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Drawing Lines and Defining Remedies: The Impact of Ellis v. Brotherhood of Railway, Airline and Steamship Clerks on the First Amendment Rights of Dissident Employees

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CASE NOTES

Drawing Lines and Defining Remedies: The Impact of *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks* on the First Amendment Rights of Dissident Employees

Union security agreements[1] make payment of union dues or their equivalent a mandatory condition of employment for millions of American workers.[2] This money is used to finance union activities ranging from collective bargaining and lobbying on matters directly concerning employees' interests to the support of political candidates and a "myriad of similar undertakings."[3] Although there is usually a perceptible connection between union activities financed with compulsory fees and the workers' economic interests, a minority of employees often disagree with union activities financed with their compulsory dues.[4]

In *Abood v. Detroit Board of Education*[5] and subsequently

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1. The term "union security agreements" refers to government sanctioned "contracts between a labor union and an employer whereby the employer agrees to require his employees, as a condition of their employment," to pay union dues, or their equivalent in the form of nonmember agency fees. T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS 4 (1977). Both the National Labor Relations Act (NLRA) § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), and the Railway Labor Act (RLA) 45 U.S.C. § 152, Eleventh (1976) allow employers to enter into security agreements with unions.

2. T. HAGGARD, *supra* note 1, at 7.

3. *Id.* at 132. Lane Kirkland, President of the AFL-CIO, indicated the range of union activity when he wrote: "Labor's political and lobbying efforts do not . . . exist solely to enact purely labor legislation. We have always been concerned with education, social welfare, health, civil rights, consumer protection and much more. We are concerned with the human condition and all that affects that condition." L. Kirkland, News from the AFL-CIO (1980); *see also* Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61, 62-63 (1983). *See generally* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 215-38 (1968) (background material on unions in politics).

4. Cantor, *supra* note 3, at 62-63; *see also* Comment, *Federal Regulation of Union Political Expenditures: New Wine in Old Bottles*, 1977 B.Y.U. L. REV. 99, 122-24 (union membership is not homogeneous).

5. 431 U.S. 209 (1977).

in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*[6], the United States Supreme Court held that although union security agreements are constitutionally permissible, the "First Amendment does limit the uses to which the union can put funds obtained from dissenting employees."[7] The Court adopted such a position because the dissenting employees' freedom of expression and association is infringed when compulsory union fees are used to support union activities and causes opposed by the dissidents.[8]

In *Ellis,* the Supreme Court was asked to define the parameters of the first amendment protection available to employees who object to union activities financed with their compulsory dues. Although the Court's decision was based on statutory construction of the Railway Labor Act, *Ellis* has potentially far-reaching implications. For example, the decision establishes that the line between permissible and impermissible uses of dissenters' fees should be drawn between union bargaining and nonbargaining functions. Under *Ellis,* only collective bargaining activities may be supported with compulsory fees over the objections of dissenting employees. In addition, despite the fact that *Ellis* is based on statutory construction of the Railway Labor Act, both the Court's test for distinguishing between bargaining and nonbargaining functions and the Court's remedies for the use of dissenters' fees to finance nonbargaining activities are arguably applicable to all union security agreements on first amendment grounds. Finally, *Ellis* may require that procedures such as escrow accounts or advance reduction of fees be implemented to assure that no portion of dissidents' fees are used to finance union nonbargaining activities. Escrow accounts or advance reductions would replace the current union practice of freely using

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6. 104 S. Ct. 1883 (1984).

7. *Id.* at 1896; *see also Abood,* 431 U.S. at 222.

8. *Ellis,* 104 S. Ct. at 1896; *Abood,* 431 U.S. at 222; *see also* Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1193 (7th Cir. 1984) (quoting Roberts v. United States Jaycees, 104 S. Ct. 3244, 3252 (1984)) ("The particular freedom of association we are speaking of—the freedom that is ancillary to freedom of speech—has a negative as well as a positive dimension. 'Freedom of association . . . plainly presupposes a freedom not to associate.' "); Brotherhood of Ry. and S.S. Clerks v. Allen, 373 U.S. 113 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (recognizing the possible first amendment issues, but interpreting the Railway Labor Act so as to avoid the constitutional questions). Commentators have also recognized these same freedoms of association and expression. *See, e.g.,* T. HAGGARD, *supra* note 1, at 133 ("The use of compulsorily obtained monies" to finance political activities which an employee detests "offends our deeply held values of political liberty and freedom of speech.").

all compulsory fees and then providing dissenting employees with a rebate equal to the proportion of their fees used impermissibly.

I. Background: The Law Before *Ellis*

The Supreme Court initially confronted the first amendment issues linked to compulsory union fees in a series of cases arising under the Railway Labor Act (RLA).[9] Section two paragraph eleven of the RLA allows an employer to enter into a union security agreement with a representative union.[10] The resulting mandatory payment of union fees as a condition of employment was first challenged in *Railway Employes' Department v. Hanson.*[11]

A. *Permissible Bargaining Activities*

In *Hanson,* a group of dissenting employees alleged that the forced payment of union fees violated their first and fifth amendment rights.[12] The Court disagreed with the employees and held that there was no constitutional barrier to requiring "financial support of the collective-bargaining agency by all who receive the benefits of its work . . . ."[13] The Court based this holding on its determination that Congress enacted the RLA to assure labor peace and eliminate free riders (those employees reaping the benefits of the union's negotiations with management but refusing to pay union fees). Because the promotion of labor peace and the elimination of free riders were important government interests that could only be achieved through compulsory support of collective bargaining, the Court reasoned that such support was constitutionally permissible.[14]

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9. *See* Brotherhood of Ry. and S.S. Clerks v. Allen, 373 U.S. 113 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956).

10. Section 2 paragraph eleven of the Railway Labor Act (RLA), 45 U.S.C. § 152, Eleventh (1976), permits unions and employers to enter into an agreement requiring all employees in the relevant bargaining unit to join the union as a condition of employment. The RLA union security provisions are not unique.

11. 351 U.S. 225 (1956).

12. *Id.* at 230.

13. *Id.* at 238.

14. *Id.* at 233-35.

B. Impermissible Political Activities and the Political-Nonpolitical Dichotomy

Labor unions engage in a wide spectrum of activities ranging from collective bargaining to the promotion of political causes. While *Hanson* established that collective bargaining activities could be financed with compulsory fees, it left open the question of whether the free rider rationale, which justifies compelled support of collective bargaining, extended to all union activities.[15] The Court answered that question in the negative in *International Association of Machinists v. Street*.[16]

In *Street*, employees alleged that the union's use of compelled fees to promote political and ideological causes they disagreed with impinged on their right of free expression.[17] The Court recognized that the constitutional questions presented were "of the utmost gravity."[18] Nevertheless, the Court based its decision on language in the RLA. The Court felt the RLA permitted use of compulsory fees to finance collective bargaining activities, but denied unions the authority, "over the employee's objection, to spend his money for political causes which he opposes."[19] The Court avoided the employees' constitutional claim by relying on language in the RLA. However, by interpreting the RLA to prohibit compulsory support of union political activities, the Court implicitly held that the free rider rationale relied upon in *Hanson* did not extend to political activities that only indirectly enhanced the union's bargaining position.[20]

In *Abood v. Detroit Board of Education*,[21] it became clear that *Street* was based on first amendment principles. Unlike

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15. *See id.* at 238 ("[I]f the exaction of dues . . . or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.").

16. 367 U.S. 740 (1961).

17. *Id.* at 744-45.

18. *Id.* at 749.

19. *Id.* at 750.

20. *See id.* at 778 (Douglas, J., concurring):

> It may be said that the election of a Franklin D. Roosevelt rather than a Calvin Coolidge might be the best possible way to serve the cause of collective bargaining. But even such a selective use of union funds for political purposes subordinates the individual's First Amendment rights to the views of the majority. . . . For when union funds are used for that purpose, the individual is required to finance political projects against which he may be in rebellion.

21. 431 U.S. 209 (1977). The *Abood* Court freely admitted that *Street* had "embraced an interpretation of the Railway Labor Act not without its difficulties . . . precisely to avoid facing the constitutional issues . . . ." *Id.* at 232.

Street, the Court's decision in *Abood* squarely addressed the first amendment issue, unclouded by the presence of statutory interpretation. In *Abood*, a group of state school teachers alleged, as had the employees in *Street*, that use of compulsory fees to further political and ideological causes they disagreed with violated their first amendment rights.[22] Relying heavily on its analysis in *Street*, the Court held that the first amendment barred the use of dissenters' fees to finance union contributions to "political candidates [or] to express political views unrelated to [the union's] duties as exclusive bargaining representative."[23] The Court determined that forcing dissenting employees to finance political causes they oppose constitutes an infringement of employees' first amendment rights:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. . . .
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> . . . Because "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals" . . . limitations upon the freedom to contribute "implicate[s] fundamental First Amendment interests . . . ."
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> The fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.[24]

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22. The dissenting employees also challenged compelled support of collective bargaining in the public sector. The Court rejected this claim, reasoning that compelled financial support was "presumptively" justified by the "important" government interest in preventing free riders. *Id.* at 225.

23. *Id.* at 234.

24. *Id.* at 233-34 (quoting Buckley v. Valeo, 424 U.S. 1, 22-23 (1976)) (other citations omitted). Numerous cases support the Court's holding that compelled contributions to unions infringe on an employee's freedom of association. *See, e.g.*, NAACP v. Alebama *ex rel.* Patterson, 357 U.S. 449 (1958). The freedom to engage or to choose not to engage in association

> for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460; *see also* Elrod v. Burns, 427 U.S. 347, 356 (1976) ("[P]olitical belief and association constitute the core of those activities protected by the First Amendment."); Buckley v. Valeo, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression.").

The *Abood* decision clearly established that the line between political and nonpolitical union activities first articulated in *Street* was mandated by the first amendment.[25] However, neither *Street* nor *Abood* indicated whether the first amendment precluded the use of dissenters' fees because the activities were political in nature or rather because the expenditures were not sufficiently related to the union's bargaining function.[26] Thus, *Hanson, Street,* and *Abood* merely divided union expenditures into roughly two categories: (1) those that are political and thus prohibited by the first amendment, and (2) all other expenditures. The Court did not decide the constitutionality of expenditures that are both nonpolitical and nonbargaining—expenditures that fall in the gray area between allowable collective bargaining expenses and the political expenditures disallowed in *Street* and *Abood.*[27]

C. The Adequacy of Rebates as a Remedy

The Court's holding in *Street* and *Abood* that political activities cannot be financed with dissenters' fees gave rise to an additional problem. Either the union had to refund the portion of exacted fees used impermissibly, or some means had to be devised to prevent the initial expenditure. In both *Street* and *Abood,* the Court had given some support to rebate schemes while rejecting broad injunctions on the collection of all union dues.[28] However, in *Brotherhood of Railway and Steamship Clerks v. Allen,*[29] decided after *Street* but before *Abood,* the Court suggested a "practical decree" that required an advance reduction of fees proportionate to the amount previously used to finance impermissible activities.[30]

Lower courts considering the issue prior to *Ellis* were divided.[31] Those courts striking down rebate programs felt that re-

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25. This conclusion assumes the presence of state action sufficient to trigger first amendment analysis. *See infra* note 83.

26. *See, e.g.,* Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds,* 14 U.C.D. L. REV. 591, 600 n.41 (1981).

27. *See Abood,* 431 U.S. at 236 n.33; *Street,* 367 U.S. at 769 (limiting its discussion to political expenditures, the Court expressed "no view as to other union expenditures objected to by an employee and not made to meet the costs" of collective bargaining).

28. *Abood,* 431 U.S. at 237-42; *Street,* 367 U.S. at 771-75.

29. 373 U.S. 113 (1963).

30. *Id.* at 122.

31. *Compare* Perry v. Local Lodge 2569, 708 F.2d 1258 (7th Cir. 1983); Robinson v.

bates were slow, cumbersome, and ineffective in preventing the temporary use of dissenters' fees to finance impermissible union activities.[32] At least one member of the Supreme Court had similar concerns. In his dissenting opinion in *Street,* Justice Black argued that while rebates "may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated."[33]

II. THE SUPREME COURT'S DECISION IN *Ellis*

The two questions left unanswered by the Court in *Street* and *Abood,* the impact of the first amendment on nonbargaining-nonpolitical activities and the adequacy of union rebate schemes, were squarely before the Court in *Ellis.* Relying heavily on its prior analysis in *Street* and *Abood,* the Court invalidated most rebate schemes and articulated a test that allows dissenters' fees to be used only to finance union bargaining activities.

New Jersey, 565 F. Supp. 942 (D.N.J. 1983), *rev'd,* 741 F.2d 598 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 1228 (1985); School Comm. v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982); Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978); Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers, 307 Minn. 96, 239 N.W.2d 437, *vacated and remanded sub nom.* Thelkeld v. Robbinsdale Fed'n of Teachers Local 872, 429 U.S. 880 (1976) (all holding or suggesting that rebates do not adequately protect the rights of dissenting employees), *with* Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1131 (9th Cir. 1976); Hudson v. Chicago Teachers Union Local No. 1, 573 F. Supp. 1505 (N.D. Ill. 1983), *rev'd,* 743 F.2d 1187 (7th Cir. 1984); Opinion of the Justices, 401 A.2d 135 (Me. 1979); Association of Capitol Powerhouse Eng'rs v. State, 89 Wash. 2d 177, 570 P.2d 1042 (1977) (all upholding rebate programs).

32. *See, e.g.,* Robinson v. New Jersey, 565 F. Supp. 942 (D.N.J. 1983), *rev'd,* 741 F.2d 598 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 1228 (1985):

> [U]nder the very best demand and return system no objecting non-member can devote the time and money required to ascertain and, if warranted, regain the portion of his representation fee which the union may use for political and ideological purposes. . . . The good faith efforts of the union defendants in these cases to create workable systems demonstrate that no demand and return system can protect an objecting non-member's First Amendment rights.

565 F. Supp. at 945-46. This note questions the Third Circuit's reversal of the district court in *Robinson. See infra* notes 101-06 and accompanying text.

33. 367 U.S. at 796 (Black, J., dissenting); *see also Abood,* 431 U.S. at 244 (Stevens, J., concurring) (The "Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.").

A. The Issues Presented in Ellis

In *Ellis*, several employees of Western Airlines sued the Brotherhood of Railway, Airline and Steamship Clerks (the union) alleging that under the first amendment dissenting employees could not be compelled to contribute anything "more than their pro rata share of the expenses of negotiating agreements and settling grievances with Western."[34] The union and Western had entered into a union security agreement under the RLA.[35] Reacting to the Court's previous decision in *Street*, the union had set up an internal rebate program to refund the dissidents' share of expenditures for political and ideological activities.[36] The employees contended that the rebate program was inadequate to protect their constitutional rights because it only resulted in a refund rather than preventing the initial expenditure.[37] The employees also challenged the legality of six separate union expenditures for arguably nonbargaining activities: "the quadrennial Grand Lodge convention, litigation not involving [their bargaining unit], union publications, social activities, death benefits for employees,[38] and general organizing efforts."[39]

The district court and the Ninth Circuit Court of Appeals upheld the union's rebate plan as a "good faith effort to comply" with legal requirements and as adequate protection of employee rights.[40] The Ninth Circuit disagreed with the district court on the permissibility of the six challenged expenditures. Relying on the Supreme Court's prior decision in *Street*,[41] the district court held that the six expenditures "were all 'non-collective bargaining activities' that could not be supported by dues collected from protesting employees."[42] The Ninth Circuit reversed and

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34. 104 S. Ct. at 1887, 1896.

35. *See supra* note 1.

36. 104 S. Ct. at 1888, 1890.

37. *Id.*

38. The Court found it unnecessary to rule on the permissibility of the union's death benefits program because the employee-plaintiffs were no longer enrolled in the program and the union was no longer the employees' exclusive representative. *Id.* at 1895.

39. *Id.* at 1888.

40. Ellis v. Brotherhood of Ry. Airline and S.S. Clerks, 80 Lab. Cas. (CCH) ¶¶ 24,031-24,032 (S.D. Cal. 1980); Ellis v. Brotherhood of Ry. Airline and S.S. Clerks, 685 F.2d 1065, 1069 (9th Cir. 1982) (dismissing the constitutional challenge to the union's rebate program as "meritless").

41. 367 U.S. 740 (1961); *see supra* notes 16-20 and accompanying text.

42. *Ellis*, 104 S. Ct. at 1888. The district court specifically held that the spending of dues and fees for noncollective bargaining activities was a violation of the union's fiduci-

upheld the use of the dissidents' fees for all six of the challenged expenditures on the basis that such activities would ultimately benefit the union's collective bargaining efforts and could therefore be financed with compulsory fees.[43]

The Supreme Court was thus asked to decide two issues. First, does the first amendment bar the use of dissenters' fees to finance the six arguably nonbargaining activities challenged by the dissenting employees? Second, does a system of rebates that refunds to dissenting employees the portion of their fees used to finance union political or ideological activities sufficiently protect the employees' constitutional rights, or must the initial use of the dissidents' money be prohibited?[44]

B. The Bargaining-Nonbargaining Dichotomy

The Court based its decision of the permissibility of financing the challenged expenditures with dissident employees' fees on the RLA rather than on the first amendment.[45] Despite this fact, the Court appears to have applied and extended the principles articulated in *Street* and *Abood*.

The Court first held that Congress's purpose in enacting the RLA was to eliminate free riders and assure labor peace.[46] Therefore, in determining whether the expenditures challenged in *Ellis* were permissible, the Court focused on whether the challenged activities were "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."[47] The Court reasoned that this was the proper focus of analysis because "the free rider Congress had in mind was the employee the union was required to represent."[48] Only activities that directly concern "the employees within the union's bargaining unit" and that are

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ary duty of fair representation. Ellis v. Brotherhood of Ry. Airline and S.S. Clerks, 91 L.R.R.M. 2339, 2343 (S.D. Cal. 1976).

43. 685 F.2d at 1072, 1074-75.

44. 104 S. Ct. at 1890.

45. *Id.*

46. *Id.* at 1890-91.

47. *Id.* at 1892.

> Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative . . . .

Id.

48. *Id.*

"normally conducted by the [employees'] exclusive representative" create any danger of a free rider—the "smug, self-satisfied nonmember, stirring up resentment by enjoying benefits earned through other employees' time and money . . . ."[49] By narrowly defining the free rider problem justifying compulsory dues, *Ellis* extended *Street*'s interpretation of the RLA to prohibit use of dissenters' fees to finance nonpolitical-nonbargaining as well as political-nonbargaining union activities.

Applying this test, the Court interpreted the RLA as prohibiting the use of dissenters' fees to finance the union's organizing and litigation activities. These activities could not be financed with dissenters' fees because they did not directly benefit the particular bargaining unit, thus making the risk of free riders minimal, and were not within the union's statutory duties as the employees' exclusive bargaining representative.[50] Although the union's organizing and litigation activities were directed toward strengthening the union's bargaining position and protecting union and employee interests,[51] that purpose was not sufficient to justify compulsory use of dissenters' fees. On the other hand, the Court determined that the RLA permitted expenditures for social activities, union conventions, and union publications because those activities are closely related to the union's duties as an exclusive bargaining representative.[52] After finding three of the expenditures permissible under the RLA, the Court then considered whether the first amendment barred the use of dissenters' fees to finance such activities. Citing *Abood*, the Court held that the use of compulsory fees to finance any union activity significantly impinges on dissenting employees' first amendment interests. However, the challenged activities were held to be "constitutionally permissible" because they were closely related to the union's bargaining duties and, therefore, implicitly justified as the least restrictive means of achieving the governmental objective of eliminating free riders.[53]

In short, *Ellis* replaces the political-nonpolitical dichotomy

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49. *Id.* at 1894.

50. *Id.* (the "free-rider rationale does not extend this far").

51. In upholding the union's organizing and litigation efforts, the Ninth Circuit noted that the litigation involved a challenge to "the airline industry's Mutual Aid Pact, under which a struck carrier receives substantial financial assistance from non-struck carriers," and that "[m]aximum organization of an industry benefits employees and units already organized." 685 F.2d at 1073-74.

52. 104 S. Ct. at 1892-94, 1896.

53. *Id.* at 1896.

of *Street* and *Abood* with a test that draws the line between bargaining and nonbargaining activities, at least with respect to union security agreements enacted under the RLA.

C. *The Adequacy of Rebates*

The Court also invalidated the union's rebate scheme, holding that "[b]y exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization."[54] The Court struck down as inadequate only "the pure rebate approach."[55] The Court reasoned, as had Justice Stevens in his concurring opinion in *Abood*,[56] that rebates only reduce, but do not eliminate the use of dissidents' money to finance activities unrelated to the union's bargaining function.

> The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but . . . [e]ven then the union obtains an involuntary loan for purposes to which the employee objects.[57]

Although the Court noted that in limited circumstances administrative convenience may justify union borrowing, it found no such justification in the instant case. Instead, the Court focused on the availability of alternatives such as advance reduction of dues and escrow accounts. The Court asserted that these alternatives would place only "the slightest additional burden, if any, on the union," but did not specifically require the use of either alternative.[58]

III. Analysis and Application

Perhaps the most significant aspect of *Ellis* is the Court's test for distinguishing between union activities that may be financed with compulsory fees and those that may not. If *Ellis* is read merely as an interpretation of the RLA, the impact of the decision is obviously limited. However, *Ellis* should not be read

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54. *Id.* at 1890.
55. *Id.*
56. *See supra* note 33.
57. *Ellis*, 104 S. Ct. at 1890.
58. *Id.*

as applying only to union security agreements under the RLA, but rather as a test premised on first amendment principles. Recognition of the Court's first amendment analysis should lead lower courts to apply the same test to all union security agreements, whether they arise under the RLA, the National Labor Relations Act, or state statutes. In addition, *Ellis* should be read as disallowing even a partial rebate scheme as a remedy for union use of dissenters' fees to finance nonbargaining union activities. The first amendment requires remedies to ensure that no portion of dissidents' fees will be used illegally even though such remedies may result in union inconvenience.

A. The Bargaining-Nonbargaining Dichotomy

Prior to *Ellis*, it was unclear whether the first amendment disallowed the political activities challenged in *Street* and *Abood* because of their political nature or rather because of their lack of relation to collective bargaining.[59] Several commentators have adopted the position that the first amendment prohibits only political activity and concluded that the free rider rationale articulated in *Street* and *Abood* encompasses virtually all union activity. They contend that if union activities are likely to strengthen union bargaining positions or otherwise produce job-related benefits, then such activities can be financed with compulsory fees.[60] The Ninth Circuit employed this rationale in *Ellis* to uphold the use of compulsory fees to finance the union's

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59. *See* Gaebler, *supra* note 26, at 600 n.41.

60. *See* Cantor, *supra* note 3, at 79-84 (citing the Ninth Circuit's approach in *Ellis* with approval and arguing that the same free rider rationale applies to both bargaining and nonbargaining activity); Cantor, *Forced Payments to Service Institutions and Constitutional Interest in Ideological Non-Association*, 36 RUTGERS L. REV. 3 (1984):

> Forced payments in return for services entails no imposition of ideological conformity. Nor do the amounts collected impair the ability of workers to conduct their own political expression. . . . A worker who complains about a union's political expenditures in pursuit of employment-related worker benefits should have no more first amendment right to a refund of the relevant portion of fees paid than a taxpayer who objects to various political expenditures by the government.

Id. at 7; *see also* Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1, 6 nn.14-15 (1981) (arguing that political action is increasingly important to employees in the private sector and that there is no clear line, if there is any line at all, between collective bargaining and political activities); Woll, *Unions in Politics: A Study in Law and the Worker's Needs*, 34 S. CAL. L. REV. 130 (1961) (suggesting that virtually all political activities that strengthen the unions' bargaining position are germane to collective bargaining and should be financed with compulsory fees). *But see infra* note 63.

organizing and litigation activities.[61] This same rationale underlies Professor Cantor's recent suggestion that prevention of the free rider problem should extend to the political arena, since union political activities can produce job-related benefits such as pension plans, worker's compensation, and job-safety regulation.[62]

The Supreme Court clearly rejected this line of reasoning in *Ellis,* emphasizing instead that activities financed with compulsory dues must have some clear relation to collective bargaining.[63] Several factors suggest that the Court's test for distinguishing between union activities that may be financed with compelled fees and those that may not is based on first amendment principles that should apply to all union security agreements.

1. First amendment analysis

The Court's decisions in *Abood* and *Ellis* are based on the premise that all compulsory union fees, regardless of the activities they are used to finance, are a "significant impingement on First Amendment rights."[64] The freedom to engage or to choose

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61. For a discussion of the Ninth Circuit's decision in *Ellis* see *supra* note 51.

62. Cantor, *supra* note 3, at 75. Justice Frankfurter also characterized the Court's assertion in *Street* that political activity could be separated from bargaining activity as a "baseless dogmatic assertion that flies in the face of fact. . . . The notion that economic and political concerns are separable is pre-Victorian." *Street,* 367 U.S. at 814 (Frankfurter, J., dissenting). *But see* Blair, *Union Security Agreements in Public Employment,* 60 CORNELL L. REV. 183 (1975):

> To respond, as Justice Frankfurter did in his dissent in *Street,* that a union security agreement does not prevent one from asserting his own ideas ignores the fact that by forcing one to contribute financial support to political views contrary to his own, such an agreement compels one to speak on political issues.

Id. at 197.

63. The *Ellis* Court recognized that "[i]f one accepts that what is good for the union is good for the employees . . . then it may be that [dissenting] employees will ultimately ride for free" by reaping the benefits of the union's nonbargaining activities without sharing the cost. 104 S. Ct. at 1894. The Court rejected the idea that the unions should therefore be allowed to use compulsory dues to finance any activity that might ultimately benefit employees by noting that "the free rider Congress had in mind was the employee the union was required to represent" in its role as exclusive bargaining representative. *Id.*

64. *Ellis,* 104 S. Ct. at 1896; *see also Abood* 431 U.S. at 222:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment rights. An employee['s] . . . moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. . . . The examples could be multiplied. To be required to help finance the union as a collec-

not to engage "in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech."[65] The Court has not limited first amendment protection to political expression. As the Court stated in *Abood:* "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection."[66] Thus, regardless of the job-related benefits produced by union activity, compelled financial support of economic as well as political views constitutes a serious infringement on dissenters' basic first amendment freedoms.[67]

In *Ellis,* after recognizing that any use of dissenters' fees infringed on first amendment interests, the Court interpreted the RLA as allowing expenditures for activities that could give rise to free riders, since in that situation the government's interest is strong enough to justify the restriction of first amendment interests.[68] Consequently, *Ellis* stands for the proposition that dissenters' fees may be used to finance only those activities that necessarily give rise to free riders, a result that *Abood* suggests is required by the first amendment.[69] It therefore follows, as the Seventh Circuit recently held, "that *Ellis* is as good a precedent

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> tive-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.

Id.; see also supra note 24 and accompanying text.

65. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

66. 431 U.S. at 231; *see also supra* note 24 and accompanying text.

67. *See supra* note 24; *see also* Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984) (holding that *Ellis* establishes a constitutional right not to be compelled to contribute to any activities that are not germane to collective bargaining).

68. 104 S. Ct. at 1896.

69. Several lower courts have interpreted the Supreme Court's reasoning in *Abood* and *Ellis* as implicitly holding that "when the government impinges on an individual's associational rights—either by prohibiting or compelling association—such action cannot be sustained unless it is justified by a compelling governmental interest." Galda v. Bloustein, 686 F.2d 159, 164 (3d Cir. 1982); *see also* Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984) (following *Ellis*); Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984) (following *Ellis*), *cert. denied,* 105 S. Ct. 1228 (1985); Havas v. Communications Workers of America, 509 F. Supp. 144 (N.D.N.Y. 1981); Lykins v. Aluminum Workers Int'l Union, 510 F. Supp. 21 (E.D. Pa. 1980) (both finding that *Abood* implicitly recognized and upheld labor peace through elimination of free riders as a compelling government interest).

Several commentators have also concluded that *Abood* stands for the proposition that elimination of free riders is a compelling government interest justifying some infringement of first amendment rights. *See, e.g.,* Cantor, *supra* note 3; Gaebler, *supra* note 26.

under the [first amendment or] the due process clause of the Fourteenth Amendment as under the Railway Labor Act."[70]

The Court's tortured reading of the RLA to prohibit such traditional union activities as organizing drives and litigation not directed at a particular bargaining unit, further suggests that the Court's decision is based on the first amendment. Several commentators[71] have joined Justices Black and Frankfurter[72] in pointing out that it is difficult to read the RLA as prohibiting the political expenditures challenged in *Street*, let alone the traditional union expenditures struck down in *Ellis*.[73] It follows that, as in *Street*, the only "reason that the Railway Labor Act was interpreted [in *Ellis*] to limit the use of agency fees was to avoid the serious constitutional questions that would have been raised otherwise."[74] The Court has acknowledged that the same first amendment interests recognized in *Abood* are present in cases arising under the RLA.[75] Thus, despite its basis in the language of the RLA, the Court's decision in *Ellis* is "strong medicine. It is not equivocal. Indeed, it contains constitutional overtones which appear to be foregone only by use of statutory construction to avoid First . . . Amendment issues."[76]

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70. Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1196 (7th Cir. 1984).

71. *See, e.g.*, Cantor, *supra* note 3, at 72.

72. *Street*, 367 U.S. at 784 (Black, J., dissenting) (arguing that the Court had interpreted the RLA to "make it mean exactly what Congress refused to make it mean"); *id.* at 799-804 (Frankfurter, J., dissenting) (arguing that the RLA cannot fairly be read to preclude the use of dues for political activity, since such activity is necessary in order for unions to function effectively).

73. Even the *Ellis* Court recognized that its reading of the RLA was not clearly required by the Act:

> In short, Congress was adequately informed about the broad scope of union activities aimed at benefiting union members, and, in light of the absance of express limitations in § 2, Eleventh it could be plausibly argued that Congress purported to authorize tha collection from involuntary members of the same dues paid by regular members.

104 S. Ct. at 1891.

74. Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1196 (7th Cir. 1984).

75. *See Ellis*, 104 S. Ct. at 1896; *see also infra* note 76.

76. Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1004 (9th Cir. 1970); *see also* Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1196 (7th Cir. 1984), stating:

> We know from *Abood*, and have tried to make clear in this opinion, that the Constitution indeed requires the same safeguards for dissenters' rights as the earlier cases found were required by the federal labor statutes. It follows that *Ellis* is as good a precedent under the due process clause of the Fourteenth Amendment as under the Railway Labor Act.

Finally, in striking down rebates, the Court has posited that only the least restrictive means of financing permissible union activity may be used. That is, the unions must adopt the remedies least likely to allow any use of dissenters' fees for illegal activities. This portion of the Court's decision parallels previous decisions holding that the government must use the least restrictive means available to effectuate its interests when first amendment interests are at stake.[77]

2. *The test for permissible expenditures of dissenters' fees*

The above factors lead to the conclusion that *Ellis* extended the first amendment bar on permissible uses of dissidents' mandatory fees to all nonbargaining activities. The free rider principle justifying infringement of first amendment interests extends only to those activities in which the union is acting as the exclusive bargaining agent for all the employees in a given bargaining unit.[78] The union is generally engaged as the employees' exclusive bargaining agent "only for the purpose of negotiating and administering collective agreements which establish the wages, hours, and working conditions of the employment relationship."[79] Only when the union is carrying out its statutory function and is acting directly and exclusively for its members, is there any real threat that employees will ride for free.[80]

For example, the union's organizing and litigation efforts challenged in *Ellis* may have resulted in benefits to all union members. However, such activities may not be financed with dissenters' fees because they have only an "attenuated connection" to the union's bargaining function. As Justice Black has noted, it makes "no difference" if the union's nonbargaining activities "are helpful adjuncts of collective bargaining. Doubtless, employers could make the same arguments" to compel contributions to aid employers on their side of the collective bargaining table.[81]

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77. *See, e.g., Hudson*, 743 F.2d at 1196-97 (citing *Ellis* for the proposition that rebates are constitutionally inadequate because there are less restrictive alternatives available); *see also* Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973).

78. *Ellis*, 104 S. Ct. at 1894.

79. T. HAGGARD, *supra* note 1, at 141; *see also id.* at 132 ("The primary function of a labor union is to represent employees in collective bargaining with their common employer.").

80. *Ellis*, 104 S. Ct. at 1894; *see also supra* note 63 and accompanying text.

81. *Street*, 367 U.S. at 789-90 (Black, J., dissenting).

Read as essentially a first amendment decision, *Ellis* establishes that activities undertaken outside the union's role as bargaining agent should not be granted the compulsory support that is denied to similar fraternal and political organizations.[82] That the union's activities may ultimately benefit some employees (as well as other segments of society) is not a compelling government interest justifying forced association by means of compulsory support.

3. *Applying the test*

So long as the state action necessary to invoke the first amendment is present,[83] the principles announced in *Ellis* should apply to any union security agreement.[84] However, the test announced in *Ellis* may result in different outcomes depending on the obligations of the particular union as exclusive bargaining agent for its employees. That is, the permissibility of financing a given union activity with dissenters' fees turns not on the forum in which the union is acting, but on the relationship of the supported activity to that union's role as the employees' exclusive bargaining representative. For example, union lobbying in Congress to support a limitation on Japanese imports could not, under the test articulated in *Ellis*, be financed with exacted fees over the employees' objections. Lobbying for limitations on imports, though arguably helpful to bolster the union's bargaining position, is not reasonably related to the union's statutory obligation to serve as the employees' exclusive bargaining representative with management. In addition, since a limitation

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82. *See* T. HAGGARD, *supra* note 1, at 141-42.

83. A detailed analysis of the elements of state action is beyond the scope of this note. However, the Court has held that the RLA sufficiently implicates the government in agency shop agreements to trigger first amendment scrutiny. *See* Railway Employes' Dep't v. Hanson, 351 U.S. 225, 232 (1956) ("the federal statute is the source of the power and authority by which any private rights are lost or sacrificed"). Public sector unions are also clearly subject to the limits imposed by the first amendment since government is the employer. Unfortunately, precedent does not resolve whether union security agreements entered into pursuant to the NLRA involve sufficient government action to invoke the first amendment. For a more complete analysis of this difficult question, see Cantor, *supra* note 3, at 68 n.36 (concluding that "[t]o some extent, the arguments in favor of finding government action prove too strong"); *see also* Reilly, *The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes*, 32 MERCER L. REV. 561, 563 (1981).

84. *See, e.g.*, Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984); Robinson v. New Jersey, 741 F.2d 598 (3d. Cir. 1984) (applying the *Ellis* test to public sector unions), *cert. denied*, 105 S. Ct. 1228 (1985).

on imports might inure to the benefit of large numbers of people outside the represented bargaining unit, no compelling government interest is served by forcing dissenting employees to finance the union's lobbying. Since the government's interest in eliminating free riders does not extend this far, the first amendment bars the use of exacted fees.[85] When the free rider principle does not apply because the union is not acting as the employee's exclusive bargaining agent, the union should not be allowed to become the employee's de facto agent and promote ideas that the employee abhors.[86]

On the other hand, when the union is acting as the employees' exclusive representative, *Ellis* does not bar even union political activity; it only prohibits nonbargaining activity, when the risk of free riders is minimal. Thus, in *Robinson v. New Jersey*,[87] the Third Circuit allowed a public sector union to use compulsory fees to finance political lobbying. *Robinson* seems well-founded since the New Jersey statute at issue allowed compulsory fees for the "support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the employers."[88] In the public sector, where many traditional labor-management issues are resolved in the political arena,[89] *Ellis* logically allows compulsory fees to be used to finance political activities undertaken to fulfill the union's bargaining function.[90]

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85. *See generally* Gaebler, *supra* note 26, at 607-19 (arguing for a flexible test turning on whether union activity is "reasonably calculated to achieve employment-related objectives" to determine permissible expenditures).

86. *See* T. HAGGARD, *supra* note 1, at 140.

87. 741 F.2d 598 (3d Cir. 1984).

88. *Id.* at 602 (quoting N.J. STAT. ANN. § 34:13A-5.5(c)).

89. For a discussion of the political nature of public sector bargaining, see *Abood*, 431 U.S. at 236 (noting that the line between bargaining activity and political activity may be "hazy"); Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985); *see also* Aslanian-Bedikian, *Abood and its Progeny: Conflicting Perspectives on Safeguarding Union Security Agreements and Individual Rights in the Public Sector*, 1984 DET. C.L. REV. 23, 85; Blair, *supra* note 62 (both arguing that public sector bargaining is inherently more political than the private sector).

90. *See, e.g.*, Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985).

4. Implications

It is difficult to forecast the potential impact of *Ellis* beyond prohibiting the use of dissenters' mandatory fees to finance nonbargaining union activities. However, some effects on future litigation and union activity in general can be discerned.

Initially, *Ellis* may severely curtail union activity outside the bargaining room. In several cases decided subsequent to *Abood*, and applying essentially the same test for permissible expenditures as that adopted by the Court in *Ellis*, as much as eighty percent of union expenditures were found to be unrelated to collective bargaining.[91] If even forty percent of union expenditures were routinely disallowed in the wake of *Ellis*, union activity in politics and elsewhere could be sharply curtailed.

Even if union activities are sharply curtailed by *Ellis*, it is difficult to criticize the Court's basic approach. The legitimate interests of both the unions and the majority of employees are protected because *Ellis* allows the use of compulsory fees to finance the unions' statutory obligation to act as bargaining agent. It seems fair to require unions to finance their nonbargaining activities with voluntary funds.[92] *Ellis* leaves unions in essentially the same position as other political and fraternal organizations. In addition, the Court's decision in *Ellis* is justified by the fact that compelling employees to finance causes and ideologies they abhor constitutes a significant infringement of basic first amendment freedoms.[93]

Despite its potential for curtailing union activities, *Ellis* probably will not drastically reduce such activities. As Justice Powell noted in his separate opinion in *Ellis*, "reasonable people—and judges—may differ" in their application of the Court's

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91. *See, e.g.*, Beck v. Communications Workers of Am., 468 F. Supp. 93 (D. Md. 1979) (finding that 80% of union dues were used for impermissible nonbargaining activity). *But see* Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984) (finding only 15% to 25% of dues being used for nonbargaining activities), *cert. denied*, 105 S. Ct. 1228 (1985).

92. One commentator has suggested that the rights of the union and the individual would be best protected by requiring political expenditures to be financed from all voluntary funds. Comment, *Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context*, 51 TEX. L. REV. 936, 983-84 (1973). Since identical first amendment interests are involved, the same sort of voluntary fund may also be appropriate to finance the union's nonbargaining expenses.

93. *See, e.g.*, Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984).

test to "particular types of expenditures."[94] By allowing not only expenditures for collective bargaining but also expenditures for activities "normally or reasonably employed" to effectuate the union's role as bargaining agent,[95] the Court has left the unions sufficient breathing space to continue financing most of their traditional activities with exacted fees.[96] The fact that the Court's test is not explicitly based on the first amendment will probably increase the lower courts' willingness to apply *Ellis* liberally, instead of requiring a strong showing that challenged activities are closely tied to collective bargaining.

Additionally, the unions have little incentive to voluntarily restrict activities funded with compulsory fees, so long as a colorable claim can be made that the activities financed are sufficiently related to collective bargaining to meet the *Ellis* test. Dissidents are not always aware of their rights and have traditionally been reluctant, or financially incapable, of asserting their rights in court.[97] Since litigation is likely to be a slow and inefficient means of restricting the unions' uses of exacted fees, any sudden change in the status quo seems unlikely, unless legislation is forthcoming.[98]

B. Remedies

The Court's decision to strike down rebate schemes is premised on its conclusion that those schemes "reduce but [do] not eliminate the statutory violation."[99] With that in mind, it is difficult to understand why the Court held only that a "pure rebate

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94. 104 S. Ct. at 1897 (Powell, J., concurring in part and dissenting in part).

95. *Id.* at 1892.

96. *Compare* Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984) (liberal reading of *Ellis*, allowing the union to continue to finance most of its activities with compulsory fees), *cert. denied*, 105 S. Ct. 1228 (1985), *with* Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187 (7th Cir. 1984) (narrow interpretation of *Ellis* allowing compelled support only for collective bargaining).

97. This conclusion seems justified by the paucity of litigation on permissible use of forced union dues since *Street; see* Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 1002 (1980) ("Whether out of fear of reprisal, peer pressure, or mere inertia, many dissenters may be reluctant to express even general opposition to the political expenditures of the union.").

98. *See* T. HAGGARD, *supra* note 1, at 139 (arguing that a legislative solution is necessary because unions are slow to implement internal remedies and individual suits are "costly, time-consuming, and of dubious efficacy").

99. *Ellis*, 104 S. Ct. at 1890.

approach is inadequate."[100] By limiting its holding to rejection of a "pure rebate approach," the Court has left the door open for systems incorporating a small advance reduction and then picking up the slack with a partial rebate.

1. *Permissibility of partial rebate systems*

In *Robinson v. New Jersey*,[101] the Third Circuit Court of Appeals relied on *Ellis* to approve a state statute mandating a fifteen percent reduction in nonmembers' fees coupled with a rebate of any proportion of the dissidents' fees over fifteen percent that was used to finance impermissible activities. Several factors suggest that a partial rebate system such as that approved in *Robinson* is inconsistent with the first amendment rationale of *Ellis*.

First, if it is illegal for a union to use dissenters' fees to finance a given activity, then the union should not be able to use exacted fees illegally for any period of time. "The cost to the employee is much less than if the money was never returned, but," as the Court noted, "this is a difference of degree only."[102]

Second, "the stark reality . . . of compulsory funds misspent on activities having significant first amendment sensitivity cannot undo the infringement of constitutional rights that the expenditure caused in the first instance."[103] Since it is "the spending rather than the retention of the fees [that] is unconstitutional," rebates do nothing to "remedy the constitutional infraction."[104] Whether the rebate system is quick or slow in refunding the dissident's money is not relevant, since it is well established that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[105] The fact that only small amounts of the dissidents' fees are involved in a partial rebate scheme also does not rectify the constitutional infraction. As Justice Black noted in *Street*, the first amendment "deprives the Government of all power to make any person pay out one single penny against his

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100. *Id.*

101. 741 F.2d 598 (3d Cir. 1984).

102. *Ellis*, 104 S. Ct. at 1890.

103. Levinson, *After* Abood: *Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 AM. U.L. REV. 1, 28 (1977).

104. Sullivan, *Freedom of Association and the Public Sector Agency Shop:* Ball v. Detroit *and* Abood v. Detroit Board of Education, 85 DICK. L. REV. 21, 39 (1980).

105. Elrod v. Burns, 427 U.S. 347, 373 (1976).

will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other."[106] Therefore, a partial rebate program like that upheld in *Robinson* is similar to a pure rebate scheme in that it may reduce, but does not eliminate, the constitutional violation.

2. *Escrow systems and advance reduction of fees*

Unlike rebates, the virtue of the alternative remedies suggested by the Court, namely escrow accounts and advance reduction of fees, is that they eliminate the possibility that exacted fees will be used, even temporarily, to finance impermissible activities. Escrow accounts were first suggested by the Michigan Appellate Court in *Ball v. City of Detroit*.[107] In that case, the court held that if an employee voiced his disagreement with union expenditures for activities unrelated to collective bargaining, then that employee's full fees would be paid into an escrow account. The union would then be allowed to withdraw the percentage used for permissible purposes only after a judicial review of its accounts to determine the percentage of fees to be used for permissible bargaining activities.[108] A similar system would be required to administer any advance reduction of fees.[109]

The advantage of escrow accounts or advance reductions is that they prevent any unnecessary infringement of the dissident's rights. An obvious disadvantage is that the union must determine the exact amount to be used for each activity and a court must pass on the permissibility of each union activity before having access to any of the dissidents' fees. The resulting accounting procedures and close judicial supervision that would be required to implement such a system[110] cast considerable

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106. 367 U.S. 740, 791 (Black, J., dissenting); *see also* Robinson v. New Jersey, 547 F. Supp. 1297, 1323 (D.N.J. 1982) ("the fact that each plaintiff's monetary stake is small does not render the deprivation of a constitutional right less important"), *rev'd*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985); School Comm. v. Greenfield Educ. Ass'n, 385 Mass. 70, ___, 431 N.E.2d 180, 189 n.8 (1982) (since the dissidents are asserting a constitutional right, the courts "are hardly in a position to label it de minimis solely because small amounts of money are at stake").

107. 84 Mich. App. 383, 269 N.W.2d 607 (1978).

108. *Id.* at ___, 269 N.W.2d at 612-13.

109. *See, e.g.*, Beck v. Communications Workers of Am., 468 F. Supp. 93 (D. Md. 1979) (advance reductions).

110. Professor Cantor has described the type of advance reduction or escrow schemes proposed by the Court in *Ellis* as "complex, costly, and wasteful." Cantor, *supra* note 3, at 84.

doubt on the Court's assertion in *Ellis* that escrow accounts would place "only the slightest additional burden, if any, on the union."[111]

The Court in *Ellis* left open the possibility that administrative inconvenience may relieve unions of the obligation to implement escrow accounts or advance reduction schemes. However, several lower courts have weighed the competing interests involved and found the balance to tip in favor of dissidents' first amendment rights.[112] The court's conclusion in *Ball* is typical: "While we recognize this works somewhat of a hardship on the union because temporarily it will be unable to collect even the portion of service fees to which it is entitled, that hardship is outweighed by the possibility that First Amendment rights will be violated."[113]

If *Ellis* is primarily a first amendment decision, one would expect the Supreme Court to reach a conclusion similar to that of *Ball* and require escrow accounts or advance reduction schemes. However, the Court has not decided whether administrative inconvenience justifies the infringement of employees' first amendment interests inherent in a partial rebate scheme.

IV. Conclusion

The Supreme Court's decision in *Ellis* has significantly extended the first amendment protection available to union dissidents by recognizing that the government's interest in eliminating free riders does not extend to union activities outside the union's role as exclusive bargaining agent. However, it seems unlikely that the limitation on uses of compulsory fees articulated by the Court will be strictly followed in the absence of widespread litigation or legislation. The Court also held that total rebate schemes were not sufficient to remedy the statutory and, by implication, constitutional violation of dissenting employees'

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111. 104 S. Ct. at 1890.

112. *See, e.g.*, Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1197 (7th Cir. 1984) (citing *Ellis* and holding that escrow accounts are "required in order to protect the dissenters' constitutional rights"); School Comm. v. Greenfield Educ. Ass'n, 385 Mass. 70, ___, 431 N.E.2d 180, 188 (1982) ("We hold, as did the *Ball* court, that the statutory right of the organization to the permissible amount is outweighed by the potential that the impermissible amounts will be used, even temporarily, in violation of the dissenting teachers' First Amendment rights."); *Ball*, 84 Mich. App. at ___, 269 N.W.2d at 613.

113. *Ball*, 84 Mich. App. at ___, 269 N.W.2d at 613.

rights. It remains to be seen, however, whether the alternative remedies suggested by the Court will prove workable.

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