶⁵

In 1935, the NLRA (or “Wagner Act”) was enacted, which included section 8(3) that contained a general prohibition against employer discrimination on the basis of union affiliation and permitted the negotiation of a union security clause.⁶⁶ When first enacted, section 8(3) of the Wagner Act, now amended as section 8(a)(3), forbid employers from “encourag[ing] or discourag[ing] membership in any labor organization,” “by

61. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.”).

62. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (requiring the union “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”).

63. See *id.* at 177, 181-82; *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (applying the *Steele* decision under the RLA to Section 9(a) of the NLRA).

64. See 45 U.S.C. § 152; 29 U.S.C. § 158(a)(3). The relevant language of § 2, Eleventh of the RLA provides as follows:

Notwithstanding any other provisions of [the RLA], or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—a) to make arrangements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class: Provided, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of requiring or retaining membership.

Id.

65. *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988).

66. National Labor Relations Act § 8(a)(3).

discrimination in regard to hire or tenure of employment or any term or condition of employment.”⁶⁷ Although this general prohibition appears to outlaw all union security agreements, Congress added the following provision:

Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is a representative of the employees as provided in § 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreements when made.⁶⁸

Section 159(a) referenced in the above proviso, now section 9(a) of the NLRA, specifies that “representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit . . . shall be the exclusive representatives of all the employees in such unit.”⁶⁹ The only limitations regarding union security agreements were that the agreement must be negotiated by a union designated as the exclusive bargaining representative under section 9(a) of the Act, and employers were prohibited from dominating unions by the language that the union could not be “established, maintained, or assisted” by the employer.⁷⁰ By its language, the section permitted a closed shop, and the legislative history of the Wagner Act indicates that closed shops as well as union and agency shops were permitted under this provision.⁷¹

The Wagner Act fulfilled the union goals of providing employees with some control over workplace rules, protecting the employees’ right to organize, creating a system that would foster unions and collective bargaining, promoting stability in industrial relations, and striking a better balance in bargaining power between employers and employees, thus

67. *Id.*

68. *Id.*

69. *Id.* § 9(a).

70. *Id.* § 8(a)(2)-(3).

71. See, e.g., *National Labor Relations Board: Hearings Before the Senate Comm. on Educ. and Lab. on S. 1958*, 74th Cong. 305 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, 1988-89 (1949); 79 CONG. REC. 7648, 7673-74 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, 2345, 2394-95 (1949); *Labor Disputes Act: Hearings Before the House Comm. on Lab. on H.R. 62848*, 74th Cong. 61 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, 2473, 2535 (1949); see also Dau-Schmidt, *supra* note 38, at 86-87 (discussing the legislative history of the Wagner Act).

creating a system to preserve industrial peace and promote economic prosperity.⁷²

A “labor organization” is an organization that exists “in whole or in part” for the purposes of collective bargaining.⁷³ Congress stated the policy to “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”⁷⁴ While the definitions of “labor organization” and “exclusive representative” in the NLRA do not limit the types of union security agreements a union may negotiate, Congress did not limit the types of and purposes, for dues and fees charged by a union under a union security agreement.⁷⁵ Furthermore, the provision was enacted in order to eliminate concerns that section 7(a) of the NLRA, which assured the freedom of employees to organize and bargain collectively through representatives of their own choosing, had outlawed the closed shop.⁷⁶ By including the word “membership” in the proviso, Congress sought to clarify that neither section 7(a) or section 8(3) barred closed-shop union security agreements.⁷⁷

In 1947, the National Labor Relations Act was amended by the Labor Management Relations Act (hereinafter “Taft-Hartley Act” or “LMRA”).⁷⁸ The Taft-Hartley Act amended the proviso to section 8(3), now renumbered as section 8(a)(3), so as to limit union security agreements only to those which required membership as a condition of employment “on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the

72. National Labor Relations Act § 1; *see also* Leon H. Keyserling, *The Wagner Act, Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 206, 215-24 (1960); Dau-Schmidt, *supra* note 38, at 88; National Labor Relations Act § 8(a)(3).

73. 29 U.S.C. § 152(5).

74. *Id.* § 151.

75. *See* THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1362 (Charles J. Morris et. al. eds., 2d Ed. 1983) (explaining how the Wagner Act authorized union security agreements only for unions that “legitimately represented” employees); Dau-Schmidt, *supra* note 38, at 76.

76. Dau-Schmidt, *supra* note 38, at 87-88.

77. *See* Dau-Schmidt, *supra* note 38, at 87; *see also* Senate report on the bill, stating:

The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of § 7 (a) of the National Industrial Recovery Act, assuring the freedom of employees to “organize and bargain collectively through representatives of their own choosing,” was deemed to legalize the closed shop. The Committee feels that this was not the intent of Congress when it wrote § 7 (a): that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

S. REP. NO. 573, at 11 (1935), *reprinted in* 2 NLRB, *supra* note 71, at 2311.

78. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197.

later.”⁷⁹ By adding a second proviso, section 8(3) was amended to prohibit discrimination for non-membership in the union if the employer has “reasonable grounds” for believing that “membership was not available to the employee on the same terms and conditions generally applicable to other members” or “membership was denied or terminated for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of . . . membership.”⁸⁰ The Supreme Court has interpreted the second proviso of section 8(a)(3) to prohibit the enforcement or observance of the membership requirement in a union shop agreement.⁸¹ Congress thus limited union membership to a post-condition of employment by outlawing the closed shop through amending section 8(3) so as to specify that a union security agreement could not require union membership as a condition of employment until “on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later.”⁸²

The language of the amended section 8(a)(3) and the supporting legislative history of the Taft-Hartley Act reflect Congress’ effort to prohibit closed shops and place limitations on other types of union security

79. *Id.* § 158(a)(3).

80. *Id.* The second proviso to § 8 (a)(3) states as follows:

Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Id.

81. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963); *see also* § 158(a)(3).

82. *Id.* The pertinent portions of § 8(a)(3) read as follows:

It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in the [NLRA], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in the subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in Section [9(a) of the NLRA], in the appropriate collective-bargaining unit covered by such agreement when made and (ii) was following an election held as provided in Section [9(e) of the NLRA] within one year proceeding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement.

Id.

agreements.⁸³ The legislative history indicates that Congress intended that the dues required under the second proviso were full periodic dues and initiation fees required of all members of the union.⁸⁴ The language of the proviso and the legislative history thus appear to equate membership with the payment of dues, but does not require the employee to assume any membership requirements beyond the payment of dues and fees assessed to all employees covered by the union security agreement.⁸⁵ In

83. See H.R. REP. NO. 80-245, at 9 (1947) stating: (“The bill bans the closed shop. Under carefully drawn regulations, it permits an employer and a union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them or after the agreement is signed.”). Furthermore, the House Report stated that “the bill permits, subject to certain regulations and limitations, union security agreements in the nature of union shops and maintenance of membership, but it bans the closed shop.” *Id.* at 30. Note that the House Report was on the Hartley bill. See *id.* The Senate Report on the Taft bill stated that the bill “abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership.” S. REP. NO. 80-105, at 3 (1947), reprinted in STAFF OF SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. & PUB. WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407, 409 (Comm. Print 1974); see also 93 CONG. REC. 5079 (1947), reprinted in STAFF OF SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. & PUB. WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1405 (Comm. Print 1974) (“[T]he proposal to outlaw the union shop has never been seriously considered by a majority of this body.”) (remarks of Senator Malone (R. Nev.)).

84. See 93 CONG. REC. 3950, 3953 (1947), reprinted in NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1010 (1948) (Senator Taft’s statement that “the employee has to pay the union dues”).

85. See S. REP. NO. 80-105, at 7, reprinted in NLRB, *supra* note 83, at 413; H.R. REP. NO. 80-510, at 41 (1947), reprinted in in NLRB, *supra* note 83, at 545. But see 93 CONG. REC. 3953 (1947), reprinted in in NLRB, *supra* note 83, at 1010 (Senator Taft’s remarks indicating the employee is applying for membership in the union); 93 CONG. REC. A3141 (1947), reprinted in in NLRB, *supra* note 83, at 906 (reflecting the belief of Representative Smith (D-VA) that the Taft-Hartley bill required an application for membership); 93 CONG. REC. 3614 (1947), reprinted in NLRB, *supra* note 83, at 736 (discussing the Hartley bill requirement that an employee must join the union and pay dues). Note that committee reports or statements by the author are given greater weight than other sources when interpreting a statute. See William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, 74 VA. L. REV. 1567, 1568 (1988). Senator Taft, one of the bill’s principal sponsors, described Section 8 (a)(3) as “substantially the rule now in effect in Canada.” 93 CONG. REC. 5088 (1947), reprinted in NLRB, *supra* note 85, at 1422. The rule in Canada required an employee to pay union dues but did not require the employee to apply for membership in the union. See *In re Ford Motor Co.*, 1946 Lab. Arb. LEXIS 37, at *15-16 (Jan. 29, 1946); see also Dau-Schmidt, *supra* note 38, at 94 n.249 (discussing the ‘Canadian Rand Rule’). During the debate on the floor of the House, Rep. Kersten, (R-Wis.) stated “I also understand that the provisions of the bill . . . merely require[] [employees] to pay reasonable dues which are required for the unions.” 93 CONG. REC. 3615 (1947), reprinted in NLRB, *supra* note 83, at 739. Senator Thyne, (R-Minn.) also appeared to believe that the qualifications for membership merely required the paying of full union dues. 93 CONG. REC. 5089 (1947), reprinted in NLRB, *supra* note 83, at 1422. The comments and House and Senate Reports also indicate that special assessments for purposes that do not benefit the employees generally are in addition to the union’s periodic dues and cannot be required under Section 8(a)(3). See also Dau-Schmidt, *supra* note 38, at 95; *Radio Officers Union vs. NLRB*, 347 U.S. 17, 41 (1954) (“[The] legislative history clearly indicates that Congress intended to prevent the utilization of union security agreements for any reason other than to compel payment of

addition, Congress intended to prevent the termination of employees from union membership and thus their jobs, for refusing to contribute to a fund for political causes they opposed.⁸⁶ The final version of section 8(a)(3) in the Taft-Hartley Act was the result of a compromise between members of Congress who desired no restrictions on the use or types of union security clauses, and those members who sought to outlaw all forms of union security agreements.⁸⁷ In amending section 8(a)(3), Congress sought to outlaw the closed shop to prevent the denial of a job to non-union members, and place restrictions on the enforceability of a union shop agreement so that employees would not lose a job when they had been discriminatorily excluded from union membership or had paid the required dues.⁸⁸ During the debates prior to passage of the bills, numerous references were made to collective bargaining as an example of benefits, but Congress did not limit the dues that could be collected, either by the language or the legislative history, to those dues directly related to collective bargaining expenses.⁸⁹

Other important provisions relevant to the issue of union security agreements include section 8(b)(2), which prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of section 8(a)(3),⁹⁰ and section 14(b), which provides that nothing in the NLRA preempts state laws that prohibit union security agreements.⁹¹ Section 14(b) of the NLRA allows states to proscribe union security agreements, stating that “nothing in [the NLRA] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any

union dues and fees.”); Local 959, Int’l Bhd. of Teamsters, 167 N.L.R.B. 1042, 1045 (1967) (concluding that a special assessment could not be collected pursuant to a union security agreement).

86. 93 CONG. REC. 4528 (1947), *reprinted in* NLRB, *supra* note 83, at 1045 (Sen. Ellender (D-LA) discussing the experience of Cecil B. De Mille). Furthermore, the Canadian “Rand Rule” referenced by Senator Taft did not include such special assessments. *Ford Motor Co.*, 1946 Lab. Arb. LEXIS 37, at *15-16; *see also* 93 CONG. REC. 5088 (1947), *reprinted in* 2 NLRB, *supra* note 83, at 1422 (remarks of Senator Taft).

87. *See* Robert J. Rosenthal, *The National Labor Relations Act and Compulsory Unionism*, 1954 WIS. L. REV. 53, 57-58 (1954); Dau-Schmidt, *supra* note 38, at 97.

88. *See* 29 U.S.C. § 158(a)(3) (2018); *see also* Dau-Schmidt, *supra* note 38, at 98. The Senate Report stated that § 8(a)(3) “remed[ie]d the most serious abuses of compulsory union membership and yet give[s] employers and unions who feel that such agreements promote [] stability by eliminating ‘free riders’ the right to continue such arrangements.” S. REP. NO. 80-105, at 7, *reprinted in* NLRB, *supra* note 83, at 413.

89. *See* David B. Gaebler, *Union Political Activity or Collective Bargaining?: First Amendment Limitations On the Uses of Union Shop Funds*, 14 U.C. DAVIS L. REV. 591, 603 (1981); *see generally* Cantor, *supra* note 50, at 65-72 (discussing different routes the courts have taken with regard to collective bargaining agreements); Dau-Schmidt, *supra* note 38, at 100.

90. 9 U.S.C. § 158(b)(2).

91. 29 U.S.C. § 164(b).

State or Territory in which such execution or application is prohibited by State or Territorial law.”⁹² Thus, section 14(b) of the Act was included to indicate that federal labor policy was not meant to be exclusive.⁹³ As such, states are free to pursue more restrictive policies with regard to union security agreements, including regulation as well as complete prohibition of such agreements requiring membership in a labor organization as a condition of employment.⁹⁴ The legislative history of section 14(b) also indicates that federal law in the NLRA does not preempt state law regarding the “execution or application” of union security agreements.⁹⁵ When discussing section 14(b), Senator Wagner stated: “The provision will not change the status quo. That is the law today; and wherever it is the law today that a [union security] agreement can be made, it will continue to be the law. By this bill we do not change that situation.”⁹⁶ The Senate report on the bill stated, in response to concerns that the proviso to section 8(3) of the Wagner Act would preempt state laws outlawing the closed shop, that “the bill does nothing to facilitate closed-shop

92. *Id.*; see generally William M. Davis, *Major Collective Bargaining Settlements in the Private Industry in 1988*, May 1989 MONTHLY LAB. REV. 34 (discussing national statistics regarding the amount of major collective bargaining settlements reached in the private industry) <https://www.bls.gov/opub/mlr/1989/05/art3full.pdf>. In comparison, the Court’s decision in *Int’l Ass’n of Machinist*, which held that agency shop agreements could not be fully observed under the Railway Labor Act impacted only about one million workers, many of whom were not unionized. *Int’l Ass’n of Machinist v. Street*, 367 U.S. 740, 771-72 (1961); see BUREAU OF LAB. STAT., EMPLOYMENT AND EARNINGS JANUARY 1962 xviii (1962) <https://fraser.stlouisfed.org/title/employment-earnings-60/january-1962-20185>.

93. See § 164(b).

94. See *Algoma Plywood and Veneer Co. v. Wisc. Emp. Rels. Bd.*, 336 U.S. 301, 314 (1948).

95. *Id.*; see also *Retail Clerks Int’l Ass’n v. Sheremehorn*, 375 U.S. 96, 102 (1963) (“In light of the wording of § 14(b) and this legislative history, we conclude that Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements.”). In addressing the free rider problem, the Report of the Senate Committee stated:

A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership. . . . [A] buses of compulsory membership have become so numerous there has been great public feeling against such arrangements. This has been reflected by the fact that in twelve states such agreements have been made illegal either by legislative act or constitutional amendment, and in fourteen other States proposals for abolishing such contracts are now pending. Although these regulatory measures have not received authoritative interpretation by the Supreme Court [citation omitted], it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations and industries affecting commerce [citations omitted]. In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining refuse to pay their share of the costs.

S. REP NO. 80-105, at 5-6 (1947), reprinted in NLRB, *supra* note 83, at 407, 411-12.

96. 79 CONG. REC. 7673 (1935), reprinted in 2 NLRB, *supra* note 71, at 2395.

agreements to or [sic] make them legal in any State where they may be illegal; it does not interfere with the status quo on this debatable subject but leaves the way open to such agreements as might now be legally consummated.”⁹⁷

Employees in the railroad and airline industries are covered by a similar provision to section 8(a)(3) of the NLRA, specifically section 2, Eleventh of the Railway Labor Act.⁹⁸ While union security agreements were unlawful under the RLA until 1951,⁹⁹ Congress amended section 2, Eleventh so that it is similar to section 8(a)(3) of the NLRA, although it expressly preempts conflicting state law.¹⁰⁰ The legislative history of the amended section 2, Eleventh also indicates Congress’ intent to permit similar union security agreements as allowed under section 8(a)(3) of the NLRA.¹⁰¹ Section 2, Eleventh of the RLA thus permits employers and unions to agree to an agency shop clause. The statutory authorization for such an agreement is designed to resolve the problem of “free riders - employees in the bargaining unit on whose behalf the union [is] obliged to perform its statutory functions, but who refuse[] to contribute to the cost thereof.”¹⁰² Under an agency shop arrangement, non-members are required to pay their fair share of union expenditures “necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”¹⁰³

Similarly, the amendments to section 8(a)(3) were enacted in part as a response to a concern regarding “free riders” who benefited from union representation but refused to join the union and thus did not contribute financially to the costs of representation.¹⁰⁴ In interpreting Congress’ response to the issue of “free riders” through the amendment to section 8(a)(3), the Supreme Court has narrowly interpreted the term “membership” so as to only permit a union security agreement to require “financial

97. S. REP. NO. 573, at 11-12 (1935), *reprinted in* NLRB, *supra* note 71, at 2311.

98. 45 U.S.C. § 152.

99. *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 778 (1988) (Blackman, J., dissenting).

100. *Id.* at 746 (citing sections of the legislative history of the NLRA); *see also* Dau-Schmidt, *supra* note 38, at 60.

101. *Beck*, 487 U.S. at 747-49 (citing sections of the legislative history of the NLRA); *see also* Dau-Schmidt, *supra* note 38, at 60.

102. *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 872-73 (1998) (quoting *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 447 (1984)).

103. *Ellis*, 466 U.S. at 448.

104. *See Int’l Ass’n of Machinists v. Street*, 376 U.S. 740, 761 (1961); *Oil, Chem. & Atomic Workers Int’l Union v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976); *see also* Elena Matsis, *Procedural Rights of Fair Share Objectors After Hudson and Beck*, 6 LAB. L. 251, 252 (1990).

core” membership.¹⁰⁵ Confronted with the issue of “membership” under a union security agreement, the Court has concluded that under such an agreement, an employee is not required to become a member of the union, but must continue to pay the dues and fees required of union members.¹⁰⁶ Thus, under a union security agreement, “membership” for purposes of section 8(a)(3) of the NLRA is limited to the payment of initiation fees and monthly dues, but does not designate full membership in the union.¹⁰⁷ Section 8(a)(3) has thus been interpreted as not intending to permit a union to force the discharge of an employee under a union security agreement for any reason other than the refusal to pay required representation fees.¹⁰⁸ The next section examines the ability of a union to charge expenditures for political purposes to an employee pursuant to the representation dues and fees required under a union security agreement.¹⁰⁹

B. Challenges to Union Security Agreements and the Payment of Dues

In a series of cases, the Supreme Court has addressed a variety of issues regarding union membership and the use of union dues. The Supreme Court first addressed the issue of requiring non-union members to make financial payments to their union under a union security clause pursuant to the Railway Labor Act in a case involving a non-union member employee of the Union Pacific Railroad Company seeking to enjoin in state court the operation of a union security clause.¹¹⁰ The Court held that section 2, Eleventh of the RLA preempted the state law prohibiting union shops in order to permit union security clauses, and did not violate the First or Fifth Amendments, thus acting as a valid exercise of Congress’

105. See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963) (stating “membership as a condition of employment is whittled down to its financial core.”); *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 217 n.10 (1977); *Beck*, 487 U.S. at 745.

106. *Gen. Motors Corp.*, 373 U.S. at 735.

107. *General Motors Corp.*, 373 U.S. at 742 (noting that section 8(a)(3) of the NLRA was implemented in order to eliminate abuses of compulsory unionism by banning closed shops, and also eliminating the problem of free riders); see also David M. Burns, *Requiring Unions to Notify Covered Employees of Their Right to be an Agency Fee Payer in the Post-Beck Era*, 48 CATH. U. L. REV. 475, 479 n.33 (1999) (citing *Decline in “Free Riding” Beneficial*, 47 UNION LAB. REP. WKLY NEWSL. (BNA) 119 (Apr. 15, 1993)) (stating that a decline in the amount of free riding may have a profound effect on some unions, citing the findings of two University of Pittsburgh researchers studying three federal employee unions, it was estimated that a ten percent drop in free riding at one of the federal employee unions “would have generated between 20 and 28% more revenue for that union in each year of the 1981-1990 decade”).

108. See *Gen. Motors Corp.*, 373 U.S. at 742-43; *Abood*, 431 U.S. at 217 n.10.

109. See *infra* Section I.B.

110. *Ry. Emps. Dep’t v. Hanson*, 351 U.S. 225, 227 (1956).

power to ensure industrial peace under the Commerce Clause.¹¹¹ Noting that the employees' First Amendment rights were protected through Congress' prohibition of any conditions upon membership other than the payment of uniform dues, fees, and assessments, the Court concluded that the Railway Labor Act did not violate the First Amendment rights of employees to freely associate by the authorization of a union shop.¹¹²

Rejecting the argument that union security agreements violated employees' First and Fifth Amendment rights, the Court concluded that trade unions and their support actually strengthen the liberty to work, and any infringement on First Amendment rights by the periodic dues and fees allowed under the provision was justified by a compelling interest in promoting collective bargaining, labor peace, and industrial self-government.¹¹³ Finally, the Court emphasized that its decision did not address the issue of the use of a union security clause to require employees' financial support for the union's political and other activities not related to collective bargaining or the settlement of grievances.¹¹⁴

The Supreme Court did address this issue several years later by examining whether union dues collected under a union security agreement could be spent on political activities despite an employee's objections.¹¹⁵ In *Street*, a group of railroad employees challenged the constitutionality of section 2, Eleventh of the RLA, which provides in part that labor organizations may enter into agreements with employers that require all employees to become members so long as membership is offered to them on the "same terms and conditions as are generally applicable to any other member," thereby authorizing the creation of a union shop.¹¹⁶ Through the creation of a union shop, unions used the compulsory membership dues to make political contributions without obtaining the approval of all of their members.¹¹⁷

The Court began its analysis by reaffirming its holding in *Hanson* that the authorization of a union security clause in section 2, Eleventh of the RLA was a valid exercise of Congress' power under the Commerce

111. *Id.* at 233, 238.

112. *See id.* at 238 (Frankfurter, J., concurring).

113. *See id.* at 235, 238.

114. *See id.* at 238.

115. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 744 (1961).

116. Railway Labor Act (RLA), 45 U.S.C. § 152 (1952); *see also* GORMAN, *supra* note 45, at 642 (explaining that union shop agreements generally mandate that employees become members of a union following a grace period and remain members until expiration of the collective bargaining agreement).

117. *See Street*, 367 U.S. at 742-45.

Clause and did not violate the First or Fifth Amendments.¹¹⁸ The Court also distinguished the *Hanson* decision by noting that the record in *Hanson* did not demonstrate that dues were being used for political purposes over the objections of workers.¹¹⁹ By examining the history of the statute with regard to legislative intent in order to avoid the First Amendment question, the Court noted that a congressional aim was to eliminate the “free rider” problem while protecting the employees’ “freedom to dissent.”¹²⁰ Based on the legislative history of the 1951 amendments to the RLA, the Court concluded that the purpose of the provision was to allow unions to recover their expenses through a union security agreement relating to their duties in negotiating and enforcing a collective bargaining agreement.¹²¹ Because the union’s use of dues for political causes was not related to collective bargaining and other administrative expenses, and this use conflicted with the interests of objecting workers, the Court held that the statute prohibited unions from using worker dues for political purposes “over an employee’s objection” when they were unrelated to collective bargaining and the settlement of grievances.¹²² In *Street*, Justice Brennan, writing for the majority, stated:

[Agency shop fees] used to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which clearly falls outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified.”¹²³

Noting that unions do not have a duty to solicit worker consent prior to using dues for political causes, the Court found that the dissenting workers had a duty to object, and a union is not authorized by the statute to continue to use the dues for political causes following such objections.¹²⁴

In reaching this determination, the Court characterized the legislative history for section 2, Eleventh of the RLA as being designed to eliminate

118. *See id.* at 749.

119. *See id.* at 747-49.

120. *Id.* at 765-67.

121. *See id.* at 763-64.

122. *Id.* at 768-69; *see also* W. Kearns Davis, Jr., Crawford v. Air Line Pilots Ass’n: *The Fourth Circuit Determines What Expenses a Union May Charge to Nonunion Workers*, 72 N.C. L. REV. 1732, 1737-39 (1994).

123. *Street*, 367 U.S. at 768.

124. *See id.* at 768-71.

the problem of “free riders.”¹²⁵ The legislative history did not support a conclusion that Congress intended to grant a union the authority to require employees to provide financial support for a union’s political causes they oppose under a union security agreement.¹²⁶

In a case examining the required procedures for employees to express their dissent, the Court held that the employees did not need to specifically identify the opposed expenditures; instead, they were merely required to express an objection to all political contributions by the union.¹²⁷ In addition, because the union possessed the relevant facts and spending records, the union had the burden of proving by a preponderance of the evidence, the proportion of political expenditures unrelated to collective bargaining and the settlement of grievances in relationship to total union expenditures in order to determine the proper remedy in such a dispute.¹²⁸

After avoiding the issue in prior cases, the Court finally did examine the constitutionality of a teacher union’s use of agency fees to fund political causes over state employees’ objections.¹²⁹ In *Abood*, a group of public school teachers challenged a Michigan statute which authorized the negotiation of a union security agreement for government employees that was modeled after the language of section 2, Eleventh, of the RLA and section 8(a)(3) of the NLRA, claiming that the agency shop agreement infringed upon their freedom of association under the First and Fourteenth Amendments.¹³⁰ The Court found the state law constitutional with regard to the use of agency fees for costs directly related to collective bargaining.¹³¹ But when employees object, a union violates the First Amendment when agency fees are used for “ideological causes not germane to its duties as collective bargaining representative” as the First Amendment protects an individual’s right not to contribute to an organization.¹³²

The agency fees assessed from non-members may be “used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment.”¹³³ Yet due to the existence of state action, objecting employees have a First Amendment right

125. See *id.* at 761-64.

126. See *id.* at 764, 768-69.

127. *Railway Clerks v. Allen*, 373 U.S. 113, 118 (1963).

128. *Id.* at 122.

129. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977).

130. *Id.* at 212-13; see also, Ralph H. Rock, *Giving Texas Lawyers Their Dues: The State Bars Liability Under Hudson and Keller for Political and Ideological Activities*, 28 ST. MARY’S L.J. 47, 59 (1996) (discussing the *Abood* decision).

131. See *Abood*, 431 U.S. at 231-32.

132. *Id.* at 235-36.

133. *Id.* at 225-26.

to “prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.”¹³⁴

While a union shop agreement would impinge upon an objecting employee’s First Amendment rights, the government interest in ensuring industrial peace and promoting collective bargaining outweighed the infringement.¹³⁵ This infringement was justified “insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment,” but did not justify political expenditures.¹³⁶ Thus, the Court concluded that an agency shop does violate objecting employees’ First Amendment rights when there is a finding of state action through the negotiation and observance of a union security agreement.¹³⁷

A remaining issue involved the permissible support that may be charged to the represented employees in the bargaining unit. In *Ellis*, the Court provided a test for permissible union expenditures, requiring that they be “necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”¹³⁸ Such expenditures are considered “‘germane’ to collective-bargaining activity.”¹³⁹ Applying this test in *Ellis*, the Court concluded that the following expenses were not reasonably incurred for purposes of serving as the exclusive representative in dealing with the employer on labor-management issues: general organizing efforts aimed at employees of other employers; various types of litigation involving the union; and union reporting on political outreach activities.¹⁴⁰ While the Court recognized that organizing efforts aimed at the employees of other employers could have a positive impact upon members of a particular bargaining unit, the Court concluded that this impact was too attenuated to support required financial contributions from dissenting employees.¹⁴¹ The Court thus found that the use of compulsory

134. *Id.* at 234.

135. *Id.* at 225.

136. *Id.* at 225-26.

137. *Id.* at 226-27.

138. *Ellis v. Bhd. of Ry., Clerks*, 466 U.S. 435, 448 (1984).

139. *See Lehnert v. Ferris Faculty Ass’n.*, 500 U.S. 507, 519 (1991).

140. *See Ellis*, 466 U.S. at 448, 450-51, 453.

141. *Ellis*, 466 U.S. at 451; *see also* Christopher David Ruiz Cameron, *The Wages of Syntax: Why the Cost of Organizing a Union Firm’s Non-Union Competition Should be Charged to “Financial Core” Employees*, 47 CATH. U. L. REV. 979, 988 (1998) (criticizing the Court’s decision in *Ellis* for failing to recognize the important role of a union in organizing other employees and the impact of these efforts on other employees represented by the union). In contrast, the Board has ruled that organizing expenditures are properly charged to non-members as agency fees pursuant to a union

fees over employees' objections for the purposes of union conventions, social events and publications was unconstitutional.¹⁴² In reaching this conclusion, the Court considered the government's interest in resolving the problem of free riders as well as the impact on employees' freedom of speech.¹⁴³

In another public sector case, the Court held that the First Amendment required unions and employers to provide three procedural safeguards for non-union workers who object to the calculation of the agency fee.¹⁴⁴ The safeguards are essential to "minimize the infringement" on non-members' rights and provide workers with "a fair opportunity to identify the impact of [the agency-fee assessment] on [their] interests."¹⁴⁵ First, employees must receive "sufficient information to gage the propriety of the union's fee"; second, the union must give objectors "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker"; and third, any amount of the objectors fee "reasonably in dispute" must be held in escrow while the challenge is pending.¹⁴⁶

In *Beck*,¹⁴⁷ the Court was presented with a challenge to an agency shop agreement under section 8(a)(3) of the NLRA, in which a portion of the dues and fees had been used for political purposes. The employees challenged the union's use of their agency shop fees for lobbying, organizing employees of other employers, and social, charitable, and political events.¹⁴⁸

Following its reasoning in *Street*, the Court concluded that section 8(a)(3) of the NLRA only authorizes a union to use dues and agency fees for purposes related to "performing the duties of an exclusive [bargaining]

security clause because "there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market." *United Food & Com. Workers, Loc., 951*, 329 N.L.R.B. 730, 738 (1999). The Board distinguished the Supreme Court's decision in *Ellis* that organizing costs are not chargeable to objecting non-members under the RLA because the NLRA, as distinguished from the RLA, has a principal purpose to foster more extensive organizing and has always permitted union security agreements. In an early case, *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), the Board held that chargeable expenses for activities outside the bargaining unit must be "germane" to the union's role in collective bargaining, contract administration, and grievance adjustment, and must be incurred for services that may ultimately ensure to the local members benefit.

142. *Ellis*, 466 U.S. at 456.

143. *Id.*

144. *Chi. Teachers Union Loc. No.1 v. Hudson*, 475 U.S. 292, 302-03 (1986).

145. *Id.* at 303.

146. *Id.* at 306, 310.

147. *Comm'ns Workers of America v. Beck*, 487 U.S. 735 (1988).

148. *Id.* at 739.

representative.”¹⁴⁹ The union was prohibited from using fees and dues for purposes other than collective bargaining, contract administration, or grievance adjustment over employees’ objections.¹⁵⁰ Under a union security clause, a union can thus require employees as a condition of employment to pay only their pro-rata share of the basic financial core membership in assessing the required initiation fees and dues.¹⁵¹ Financial core membership means only those expenses needed to finance union activities related to collective bargaining, contract administration, and processing grievances, and not the union’s political and fraternal activities.¹⁵² A union shop clause can require employees who wish to remain only “basic financial members” to pay dues and fees, but cannot require them to become full members, participate in union meetings at elections, or become subject to union discipline.¹⁵³ Similarly, an agency shop clause does not require the employees to join the union as full members, but does require payment for the services rendered by the union in negotiating and administering the collective bargaining agreement.¹⁵⁴ Affirming that section 8(a)(3) permitted the negotiation of a union security clause requiring membership “whittled down to its financial core,”¹⁵⁵ the Court concluded that the legislative history reflected Congress’ identical intent when enacting section 2, Eleventh of the RLA and section 8(a)(3) of the NLRA, and thus the Court could apply its precedent in interpreting section 2, Eleventh of the RLA to a controversy arising under section 8(a)(3) of the NLRA because the sections are “in all material respects identical.”¹⁵⁶ The identical provisions shared the same purpose of eliminating free riders by requiring workers who benefited from union representation to also share in the cost of union representation for purposes of collective bargaining.¹⁵⁷ Following from this interpretation of Congress’ goal, the Court concluded that section 8(a)(3) permitted a union to require dissenting employees to contribute to the costs that are “necessarily or reasonably incurred for the purpose of performing the duties of an exclusive

149. *Id.* at 752 (quoting *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 448 (1984)); see also George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKLEY J. EMP. & LAB. L. 187, 232 (1994) (arguing that the Court erroneously concluded that the legislative history of the NLRA supported the Courts holding.).

150. Feldman, *supra* note 149, at 235.

151. *Beck*, 487 U.S. at 745 (quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963)).

152. See *id.*

153. See *Union Starch & Refining Co.*, 87 N.L.R.B. 779, 784 (1949).

154. *Id.*

155. *Beck*, 487 U.S. at 745 (quoting *General Motors Corp.*, 373 U.S. at 742).

156. *Id.* at 742-43.

157. *Id.* at 753.

[bargaining] representative.”¹⁵⁸ By resolving the statutory issue in this manner, the Court avoided the necessity of resolving the constitutional question regarding whether such an agreement violated objecting employees’ First Amendment rights.¹⁵⁹ In reaching this decision, the Court ignored the language of section 8 (a)(3) regarding the assessment of “uniform” dues as well as the legislative history of the 1947 amendments.¹⁶⁰ Instead, the Court construed Congress’ sole purpose as being to resolve the free rider problem addressed in *Street*.¹⁶¹

A few years later, the Court adopted a three-prong test for determining whether a dissenting worker’s fees could be applied to a particular activity: the expenditure “must (1) be germane to collective bargain activities; (2) be justified by the government’s vital policy interest in labor policy in avoiding free riders; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.”¹⁶² Despite disagreement on the application of the test to the challenged union activities, a majority concluded that a local union may charge dissenting employees for costs related to activities involving its “state and national affiliate,” even when the employees do not directly benefit from such activities, for expenditures on an educational publication that was informational as opposed to political or public, to finance trips by union delegates to conventions involving the parent union, and for expenses in preparation for carrying out an illegal strike.¹⁶³ The Court restricted its decision by determining that a local union may not direct fees

158. *Id.* at 752 (quoting *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 448 (1984)).

159. *See Beck*, 466 U.S. at 763 n.1.

160. *See* Dau-Schmidt, *supra* note 38, at 54-55 (presenting a detailed criticism of the Court’s decision, asserting that the Court’s interpretation of Section 8(a)(3) of the NLRA in *Beck* conflicts with the statutory language, administrative interpretations, and legislative history. In addition, Professor Dau-Schmidt argues that the Court’s interpretation of § 8(a)(3) is an inappropriate application of the doctrine of avoiding constitutional questions, and that an examination of that question leads to the conclusion that there is insufficient state action in the negotiation and observance of union security agreements under the NLRA to support constitutional objections); *see also Ellis*, 466 U.S. at 762.

161. For a discussion of the legislative history, *see Ellis*, 466 U.S. at 763, 770-80 (Blackman, J., dissenting); *Beck Commc’ns Workers of Am.*, 776 F.2d 1187, 1214-21 (4th Cir. 1985) (Winter, C.J., dissenting).

162. *See Lehnert v. Ferris Fac. Ass’n*, 500 U.S. 507, 519 (6th Cir 1991); *see also Davis*, *supra* note 122, at 1741-42 (quoting *Lehnert*, 500 U.S. at 519); *Airline Pilots Ass’n v. Miller*, 523 U.S. 866, 868 (1998) (holding that under an agency shop agreement pursuant to the RLA, non-union employees must pay their fair share of union expenditures necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees, but costs unrelated to the duties of the labor union as the exclusive representative could not be imposed on objecting non-union employees. The purposes for which a union may spend the agency fee paid by non-members are circumscribed by the First Amendment when public employers are involved, and the NLRA or RLA when private employers subject to their provisions are involved).

163. *See Lehnert*, 500 U.S. at 528-31.

from dissenting employees to “bargaining activities wholly unrelated to the employees in the unit.”¹⁶⁴ The Court concluded though, that even when the First Amendment is implicated, the dissenting employees’ First Amendment rights may be trumped by the government interest in preserving union shops and the integrity of federal labor policy, particularly with regard to the elimination of the free rider problem.¹⁶⁵

Following the Court’s decision in *Beck*, the National Labor Relations Board proposed a set of requirements for notifying employees of their rights under *Beck*.¹⁶⁶ These rules included alternative forms of notice to be provided to the employees, including direct mailings to the last known address of each employee, posting notices in the workplace and in locations where the union usually posted notices, or publishing the information in newsletters sent to all employees covered by the union security agreement.¹⁶⁷ Under these proposed rules, unions were also required to separately notify non-member financial core employees of their right to object to expenditures for non-representational purposes and pay reduced dues and fees.¹⁶⁸ Similarly, non-member financial core employees were to be provided notice either through direct mailing, postings, or publication.¹⁶⁹ Ultimately, the proposed rules were withdrawn in favor of a case-by-case implementation of *Beck*’s notice requirements.¹⁷⁰ This case-by-case approach by the NLRB has been criticized for its slow pace and failure to enforce *Beck* rights.¹⁷¹

II. CAMPAIGN FINANCE REFORM & PAYCHECK PROTECTION

Following the decision in *Beck*, numerous proposals have been made at the state and federal levels to require employee consent before unions can spend dues and fees for political purposes.¹⁷² For example, in 1998

164. *See id.* at 524.

165. *See id.* at 518, 524-32; *see also Ellis*, 466 U.S. at 435, 455-56.

166. *See* Union Dues Regulations, 57 Fed. Reg. 43635, 43636 (1992) (proposed Sept. 22, 1992) (to be codified at 29 C.F.R. Pt. 103) (withdrawn Mar. 19, 1996).

167. *See id.* at 43642.

168. *See id.*

169. *See id.*

170. *See* Proposed Rules Notice, 61 Fed. Reg. 11167 (Mar. 19, 1996).

171. *See* LAB. REL. WK. (BNA), WITNESSES TELL PANEL REBATE OF DUES SPENT ON POLITICS IS HARD TO ACHIEVE (1996), Bloomberg Law (discussing Rep. Fawell’s statement that the Board’s case-by-case approach is similar to “molasses going uphill”); *see also* Matsis, *supra* note 104, at 257-58.

172. *See, e.g.*, S. 650, 89th Leg., Reg. Sess. (Mich. 1997); S. 480, 1998 Leg. 412th Sess. (Md. 1998); Fair Campaign Practices Act, 1993 Wash. Laws, ch. 2, § 7(3); Worker Paycheck Fairness Act, H.R. 1625, 105th Cong. (1997); Paycheck Protection Act, S.9, 105th Cong. (1997); Campaign Finance Reform Act of 1996, H.R. 3820, 104th Cong. Title IV (Worker Right to Know) (1996); The

alone, paycheck protection legislation was introduced in twenty-six states.¹⁷³ The various paycheck protection measures proposed in Congress and similar acts in the various states, while varying in language and details, all require unions to obtain written permission from employees before using fees and dues for political purposes.¹⁷⁴ These proposed bills thus reject the precedent from *Street* that “dissent is not . . . presumed”¹⁷⁵ and create a system requiring affirmative consent before the union may use the workers’ dues and fees to contribute to purposes unrelated to collective bargaining and the settlement of grievances.¹⁷⁶

Labor organizations contribute substantial amounts of money to political campaigns and parties.¹⁷⁷ As the tables below indicate, the majority of this support is provided to the Democratic Party.¹⁷⁸

While most large contributors cover their bets by making contributions to both parties, labor organizations constitute one of the largest contributors to the Democratic Party, providing almost \$36.3 million as contrasted with just over \$600,000 to the Republican Party.¹⁷⁹ Furthermore, much of this money is distributed through “soft” money political action committees.¹⁸⁰ The figures are based on contributions from PACs, soft money donors, and individuals giving \$200 or more, as reported to the Federal Election Commission in the 1999-2000 election cycle.¹⁸¹

Worker Right to Know Act H.R. 3580, 104th Cong. (1996) (existing as several provisions in the Campaign Finance Reform Act of 1996, H.R. 3820, Title IV, 142 Cong. Rec. H 8458, H 8462-63 (Daily Ed. Jul. 25, 1996).

173. See, e.g., Jack W. Germond & Jules Witcover, *Despite Loss in California, ‘Paycheck Protection’ Fight Continues*, THE BALTIMORE SUN (Jun. 10, 1998, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-1998-06-10-1998161053-story.html> (discussing California’s initiative).

174. See, e.g., *id.* (discussing California’s initiative).

175. See *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 774 (1961).

176. See Michael C. Kochkodin, *A Good Politician is One That Stays Bought: An Examination of Paycheck Protection Acts and Their Impact on Union Political Campaign Spending*, 2 U. PA. J. LAB. & EMP. L. 807, 822 (1999).

177. *Democratic Party*, OPEN SECRETS, <https://www.opensecrets.org/parties/indus.php?cmte=DPC&cycle=2000> (last visited Feb. 15, 2022).

178. See *id.*

179. *Republican Party*, OPEN SECRETS, <https://www.opensecrets.org/parties/totals.php?cmte=RPC&cycle=2020> (last visited Feb. 15, 2022); *Democratic Party*, *supra* note 177.

180. See *Republican Party*, *supra* note 179; *Democratic Party*, *supra* note 177.

181. See *Republican Party*, *supra* note 179.

Table 1. Republican Party

Sector	Total Contributions (in millions)
Agribusiness	\$21.7
Communications/Electronics	\$38.2
Construction	\$14.4
Defense	\$3.6
Energy/Natural Resources	\$28.4
Finance/Insurance/Real Estate	\$93.1
Health	\$26
Lawyers & Lobbyists	\$11.7
Transportation	\$20
Miscellaneous Business	\$56.1
Labor	\$.634
Ideology/Single-Issue	\$25.7
Other	\$40.2

Table 2. Democratic Party

Sector	Total Contributions (in millions)
Agribusiness	\$6
Communications/Electronics	\$48.7
Construction	\$7.1
Defense	\$1.9
Energy/Natural Resources	\$8.4
Finance/Insurance/Real Estate	\$67.9
Health	\$14.5
Lawyers & Lobbyists	\$35.2
Transportation	\$7.5
Miscellaneous Business	\$34.5
Labor	\$36.3
Ideology/Single-Issue	\$24.8
Other	\$22.2

As can be readily appreciated, unions vehemently oppose discounting full union dues for workers who object to particular expenditures, and such discounts for expenditures that are political or not related to collective bargaining activity equal a substantial portion of a union's resources.¹⁸² In opposing these various measures, union officials rely upon three primary arguments. First, as stated in opposition to a proposed bill in Texas that would require labor unions to get written permission every year from members prior to using the union dues for political activity such as issue advocacy, lobbying, voter registration, attendance at social or political events, and publication of views, the Texas AFL-CIO argued that the bill would "impose an ultra-expensive burden on unions to obtain written proof on what we already know from national polling that the vast majority of union members approve of the political activity of their unions."¹⁸³ In addition, officials argued that the bill would be prohibitively expensive to administer, would violate First Amendment rights, and presumes that separate "from any other dues-collecting organization, separate from any group that does politics or voter registration, the Texas AFL-CIO and its member unions need government micro-management of how to spend voluntary dues payments."¹⁸⁴ Unions assert that employees who object to contributing financial support to a union's political activities already have a legal right under the Supreme Court's decisions in *Street*, *Abood*, and *Beck* to avoid contributing dues and fees for political purposes.¹⁸⁵ This argument thus contends that a paycheck protection act is not required to prevent a union from spending dues and fees for purposes to which employees object because the employees already have the option of becoming a financial core member as provided for under Supreme Court precedent.¹⁸⁶

In addition, unions assert that requiring written consent from each employee prior to spending dues or fees for political activities imposes significant bookkeeping and administrative costs on the union that infringe upon the union's political activities, particularly when only a "negligible" number of employees actually object to the union political

182. See *Wegscheid, v. Loc. Union 2911*, 117 F.3d 986, 990 (7th Cir. 1997) (the agency fee accounted for only 76.4 percent of the full dues, with almost a quarter being used for political or non-collective bargaining related expenditures).

183. *The Elaine Chao Flap: What Does it Mean?*, PEOPLE'S WORLD (Mar. 21, 2003), <https://www.peoplesworld.org/article/the-elaine-chao-flap-what-does-it-mean/>.

184. *Labor Relations Weekly*, BUREAU NAT'L AFFS. Vol. 13, No. 2 (Jan. 13, 1999).

185. See 144 CONG. REC. H1752 (Daily Ed. Mar. 30, 1998) (statement of Rep. Clay); Kochkodin, *supra* note 176, at 822.

186. See Kochodin, *supra* note 176, at 822.

expenditures.¹⁸⁷ Such protection is also unnecessary because unions comply with the requirements of financial core membership under the Court's precedent in *Street*, *Abood*, and *Beck*.¹⁸⁸ The third argument by union officials contends that paycheck protection efforts at the federal and state level, rather than being designed to protect the interests of minority employees, are thinly veiled politically motivated attempts to "punish labor for being politically effective in recent elections."¹⁸⁹

Advocates for paycheck protection efforts claim that the majority of employees are in favor of requiring unions to obtain written consent prior to spending dues and fees for purposes unrelated to collective bargaining or the settlement of grievances and the vast majority of workers are not aware of their right to dissent from contributing to a union's political causes.¹⁹⁰ In contrast to the Court's conclusion that "dissent is not to be presumed,"¹⁹¹ the various Congressional proposals to require prior written authorization create, in essence, an "opt-in" process whereby an employee must give prior approval to the union's collection of dues and fees for expenditures and activities outside its role in collective bargaining and the settlement of grievances.¹⁹² An asserted advantage of the proposed opt-in procedure is that it would distinguish between representational and

187. *See id.*

188. *See* 142 CONG. REC. H8511 (July 25, 1996) (statement of Rep. Kildee) (asserting that approximately 15,000 members of the American Federation of State, County, and Municipal Employees, will receive refunds for dues and fees spent on political activities). *But see* Joseph Knollenberg, *The Changing Of The Guard: Republicans Take On Labor In The Use Of Mandatory Dues Or Fees For Political Purposes*, 35 HARV. J. ON LEGIS. 347, 364-66 (1988) (providing descriptions of threatening and harassing behavior by unions against employees refusing to contribute dues or fees in support of union political issues).

189. *See* 142 CONG. REC. H1758 (Mar. 30, 1998) (statement of Rep. Jackson-Lee) (referring to a proposed Federal Paycheck Protection Act as a "gag rule"); Kochodin, *supra* note 176, at 823 (citing Ralph Z. Hallow, *Union Set to Kill Consent Initiative: Oppose Ballot on Use of Dues*, WASH. TIMES, Nov. 12, 1997, at A4 (quoting Judith Barish, Communications Director for the California Labor Federation, the state's subsidiary of the AFL-CIO, discussing the political motivations of California's Proposition 226 Paycheck Protection Act)).

190. Burns, *supra* note 107, at 488-89 (discussing a 1996 survey in which seventy-eight percent of union workers indicated that they were not aware of their right to pay reduced fee based on representational activities under the Court's decision in *Beck*); D. MARK WILSON, THE WORKER PAYCHECK FAIRNESS ACT: ENDING THE INVOLUNTARY USE OF UNION DUES, HERITAGE FOUNDATION BACKGROUND, 1 n.3 (1998) (asserting that sixty-seven percent of union members were not aware of the *Beck* decision); Kochkodin, *supra* note 176, at 823 (discussing the claim that workers are not aware of their rights under the Court's precedent in *Street*, *Abood*, and *Beck*).

191. *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961); *see also* Comm'ns Workers of America v. Beck, 487 U.S. 735, 774 (1988) (finding that although *Street* is a Railway Labor Act case, it was controlling because of the similar union security statutory provisions).

192. *See* Paycheck Fairness Act, S. 9, 105th Cong. § 2 (1997); *see also* H.R. REP. NO. 105-397, at 6-7 (1997) (written statement of Marshall J. Breger) (stating that the current opt-out procedure creates "confusion as to the clarity of the notice" in describing the opt-in procedure as fair).

non-representational dues and fees at the beginning of the employment relationship rather than requiring the employee to voice objections after the fact.¹⁹³ It has also been asserted that requiring employees to voice their objections results in harassment by unions and other employees.¹⁹⁴ In addition, advocates for paycheck protection legislation point to the impact of legislation enacted in Washington in 1992, asserting that it provides empirical support for the conclusion that most employees will choose not to financially support a union's political expenditures when given an option.¹⁹⁵

A. *Federal Campaign Finance Reform and the Requirement of Worker Consent*

Congress first attempted to regulate campaign financing in 1907 with the Act of January 26, 1907, which provided in pertinent part:

That it should be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatsoever to make a money contribution in connection with any election at which Presidential and Vice-

193. See H.R. REP. NO. 105-397, at 15 (1997) (written statement of Roger Pilon, Ph.D., J.D., Senior Fellow and Camp Director, Center for Constitutional Studies, Cato Institute, noting that employees would be permitted to retake control over their union dues and fees).

194. See *The Worker Right to Know Act Before the Subcomm. on Employer-Employee Relations of the House Comm. on Econ. and Educ. Opportunities: Hearing on H.R. 3580*, 104th Cong. 234 (statement of Charles W. Baird, Ph.D., Professor of Economics and Director of Smith Center for Private Enterprise Studies); see also *Hearings on H.R. 1625*, 105 H.R. REP. NO. 105-397, at 19 (1997) (statement of Jane Gansmann, TWA employee, stating that her name and other union dues objectors' names were printed in a union publication); *The Worker Paycheck Fairness Act Before the House Committee on Education and the Workforce: Hearing on H.R. 1625*, 105th Cong. 91 (testimony of Charles Barth, aircraft maintenance technician, U.S. Airways, testifying that letters were posted in the workplace "listing the names of Political Objectors, and labeling them Union Objectors, Dues Objectors and Scabs"); *Hearings on Mandatory Union Dues Before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce*, 105th Cong. 34-35 at 4 105-397, at 9 (1997) (statement of Kerry W. Gipe, aircraft mechanic, U.S. Airways, stating that the names of objectors were posted on union and company property referring to them as Scabs, and objectors were informed that their names were being distributed to union officials in order to prevent them from being employed at union shops in other locations).

195. See Cathleen Ferraro, *Battle over Proposition 226 Gets Under Way*, SACRAMENTO BEE, (Mar. 20, 1998) (discussing the potential impact of Proposition 226 California in comparing the results in Washington); 144 Cong. Rec. H1 753-54 (Daily Ed. Mar. 30, 1998) (statement of Rep. Schaffer). *But See* Kochkodin, *supra* note 176, at 824 (arguing that paycheck protection legislation will have only a minimal impact upon the amount of dues and fees available for union political spending, and in fact may permit unions to increase the amount of money contributed to political causes without the consent of employees through soft money political action committees).

Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.¹⁹⁶

In 1925, Congress enacted the Federal Corrupt Practices Act of 1925, which expressly excluded primaries and conventions from the scope of the prohibition regarding corporate contributions, and changed the term “money contributions” to simply “contribution” in order to clarify that the prohibition was applicable to contributions in-kind and contributions of things-in-value, in addition to money.¹⁹⁷ The first effort by Congress to regulate political contributions from labor organizations did not occur until 1943.¹⁹⁸ In the War Labor Disputes Act, Congress provided in pertinent part:

It is unlawful for any . . . labor organization to make a contribution in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or for any candidate, political committee or other person to accept or receive any contribution prohibited by this section.¹⁹⁹

Because Congressional committees had interpreted the word “contribution” narrowly, it was possible for organized labor to provide substantial expenditures in the 1944 Presidential election.²⁰⁰ In order to close this loophole, Congress in 1947 broadened the prohibition on labor union contributions to federal elections so as to include expenditures.²⁰¹

Currently regulated by the Federal Election Campaign Act,²⁰² which continues the Federal Corrupt Practices Act prohibitions against political contributions and expenditures by both labor unions and corporations,²⁰³ the Act also provides that a corporation or labor organization may

196. Tillman Act of 1907, Ch. 420, 34 Stat. 864 (1907) (impliedly repealed in 1925). Note that this discussion of campaign finance reform will focus on measures restricting a union’s use of dues and fees for political purposes. A detailed examination of campaign finance reform is beyond the scope of this article.

197. Federal Corrupt Practices Act of 1925, Ch. 386, Tit. III, 43 Stat. 1070 (amended in 1943) (repealed in 1971).

198. War Labor Disputes Act, Ch. 144, 57 Stat. 163 (1943) (amended in 1947).

199. *Id.*

200. See H.R. REP. NO. 78-2093, at 2-3 11 (1944); see also *United States v. CIO*, 335 U.S. 106, 115 (1948) (providing a discussion of the legislative history of the prohibition of labor union contributions and expenditures).

201. Labor Management Relations (Taft-Hartley) Act 29 U.S.C. § 171(b); see 2 U.S.C. § 441b (1976) (detailing the prohibitions regarding corporate and labor union contributions and expenditures).

202. 2 U.S.C. §§ 431-55 (1980).

203. *Id.* § 441b (1980).

establish a “separate segregated fund” to make such contributions and expenditures,²⁰⁴ so corporate or union treasury funds may not be commingled with voluntary contributions to such a fund.²⁰⁵ Thus, while a labor organization is forbidden to make political “contributions or expenditures” in connection with federal elections, a labor union may use its treasury funds to communicate with its members and their families, finance a non-partisan voter registration or “get out the vote” campaign aimed at its members and families, engage in issue-oriented political communications which do not expressly advocate the election or defeat of a specifically identified candidate, and may also use treasury funds to establish and administer and solicit funds for a separate segregated fund utilized to make contributions and expenditures.²⁰⁶ In simple terms, labor, as well as other organizations, can create separately funded political action committees to use “soft” money for the purposes listed that do not directly provide financial support to a specific candidate or party.²⁰⁷ Furthermore, except as may be prohibited by state law, a labor union may use treasury funds to make contributions and expenditures with respect to state and other local offices.²⁰⁸ While only twenty states forbid labor unions from contributing treasury funds to state and local candidates within those states,²⁰⁹ twenty-two states forbid corporations from contributing treasury funds to candidates for state and local offices.²¹⁰

Various bills have been proposed in Congress to require unions to obtain prior written consent of employees before the union can collect dues or fees for non-representational activities and also require employers to post notices of the employees’ *Beck* rights.²¹¹ Both the Worker Right to Know Act from the 104th Congress, H.R. 3580, and the Worker Paycheck Fairness Act, H.R. 1625 from the 105th Congress, similarly require unions to obtain prior written consent from employees before collecting dues and fees for non-representational activities as well as

204. *Id.* § 441b(b)(2)(C).

205. *See id.* (interpreting the prior statute).

206. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.4(a)(2) (1981); *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972); 2 U.S.C. § 441-b(b)(2)(C).

207. *See* 2 U.S.C. § 441b(b)(2) (interpreting prior legislation).

208. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 327 (2010).

209. *See State Limits on Contributions to Candidates 2019-2020 Election Cycle*, NAT’L CONF. OF STATE LEGIS., <https://www.ncsl.org/Portals/1/Documents/Elections/Contribution-Limits-to-Candidates-2019-2020.pdf?ver=2019-10-02-132802-117> (last updated June 2019).

210. *See id.*

211. *See, e.g.*, H.R. REP. NO. 105-397, at 4 (1997) (Worker Paycheck Fairness Act); Paycheck Protection Act, S. 9 105th Cong. sec. 2 (1997); Campaign Finance Reform (Worker Right to Know) Act of 1996, H.R. 3820, 104th Cong. Tit. IV, sec. 404(a).

requiring the posting of notice concerning the *Beck* rights of employees.²¹² Similarly, the Senate Paycheck Protection Act sought to make workers aware of how unions spent employee dues and fees with regard to political contributions by amending section 316 of the Federal Election Campaign Act of 1971 to require unions to obtain prior written, voluntary authorization from each employee before collecting or assessing dues earmarked for political expenditures.²¹³

In 1997, Harris Fawell, Chairman of the House Subcommittee on Employer-Employee Relations, first introduced the Worker Paycheck Fairness Act.²¹⁴ The Act was hailed as a “common sense solution” because it promised to give workers more control over their money by granting each employee the right to decide whether to pay for activities exceeding the scope of legitimate collective bargaining activities.²¹⁵ Sponsors of the Act avowed that the *Beck* decision imposed an unreasonable burden on employees because employees must first resign from union membership in order to exercise their rights guaranteed under *Beck*.²¹⁶ The Worker Paycheck Fairness Act mandates that the employee be given a choice at the inception of employment and must provide written permission before any dues are spent for any purpose unrelated to collective bargaining, including political purposes.²¹⁷ Rather than opting out of the union, supporters of the Act have suggested that it is fairer to a member to “opt in” to providing political support for unions.²¹⁸ Supporters of the “opt-in” procedure assert that it would allow employees to exercise *Beck* rights without harassment and reduce the possibility of non-compliance with *Beck* principles.²¹⁹ Section 7 of the Worker Paycheck Fairness Act sought to remedy asserted problems of harassment as well as the loss of workplace rights by prohibiting retaliation and coercion by a labor organization against an employee exercising *Beck* rights: “It shall be unlawful

212. See Campaign Finance Reform (Worker Right to Know) Act of 1996, H.R. 3820, 104th Cong. Tit. IV, sec. 402 (1996) (The Worker Right to Know Act was incorporated into the 104th Congress’ Campaign Finance Reform Act of 1996); Paycheck Protection Act, S. 9, 105th Cong. sec. 2 (1997).

213. Paycheck Protection Act, S. 9, 105th Cong. sec. 2 (1997); 52 U.S.C.A. § 30118(a) (text of § 316 of the Federal Campaign Act of 1971); 143 Cong. Rec. S265 (Daily Ed. Jan. 21, 1997) (statement of Sen. Nickles) (noting that the National Labor Relations Board has made some efforts in enforcing *Beck* rights but “more needs to be done”).

214. H.R. REP. NO. 105-397 (1997) (Worker Paycheck Fairness Act).

215. *Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act: Before the S. Comm. on Health, Educ., Lab., & Pensions*, 113th Cong. 2 (2014) (testimony of Deborah Thompson Eisenberg).

216. H.R. REP. NO. 105-397, at 8.

217. See *id.* at 11.

218. *Id.*

219. Burns, *supra* note 107, at 497.

for any labor organization to coerce, intimidate, threaten, interfere with, or retaliate against any employee in the exercise of, or on account of having exercised, any right granted or protected by this Act.”²²⁰ Furthermore, section 7 “would also prohibit unions from forcing workers to resign their union membership, and, in the process, give up critical workplace rights.”²²¹

The Worker Paycheck Fairness Act has been criticized as an effort to silence union political voices.²²² The measure has inspired much opposition, with many accountants asserting that the functional reporting scheme will bankrupt local unions and greatly reduce the discretionary decision-making powers of the collective association.²²³ A related controversy addresses the issue of creating clear and fair standards for the calculation of union dues and the difficulties of calculating the amount of money refunded to those individuals choosing to pay only “core membership fees.”²²⁴ In response to these efforts, the Teamsters issued the following resolution:

WHEREAS, legislation spuriously known as paycheck protection aims to remove the ability of unions to collectively bargain for the employer to make automatic deductions of union dues and other fees from the worker’s paycheck; and

WHEREAS, automated processing of union dues and DRIVE contributions adds no substantial additional cost not already associated with the deductions already being made for medical insurance, retirement accounts, charitable contributions and other things at the request of the employee or employer; and

WHEREAS, payroll dues deductions are often one of the first agreements made by the parties in collective bargaining; and

220. See Worker Paycheck Fairness Act, H.R. 1625, 105th Cong. § 7 (1997).

221. See H.R. REP. NO. 105-397, at 19.

222. See *Hearing on H.R. 1625, the Worker Protection Paycheck Fairness Act before the H. Comm. on Educ. & the Workforce*, 105th Cong. 12 (1997) (written statement of Captain Mitchell Kraus, General Counsel, Transportation Communications International Union, stating that the Act “is an effort to punish union members for making their views heard on issues during the 1996 election”).

223. *Id.* at 192 (written statement of Hon. Marshall J. Berger, Visiting Professor, Columbus Sch. of L.).

224. See Ben Rothman, Esq., *Union Dues and Do Nots*, BEN ROTHMAN, ESQ., <http://santamonicainjurylawyer.com/union-dues-and-do-nots/> (last visited Feb. 15, 2022).

WHEREAS, federal law already forbids the donation of union dues to political campaigns; and

WHEREAS, proponents of the legislation purposefully confuse fair-share fees, dues and DRIVE contributions; and

WHEREAS, DRIVE contributions are voluntary; and

WHEREAS, restricting the ability of a union member to voluntarily support an organization violates the constitutional right to free association; and

WHEREAS, paycheck protection measures are an undemocratic attempt to weaken the political strength of unions.

NOW, THEREFORE, BE IT RESOLVED at this 29th International Convention that the International Brotherhood of Teamsters oppose laws restricting deduction of union dues and DRIVE contributions; and

BE IT FURTHER RESOLVED that International Brotherhood of Teamsters and its affiliates will work to educate members, the public and elected officials about the real purpose and effect of these laws; and

FINALLY, BE IT RESOLVED that the International Brotherhood of Teamsters and its affiliates continue to lobby, work in coalitions and identify supportive politicians to stop all efforts to implement laws restricting deduction of union dues and DRIVE contributions and roll back those laws that exist.²²⁵

Joan Claybrook, the President of the public interest group Public Citizen, opposes paycheck protection measures, arguing that the business community already has an overwhelming advantage over labor in terms of spending to support its favorite candidates.²²⁶ Statistics provided at congressional hearings by Claybrook demonstrate that business interests spent \$667 million dollars in hard money and soft money contributions to federal candidates and parties in the 1998 election cycle, more than ten times the \$61 million dollars spent by labor.²²⁷

225. *So-Called Paycheck Protection Laws*, INT'L BHD. OF TEAMSTERS, <https://teamster.org/so-called-paycheck-protection-laws/> (last visited Feb. 15, 2022).

226. Labor Relations Week, *supra* note 8, at 441.

227. *Id.*

B. State Measures Regarding the Use of Union Dues for Political Purposes

Several states have enacted some form of paycheck protection legislation.²²⁸ Each of these laws, except the measure passed in Ohio, is currently in effect. Referendums in other states such as California have been

228. Wyoming enacted a paycheck protection law in March 1998. Employers may deduct political contributions from a worker's paycheck only after the worker has given his or her permission in writing. Permission is valid for the calendar year. The relevant language states:

(h) No organization of any kind, as specified in subsection (a) of this section, shall solicit or obtain contributions for any of the purposes specified in subsection (a) of this section from an individual on an automatic basis, including but not limited to a payroll deduction plan or reverse checkoff method, unless the individual who is contributing affirmatively consents in writing to the contribution at least once in every calendar year. Nothing in this section shall be construed to authorize contributions otherwise prohibited under this election code.

WY. STAT. ANN. § 22-25-102 (2020).

Idaho's paycheck protection law was enacted in 1997. Employers may deduct political contributions from a worker's paycheck only after the worker has given his or her permission in writing. Permission is valid for the calendar year. *See* IDAHO CODE ANN. § 67-6605 (2021). Ohio's paycheck protection law was enacted in 1995, although due to legal challenges brought by the state's public sector unions it has been held up in the courts ever since. Federal courts have upheld the measure while state courts have rejected it. *See* Toledo Area AFL-CIO Council v. Pizza, 898 F. Supp. 554, 571 (N.D. Ohio 1995); Toledo Area AFL-CIO Council v. Pizza, 907 F. Supp. 263, 266 (N.D. Ohio 1995); Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307 (6th Cir. 1998); United Auto Workers, Loc. Union 1112 v. Philomena, 700 N.E.2d 936, 959 (Ohio Ct. App. 1998). The law prohibits public employers in the state from withholding political funds from the paychecks of government workers. Public employee unions may raise funds for their political campaigns only through voluntary solicitations. This law does not apply to the paychecks of private section union members. The relevant language states: "No public employer shall deduct from the wages and salaries of its employees any amounts for the support of any candidate, separate segregated fund, political action committee, legislative campaign fund, political party, or ballot issue." OHIO REV. CODE ANN. § 3599.031 (h).

Governor John Engler signed Michigan's paycheck protection measure into law in 1994. It prohibits employers from deducting PAC funds from worker paychecks without annual written authorization. The relevant language states:

Contributions shall not be obtained for a separate segregated fund established under this section by use of coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization shall not solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection, (2), (3), (4) or (5) on an automatic or passive basis including but not limited to a payroll deduction plan or reverse checkoff method. A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization may solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4) only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year.

MICH. COMP. LAWS ANN. 169.255 § 55(6).

narrowly defeated.²²⁹ In 2017, a bill to prohibit state, county, and local governments from using their payroll systems for voluntary contributions to their union's political action committees was narrowly defeated in the House after passing the Senate.²³⁰ The Senate had also sought to amend the State Constitution to state that no agency in the Executive Department or school district may use its payroll system to collect membership dues, non-membership fees or political contributions from an employee.²³¹ Recently, in 2021, West Virginia passed a new state law prohibiting employers and unions from withholding or diverting any portion of an employee's pay to use for political activity unless the employee provides an annual express written request.²³² The following discussion will focus on the measures in Washington and California.

Washington's paycheck protection law, enacted with the passage of Initiative 134 in 1992, was approved by a seventy-two percent margin, thus becoming the first reform legislation to require unions to obtain employees' consent before using dues and fees for political purposes.²³³ The Washington initiative required a union to obtain the annual written consent of employees prior to using dues and fees for political contributions, and also required unions and employers to use a prescribed consent form that notified the employee of the prohibition against discrimination on the basis of an employee's refusal to consent to the use of the dues and fees for the union's political purposes.²³⁴ These employee consent forms must be maintained and public access provided to them, and the union must provide documentation regarding the amount of money withheld from each employee's dues and fees and the amount and date on which contributions were given to a political entity.²³⁵ A previously enacted definition

229. See discussion of California Proposition 226, *supra* note 195 and accompanying text. A proposal that was included as part of a larger campaign finance reform bill that would have required unions to receive annual authorization from members before any of their wages, dues, or fees could be used to support political activities was defeated in the Iowa Legislature on April 28, 1999. Human Relations Reporter, Vol. 17, No. 18, (May 10, 1999 at 36 BNA).

230. Steve Esack, *Pennsylvania House rejects bill targeting unions' political activity*, THE MORNING CALL, <https://www.mcall.com/news/pennsylvania/capitol-ideas/mc-nws-legislature-union-campaign-bill-20171212-story.html> (last visited Feb. 15, 2022).

231. *Id.*

232. H.B. 2009, 85th Leg., 2d Sess. (W.V. 2021).

233. 1993 Wash. Laws, ch. 2; see also Wash. Fed. of State Emps. v. State, 901 P. 2d 1028, 1030-31 (Wash. 1995) (en banc).

234. 1993 Wash. Laws, ch. 2, § 7(3).

235. *Id.* § 7(4). The relevant section of the legislation provides as follows:

Sect. 8, subsection (3): No employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee. The request must be

of the term “contribution” exempted from coverage “soft” money contributions such as internal political communications published by labor organizations, and the printing of political messages on banners and signs for display on private property.²³⁶ Thus, the annual reauthorization of wage deductions for political contributions by a union was only applicable to “hard” money contributions given directly to political candidates and parties.²³⁷

Proposition 226 in California, rejected by voters in 1998, would have prohibited employers from deducting money from an employee’s paycheck for political purposes without the employee’s consent.²³⁸ The California Initiative was similar to the Washington Initiative, and would have required unions to obtain yearly written consent from employees on a prescribed form prior to using dues and fees for political activities.²³⁹ Similar to the Washington Initiative, the proposed California Initiative would have required record keeping of employee consent forms, the amount of fees withheld for political expenditures, the amounts transferred to a political organization, and the names of the organizations receiving funds.²⁴⁰ The California initiative, however, did not include a public access provision. Section 85991 would have also been added so as to prohibit labor organizations from using union dues or fees for political contributions without a member’s written consent, stating in relevant part:

made on a form prescribed by the commission informing the employee of the prohibition against employer and labor organization discrimination prescribed in subsection (2) of this section. The request is valid for no more than 12 months from the date the employee makes it.

Sec. 8, subsection (4): Each person or entity who withholds contributions under subsection (3) of this section shall maintain open for public inspection for a period of no less than three years, during normal business hours, documents and books of accounts that shall include a copy of each employee’s request, the amounts and dates funds were actually withheld, and the amounts and dates funds were transferred to a political committee. Copies of such information shall be delivered to the commission upon request.

Sec. 16: AGENCY SHOP FEES AS CONTRIBUTIONS. A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Id.

236. See WASH. REV. CODE ANN. § 42.17.020 (15) (West 1998) (defining the term “contribution” and including interpretive examples applicable to the language of § 42.17.680 of the Wash. Rev. Code).

237. See generally *id.* (showing examples of types of contributions).

238. *Proposition 226, Political Contributions by Employees, Union Members, Foreign Entities*, Legislative Analyst’s Office (June 1998), https://lao.ca.gov/ballot/1998/226_06_1998.htm.

239. See *id.*

240. See Kochkodin, *supra* note 176, at 803 n.137.

No labor organization shall use any portion of dues, agency shop fees, or any other fees paid by members of the labor organization, or individuals who are not members, to make contributions for expenditures except upon the written authorization of the member, or individual who is not a member, received within the previous 12 months.²⁴¹

A 2010 Paycheck Protection Act petition failed to qualify for the ballot.²⁴²

The various campaign finance reform measures, both at the federal and state levels, all suffer from a similar flaw by not imposing restrictions upon the use of “soft” money contributions.²⁴³ The failure to address the use of such contributions permits money to be simply redirected away from direct contributions to candidates or political parties through the use of political action committees.²⁴⁴ By focusing primarily on labor organization contributions, these measures also appear to be more concerned with restricting contributions to Democratic candidates and the Democratic Party as opposed to the asserted goal of protecting worker rights of association and speech that are addressed in the following section.²⁴⁵

III. THE FIRST AMENDMENT & OBJECTIONS TO UNION EXPENDITURES

While the government has developed a system of private negotiation and collective bargaining through elected exclusive representatives with the goal of achieving labor peace and industrial self-government, this system appears to provide insufficient state action required to trigger constitutional scrutiny of the negotiation, agreement and observance of a collective bargaining agreement between a private union and private employer under the NLRA.²⁴⁶ In fact, it has generally been assumed that

241. *Id.*

242. *California Paycheck Protection Act (2010)*, Ballotpedia, [https://ballotpedia.org/California_Paycheck_Protection_Act_\(2010\)](https://ballotpedia.org/California_Paycheck_Protection_Act_(2010)) (last visited, Feb. 14, 2022).

243. *See Kochkodin, supra* note 176, at 827.

244. *See id.* at 832.

245. *See generally* Stratmann, *supra* note 23, at 632 (showing how closely labor unions are tied to the Democratic Party, both financially and through their support).

246. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-2 (2d ed. 1988); William P. Marshall, *Diluting Constitutional Rights: Rethinking “Rethinking State Action”*, 80 NW. U. L. REV. 558, 569-70 (1985) (“[I]f the Constitution is used to restrict private conduct, its role will be transformed. Rather than retaining its position as a protector of liberty, it will become for many, if not all, a vehicle of regulation and annoyance as the populous’ forth continually to look over its collective shoulder in fear that its actions might be in contravention of the judiciary demarcation of another’s constitutional rights.”).

the federal Constitution does not apply to labor contract terms.²⁴⁷ As an example of this view, Title VII of the Civil Rights Act of 1964, or the duty of fair representation, rather than the federal Constitution, has been used to invalidate terms in collective bargaining agreements that discriminate on the basis of religion, race, or gender within the workforce.²⁴⁸ For example, in *Steele*,²⁴⁹ the Court found an implied duty of fair representation, despite Congress' imprimatur on the union's role in collective bargaining, rather than brand the conduct of the union as government action.²⁵⁰

The principal support for the argument that state action exists in the negotiation and observance of the union security agreement derives from the designation of the union as the exclusive representative of the employees under section 9(a) of the NLRA.²⁵¹ In order for dissenting employees to raise constitutional objections to agency fees for expenses unrelated to collective bargaining, such state action is a prerequisite.²⁵² As stated previously, the Court in *Beck* failed to answer the question of whether the negotiation and observance of an agency shop clause violated objecting employees' First Amendment rights.²⁵³ Analysis of this issue requires a determination of whether the negotiation and observance of the agreement constitutes state action, and if so, whether compulsory financial support for the union under such a clause infringes upon the objecting employees' rights, and whether such infringement is justified by a compelling interest drawn as narrowly as possible to avoid infringement upon First Amendment rights.²⁵⁴ With regard to public-sector union security clauses, the Court concluded in *Abood* that compulsory financial support of a union's financial activities does infringe upon objecting employees' First Amendment rights.²⁵⁵ In that case, however, the Court held that the State had sufficient interest to justify infringement upon First Amendment rights with regard to collective bargaining expenses, but was not justified

247. See, e.g., *Aldridge v. Boys*, 98 Ill. App.3d 803, 808, 424 N.E.2d 886, 889 (1981); *Black v. Cutter Lab'y*, 351 U.S. 292, 299 (1956); *Linscott v. Miller Falls Co.*, 440 F.2d 14, 20 (1st Cir.1971).

248. See Lisa Nagele-Piazza, *What Can Employers Do When Workers' Civil Rights and Labor Rights Clash?*, SHRM (Nov. 11, 2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/worker-civil-rights-and-labor-rights-clash.aspx>.

249. See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944).

250. See HARRY H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 258 (1968).

251. See 29 U.S.C. § 159 (a) (1982).

252. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1976).

253. *Beck v. Comm'n Workers of America*, 468 F. Supp. 93, 97 (D. Md. 1979).

254. See *Hudgens vs. NLRB*, 424 U.S. 507, 513 (1976); *TRIBE*, *supra* note 246, §12-23; see also *Cantor*, *supra* note 50, at 70-71 (1983) (arguing that if there is state action in the negotiation and observance of an agency shop agreement, the agreement does not infringe upon objecting employees' First Amendment rights). But see David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1003-06 (1992).

255. *Abood*, 431 U.S. at 241-42.

regarding financial support for union political expenditures.²⁵⁶ The Court relied on its prior decision in *Hanson*,²⁵⁷ interpreting that decision as standing for the proposition that compulsory financial support of a union did infringe upon objecting employees First Amendment rights, but such infringement was justified with regard to collective bargaining expenses due to the State's interest in establishing a system for labor relations based on collective bargaining.²⁵⁸ In *Hanson*, the basis for the finding of state action was the exercise of the Supremacy Clause in Section 2, Eleventh of the RLA.²⁵⁹ Such an exercise of the Supremacy Clause does not exist in section 8(a)(3) of the NLRA.²⁶⁰

Section 2 (5) of the NLRA defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."²⁶¹ Section 9 (a) of the NLRA defines "exclusive representative" as the following: "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."²⁶²

In *Beck*, at both the trial court and Fourth Circuit, it was held that the union's collection of fees unrelated to collective bargaining would violate a dissenting employee's First Amendment rights.²⁶³ The Supreme Court affirmed the holding that section 8 (a)(3) of the NLRA prohibited the compulsion of dues for purposes unrelated to collective bargaining.²⁶⁴

256. *Id.* at 222, 234-36.

257. *Railway Emp. Dep't v. Hanson*, 351 U.S. 225 (1956), discussed *infra* nn.259-60 & 273 and accompanying text.

258. *See Abood*, 431 U.S. at 222. *But see* *Dau-Schmidt*, *supra* note 38, at n. 342 (criticizing this conclusion and proposing an alternative interpretation of *Hanson* that "the compulsory financial support of a union does not infringe on dissenters' first amendment rights").

259. *Hanson*, 351 U.S. at 232.

260. *See* 29 U.S.C. § 164(b) (1982).

261. *Id.* § 152(5).

262. *Id.* § 159(a).

263. *Beck v. Comm'n Workers of Am.*, 468 F. Supp. 93, 97 (D. Md. 1979), *aff'd in part*, 776 F.2d 1187 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 108 S. Ct. 2641 (1988) (stating that "collect[ing] from the plaintiffs amounts beyond that allocable to collective bargaining . . . violates the First Amendment rights of the plaintiffs."). The en banc majority of the Fourth Circuit also held that the unions negotiation and enforcement of an agency shop agreement violated its duty of fair representation. *Beck*, 776 F.2d at 1205.

264. *Beck*, 487 U.S. at 736, 762-63.

Applying its interpretation of section 2, Eleventh in *Street* to the interpretation of section 8 (a)(3), the Court announced that the “nearly identical language [of the two sections] reflects the fact that, in both, Congress authorized compulsory unionism only to the extent necessary to insure that those who enjoy union negotiated benefits contribute to their cost.”²⁶⁵ Examining the legislative history of section 8 (a)(3) of the NLRA, the majority asserted that Congress had concluded that a closed shop “create[d] too great a barrier to free employment,” and Congress was “equally concerned . . . that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without . . . contributing financial support to those efforts.”²⁶⁶ The purpose of revising section 8 (a)(3) was to limit union security by banning closed shops, but also to permit the continuation of other forms of union security.²⁶⁷ Furthermore, the Court concluded that “Congress viewed the Wagner Act’s regime of compulsory unionism as seriously flawed,” and thus did not “set out . . . simply to tinker in some limited fashion with the [Act’s] authorization of union-security agreements.”²⁶⁸ Instead, Congress retained union security for the limited purpose of “promot[ing] stability [in labor relations] by eliminating free riders.”²⁶⁹ By interpreting section 8(a)(3) in this manner, the Court again avoided the constitutional questions raised in the case.

Justice Blackmun, joined by Justices O’Connor and Scalia, dissented from the Court’s interpretation of section 8(a)(3), arguing that the plain language of the statute permitted an agency shop, and that the legislative history showed Congress’ purpose was to prescribe the closed shop and union discrimination in membership and employment, but did not support the conclusion that Congress’ purpose was to prevent free riders.²⁷⁰ It can also be argued that the constitutional question which the Court avoided in the string of cases interpreting the RLA, namely whether an agency shop agreement between a private union as the exclusive representative violated the objecting employees’ First Amendment rights,²⁷¹ was not

265. *Id.* at 746.

266. *Id.* at 748 (quoting S. REP. NO. 80-105, at 7 (1947), reprinted in STAFF OF SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. & PUB. WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 412 (Comm. Print 1974)).

267. *Id.* at 749.

268. *Id.* at 755 (quoting S. REP. NO. 80-105, at 7 (1947), reprinted in STAFF OF SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. & PUB. WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 413 (Comm. Print 1974)).

269. *Id.*

270. *Id.* at 765-66 (Blackmun, J., dissenting); see also Dau-Schmidt, *supra* note 38 (providing a detailed criticism of the Court’s interpretation of the language and legislative history of section 8(a)(3)).

271. See *Int’l Assoc. of Machinists v. Street*, 367 U.S. 740, 768 (1961) (Black, J., dissenting).

present in *Beck* because the basis for state action in the RLA cases, the exercise of the Supremacy Clause by Congress in preempting state legislation that prohibited union security agreements, did not exist under the NLRA, which does not include such a preemption provision.²⁷²

The Court's interpretation of section 8(a)(3) that permits the substitution of an agency fee for union membership and full dues has been attacked as violating the "plain meaning" of the section.²⁷³ Read literally, the language of section 8(a)(3) authorizes the parties to include language in the collective bargaining agreement to compel all employees in the bargaining unit to join the union as full members and pay the full corresponding union dues.²⁷⁴ Yet if a union security clause is determined to be governmental action, the representation that employees in the bargaining unit are "members" of a union could conceivably be viewed as compelled ideological association in violation of First Amendment principles initially adopted in the second flag-salute case.²⁷⁵ The justification for the contrary interpretation is that requiring full union membership and the payment of corresponding dues by the union would violate the union's implied duty of fair representation to all members of the bargaining unit, which is implied in section 9(a) of the NLRA,²⁷⁶ if the union forced some of the employees to support activities unrelated to such representation.²⁷⁷ In addition, a concern exists that the First Amendment may be violated if the union shop provision is interpreted so as to permit a union to use its power as the exclusive bargaining representative to force non-union or "financial core" workers to identify with and support an organization whose political activities may be objectionable to them.²⁷⁸ While it is true that a union is not a state actor, the NLRA does permit states to forbid a union shop clause in collective bargaining agreements pursuant to the "right to work" provision,²⁷⁹ and if a state does not exercise its power to prohibit union shop clauses, the NLRA arguably empowers a union to

272. *See Ry. Emps. Dep't v. Hanson*, 351 U.S. 225, 232 (1956); 29 U.S.C. § 164(b) (1982).

273. *See Wegscheid v. Loc. 2911*, 117 F.3d 987, 988 (7th Cir. 1997).

274. 29 U.S.C. § 158(a)(3).

275. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (expanding governmental action under the constitution); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-34 (1977); *Wooley v. Mainard*, 430 U.S. 705, 713 (1977).

276. 29 U.S.C. § 159(a) (permitting a collective bargaining agreement to make the union the exclusive representative of the workers in the unit).

277. *See Commc'ns Workers of Am. v. Beck*, 487 U.S. 736, 759 (1988); *Wegscheid*, 117 F.3d at 987-88; *Breining v. Sheet Metal Workers*, 493 U.S. 67, 86-87 (1989).

278. *Wegscheid*, 117 F.3d at 988.

279. *See* 29 U.S.C. § 164(b).

coerce employees in their represented bargaining unit to associate with an organization to which they object.²⁸⁰

The Court has emphasized that “[t]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”²⁸¹ Justice Frankfurter noted in *Street* that no denial of free speech was involved through union political expenditures because no workers were being denied an opportunity to express their views in any form or forum.²⁸² While the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments,²⁸³ a government may not require an individual to relinquish rights guaranteed by the First Amendment as a condition of public employment.²⁸⁴ As noted by the Court in *Abood*, the fact that employees are compelled to make as opposed to prohibited from making contributions for political purposes still infringes upon their constitutional rights.²⁸⁵ A union is thus prohibited from requiring any employees to contribute financial or other support to an ideological cause the employees may oppose as a condition of holding a job or continuing employment.²⁸⁶ This restriction on a union’s activities, however, does not limit a union in spending funds in an expression of political views on behalf of political candidates, or toward the advancement of other ideological causes that are not “germane” to its duties as the exclusive bargaining representative for the employees.²⁸⁷ The First Amendment “requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”²⁸⁸

The crux of the problem is determining the strength of the nexus between the federal legislative framework and the agreement to a union security clause by the parties. Section 8(a)(3) does not require that unions and employers agree to a union security clause.²⁸⁹ The central notion of freedom of contract, which leaves the terms of the collective bargaining

280. See *Coercion of Employees* (Section 8(b)(1)(a)), NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/coercion-of-employees-section-8b1a> (last visited Feb. 12, 2022).

281. *Wooley v. Mainard*, 430 U.S. 705, 714 (1977).

282. *Int’l Assoc. of Machinists v. Street*, 367 U.S. 740, 798 (1961) (Frankfurter, J., dissenting).

283. See e.g., *Elrod v. Burns*, 427 U.S. 347, 355-57 (1976).

284. *Id.* at 357-360; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 226, 234 (1977).

285. *Abood*, 431 U.S. at 234.

286. *Id.* at 235.

287. NAT’L LAB. RELS. BD., *supra* note 280.

288. *Abood*, 431 U.S. at 235-36.

289. See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988).

agreement free from government intervention, supports the conclusion that there is no government action underlying the agency shop. As the Supreme Court has noted: “Our cases state ‘that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.’ This Court, however, has never held that a State’s mere acquiescence in a private action converts that action into that of a State.”²⁹⁰ In first determining whether state action exists for a First Amendment claim, the Court requires actual coercion or direct involvement of the government in the challenged decision or act, rather than merely indirect coercion or involvement.²⁹¹ The Court’s finding of state action in *Hanson* was based on Congress’ exercise of the Supremacy Clause to preempt inconsistent state laws, rather than the union’s role in negotiating a collective bargaining agreement.²⁹² While the Court has never resolved the issue of state action with regard to the NLRA and union security agreements, it has indicated in dicta found in two cases that state action does not exist with regard to the union’s role in negotiating and enforcing a collective bargaining agreement.²⁹³ In the case that established the duty of fair representation, the Court avoided the constitutional question, but Justice Murphy in his concurrence concluded that the negotiation of a discriminatory collective agreement by a union as the exclusive representative did constitute state action.²⁹⁴ However, in *Beck*, the Court cited *Weber* for the

290. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)); *cf. Int’l Ass’n of Machinists v. Fed. Election Comm’n*, 678 F.2d 1092, 1119 (D.D.C. 1982) (Edwards, C.J., concurring) (discussing an absence of “state action” in government authorization of certain corporate expenditures), *aff’d*, 456 U.S. 974 (1982); *see also* *Blum v. Yaretsky*, 457 U.S. 991, 992 (1982) (no state action in activity of state-funded and state-regulated nursing home); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) (no state action in activity of private school educating special students referred and funded by the state).

291. Ronna Greff Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150, 1156-57 (1985); *see also* Ronna Greff Schneider, *State Action - Making Sense Out Of Chaos - An Historical Approach*, 37 U. FLA. L. REV. 737, 739-43 (1985) (discussing a contraction in the state action doctrine by narrowing the relevant activity that constitutes state action); Dau-Schmidt, *supra* note 38, at 122 (stating that “a nexus of actual state coercion or direct state interjection into the specific discriminatory act must exist in order to scrutinize the actions of a private party as those of the state.”).

292. *Ry. Emps. Dep’t v. Hanson*, 351 U.S. 159, 232 (1956).

293. *See United Steelworkers of Am. v. Weber*, 443 U.S. 193, 200 (1979) (stating that a union’s observation of a collective bargaining “does not involve state action,” even though the issue was not in dispute by the parties); *United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982) (relying on its previous decision in *Weber*, ruling that a union’s internal policy that prohibited candidates for union office from accepting contributions from non-members did not constitute state action), *rehearing denied*, 459 U.S. 899 (1982).

294. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring).

proposition that “negotiation of a collective agreement’s affirmative action plan does not involve state action.”²⁹⁵

Based on the requirements for state action under current Supreme Court doctrine, it is difficult to reach the conclusion that the designation of the union as the exclusive bargaining representative provides the required nexus between the State and the union’s activities to meet the requirement of state action.²⁹⁶ Furthermore, the argument that industrial self-government meets the requirement of a delegated government function for purposes of state action similarly fails because the actions of a private party are considered state action only if that party is performing a function “traditionally the exclusive prerogative of the State.”²⁹⁷ While it may be argued that the NLRA encourages agency shop agreements and that such encouragement of a private party’s actions constitute state action, such encouragement only constitutes state action if the state “has exercised coercive power or has provided such significant encouragement. Either ‘overt or covert,’ the action must in law be deemed to be that of the State.”²⁹⁸ Thus, “[m]ere [State] approval or acquiescence in the initiatives of a private party is not sufficient” to constitute state action.²⁹⁹ More importantly, section 8(a)(3) of the NLRA does not require or encourage a union security agreement, but rather permits the parties to voluntarily enter into such an agreement.³⁰⁰ A “fundamental premise” of the NLRA is that governmental regulation only extends to the process of collective bargaining, but agreement regarding the specific terms of the collective bargaining agreement is left to the parties.³⁰¹ Furthermore, the duty to bargain in good faith does not require concessions by the parties.³⁰² The

295. *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 761 (1988).

296. See *Dau-Schmidt*, *supra* note 38, at 126-127. But see Symposium, *Individual Rights In Industrial Self Government - A “State Action” Analysis*, 63 NW. U. L. REV. 4, 8-19 (1968) (arguing that collective agreements, by serving as the “industrial self-government” between unions and employers should be subject to constitutional restraints similar to legislation of federal and state governments); Alfred W. Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432, 482-83 (1959) (presenting a similar argument).

297. *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-61 (1978).

298. *Blum*, 457 U.S. at 1004; see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970).

299. *Blum*, 457 U.S. at 1004-05 (first citing *Flagg Bros.*, 436 U.S. at 164-65; and then citing *Jackson*, 419 U.S. at 357).

300. *H.K. Porter Co. vs. NLRB*, 397 U.S. 99, 108 (1970).

301. *Id.*; *Howard Johnson Co. v. Hotel & Rest. Emps. Int’l Union*, 417 U.S. 249, 254 (1974).

302. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (“The Act does not compel agreements between employers and employees. It does not compel any agreement whatever . . . The theory of the Act is that free opportunity for negotiation for accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.”); see also 29 U.S.C. § 158(d) (1982) (expressly eliminating

concept of state action is severely strained to include within it a union's and employer's actions in requiring dues payments under an agency shop agreement under the NLRA.³⁰³

Because a union security agreement imposes little economic cost on the employer and is a mandatory subject of bargaining, the statutory provision may result in more union security clauses than would otherwise be present.³⁰⁴ While it can be assumed that some union security agreements would be bargained for even in the absence of section 8(a)(3) authorization, it must be recognized that the language of section 8(a)(3) is not the only statutory provision arguably connecting government action with the union security agreement.³⁰⁵ In addition to section 8(a)(3), Congress bestows an exclusive representation power upon unions, includes union security clauses within the definition of mandatory subjects of bargaining, and provides a mechanism to enforce the collective bargaining agreement in federal court under section 301.³⁰⁶ This combination of exclusive representation, mandatory bargaining, and contract enforcement mechanism underlie most provisions in a collective bargaining agreement and arguably lead to the conclusion that government action does support union security clauses.³⁰⁷ As stated by Justice Douglas: "When Congress authorizes an employer and a union to enter into union-shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the federal government behind the agreements just as surely as if it had imposed them by statute."³⁰⁸ Based on current Supreme Court prerequisites for state action, however, it does not appear that this system of industrial self-government passes the necessary hurdles to support such a claim.

any requirement to make concessions with regard to the duty to bargain in good faith); *H.K. Porter*, 397 U.S. at 108 ("[T]he fundamental premise on which the [NLRA] is based [is] private bargaining under government supervision of the procedure loan, without any official compulsion over the actual terms of the contract.").

303. See HARRY H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 213-64 (1968); Victor Brudney, *Association Advocacy and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1, 49 n.126 (1995); Dau-Schmidt, *supra* note 38, at 57-63.

304. See THOMAS HAGGARD, *COMPULSORY UNIONISM, THE NLRB, AND THE COURTS* 293 (1977); Hugh L. Reilly, *The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes*, 32 MERCER L. REV. 561, 563 (1981).

305. 29 U.S.C. § 158(b)(2).

306. *Id.* § 185(b).

307. *Buckley v. Am. Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1095 (1974) ("It is significant that congressional permissiveness towards union shop agreements is coupled with the NLRA's "exclusivity" principle, whereby a majority vote of the employees in a particular category is sufficient to designate an exclusive bargaining representative whose actions bind majority and minority alike.").

308. *Id.* (dissenting from a denial of certiorari).

The creation of a system that permits union security agreements entails some limited government support, but not the complex legislative schemes, subsidy, or intertwining relationship demonstrated with other professional or occupational associations.³⁰⁹ While the union's role as exclusive representative and collective bargainer is clearly facilitated by its statutory role established by the NLRA, and also the section 8(a)(3) government-granted right to bargain for a union security clause and the related requirement of dues,³¹⁰ it can also be argued that the government's support of unions by creating a system that supports union representation and collective bargaining does not reach the level of special empowerment provided to many professional trade associations or business operations by the government.³¹¹ It must be recognized, however, that an individual employee's membership or financial support is effectively compelled under this statutory scheme by virtue of the union security clause provision in section 8(a)(3).³¹² When a union shop or other union security arrangement exists throughout an industry, employees within that industry are compelled to either join the union as a member or pay dues and fees under either an agency fee arrangement or as a "financial core" member, in a similar fashion to a lawyer's support of a bar association or a doctor or plumber's required membership in a professional association.³¹³ In particular industries, unions control access to employment in the entire or at least a substantial part of that industry.³¹⁴ Yet this support does not extend to the required state action for constitutional challenges to a union security clause because for the government to be the entity identified as compelling speech, it must both support the association and also be involved with the activity that caused the injury.³¹⁵

Because the government and employer do not dictate the content of speech that is supported by the employees' dues or fees contributions

309. See Brudney, *supra* note 303, at 47-8.

310. See, e.g., *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 60-65 (1975); *NLRB v. General Motors Corp.*, 373 U.S. 734, 741 (1963); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-39 (1941).

311. See, e.g., *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 655 (1990); Thomas C. Kohler, *Setting the Conditions/or Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DiBartolo*, 1990 WIS. L. REV. 149, 187-88 (1990); Joel Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws*, 1990 WIS. L. REV. 1, 99; Paul C. Weiler, *Promises to Keep: Securing Workers' Rights of Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1774 (1983).

312. See 29 U.S.C. § 158(a)(3).

313. Brudney, *supra* note 303, at 48.

314. See OLSON, *supra* note 47, at 75.

315. See *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968); Jonathan Lang, *Toward a Right to Union Membership*, 12 HARV. C.R. C.L. L. REV. 31, 47-49 (1977).

pursuant to the union security clause, it is difficult to argue that government-authorized union security arrangements violate dissenting employees' speech rights under the First Amendment.³¹⁶ While government-compelled speech is not involved with regard to a union security arrangement, arguments can still be advanced to protect dissenting employees against the use of compelled contributions to support the union's political speech and other activities.³¹⁷ By vesting exclusive bargaining power and representation in the union, thus achieving the goal of industrial peace, it can be argued that the policies that support the statutory scheme providing for a union security arrangement do not require individuals to contribute to the support of the union's speech.³¹⁸ Employees may be required to support the exclusive bargaining representative by the payment of dues and fees in order to avoid the problem of free riders and promote industrial peace, and individual employees choosing not to join the union as full members may similarly be required to contribute their fair share toward the financial burden of collective bargaining and related activities.³¹⁹ The difficulty is striking the proper balance between the intrusion on individual employees' freedom of speech by requiring objecting members to contribute to the group's speech activities, and the participation of the union in political activity.³²⁰ In a similar manner to bar associations or other professional or occupational organizations, union security clauses and the union's role as the exclusive representative exert pressure on individuals to join the union or pay dues and fees to support the union's activities unrelated to collective bargaining. However, if legislation is drafted which relieves all members of the obligation to support such activity by the union, it will restrict and impair the union and its supporting members' speech and political activities.³²¹ Yet, there is no limitation on the union's speech so as to preclude the full members from collectively voicing their advocacy for particular concerns or individuals.³²² The question thus arises whether the primary function of the union is to serve an advocacy

316. See Brudney, *supra* note 303, at 49 n.126; Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interest in Ideological/Association*, 36 RUTGERS L. REV. 3, 51-52 (1983); *DeMille v. Am. Fed'n. of Radio Artists*, 187 P.2d 769, 773-76 (Cal. 1974), *cert. denied*, 333 U.S. 876 (1948).

317. Brudney, *supra* note 303, at 49-50.

318. See *id.* at 50-51; *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 233-35 (1956).

319. See OLSON, *supra* note 47, at 15-16.

320. See *Kolinske v. Lubbers*, 516 F. Supp. 1171, 1180 (D.D.C. 1981).

321. See Brudney, *supra* note 303, at 51-52.

322. See Robert M. Cohan, *Of Politics, Pipefitters and Section 610: Union Political Contributions in Modern Context*, 51 TEX. L. REV. 936, 941 (1973).

role on behalf of its members and other interested parties, or to be engaged in traditional collective bargaining activities.³²³

As discussed previously, the Supreme Court has not answered whether agreement to an agency shop clause under the NLRA sufficiently implicates Congress in the collective bargaining agreement so as to constitute government action for purposes of the First Amendment.³²⁴ Lower courts are in disagreement regarding whether agency shop clauses are sufficiently a product of government action so as to invoke constitutional protections.³²⁵ While the Supreme Court has concluded that the union security provision in the RLA, section 2, Eleventh, which is almost identical to section 8(a)(3) of the NLRA, sufficiently implicates the government in agency shop clauses to trigger application of First Amendment protection,³²⁶ arguable distinctions can be identified between the degree of government involvement under the RLA and NLRA union security provisions. As the Court noted in *Hanson*, the RLA specifically superseded conflicting state legislation that restricted union security so that federal law operated as “the source of the power and authority” for private agency shop agreements.³²⁷ In contrast, states are permitted to enact legislation

323. See Joseph L. Rauh Jr., *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152, 153-56 (1961); see also Cohan, *supra* note 322, at 981-83.

324. See *Kolinske v. Lubbers*, 712 F.2d 471, 477 (D.C.Cir. 1983).

325. See, e.g., *Linscott v. Miller Falls Co.*, 440 F.2d 14, 18 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1971) (finding sufficient government action); *Kolinske*, 516 F. Supp. at 1178-79; *Havas v. Communications Workers*, 509 F. Supp. 144, 148-49 (N.D.N.Y. 1981); *Lykins v. Aluminum Workers Int'l Union*, 510 F. Supp. 21, 24-26 (E.D. Pa. 1980). *But see* *Kolinske v. Lubbers*, 712 F.2d 471, 476 (D.C.Cir.1983) (finding no state action); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410 (10th Cir. 1971); *Otten v. Balt. O.R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953). For example, the Ninth Circuit has rejected the contention that affirmative consent to the deduction of full member dues is required in order to protect non-members' First Amendment rights. See generally *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258 (9th Cir. 1992). The Ninth Circuit stated:

The Supreme Court has repeatedly held that non-members' rights are adequately protected when they are given the opportunity to object to such [political] deductions and to pay a fair share fee to support the union's representation cost . . . Thus, the Supreme Court has clearly held that the non-union employee has the burden of raising an objection. The non-member's 'burden' is simply the obligation to make his objection known.

Mitchell, 963 F.2d at 261.

In a similar case, the Sixth Circuit, rejecting the contention that non-members should only be required to pay costs related to collective bargaining unless they affirmatively consent to pay for the union's political expenditures, stated:

[This] argument must fall because it seeks to shift the balance of interest underlying all of the Supreme Court's pronouncements on the subject of agency shop fees. An "opt-in" procedure would greatly burden unions while offering only a modicum of protection to non-union employees whose procedural rights have already been safeguarded.

Weaver v. Cincinnati, 970 F.2d 1523, 1531 (6th Cir. 1992).

326. See *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232 (1956).

327. *Id.*

under the NLRA that supersedes Congress' authorization for an agency shop clause.³²⁸ Furthermore, in contrast to the RLA that initially barred agency shop agreements until the 1951 authorizing provision, the NLRA authorization of the agency shop limits earlier federal labor- management law under which all union security arrangements, including the closed shop, were permitted.³²⁹

In *Abood*, the Court identified the objecting employees' First Amendment interest as deriving from the freedom to associate for the advancement of ideas or the right to refrain from doing so.³³⁰ The First Amendment right of association was described by the Court as "the freedom of an individual to associate for the purpose of advancing beliefs and ideas," to contribute "to an organization for the purpose of spreading a political message," and to join with "like-minded persons to pool their resources in furtherance of common political goals."³³¹ The Court also recognized the right to refrain from expressive association for ideological purposes that were not related to collective bargaining.³³² Furthermore, the Court observed:

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative [such as objecting to medical benefits covering abortion or negotiating limits on the right to strike] To be required to help finance the union as collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.³³³

Unions may expend funds "for the expression of political views or toward the advancement of other ideological causes not germane to its duties as collective- bargaining representative . . . [but] such expenditures [must] be financed from charges, dues, or assessments paid by employees

328. See 29 U.S.C. § 164(b); *Kolinske*, 712 F.2d at 476; *Linscott*, 440 F.2d at 19-20 (Coffin, J., concurring).

329. See 29 U.S.C. § 158(a)(3); see also Rosenthal, *supra* note 87, at 55-57.

330. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-34 (1977).

331. *Id.*

332. See *id.* at 234-36.

333. *Id.* at 222.

who do not object to advancing those ideas”³³⁴ The Court thus drew a “line[] between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.”³³⁵ Finally, expressive conduct that goes to the core of a union’s role as the exclusive bargaining representative, such as a union’s activities in negotiating or administering the collective bargaining agreement, is chargeable to objecting employees not because such activities are free of “ideological objection,” but “because such coercion interfering with the right to refrain from expressive association that may result is justified by the governmental interest in industrial stability.”³³⁶ Relying on the concept of “freedom of belief,” the Court in *Abood* found an invasion of “an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so.”³³⁷ The Court

334. *Id.* at 235-36.

335. *Id.* at 236.

336. Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objecter Cases*, 41 HASTINGS L. J. 1, 25 (1989).

337. *Abood*, 431 U.S. at 220-22; *see also* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943) (articulating the concept of “freedom of belief ‘ in a compulsory flag salute case). For a criticism of this approach, *see* Cantor, *supra* note 50, at 70-72. Professor Cantor contends that:

[F]orced payments to a service organization by all who benefit from the service do not significantly impinge on associational or speech interests, even if the beneficiary organization uses a portion of the extracted fees to support political or ideological causes opposed by some payers. So long as the organization does in fact provide a useful function for the fees payers, and so long as the organization is legally bound to use the funds to promote the related functions and goals of the organization, then the disgruntled fees payer cannot complain any more than the taxpayer whose funds are used by the government for programs ideologically offensive to the taxpayer. The thrust of the freedom to think and believe and associate as one wishes, . . . is freedom from forced identification with, or adoption of, ideological positions. Because the agency shop fees payor is free to speak and think as he pleases, because the payor’s economic capacity to support chosen causes is not significantly impaired, and because the service organization is not selected for partisan reasons related to its political or ideological positions, I contend that no First Amendment interest is materially impaired by an agency shop arrangement.

Id. [footnotes omitted].

Note that the contention that a labor union performs a valuable service for all members of the bargaining union has been disputed. *See, e.g.,* Merrill, *Limitations Upon the Use of Compulsory Union Dues*, 42 J. AIR L. & COM. 711, 716-21 (1976); Edwin Viera, Book Review, 29 S. C. L. REV. 437, 453-54 (1978) (reviewing THOMAS HAGGARD, *COMPULSORY UNIONISM, THE NLRB, AND THE COURTS* (1977)). They argue that group representation by a labor union disadvantages superior workers by depriving them of the liberty of contract. Courts, however, have recognized that significant benefits are provided to workers through exclusive representative. *See, e.g., Abood*, 431 U.S. at 220-21; *Emporium Capwell Co. v. W. Addition Cmty. Org.* 420 U.S. 50, 63-64 (1975) (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)). Congress’ authorization of compulsory extraction of a fee from all employees in a represented bargaining unit requires that the money be spent consistent with the goal of providing effective representation of the workers. *See Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944) (recognizing a duty of fair representation deriving from congress’ authorization of exclusive representation to the properly designated labor

ultimately adopted the conclusion, however, that the infringement on First Amendment rights was justified by the State's compelling interest in creating a system for collective bargaining and promoting industrial peace.³³⁸ While the Court did not reach a conclusion regarding the issue of whether objecting employees' First Amendment rights would be violated by the imposition of "other conditions . . . or . . . the exaction of dues . . . as a cover for forcing ideological conformity or other action . . .,"³³⁹ a majority found that the First Amendment requires union political expenditures to be derived from fees "paid by employees who do not object" to such political expenditures.³⁴⁰

In 2018, the Supreme Court affirmed in a 5-4 decision in *Janus v. AFSCME*³⁴¹ public employees' First Amendment rights and determined government employees could not be forced to join a union and could not be required to pay union dues or fees.³⁴² Justice Alito, writing for the Court, stated that agency-shop agreements violate "the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."³⁴³ The Court thus overturned the decision in *Abood*, holding that the conclusion in *Abood* was inconsistent with the First Amendment.³⁴⁴

Even in the absence of state action, it has been argued that constitutional values should govern the analysis of this issue.³⁴⁵ Scholars have asserted that constitutional values rather than the vague definition of "germane to collective bargaining" should determine what union activities are chargeable to objecting employees.³⁴⁶ By recognizing and protecting constitutional values even in the absence of state action, the Board and

organization); *Greisman v. Newcomb Hosp.*, 192 A.2d 817, 824-25 (N.J. 1963); *James v. Marinship Corp.*, 155 P.2d 329, 338 (Cal. 1944); *McNamara v. Johnston*, 522 F.2d 1157, 1163-67 (7th Cir. 1975) (discussing the fiduciary duty imposed upon a labor organization by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501 (1976), and recognizing that a union's political expenditures promote common interests of workers in the bargaining unit). See generally William P. Kratzke, *Fiduciary Obligations in Internal Political Affairs of Labor Unions Under Section 501(a) of The Labor-Management Reporting and Disclosure Act of Labor Unions*, 18 B.C. INDUS. & COM. L. REV. 1019 (1977); *Int'l Bhd. of Elec. Workers, Local 3*, 266 N.L.R.B. 224, 227 (1983) (discussing a fiduciary obligation imposed on a labor organization in the administration of a union security clause).

338. *Abood*, 431 U.S., at 241-42.

339. *Hanson*, 351 U.S. at 238.

340. *Abood*, 431 U.S. at 236.

341. *Janus v. Am. Fed. of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448 (2018).

342. *Id.* at 2486.

343. *Id.* at 2448.

344. *Id.* at 2486.

345. For a discussion of the types of charges that should be deducted from objecting employees' dues and fees, see Hartley, *supra* note 336.

346. See *id.* at 21-22.

Court would recognize the “privatization of personal freedoms” in which labor law for the last fifty years has provided statutory protection for the constitutional interests of employees by balancing the employees’ right of free association and speech against other competing legitimate government interests.³⁴⁷ As stated by Professor Summers, “[c]onstitutional values are not cabined in the confines of state action Other institutions of government have equal, indeed greater, responsibility for protecting and promoting constitutional values.”³⁴⁸ As evidenced by the foundation of freedom of association and free speech, “the core of labor law is the protection and promotion of constitutional values.”³⁴⁹ Since 1932, the stated labor policy of the United States has been rooted in the First Amendment right of freedom of association.³⁵⁰ Section 2 of the Norris-LaGuardia Act states that national labor policy is to protect workers’ “full freedom of association,” while at the same time recognizing that employees are “free to decline to associate with [their] fellows.”³⁵¹ These constitutional values of freedom of association, as well as the right to refrain from association, are also codified in Congress’ formulation of § 7 of the Taft-Hartley Act.³⁵² Furthermore, the Taft-Hartley Act contains the “free speech” provision, § 8(c), that states: “the expressing of any views, arguments, or opinions . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”³⁵³ The Court has held that the language contained in section 8(c) “merely implements the First Amendment.”³⁵⁴ In discussing the duty of fair representation, the Court has also recognized “at least as exacting a duty to protect equally the interests of the members . . . as the Constitution imposes upon a legislature to give equal protection to the interests of those to whom it legislates.”³⁵⁵ Thus, the Supreme Court decisions regarding objecting employees’ obligation to pay dues and fees reflect Congress’ balancing of the demands of free speech and associational values for employees weighed against the legitimate interests of the union majority.³⁵⁶

347. Clyde Summers, *Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, U. ILL. L. REV. 689, 696 (1986); Hartley, *supra* note 336, at 83.

348. Summers, *supra* note 347, at 695.

349. *Id.* at 701.

350. See Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-15.

351. *Id.* § 102.

352. *Id.* § 157.

353. *Id.* § 158(c).

354. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

355. Steele v. Louisville-Nashville R.R., 323 U.S. 192, 202 (1994).

356. See Hartley, *supra* note 336, at 9.

IV. BALANCING THE INTERESTS OF LABOR ORGANIZATIONS & INDIVIDUAL EMPLOYEES

A labor union can be defined as a private membership association comprised of workers who voluntarily wish to join the organization.³⁵⁷ In exchange for the members' dues, pledge to support union activities, and be governed by the union's rules and regulations, the union represents the workers in collective bargaining units and acts for the health and welfare of the membership.³⁵⁸ Unions have a duty of fair representation owed to all employees within a bargaining unit, members and non-members alike.³⁵⁹ This duty prevents a union from favoring members over non-members in the negotiation of the terms and conditions of the collective bargaining agreement, as well as the administration of the contract and operation of the grievance arbitration process.³⁶⁰ By not becoming a full member of the union, an employee is excluded from participation in union governance and decision making.³⁶¹ Non-members are thus excluded from holding union office, voting for union officers, or voting on issues such as declaring a strike or contract ratification.³⁶² One can thus argue that for non-members, the dues and fees paid lead to a system of "taxation without representation", or at least a system that denies them a final voice in the important decisions related to exclusive representation.³⁶³ Union decisions, however, are governed by the duty of fair representation.³⁶⁴ Furthermore, the non-member does receive the benefit of union representation through the collective bargaining and grievance arbitration process, and is also free to join the union.³⁶⁵ By choosing not to join the union, the employee is also free from union rules and discipline.³⁶⁶ Section 7 protects the right to refrain from concerted activity, and thus non-members cannot be subjected to union discipline for refusing to participate in

357. See Cantor, *supra* note 50, at 100.

358. See *NLRB v. Allis-Chalmers*, 388 U.S. 175, 180 (1967).

359. See *Pines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976).

360. See *Prestige Bedding Co.*, 212 N.L.R.B. 690, 690 (1974); *Schorr Stern Food Corp.*, 248 N.L.R.B. 292, 293 (1980); *Highway and Loc. Motor Freight Emps. Loc. 667*, 228 N.L.R.B. 398, 398 (1977); *Int'l Bhd. of Elec. Workers Loc. 1504*, 211 N.L.R.B. 580, 580 (1974); *United Steelworkers Union Loc. 937*, 200 N.L.R.B. 40, 40 (1972).

361. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 737 (1963); *Kolinske v. Lubbers*, 516 F. Supp. 1171, 1173 (D.C. 1981), *rev'd*, 712 F. 2d 471 (D.C. Cir. 1983); Harry Wellington, *Union Fines and Workers Rights*, 85 YALE L.J. 1022, 1046 (1976).

362. See *Gen. Motors Corp.*, 373 U.S. at 737.

363. *Id.*

364. See *Pines*, 424 U.S. at 564.

365. See *Gen. Motors Corp.*, 373 U.S. at 737.

366. See Cantor, *supra* note 50, at 84 n.105.

such activity.³⁶⁷ Full members, in contrast, may be subject to union discipline under union rules and regulations.³⁶⁸ Thus, some commentators have argued that if “conscientious objections prevent a fees payor from joining the union and participating in its governance, the situation is akin to that of a citizen-taxpayer who refuses to vote for conscientious reasons but remains bound by governmental decisions.”³⁶⁹ Yet this concern is particularly true with regard to contract ratification in which non-members are excluded from voting for approval of the collective bargaining agreement that will govern their employment relationship.³⁷⁰

As determined by the Supreme Court in *General Motors*,³⁷¹ membership as a condition of employment for workers under a union security agreement is viewed as the equivalent of paying “periodic dues and initiation fees” as opposed to full membership.³⁷² Thus, under a union security agreement, there are two categories of employees: “financial core” members who are obliged only to pay dues and initiation fees, and “full” members who voluntarily assume all the rights and obligations of union membership in addition to paying dues and initiation fees.³⁷³ As full members, they enjoy traditional rights of participating in strike votes, ratification of the collective bargaining agreement, and other related internal procedures of the union.³⁷⁴ While the statutory language of section 8(a)(3) of the NLRA refers to union “membership” as a condition of employment, the NLRA has been interpreted as to refer to “financial core membership” rather than full union membership, and thus authorization for a union shop is in essence authorization for an agency shop security arrangement.³⁷⁵ Therefore, collective bargaining agreements that reference union membership as a condition of employment merely require employees to pay the equivalent of union dues, and cannot require full union

367. See *Pattern Makers v. NLRB*, 473 U.S. 95, 99-100.

368. See *NLRB v. Allis-Chalmers Co.*, 388 U.S. 175, 194 (1967) (explaining that union members have obligations to the union and are thus subject to disciplinary authority by the union in the form of fines and other sanctions); see also *Pattern Makers*, 473 U.S. at 99 (1985) (holding that union members could resign at any time and thus escape union discipline from engaging in strike activity and crossing a valid picket line).

369. Cantor, *supra* note 50, at 105.

370. *But see* Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB, 595 F. 2d 808, 811 (D.C. Cir. 1979) (appearing to hold the practice of contract ratification being limited to votes by full union members, but requiring the vote to reflect some consideration of the interests of the all employees).

371. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 740 (1963).

372. See *id.*

373. See *id.* at 742.

374. See *id.* at 737.

375. See Cantor, *supra* note 50, at 61 n.2; see also *Gen. Motors Corp.*, 373 U.S. at 741-43; *Loc. Union No. 749, Int'l Bhd. of Boilermakers v. NLRB*, 466 F.2d 343, 345 (D.C. Cir. 1972).

membership.³⁷⁶ Because this distinction is not widely known to employees, some workers may be coerced into becoming full union members against their wishes.³⁷⁷ Under such union security arrangements, even workers who are ideologically opposed to unionism are required to contribute dues and fees in support of the bargaining representative.³⁷⁸ Recognizing this concern, in 1988, Congress created an exemption for workers with religious objections to unions by requiring these specific workers to contribute an amount equal to union dues to charity instead.³⁷⁹

Deciding in *General Motors*³⁸⁰ that section 8(a)(3) of the NLRA only authorizes the compulsion of financial core membership by focusing on the “practical effect” of the revisions to the section 8(a)(3) provision that workers who had been ousted from a union could not be fired by an employer except for a refusal to tender an amount equal to union dues, the Court limited the authority of section 8(a)(3) in effect to an agency shop in which financial support for the union is the only condition of employment.³⁸¹ In the provision to section 8(a)(3), Congress sought to address a concern regarding the firing of workers covered by a union security clause

376. *Amalgamated Ass’n of Street Elec. R.R. & Motor Coach Emps. v. Las Vegas-Tonopah-Reno Stage Line, Inc.*, 202 F. Supp. 726, 731 (D. Nev. 1962), *aff’d.*, 319 F.2d 783 (9th Cir. 1963).

377. *See Marden v. Int’l Ass’n of Machinists*, 576 F.2d 576, 578 (5th Cir. 1978); Wellington, *supra* note 361, at 1051-52.

378. *Ry. Emps. Dep’t. v. Hanson*, 351 U.S. 225, 238 (1956); *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 245 (1977).

379. Act of Dec. 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452 (1980), (codified at 29 U.S.C. § 169); *see also* Steven C. Schwab, *Union Security Agreements and Title VII: The Scope and Effect of the New Section Nineteen of the National Labor Relations Act*, 17 GONZAGA L. REV. 329, 330-31, 349 (1982); Charleston C.K. Wang, Note, *Religious Accommodation v. Union Security: A Tale of Two Statutes*, 9 N. KY. L. REV. 331, 362 (1982).

380. *Gen. Motors Corp.*, 373 U.S. at 741-43.

381. *See* NLRB, *supra* note 84, at 654-55 (remarks of Rep. Klein) (commenting that while the Hartley Bill appeared to permit a union shop, the practical effect of protecting union members who had been ousted by the union from being terminated by the employer so long as dues had been paid was to “allow only a requirement that dues be paid”); *see also id.* at 770-71 (remarks of Rep. Hartley); *id.* at 1010, 1096, 1420 (remarks of Sen. Taft) (indicating that a “modified union shop” was being authorized). Opponents of the proviso argued that the impact would be to “cripple” union discipline by protecting an ousted union member from discharge by the employer as long as dues were paid, and that this contrasted with a genuine union shop in which a worker who had been ousted by the union would also be terminated from employment as long as the ouster from the union was for a legitimate reason; *see id.* at 371-72, 471, 875-76, 904, 1040-41, 1094, 1569, 1578. For example, Sen. Murray stated:

[I]f the [a member defined the union] pays or offers to pay his dues and initiation fees, the employer need not fire him, and any attempt by the union to persuade the employer to do so would be an unfair labor practice The union would be completely shorn of effective power to discipline its members for good cause.

Id. at 1040-1041; *see also* Cantor, *supra* note 50, at 72 (criticizing Justice Brennan’s opinion in *Street* for “torture[ing]” the legislative history of the Taft-Hartley Act in order to discern a congressional limitation on the use of union security fees for political purposes.).

who had been barred from a union or were ousted for arbitrary or capricious reasons, as well as responding to the free rider problem by requiring the equitable sharing of union representation costs.³⁸² The goal of the provision relating to union security thus appears on its face, and as evidenced by the legislative history, was to be designed to protect workers' jobs from union abuses and also to require all workers who benefit from union representation to contribute to those costs.³⁸³ The specific amount required to be contributed by non-members was not specified in the language of the provision or the legislative history.³⁸⁴ The only limitation included with regard to the political uses for union dues and fees pursuant to a union security agreement was to prohibit their use for contributions to federal elections.³⁸⁵ Numerous scholars have asserted that a union's efforts through political action and contributions provide benefits for employees such as pensions, worker's compensation, and occupational safety, and the rationale for preventing free ridership is applicable to these expenditures also.³⁸⁶

The principle of an agency shop agreement, namely empowering a union to collect fees from non-union members, contrasts sharply with the conclusion that "dissent is not to be presumed."³⁸⁷ Instead, by refusing to join a union, an employee has implicitly dissented from the union and its objectives, or, at a minimum, decided not to support the union and its objectives, financially or otherwise.³⁸⁸ It is difficult to conclude that a non-member employee who opposes union representation for purposes of collective bargaining or grievance settlement would desire to pay a fee to the same union in support of that union's political causes.³⁸⁹ This point also

382. See S. REP. NO. 80-105, at 6-7 (1947), reprinted in NLRB, *supra* note 84, at 407, 412-13 952-53, 1199, 1417, 1419-20; NLRB, *supra* note 84, at 426 ("[T]he committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion there from. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership.").

383. See Cantor, *supra* note 50, at 72-73.

384. See *id.* at 73.

385. See Labor Management Relations (Taft-Hartley) Act § 304, 52 U.S.C. § 30118; NLRB, *supra* note 84, at 571-72, 928, 1526-35, 1603-04, 1609-1610.

386. See Patricia N. Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 196 (1975); Gaebler, *supra* note 89, at 601-02, 606-09, 616-17; Rauh, *supra* note 323, at 152, 153-63; J. Albert Woll, *Unions and Politics: A Study in the Law and the Workers' Needs*, 34 S. CAL. L. REV. 130, 144 (1961); Timothy J. Hatch, *Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining*, 1980 WIS. L. REV. 134, 142, 150-52 (1980); Cantor, *supra* note 50, at 75.

387. See *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961).

388. See *supra* Section I.B.

389. See *supra* Section I.B.

holds true for a union shop in which financial-core membership is compelled. As the Court noted in *Austin*:

an employee who objects to a union's political activity thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury.³⁹⁰

Financial core members or agency fee contributors may oppose unionism as a general concept, or a particular representative union, and may also object to contributing to union activity unrelated to contract negotiation and administration.³⁹¹

The majority of collective bargaining agreements define "membership" as a condition of employment in a union security clause as simply membership, rather than the payment of periodic dues and initiation fees.³⁹² As stated by Judge Posner, "[t]he only realistic explanation for retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union."³⁹³ Neither workers nor employers generally understand that "membership" as referenced in section 8 (a)(3) of the NLRA is defined as merely the payment of required periodic dues and fees.³⁹⁴ Furthermore, under current doctrine, the only manner in which an employee can object to political expenditures is first through exercising the right to resign from the union.³⁹⁵

390. *Austin v. Michigan Chamber of Com.*, 494 U.S. 652, 665-666 (1990). Former Chairman Gould of the NLRB has criticized the Supreme Court's decision that employees covered by a Union security agreement are only required to be financial core members, stating that the holding "that union membership can be defined as only requiring the payment of periodic dues and initiation fees is, in my judgment, a decision that was erroneous. I think that the statute is consistent with an approach which would allow unions and employers . . . to negotiate an agreement which requires full membership obligations, as well as the payment of initiation fees and dues." See William B. Gould IV, Chairman, Nat'l Lab. Rels. Bd., *Autonomy and Intervention: Some Parts of the National Labor Relations Act Paradox* (Mar. 20 1997) (transcript available in the Stetson University College of Law Library).

391. See Pa. Lab. Rels. Bd. v. E. Lancaster Co. Educ. Ass'n., 427 A.2d 305, 307 (Pa. Commw. Ct. 1981), *cert. denied, sub. nom. Schreffler v. Pa. Lab. Rels. Bd.*, 103 S. Ct. 84 (1982).

392. NLRB Press Release, "Campaign Finance Reform of the Union Dues Dispute Under Beck" William B. Gould IV, Chairman NLRB, at 4.

393. *Wegscheid, v. Loc. Union 2911*, 117 F.3d 986, 990 (7th Cir. 1997).

394. See *NLRB v. Gen. Motors*, 373 U.S. 734, 741-43 (1963); see also *Connecticut Limousine*, 324 N.L.R.B. 633, 639 (1997) (William Gould dissenting) (requiring the unions and employers to revise union security clauses in a collective bargaining agreement so as to define membership as only the obligation to pay periodic dues and initiation fees).

395. See H.R. REP. NO. 105-397, at 5 (1997).

By resigning, however, the worker relinquishes the privilege to vote with regard to strikes and ratification of the collective bargaining agreement, two of the most serious decisions affecting the employment relationship.³⁹⁶ By becoming a financial core member and not contributing to union expenditures unrelated to collective bargaining or the settlement of grievances, an objecting employee may lose any rights to participate in union affairs.³⁹⁷ For example, while the objecting financial core member retains the right to vote regarding the selection of a collective bargaining representative, the employee does not have a right to vote for the individuals who represent members of the bargaining unit in the union.³⁹⁸ Additionally, the employee is not permitted to participate in the ratification of negotiated terms and conditions of employment in the collective bargaining agreement, and has no right to vote in decisions regarding disputes such as whether to strike the employer.³⁹⁹ In *Beck*, the Court sought to develop an accommodation between employees' right to object to union expenditures for political purposes and the union's ability to require every employee to contribute to the cost of collective bargaining activities.⁴⁰⁰ While the Court's decisions in *Street* and *Abood* determined that "dissent is not to be presumed,"⁴⁰¹ and the decision in *Beck* required employees to voice their objections in order to obtain a reduction in their dues and fees which flowed to political contributions,⁴⁰² most union employees are

396. *See id.* at 9.

397. *See id.*

398. *See* *Kidwell v. Transp. Comms. Int'l Union*, 946 F.2d 283, 295 (4th Cir. 1991).

399. *See id.* at 296. In *Kidwell*, an employee asserted that a union was prohibited from requiring the employee to resign from the union when she refused to support union expenditures not related to collective bargaining. *Id.* at 287. The Fourth Circuit rejected this argument, concluding that the RLA and prior court decisions did not establish a right for employees to refuse to financially support the union by becoming financial core members while at the same time retaining full union membership with all privileges and responsibilities. *Id.* According to the Fourth Circuit, employees are presented with two choices:

(1) full union membership with a requirement of paying complete union dues, thus enjoying the right to vote on internal union matters, ratification of the collective bargaining agreement, and decisions regarding political or other causes to which the union by majority vote decides to contribute; or (2) financial core membership with the requirement of paying dues and fees related to collective bargaining and grievance adjustment, and the right to vote on the selection of the collective bargaining representative, but excluding participation in internal union matters, ratification of the negotiated agreement, and the decision-making process regarding the union's financial support for non-collective bargaining related expenditures.

Id. at 296; *see also* *Kochkodin*, *supra* note 176, 820-21 (discussing the impact of this decision).

400. *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988).

401. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 (1977).

402. *Beck*, 487 U.S. at 738.

unaware of their rights to avoid contributing to political causes through their required fees and dues.⁴⁰³

Debate continues today over when and how a union should be allowed to use mandatory dues collected from employees covered by a union security agreement for non-collective bargaining activities. The struggle focuses on the question of whether a union's raising and spending money from the employees for non-collective bargaining purposes should operate on an "opt-in" or "opt-out" system of contributions.⁴⁰⁴ In an "opt-in" system, the default position is that employees are not presumed to want to give money to their union for non-collective bargaining purposes, including political expenditures.⁴⁰⁵ Instead, they must expressly announce their acquiescence to contributions provided to the union for such purposes.⁴⁰⁶ In contrast, an "opt-out" system, as currently in operation under *Beck*, assumes that employees consent to funding non-collective bargaining activities so that objecting employees must affirmatively "opt-out" of contributing to such purposes.⁴⁰⁷

While supporters of paycheck protection measures assert the goal of preventing unions from forcing employees to contribute to political causes to which the employees object, a limitation on the effectiveness of paycheck protection legislation at the state level is the broad preemption provision in section 453 of the Federal Election Campaign Act, that prevents state law from regulating elections to federal office.⁴⁰⁸ Furthermore, by only addressing the expenditures of dues and fees for political purposes without the employee's consent, paycheck protection efforts do not go as far as Supreme Court decisions which permit an objecting employee to refuse financial support for all union expenditures unrelated to collective bargaining, contract administration, and the settlement of grievances.⁴⁰⁹

An alternative to paycheck protection initiatives is to enact federal legislation eliminating compulsory unionism and the payment of dues as a condition of employment. In fact, numerous states have enacted such

403. Harry Beck, Editorial, *My Union Dues Don't Go to Politics*, HERALD, Nov. 1, 1996, at 27A (a poll from the mid-1990's indicated that 78% of union members were not aware of their rights under *Beck*. In numerous cases before the Board, it has been found that not only were employees unaware of their rights, but unions failed to provide such notice or intentionally avoided doing so).

404. *See* Kochkodin, *supra* note 210, at 809.

405. *See id.*

406. *See id.*

407. *See id.*

408. *See* 2 U.S.C. § 453.

409. *See* *Ellis v. Ry Clerks*, 466 U.S. 435, 450-53; *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

legislation under section 14 (b) of the NLRA through the creation of “right to work” laws.⁴¹⁰ Such a proposal ignores the important contributions of unions and conflicts with the balance sought in the Taft-Hartley Act to ensure labor peace while protecting the rights of individual workers from the abuses of unionism.⁴¹¹ Rather than requiring notice of *Beck* rights or enacting a statute at either the federal or the state level to require prior written consent for a union to spend an employee’s dues and fees for political purposes, Section 8 (a)(3) of the NLRA and section 2, Eleventh of the RLA should be revised so as to eliminate the confusing distinction between financial core membership and full membership in a union. These sections should be revised so as to prohibit union shop agreements and only permit agency fee arrangements. This would eliminate the confusion created by the *Beck* decision with regard to financial core membership, so that employees who voluntarily choose to join a union could be assessed fees related to the union’s political causes, but all other employees would only be required to pay fees related to the union’s activities in collective bargaining, contract administration, and the settlement of grievances. When Congress first included the word “membership” in the provision to section 8(3) of the Wagner Act, Congress sought to clarify that neither section 7(a) or section 8(3) barred closed-shop union security agreements.⁴¹² Because authority for a closed shop was eliminated by the Taft-Hartley Act amendments to section 8 (3), inclusion of the word “membership” in section 8(a)(3) should similarly be deleted. A union security clause would thus merely permit an agency fee relationship requiring the payment of dues and fees related to collective bargaining, contract administration, and the processing of grievances, but not requiring membership in a union under a union shop clause. Furthermore, all members

410. See National Right to Work Legal Defense Foundation, *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <http://www.nrtw.org/rtws.htm> (last visited Apr. 12, 2022) (stating that twenty-seven states have “right to work” laws: Alabama, Arizona, Arkansas, Florida, Georgia, Guam, Idaho, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming).

411. See R. Gorman, *supra* note 43, at 640.

412. See Dau-Schmidt, *supra* note 38, at 87; see also S. Rep. No. 573, at 11-12 (1935), reprinted in NLRB, *supra* note 71, at 2311, stating:

The reason for the insertion of the [provision] is as follows: According to some interpretations, the provision of § 7 (a) of the National Industrial Recovery Act, assuring the freedom of employees to organize and bargain collectively through representatives of their own choosing, was deemed to illegalize the close-shop. The Committee feels that this was not the intent of Congress when it wrote § 7 (a): That is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on the subject.

Id.

of the bargaining unit would be entitled to select the representatives for those purposes and also participate in contract ratification and strike votes. If employees choose to a union as members, those employees may do so by meeting the union's requirements for membership and thus avail themselves of full rights as a member of the union as well as being subject to union discipline. This proposed revision would provide a proper balance between preserving the goals of the NLRA while at the same time protecting individual employee rights.

CONCLUSION

Politics and the labor movement have long enjoyed a close connection, and this nexus is evidenced today in the recent battle over paycheck protection efforts.⁴¹³ Rather than addressing real campaign finance reform that would limit the influence of "soft" money, the proposals to require written permission from individual employees before union dues may be used for political purposes appear to be merely thinly-veiled attempts to limit campaign contributions from labor organizations to the Democratic Party.⁴¹⁴ Despite the claims of supporters, they are not designed to protect First Amendment rights. In order to achieve such a goal effectively, Section 8(a)(3) should be amended to limit union security agreements to agency relationships by deleting the language relating to membership.⁴¹⁵ While candidates pledge that campaign finance reform will be central goals of their administrations, such reform will likely continue to be politically motivated attempts to limit contributions to rival candidates and political parties rather than serious efforts to enact true reform.

413. *See supra* Section I.

414. *See supra* Section II.

415. *See supra* Section I.

