



12-1-1983

Uses and Abuses of the Agency Shop

Norman L. Cantor

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Norman L. Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61 (1983).

Available at: <http://scholarship.law.nd.edu/ndlr/vol59/iss1/6>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Uses and Abuses of the Agency Shop

*Norman L. Cantor**

The National Labor Relations Act (NLRA) and the Railway Labor Act (RLA) both authorize a form of union security agreement under which all workers in a unit represented by a union must contribute to the union the equivalent of "the periodic dues and the initiation fees" required from full union members.¹ Workers who choose not to become union members,² and even workers who are

* Professor of Law, Rutgers Law School, Newark, N.J.; B.A. 1964, Princeton University; J.D. 1967, Columbia University.

1 National Labor Relations Act (NLRA) § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976) states that "nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment." An employer may enter into a union security agreement provided that:

no employer shall justify any discrimination against an employee for nonmembership 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.

In 1951, the Railway Labor Act (RLA) was amended to permit union security arrangements between rail unions and employers. 45 U.S.C. § 152, Eleventh (1976). The RLA union security provisions seem to embody identical constraints to those in the NLRA. *See* Lykins v. Aluminum Workers Int'l Union, 510 F. Supp. 21, 25 (E.D. Pa. 1980); Comment, *The Regulation of Union Political Activity; Majority Rights and Remedies*, 126 U. PA. L. REV. 386, 416 (1977). The RLA provision was modeled after NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976) (adopted in 1947 in the Labor Management Relations (Taft-Hartley) Act, which amended the NLRA). *See* S. REP. NO. 2262, 81st Cong., 2d Sess. 1 (1950).

2 Although the statutory language refers to union "membership" as a condition of employment, the NLRA has been interpreted to refer to "financial core membership" rather than full union membership. Thus what appears to be a union shop authorization is actually an agency shop authorization. *See* NLRB v. General Motors Corp., 373 U.S. 734, 741-43 (1963); Local Union No. 749, Int'l Bhd. of Boilermakers v. NLRB, 466 F.2d 343, 345 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); Wine & Liquor Store Employees, Local 122, 261 N.L.R.B. No. 152, 1981-82 NLRB Dec. (CCH) ¶ 19,066 (1982); United Stanford Employees, Local 680, 232 N.L.R.B. 326 (1977), *aff'd*, 601 F.2d 980 (9th Cir. 1979). The many collective bargaining agreements which refer to union membership as a condition of employment cannot be implemented beyond requiring workers to pay the equivalent of union dues. *Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees 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). However, because this fact is not widely known, numerous workers may be misled into becoming full union members. *See* Marden v. International Ass'n of Machinists, 576 F.2d 576,

ideologically opposed to unionism,³ are bound by such a union security arrangement. This arrangement is termed an agency shop, and the affected non-member workers are called agency shop fees payors.⁴

The agency shop fees go into union treasuries and are commonly used for a wide range of union activities.⁵ Most importantly, the fees go toward the union's performance of contract-related functions, i.e., the negotiation and administration of a collective bargaining agreement (including the maintenance of grievance-arbitration machinery). Union funds are also used for institutional costs attendant on collective bargaining agreements but less directly related to contracts than the immediate costs of contract negotiation and handling. These expenses include such items as maintenance of union buildings and offices, publication of union journals, conduct of conventions, and maintenance of a strike fund. In addition, unions often make "political" expenditures in the course of promoting workers' interests, including lobbying for work-related legislation (e.g., pension or occupational safety measures) or supporting candidates perceived as favoring labor interests. Sometimes union "political" or "ideological" expenditures go beyond work-related objects, for unions also make political and social contributions — to causes, charities, and agencies⁶ — either to promote general interests which the union per-

578 (5th Cir. 1978); Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1051-52 (1976).

3 *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 236-38 (1956); see *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

Congress in 1980 created an exemption from dues or agency shop fee payments for workers with religiously grounded objections to supporting unions. Act of Dec. 24, 1980, Pub. L. No. 96-593, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 3452 (to be codified at 29 U.S.C. § 169). Exempted workers must pay to a charity an amount equal to union dues, and the union may charge them for grievance handling. *Id.*; see Schwab, *Union Security Agreements and Title VII: The Scope and Effect of the New 19 of the NLRA*, 17 GONZ. L. REV. 329, 330-31, 349 (1982); Note, *Religious Accommodation versus Union Security: A Tale of Two Statutes*, 9 NO. KY. L. REV. 331, 362 (1982). This exemption for religious conscientious objectors creates some tension with the establishment clause. See Schwab, *supra*, at 349-53; cf. *Welsh v. United States*, 398 U.S. 333, 360 n.12 (1970) (Harlan, J., concurring) (questioning the constitutionality of a religious exemption from the military draft). However, constitutional challenge to such religious accommodations has generally failed. See *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34 (6th Cir. 1982).

4 See generally T. HAGGARD, *COMPULSORY UNIONISM, THE NLRB, AND THE COURTS* (1977).

5 See *Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn*, 373 U.S. 746, 753-54 (1963).

6 See, e.g., *McNamara v. Johnston*, 522 F.2d 1157, 1159 n.2 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Jensen v. Yonamine*, 437 F. Supp. 368, 371 n.4 (D. Hawaii 1977). Obviously, the causes will range widely depending on the preferences and perceptions of officers in charge of union funds. Usually there will be a perceptible connection between objects supported and workers' economic interests.

ceives workers to have in common with other citizens, or to promote union public relations. Finally, unions may divert monies to special purpose funds aimed at benevolent assistance to workers. These may range from pension or other funds to recreational programs.

Agency fees payors may chafe at a variety of union expenditures. Some may be opposed to unionism in general or to the incumbent union in particular, and therefore attempt to confine forced payments to the very minimum authorized by law. In particular, such objectors may wish to avoid contributing to union activity beyond the core function of contract negotiation and administration. Other fees payors may have ideological objections to some goals pursued by the collective bargaining representative, and may therefore seek a rebate or deduction of a portion of their fees. Still others may wish to avoid payment to workers' benevolent programs promoted by a union, either because they are not in a position to benefit from a particular program⁷ or because they may wish to make alternative benefit arrangements for themselves.

This article examines the various legal constraints on union extraction and use of agency shop fees. Scrutiny is given to the extent to which objecting fees payors may gain exemption from part or all of the normal dues equivalency payment. In turn, the extent to which unions may treat agency fees payors differently from union members in the provision of benefits and services is examined. Along these lines, consideration is given to limitations on union efforts to use the union security mechanism to force non-members to engage in conduct desired by the union.

I. Reductions or Exemptions for Agency Fees Payors

A. *Assessments*

The National Labor Relations Board (Board) and reviewing courts have consistently ruled that the periodic dues and initiation fees collectible through union security provisions do not include "assessments."⁸ Thus contract provisions requiring payment of "general

7 Non-athletic workers may rebel at contributing to recreational programs, and childless workers may object to supporting day-care or scholarship programs for workers' children. See *Pennsylvania Labor Relations Bd. v. Eastern Lancaster County Educ. Ass'n*, 58 Pa. Commw. 78, 427 A.2d 305 (1981), *cert. denied sub nom. Schreffler v. Pennsylvania Labor Relations Bd.*, 103 S. Ct. 84 (1982).

8 See *International Longshoremen's Ass'n Local 1180*, 266 N.L.R.B. No. 57, 1983 NLRB Dec. (CCH) ¶ 15,679 (1983); T. HAGGARD, *supra* note 4, at 82-83. The RLA, by contrast, permits the collection of assessments through union security arrangements. See *International Ass'n of Machinists v. Street*, 357 U.S. 740, 766 (1961).

and uniform assessments" in addition to "regular and usual initiation fees and . . . dues" have been invalidated.⁹ But assessments, as opposed to dues, are not always easy to define.

Unions initially argued that any fees uniformly required of all unit workers should be deemed the equivalent of dues.¹⁰ This argument was grounded on the origin of the NLRA union security proviso as a curb on arbitrary treatment of individuals or discrete groups within work units.¹¹ The consequent union claim was that any *uniform* charge could not be within the thrust of § 8(a)(3) and therefore ought to be deemed part of legitimate dues obligations. This union position has been rejected. The Board has relied on one particular incident in the Taft-Hartley history in which legislators expressed antipathy to a one-time union assessment to craft a requirement of "periodicity" and "regularity" before even uniform charges will be considered to be dues.¹²

A uniform fee may be deemed an assessment if it is a temporary levy arising from unanticipated demands, such as funds to support strikers in a sister union.¹³ According to one frequently cited definition: "An assessment . . . is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly

9 See *NLRB v. Guided Missile Lodge 1254*, 241 F.2d 695, 697 (9th Cir. 1957); *Tom's Monarch Laundry & Cleaning Co.*, 161 N.L.R.B. 740, 746 (1966); *H. Muehlstein & Co.*, 118 N.L.R.B. 268, 276 (1957).

10 *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 9 (3d Cir. 1962); *International Harvester Co.*, 95 N.L.R.B. 730, 732 (1951).

11 Congress in amending the NLRA in 1947 to preclude the closed shop and to authorize a modified union shop was largely concerned with the arbitrary use of union power first to expel employees from membership and then to get them fired through a union security provision. See S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947); T. HAGGARD, *supra* note 4, at 66; Rosenthal, *The NLRA and Compulsory Unionism*, 1954 WIS. L. REV. 53, 58.

12 See *International Harvester Co.*, 95 N.L.R.B. 730, 732-33 (1951); *Electric Auto-Lite Co.*, 92 N.L.R.B. 1073, 1078 (1950), *aff'd*, 196 F.2d 500 (6th Cir. 1952).

The incident in question involved testimony of Cecil B. DeMille in which he described his expulsion from a union and disqualification from employment for having refused to pay a special charge imposed by the union to create a fund to combat a proposed anti-closed shop law. See *Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 796-808 (1947) (statement of Cecil B. DeMille, Producer); see also 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1061 (1948); *DeMille v. American Fed'n of Television & Radio Artists*, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876 (1948).

13 See *NLRB v. Die & Tool Makers Lodge 113*, 231 F.2d 298 (7th Cir. 1956); *International Harvester Co.*, 95 N.L.R.B. at 731, 734; *Anaconda Copper Mining Co.*, 110 N.L.R.B. 1925, 1926 (1954).

recurring obligation as in the case of 'periodic dues'.¹⁴ Labels are not determinative. In one case, an "hours worked levy" of fifteen cents per hour (in addition to monthly dues) was found to be part of legitimate dues even though labelled as an assessment in the collective bargaining agreement.¹⁵ The levy was a regular and periodic charge, and the proceeds were used for general operating expenses.

There is limited authority for the proposition that even regular and periodic payments can be deemed assessments rather than dues if the proceeds are diverted to a special purpose outside general operating costs. In *Welsbach Electric Corp.*,¹⁶ the Board considered challenges to a regular "working assessment" (one percent of salary) used to support the union's general operation and a separate regular payment to a loan fund for unemployed workers. The Board upheld the use of a union security provision for the one percent charge going to the union treasury but struck down the loan fund collection, labelling it an assessment in part because the funds were used for special items beyond contract-related expenses.¹⁷ *Welsbach* is of limited precedential value.¹⁸ The issue of regular payments to ongoing special purpose funds, such as a loan fund, cannot be solved by labelling the levy an "assessment" rather than dues. The larger question is whether workers covered by union security clauses can exempt themselves from the portion of their fees used for benevolent funds aiding workers' health and welfare.¹⁹ That issue will be addressed below.²⁰

B. *Expenditures Beyond the Core of Contract-Related Activity*

1. Political and Ideological Expenditures

Agency shop fees payors have frequently complained that forced financial support of unions in general, and union political expenditures in particular, impermissibly invades their freedom to choose

14 *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 11 (3d Cir. 1962); *see also* *United Contractors Ass'n*, 201 N.L.R.B. 337, 341 (1973).

15 201 N.L.R.B. at 340; *see also* *International Alliance of Theatrical Stage Employees*, 140 N.L.R.B. 759 (1963).

16 236 N.L.R.B. 503 (1978).

17 *Id.* at 517 n.34, 521; *see also* *Anaconda Copper Mining Co.*, 110 N.L.R.B. 1925 (1954).

18 The finding regarding the loan fund was dictum because the relevant check-off authorizations were found to have been coerced and the salary deduction invalid on that basis. 236 N.L.R.B. at 516-17. Moreover, non-union members were not forced to contribute to the loan fund in *Welsbach*. *Id.* at 514 n.25.

19 *Compare* *Local 959, Int'l Bhd. of Teamsters*, 167 N.L.R.B. 1042 (1967) *with* *Detroit Mailers Union No. 40*, 192 N.L.R.B. 951 (1971).

20 *See* text accompanying notes 108-32 *infra*.

which causes to support.²¹ To some extent, the argument has struck a responsive judicial chord. In *Abood v. Detroit Board of Education*,²² in the context of an agency shop agreement between a governmental entity and a public sector union, the Supreme Court found that the ideological affront entailed in forced financial support of controversial union positions, or of political causes favored by the union, indeed implicates first amendment interests. But the ultimate ramifications of *Abood*, particularly for the private sector, are not clear. *Abood* acknowledged strong governmental interests in the agency shop as a device to spread equitably the costs of obtaining workers' benefits, and thus to promote industrial stability through promoting stable and secure unions.²³ As a consequence, *Abood* upheld the agency shop in principle and, at a minimum, the extraction of funds for negotiating and administering collective bargaining agreements. However *Abood* invalidated use of fees payors' funds over their objections for "ideological activity unrelated to collective bargaining."²⁴ *Abood* purported simply to reinforce the basic scheme imposed on the private sector by *Railway Employees' Department v. Hanson*²⁵ and *International Association of Machinists v. Street*.²⁶ Analysis of the contemporary boundaries of private sector agency shop provisions must start with those two cases.

Hanson involved a broad constitutional challenge lodged by railway workers against an agency shop provision authorized by the RLA.²⁷ The Supreme Court rejected the challenge and upheld Con-

21 *E.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Buckley v. American Fed'n of Television & Radio Artists*, 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974); *Lykins v. Aluminum Workers Int'l Union*, 510 F. Supp. 21 (E.D. Pa. 1980); *Jensen v. Yonamine*, 437 F. Supp. 368 (D. Hawaii 1977).

22 431 U.S. 209 (1977).

23 *Id.* at 224. For further discussion of the thesis that the agency shop helps to distribute the costs of obtaining workers' benefits equitably, see notes 54-56 *infra* and accompanying text.

24 431 U.S. at 236. The Court apparently held that the government's interests in labor stability and equitable distribution of union expenses, which justified extraction of agency fees to support contract-related union activity, were insufficient to override the injury imposed through forced financial support of ideological causes "unrelated" to collective bargaining. But the Court readily acknowledged that the line drawn would be difficult to administer and left that task to later consideration on a better developed factual record. *Id.*

25 351 U.S. 225 (1956).

26 367 U.S. 740 (1961).

27 Section 2(11), 45 U.S.C. § 152, Eleventh (1976). The union security arrangements authorized by the RLA are closely akin to the NLRA scheme fixed by § 8(a)(3). One major distinction between the two Acts is that the RLA overrides state legislation while the NLRA specifically allows states to regulate union security clauses. *See* NLRA § 14(b), 29 U.S.C. § 164(b) (1976). This distinction might have significance for purposes of finding government

gress' promotion of union security provisions as a "stabilizing force" in industrial relations. The constitutional claim was dismissed fairly summarily. The opinion stated that "financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress . . . and does not violate either the First or the Fifth Amendments."²⁸

Five years later, the Court in *Street* faced an issue not considered in *Hanson*, a first amendment challenge to use of agency shop fees for political causes obnoxious to the plaintiff fees payors.²⁹ A plurality of four justices, in an opinion by Justice Brennan, determined to avoid the constitutional issue by construing the RLA to deny a union authority to spend money over a fees payor's objection for "political causes" opposed by the payor.³⁰ Justice Brennan relied on Congress' objective of allowing elimination of "free riders" by authorizing mandatory sharing of union costs of obtaining employee benefits.³¹ He regarded the relevant costs as those incurred by the union in negotiating and administering collective bargaining agreements. Political expenditures were considered to be outside such contract-related services and hence outside the intent of Congress.³²

Street, as reinforced by *Abood*, represents a statutory bar to union use of agency shop fees over payors' objections for promotion of

action triggering constitutional constraints; the finding of government action in *Hanson* was grounded, at least in part, on Congress' strong reinforcement of the agency shop through the override of conflicting state provisions. 351 U.S. at 232; *see* note 36 *infra*.

28 351 U.S. at 238.

29 The trial court had found that agency fees had been used to finance electoral campaigns and "to promote the propagation of political and economic doctrines, concepts and ideologies" opposed by plaintiff payors. 367 U.S. at 744.

30 *Id.* at 749-50, 768.

31 *Id.* at 764.

32 Justice Brennan stated:

[Agency shop fees'] use 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.

Id. at 768.

Four justices rejected Justice Brennan's narrow interpretation of congressional intent and thus reached the constitutional issue. They divided two to two on that point. Justices Black and Douglas contended that use of compelled fees for political causes seriously violated objectors' first amendment freedom to speak, think, and support causes of their choice. *Id.* at 778, 788. Justices Frankfurter and Harlan rejected the first amendment claims, finding that payments in return for representational services, even when diverted toward political channels to promote workers' interests, did not significantly infringe upon fees payors' rights to speak, think, and associate as they pleased. *Id.* at 805-06.

“political causes.” Courts are now willing to force unions to rebate a portion of agency shop fees and to deduct prospectively a percentage related to the pro rata portion of fees used by the union for political and ideological causes, once an agency fees payor has notified the union of objections to such expenditures.³³ The action has been described as enforcement of both a duty of fair representation and of an implied term (corresponding to the guidelines of *Street*) of the union security provision in the applicable collective bargaining agreement.³⁴ Occasionally, the first amendment is invoked by a court,³⁵ even though there has never been a definitive finding of government action flowing from Congress’ endorsement of agency shop provisions in the private sector.³⁶

33 The appropriate remedy for objecting fees payors has proved difficult to formulate. *Street* made clear that agency fees payors would not be exempt from all union security obligations; they would be entitled to pro rata deductions from their fees payments. *Id.* at 775. The objecting fees payor need not detail the particular causes to which he is opposed because to do so would infringe on privacy of political belief. *Abood*, 431 U.S. at 241. Moreover, once a payor communicates objections, he apparently continues indefinitely to receive a deduction from fees even though the particular causes supported may vary from year to year.

For discussion of remedies in this area, see *id.* at 237-42; *Brotherhood of Ry., Airline & S.S. Clerks v. Allen*, 373 U.S. 113 (1963); *Rehmus & Kerner, The Agency Shop After Abood: No Free Ride, But What's the Fare*, 34 INDUS. & LAB. REL. REV. 90, 95-99 (1980); *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, 32-44 (1980); *Merrill, Limitations Upon the Use of Compulsory Union Dues*, 42 J. AIR L. & COM. 711, 747-56 (1976).

Many unions have instituted machinery to ensure the appropriate deduction from agency shop fees of objecting payors. The central question is whether each such program can be depended upon to make accurate assessments of the portion of the union budget representing ideological-type expenditures. Judicial receptiveness to voluntary union programs has varied. *Compare Perry v. Local Lodge 2569, International Ass'n of Machinists*, 708 F.2d 1258 (7th Cir. 1983) and *Reid v. UAW*, 479 F.2d 517, 518 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973) and *Olsen v. Communications Workers*, 559 F. Supp. 754 (D.N.J. 1983) with *Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 1132 (9th Cir. 1976) and *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 685 F.2d 1065 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1267 (1983) and *Haag v. Hogue*, 116 Misc. 2d 935 (N.Y. Sup. Ct. 1982).

34 See *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 998, 1000 (9th Cir. 1970); *Lykins v. Aluminum Workers Int'l Union*, 510 F. Supp. 21 (E.D. Pa. 1980).

35 *Havas v. Communications Workers*, 509 F. Supp. 144, 149 (N.D.N.Y. 1981); *Beck v. Communications Workers*, 468 F. Supp. 93, 96 (D. Md. 1979); *cf. Kolinske v. UAW*, 530 F. Supp. 728 (D.D.C. 1982), *rev'd sub nom. Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983).

36 Precedent does not resolve whether implementation of an agency shop clause, as authorized by the NLRA, sufficiently implicates Congress in the contractual arrangement to constitute government action for purposes of invoking the first amendment. Some decisions have held that agency shop clauses are sufficiently a product of congressional inspiration to invoke constitutional guarantees. See *Linscott v. Miller Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); *Kolinske v. Lubbers*, 516 F. Supp. 1171, 1178-79 (D.D.C. 1981), *rev'd*, 712 F.2d 471 (D.C. Cir. 1983); *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 (E.D. Pa. 1980). Other courts have reached a contrary conclusion. See *Kolinske v. Lubbers*, 712 F.2d

Aboud reinforced the underlying premise of *Street* — that first

471 (D.C. Cir. 1983); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410 (10th Cir. 1971); *Otten v. Baltimore & O.R.R.*, 205 F.2d 58, *aff'd per curiam*, 229 F.2d 919 (2d Cir.), *cert. denied*, 351 U.S. 983 (1956). Most of these decisions have not considered the major, recent Supreme Court expressions concerning state action. *See* *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *see also* *Blum v. Yaretsky*, 457 U.S. 991 (1982) (no state action in activity of state-funded and state-regulated nursing home); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (no state action in activity of private school educating special students referred and funded by the state).

Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956), established that the 1951 RLA provision on union security, § 2(11), 45 U.S.C. § 152, Eleventh (1976), almost identical in language to the NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976), sufficiently implicated the government in agency shop agreements to trigger first amendment scrutiny. But there are arguable distinctions between the degree of government involvement under the RLA and under the NLRA. In *Hanson*, the Court pointed out that the RLA specifically superceded conflicting state legislation restricting union security so that federal law was "the source of the power and authority" for private agency shop agreements. 351 U.S. at 232. *See* K. HAN-SLOWE, D. DUNN & J. ERSTLING, *UNION SECURITY IN PUBLIC EMPLOYMENT: OF FREE RIDING AND FREE ASSOCIATION* 23 (1978). The NLRA, by contrast, permits state legislation to override federal authorization of agency shop arrangements. NLRA § 14(b), 29 U.S.C. § 164(b) (1976); *Kolinske*, 712 F.2d 471, 476-80 (D.C. Cir. 1983); *Linscott*, 440 F.2d at 19-20 (Coffin, J., concurring). Moreover, unlike the RLA, under which agency shop agreements were barred until the 1951 authorizing provision, the NLRA authorization of the agency shop constitutes a limitation on the pre-existing federal labor-management framework under which all union security arrangements including the closed shop were permitted. *See* NLRA § 8(3), 49 Stat. 452 (1935); *Rosenthal*, *supra* note 11, at 55-57.

The hard question is just how strong a nexus there is between the federal legislative framework and the adoption of agency shop provisions. Section 8(a)(3) by itself is permissive and does not mandate that unions and employers enter into agency shop agreements; this fact cuts against finding 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." *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.* *International Ass'n of Machinists v. Federal Election Comm'n*, 678 F.2d 1092, 1119 (D.C. Cir. 1982) (Edwards, J., concurring) (discussing an absence of "state action" in government authorization of certain corporate expenditures), *aff'd*, 456 U.S. 974 (1982).

Presumably, some agency shop agreements would be bargained even in the absence of § 8(a)(3) authorization. On the other hand, the § 8(a)(3) language is not the only statutory nexus with an agency shop provision. Congress' conferral of an exclusive representation prerogative to unions, inclusion of union security within mandatory subjects of bargaining, and provision of federal contract enforcement machinery all lend impetus to union efforts to secure agency shop arrangements. In *Buckley v. American Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1095 (1974), Justice Douglas dissented from a denial of certiorari:

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.

Because union security is a mandatory bargaining subject, and because the economic cost of an agency shop provision to the employer is modest, the practical effect may be a greater incidence of agency shop provisions than would otherwise be present. *See* T. HAGGARD, *supra* note 4, at 242, 293; *Reilly, The Constitutionality of Labor Unions' Collection and Use of Forced Dues for*

amendment interests would be severely invaded if unions were permitted to use agency shop fees for political and ideological causes over the objections of fee payors. Relying on "freedom of belief," as first articulated in *West Virginia State Board of Education v. Barnette*,³⁷ the compulsory flag salute case, Justice Stewart found in *Abood* an invasion of "an employee's freedom to associate for the advancement of ideas, or to refrain from doing so."³⁸ Consequently, the Court precluded use of objecting fees payors' funds for "ideological activity unrelated to collective bargaining."³⁹ The opinion conceded that such a limitation would be difficult to administer and left implementation of the standard to further factual development of the record.⁴⁰ But Justice Stewart's opinion made clear that the prohibition on political expenditures articulated in *Street* as a matter of statutory interpretation would be carried over to the public sector context as a matter of constitutional law.

My own perspective is quite different.⁴¹ Forced 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 payors. So long as

Non-Bargaining Purposes, 32 MERCER L. REV. 561, 563 (1981). These factors point toward a finding of government action behind agency shop clauses.

The eventual Supreme Court reaction to these various arguments is hard to gauge. To some extent, the arguments in favor of finding government action prove too strong. The combination of exclusive representation, mandatory subjects of bargaining, and contract enforcement machinery underlie most provisions in a collective bargaining agreement. Yet it has generally been assumed that the federal Constitution does not apply to labor contract terms. *See, e.g.*, *Aldridge v. Boys*, 98 Ill. App. 3d 803, 808, 424 N.E.2d 886, 889 (1981); *Black v. Cutter Laboratories*, 351 U.S. 292, 294-99 (1956); *Linscott v. Miller Falls Co.*, 440 F.2d 14, 20 (1st Cir. 1971). Under this view, Title VII of the Civil Rights Act of 1964, or the duty of fair representation, and not the federal Constitution, invalidated collective bargaining agreement terms which discriminated against religious, racial, or gender minorities within the workforce. In *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), the Court chose to imply a union duty of fair representation under the NLRA rather than to brand the conduct of the union as government action, despite the government's imprimatur placed on the union in the exercise of its collective bargaining function. *See generally* Wellington, *The Constitution, The Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961). In any event, the government action assumption which underlay *Street*'s avoidance of constitutional issues needs to be tested in light of more recent Supreme Court doctrine. *See* *Kolinske v. Lubbers*, 712 F.2d 471, 474-80 (D.C. Cir. 1983).

37 319 U.S. 624 (1943).

38 431 U.S. 222, 233-35. *But see* *Kolinske*, 712 F.2d at 476-77.

39 431 U.S. at 235-36. *See* notes 72-107 *infra* and accompanying text for further discussion of the scope of permissible expenditures after *Abood*.

40 431 U.S. at 236-37.

41 *See* Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association* (to be published in RUTGERS L. REV. (Fall 1983)).

the organization does in fact perform a useful function for the fees payors,⁴² and so long as the organization is legally bound to use the funds to promote the related functions and goals of the organization,⁴³ then the disgruntled fees payor cannot complain any more than the taxpayer whose funds are used by the government for programs ideologically offensive to the taxpayer.⁴⁴ The thrust of the freedom to think and believe and associate as one wishes, as espoused in *West Virginia State Board of Education v. Barnette*,⁴⁵ is freedom from forced identification with, or adoption of, ideological positions.⁴⁶ 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

42 There are analysts who dispute the proposition that a labor union performs valuable services for all members of a represented unit. See, e.g., Merrill, *supra* note 33, at 716-21; Viera, Book Review, 29 S.C.L. REV. 437, 453-54 (1978) (reviewing T. HAGGARD, *supra* note 4). Their thesis is that superior workers are disadvantaged by group representation, being deprived of liberty of contract through exclusive union representation. Merrill, *supra*, at 716-21; Viera, *supra*, at 453-54. But numerous courts have found widespread benefits flowing from exclusive representation. See, e.g., *Abood*, 431 U.S. at 220-21; *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 63-64 (1975) (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 178 (1967)). Even if there are some workers who could command a better salary than the union has bargained for the group, a close fit likely exists between union representation and the provision of some significant benefits (whether in fringe benefits, working conditions, or grievance machinery) which would not otherwise have been secured.

43 See *McNamara v. Johnston*, 522 F.2d 1157, 1163-67 (7th Cir. 1975) (discussing the fiduciary obligation imposed by the Labor-Management Reporting and Disclosure Act of 1959, § 501, 29 U.S.C. § 501 (1976), and accepting that political expenditures may well promote the common interests represented in a labor union); see also 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). The duty of fair representation toward all workers within a unit also binds the union in its performance of many functions. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-04 (1944); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-64 (1976). Moreover, there is already a fiduciary obligation imposed on unions in administration of union security clauses. See, e.g., *International Bhd. of Elec. Workers, Local 3*, 266 N.L.R.B. 49 (1983). Such a fiduciary duty can easily be extended to encompass an obligation to use agency fees only in the interests of fees payors. Cf. note 64 *infra*.

44 It is well established that taxpayers cannot obtain rebates despite ideological affronts to their consciences by various government uses of tax monies. *Graves v. Commissioner*, 579 F.2d 392 (6th Cir. 1978); *Autenrieth v. Cullen*, 418 F.2d 586, 588-89 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970); *Crowe v. Commissioner*, 396 F.2d 766 (8th Cir. 1968); cf. *United States v. Lee*, 455 U.S. 252 (1982) (Amish must pay social security taxes despite contravention of their religious principles).

45 319 U.S. 624 (1943).

46 See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-87 (1980).

materially impaired by an agency shop arrangement.⁴⁷

If my position were adopted, with recognition of the negligible constitutional invasion entailed in use of agency shop fees to promote union causes through political channels, then the *Street* doctrine would have to be reassessed. In order to avoid the constitutional issue assumed to be lurking in *Street*, Justice Brennan's opinion tortured the legislative history to find a congressional limitation on the use of union security fees for political purposes. In point of fact, in shaping the Taft-Hartley Act⁴⁸ union security provision to allow the elimination of free riders, Congress did not differentiate between union expenditures in the realm of contract negotiation and union efforts to advance workers' interests through legislative or other non-bargaining channels.

Scrutiny of the legislative history of the Taft-Hartley Act discloses convincingly that Congress did not intend to preclude union political expenditures from either union shop dues or agency shop fees. In the first place, Congress thought that the § 8(a)(3) proviso authorized a union shop in which covered workers could be compelled to become full union members with the concomitant obligation to pay full union dues.⁴⁹ When the Supreme Court in 1963 ruled that only financial core membership could be compelled,⁵⁰ it focused on what Congress had recognized as the "practical effect"⁵¹ of the revised § 8(a)(3) proviso — namely, that because workers

47 Cf. *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) (student fees extracted for school newspaper).

48 Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

49 See S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 412-13 (1948); H.R. REP. NO. 245, 80th Cong., 1st Sess. 9 (1947), reprinted in 1 NLRB, *supra*, at 300; H.R. REP. NO. 510, 80th Cong., 1st Sess. 41, 44 (1947), reprinted in 1 NLRB, *supra*, at 545, 548; 93 CONG. REC. 5,079-80 (1947), reprinted in 2 NLRB, *supra* note 12, at 1405.

See also *Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Senate Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess. 997 (1947); 96 CONG. REC. 17,050 (1947); H. R. REP. NO. 2811, 80th Cong., 2d Sess. 5-6 (1950); *To Amend the Railway Labor Act . . . Providing for Union Membership and Agreements for Deduction from Wages of Carrier Employees for Certain Purposes: Hearings on S. 3295 Before the Subcomm. on Railway Labor Act Amendments of the Senate Comm. on Labor and Public Welfare*, 81st Cong., 2d Sess. 35 (1950); Hopfl, *The Agency Shop Question*, 49 CORNELL L.Q. 478, 484 (1964); 93 CONG. REC. A2801, A2825, 7506 (1947), reprinted in 1 NLRB, *supra*, at 901, 905, 926.

50 *NLRB v. General Motors Corp.*, 373 U.S. 734, 741-43 (1963).

51 See remarks of Rep. Klein, 1 NLRB, *supra* note 49, at 654-55, where he comments that despite the fact that the Hartley bill purported to allow a union shop, the practical effect of insulating ousted union members against being fired by the employer so long as dues were paid was to "allow only a requirement that dues be paid"; see also *id.* at 770-71 (remarks of Rep. Hartley); 2 NLRB, *supra* note 12, at 1010, 1096, 1420 (remarks of Sen. Taft); both indicating that a "modified union shop" was being authorized.

ousted from a union could not be fired by an employer so long as the workers continued to tender an amount equal to union dues, the actual impact of the revised Act was to authorize an agency shop in which only financial support of the union was required.⁵² (This interpretation avoided the constitutional issue of whether workers could be compelled, consistent with freedom of association, to become full union members.)

The thrust of the provisions relating to union security was to insulate workers' jobs, not to circumscribe union expenditures from regular dues payments or agency shop fees. The abuse which Congress was trying to correct was the firing of workers, pursuant to union security clauses, who had been initially barred or subsequently ousted from a union for arbitrary or capricious reasons.⁵³ Congress was responsive to the free rider rationale,⁵⁴ the need for equitably spreading union costs of securing workers' benefits, and therefore indicated that even non-members would have to pay union dues.⁵⁵ The amount permitted to be extracted from non-members pursuant to a union-security clause was never defined as other than the amount generally required by a union as dues.⁵⁶

52 Opponents of the proposed § 8(a)(3) proviso lamented many times that the practical effect of the language was to "cripple" union discipline by insulating an ousted union member from discharge so long as he continued to pay dues. In a genuine union shop, by contrast, a worker legitimately ousted from a union would also be ousted from employment. Without a genuine union shop, ousted employer spies, anti-union workers, or "troublemakers" would remain in the work force as corrosive influences. This drew the wrath of pro-union members of Congress. See 1 NLRB, *supra* note 49, at 371-72, 471, 875-76, 904; 2 NLRB, *supra* note 12, at 1040-41, 1094, 1569, 1578; see also note 182 *infra*.

53 See S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947), reprinted in 1 NLRB, *supra* note 49, at 407, 412-13; 2 NLRB, *supra* note 12, at 952-53, 1199, 1417, 1419-20. Congress determined to preserve union control over membership policies but to protect barred or ousted workers from loss of employment. "The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership." 1 NLRB, *supra* note 49, at 426; see also *id.* at 323, 409, 427, 906; 2 NLRB, *supra* note 12, at 1068, 1416, 1569.

54 See 1 NLRB, *supra* note 49, at 412-13, 741; 2 NLRB, *supra* note 12, at 1010, 1170, 1422.

55 "The employee has to pay the union dues." 2 NLRB, *supra* note 12, at 1010 (remarks of Sen. Taft); see also 1 NLRB, *supra* note 49, at 300, 871; Great Lakes Dist. Seafarers' Int'l Union, 149 N.L.R.B. 1114, 1120 (1964).

56 The free rider argument used by backers of union security emphasized benefits flowing from collective bargaining but did not exclude union representational efforts through other channels. See 1 NLRB, *supra* note 49, at 412-13, 741; 2 NLRB, *supra* note 12, at 1010, 1170, 1422. Even if the union's core collective bargaining activity was the prime impetus for imposing a financial obligation on all represented workers in a unit, the union activity to be supported in return was not confined to securing benefits solely through collective bargaining. *Id.* at 1170. For a discussion of the RLA union security provision, see *To Amend the Railway Labor Act . . . Providing for Union Membership and Agreements for Deduction from Wages of Carrier*

When Congress thus defined the permissible union security sum as an amount equal to union dues, it was well aware of the labor movement's traditional use of political channels to secure workers' benefits.⁵⁷ Indeed, several legislators noted in the Taft-Hartley debates that the AFL-CIO was expending considerable sums to oppose passage of the Act itself.⁵⁸

To be sure, Congress was not entirely pleased with union political expenditures and their implications for workers who disagreed with the union leadership's choice of political objectives to be supported by the union. The House of Representatives passed a provision which would have made it an unfair labor practice for a union to discipline a worker for having supported political candidates or referendum issues in contravention of union instructions.⁵⁹ This measure was apparently promoted by an incident, recounted in congressional hearing, in which Cecil B. DeMille had been expelled from a union and barred from employment for having refused to pay a union special assessment levied to gather funds to oppose a proposed state referendum on a right to work law.⁶⁰ The provision was part of a workers' "bill of rights" which, while adopted by the House, did not survive the joint conference committee and was not part of the final Taft-Hartley Act. Its final version did give limited protection to people like DeMille, making it unlawful for an employer to fire a worker ousted from the union for failure to pay an assessment, in-

Employees for Certain Purposes: Hearings on S. 3295 Before the Subcomm. on Railway Labor Act Amendments of the Senate Comm. on Labor and Public Welfare, 81st Cong., 2d Sess. 33-36, 140, 236-37 (1950); *Railway Labor Act Amendments: Hearings on H.R. 7789 Before the House Comm. on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 250, 255, 275 (1950).

57 See, e.g., 1 NLRB, *supra* note 49, at 295; 2 NLRB, *supra* note 12, at 1425, 1526-35, 1603-04, 1609; see *United States v. UAW*, 352 U.S. 567, 579-80 (1957); *United States v. Congress of Indus. Org.*, 335 U.S. 106, 123 (1948); *McNamara v. Johnston*, 522 F.2d 1157, 1165 (7th Cir. 1975) (discussing legislative history of § 501 of Labor-Management Reporting and Disclosure Act of 1959 and Congress' recognition there of the appropriateness of union efforts to use political channels), *cert. denied*, 425 U.S. 911 (1976); see also *International Ass'n of Machinists v. Street*, 367 U.S. 740, 801-03, 812 (1961) (Frankfurter, Harlan, JJ., dissenting).

Several Justices in *Street* recognized that Congress had not intended to exclude political expenditures from the monies collected via union security agreements under Taft-Hartley. See *id.* at 784-85, 816-18.

58 See 2 NLRB, *supra* note 12, at 1424, 1549.

59 See H.R. 3020, 80th Cong., 1st Sess. § 8(c)(5) (1947), reprinted in 1 NLRB, *supra* note 49, at 180.

60 See 2 NLRB, *supra* note 12, at 1062, and note 12 *supra*, describing the incident. Representative Hartley indicated that the proposed § 8(c)(5) would allow a working man "to decide for himself whether or not his money will be spent for political purposes." 1 NLRB, *supra* note 49, at 616; see also *id.* at 295 (discussing for the House Report accompanying the House bill containing the proposed § 8(c)(5)).

cluding a political assessment.⁶¹ But the only limitation Congress placed on the political uses which unions could make of monies collected through a union security provision was to ban their use in connection with federal elections.⁶² In sum, Congress did not intend the Taft-Hartley Act to prevent all political expenditures of the money collected pursuant to union security agreements.

Thus a reexamination of the relevant legislative history would likely yield a statutory interpretation of permissible agency fees expenditures quite removed from Justice Brennan's version in *Street*. Such a reassessment would at least acknowledge what a number of commentators have noted, that union efforts in the political arena can produce job-related benefits for workers (e.g., pension, workers' compensation, and job-safety legislation), and that the free-rider rationale applies to such expenditures.⁶³ A redrawn statutory line should inquire whether particular political expenditures could reasonably be said to be aimed at producing job-related benefits for represented workers. This standard reflects an implied fiduciary limitation which must be imposed where Congress has delegated a mini-taxing power to a private institution like a labor union.⁶⁴

This actual congressional intent, allowing all costs of union representation, including promotion of workers' economic interests through political channels, to be allocated to fees payors, would be

61 See notes 8-15 *supra*.

62 See Taft-Hartley Act, § 304, 61 Stat. 136, 159-60 (1947); 1 NLRB, *supra* note 49, at 571-72, 928; 2 NLRB, *supra* note 12, at 1526-35, 1603-04, 1609. The final Act also contained § 8(b)(5), prohibiting "excessive or discriminatory" initiation fees, but this did not affect union political expenditures with dues monies. See *id.* at 1618, 1623.

63 See Blair, *Union Security Agreements in the Public Sector*, 60 CORNELL L. REV. 183, 197 (1975); Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C.D. L. REV. 591, 601-02, 606-09, 616-17 (1981); Rauh, *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152, 153-63 (1961); Woll, *Unions in Politics: A Study in Law & the Workers' Needs*, 34 S. CAL. L. REV. 130, 144 (1961); Note, *Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining*, 1980 WIS. L. REV. 134, 142, 150-52.

Modern unions must resort to legislative sources to adequately represent workers' interests. See Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1; Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1, 2-4 (1982).

64 Where Congress has authorized compulsory extraction of a fee from workers in a represented unit, the monies must be spent in a manner consistent with the purpose for which the fee is extracted, effective representation of workers. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944) (implying a duty of fair representation from Congress' allocation of exclusive representation authority to properly designated labor unions); *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 402-04, 192 A.2d 817, 824-25 (1963); *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944); see also note 43 *supra*, regarding the fiduciary obligations already imposed on unions in the expenditure of monies collected through union security provisions.

upheld under a constitutional standard more relaxed than strict scrutiny. The underlying government interest in promoting labor stability through secure unions, equitably financed, is at least rational as applied to an agency shop. Indeed, it has occasionally been deemed a compelling interest in the context of religious and conscientious objections to compelled payments to unions.⁶⁵

Unfortunately, the Supreme Court has shown little disposition to alter its perception of the invasion of associational interests involved in political expenditures of agency shop fees. *Abood* reinforces *Street* rather than undermining it. The one ray of light, and a faint one at that, is Justice Stewart's acknowledgement for the majority in *Abood* that some public sector expenditures in lobbying efforts might be deemed an integral part of permissible efforts to further workers' collective bargaining interests.⁶⁶ The consequence would be that some lobbying efforts could constitutionally be financed in part with agency shop fees despite payors' objections. However, Justice Stewart mentioned that there would be a distinction made in this respect between permissible expenditures in the public and private sectors.⁶⁷ And the examples of permissible lobbying efforts cited, lobbying a legislative body for ratification of a public sector labor contract or lobbying for sufficient government funding to meet contractual obligations,⁶⁸ do not offer much encouragement for extending a comparable analysis to the private sector. In the meantime, the *Street* prohibition on political uses of agency shop fees over workers' objections remains firm.⁶⁹

65 *Yott v. North Am. Rockwell*, 501 F.2d 398, 403 (9th Cir. 1974); *Buckley v. American Fed'n of Television & Radio Artists*, 496 F.2d 305, 311 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974); *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977); *Linscott v. Miller Falls Co.*, 440 F.2d 14, 17 (1st Cir. 1971); *Gray v. Gulf, M. & O.R.R.*, 429 F.2d 1064, 1072 (5th Cir. 1970).

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

67 *Id.*

68 *Id.*

69 In *Robinson v. New Jersey*, 547 F. Supp. 1297 (D.N.J. 1982), the court gave a narrow reading to the Stewart dictum in *Abood*. The New Jersey legislature had authorized public sector unions to spend agency shop fees for "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 public employer." N.J. STAT. ANN. § 34:13A-5.5(c) (West Supp. 1983-84). Judge Debevoise ruled that such a broad authorization of political uses of agency shop fees exceeded the bounds shaped by *Abood*. 547 F. Supp. at 1316-17. This ruling came despite the vigorous arguments by the public sector unions involved that the funds were being used to garner material benefits for workers through political channels and that the free rider rationale should sustain such expenditures. Judge Debevoise emphasized the ideological differences of opinion surrounding the challenged lob-

2. Non-Ideological Expenditures Beyond Contract-Related Functions

The Supreme Court in *Street* spoke only to political expenditures of agency shop fees over payors' objections. Justice Brennan's opinion declared:

We have before us only the question whether the power [to spend agency shop fees] is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes. . . .

We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes.⁷⁰

Thus, while upholding forced payments for contract-related expenses (bargaining and administration of collective agreements), and while barring use of agency fees for political expenditures, *Street* left a large gray area. Part of that unresolved gray area involves union expenditures beyond the core contract-related functions, but related in some fashion to advancement of workers' employment interests.⁷¹ At the top of the list are union institutional expenses such as conventions, journals, and building and maintenance of union halls. Maintenance of a strike-fund should also be included. Farther removed from immediate contract-related functions, but still within a category of expenses aimed at promoting workers' job-related interests, would be a union's organizing costs and contributions to labor federations such as the AFL-CIO. On the farthest fringe short of political expenditures would be charitable contributions and community services aimed at promoting union public relations.

Despite *Street*'s narrow holding being confined to political expenditures, a number of courts have extended the bar on use of

bying expenditures. *Id.* at 1317. See also *Olson v. Communications Workers*, 559 F. Supp. 754 (D.N.J. 1983). What this emphasis overlooked was the powerful labor need to turn to legislative channels to procure worker benefits excluded from collective bargaining by legislative denomination of certain subjects like worker discipline as non-permissible subjects of public sector bargaining. See *American Fed'n of Gov't Employees v. Federal Labor Relations Auth.*, 691 F.2d 1565 (D.C. Cir. 1982); *International Fed'n of Professional & Technical Eng'rs v. New Jersey*, 88 N.J. 393, 443 A.2d 187 (1982).

⁷⁰ *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961); see also *id.* at 793 (Black, J., dissenting) (noting that while the lower court decree had barred all uses of agency shop fees beyond contract-related expenses, the Supreme Court's disposition was confined to monies "used to propagate political and ideological views obnoxious to the employees.").

⁷¹ Another gray area concerns collections for benevolent funds aimed at workers' health and welfare. See notes 108-32 *infra* and accompanying text.

agency fees over objections of fees payors to any union expenditures beyond those necessary for negotiating and administering a collective bargaining agreement.⁷² These cases reject limiting *Street* and *Abood* to union expenses of a political nature,⁷³ preferring the view that elimination of free ridership is the heart of *Street*, and that this objective requires financial extractions only to cover expenditures necessary to a union's performance of its collective bargaining-related functions.⁷⁴

The litigation in *Beck v. Communications Workers*⁷⁵ provides an illustration. This was a suit by agency fees payors seeking a rebate and prospective reduction of agency fees collected pursuant to an agency shop agreement between the Communications Workers of America (CWA) and the Bell Telephone System. The trial court in *Beck* entered a declaratory judgment, relying on *Abood*, barring the use of objectors' agency shop fees for any purposes beyond "collective bargaining, contract administration, and grievance adjustment."⁷⁶ A special master then assembled 3,844 pages of testimony and 2100 documentary exhibits to determine what percentage of agency shop fees the CWA used beyond contract-related functions.⁷⁷ Employing a standard that in order for an expense to be deemed chargeable to fees payors, the union must prove that the expenditure "directly related to and is reasonably necessary for effectuation" of a contract-related function, the special master ruled that eighty-one percent of CWA fees were refundable.⁷⁸ He disallowed, inter alia, union contributions

72 See *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970); *Dean v. Trans World Airlines*, 94 Lab. Cas. (CCH) ¶ 13,652 (W.D. Wash. 1981), *rev'd*, 708 F.2d 486 (9th Cir. 1983); *Lykins v. Aluminum Workers Int'l Union*, 510 F. Supp. 21, 26-27 (E.D. Pa. 1980); *Havas v. Communications Workers*, 509 F. Supp. 144, 149 (N.D.N.Y. 1981); *Beck v. Communications Workers*, 468 F. Supp. 93, 96-97 (D. Md. 1979). For examples of a similar position being taken in post-*Abood* public sector cases, see *Robinson v. New Jersey*, 547 F. Supp. 1297, 1315-16 (D.N.J. 1982), and cases cited in *Reilly, supra* note 36, at 564; Note, *Union Security Agreements in the Public Sector since Abood*, 33 S.C.L. REV. 521 (1982).

73 See *Gaebler, supra* note 63, at 596-97, 600, for discussion of *Street* and *Abood*.

74 These functions would be limited to contract negotiation and administration. For commentary supporting this interpretation of the permissible scope of agency fee extractions, see T. HAGGARD, *supra* note 4, at 66-67, 134-35; Oberer, *The Future of Collective Bargaining in Public Employment*, 20 LAB. L.J. 777, 781-82 (1969); Merrill, *supra* note 33, at 750-51. Merrill served as counsel for the National Right to Work Legal Foundation in *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 91 L.R.R.M. (BNA) 2339 (S.D. Cal. 1976), one of the suits on behalf of agency fees payors seeking maximum recoupment of agency shop fees.

75 *Beck v. Communications Workers*, 468 F. Supp. 93 (D. Md. 1979), *enforced* 112 L.R.R.M. 3069 (D. Md. 1983).

76 468 F. Supp. at 96.

77 Report of special master, DAILY LAB. REP. (BNA) No. 166 at D-1 (Aug. 25, 1980).

78 *Id.* at D-4, D-12 to D-13. The special master later collected an additional 800 pages of

to various community services, costs of organizing activity, affiliation fees to the AFL-CIO, and costs of a public relations campaign during contract negotiations.⁷⁹ Among union expenses allowed were costs relating to a telephone workers' strike fund, a monthly journal, union executive board functions, and furnishing, maintenance, and operation of union buildings.⁸⁰

There is an alternative rationale to the narrow approach taken in *Beck*.⁸¹ Some commentators have argued first that a union's legitimate use of agency shop fees is congruent with the statutory duty of fair representation.⁸² Their secondary conclusion is that the proper boundary for use of such fees is the performance of contract-related functions, i.e., negotiation and administration of collective agreements.⁸³ While this framework is superficially appealing, the argument is unconvincing. It is not clear that the duty of fair representation is confined to the sphere of contract-related functions.⁸⁴ A union may not have an affirmative obligation to under-

testimony and 2,296 exhibits. His final determination was that 79% of CWA fees were refundable. 112 L.R.R.M. at 3072, 3075; *see also* *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 108 L.R.R.M. 2648 (S.D. Cal. 1980) (ruling that agency fees payors were entitled to rebates of 38% and 40% of fees paid to their rail union in the years analyzed). This ruling was overturned by the Ninth Circuit. *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 685 F.2d 1065 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1267 (1983).

79 DAILY LAB. REP. (BNA), at D-5, D-9 to D-12 (Aug. 25, 1980).

80 *Id.* at D-9 to D-12. Though a strike fund for telephone workers was allowed, contributions to a mine workers' strike fund were disallowed. Expenses for the union's monthly journal were allowed even though the journal was not distributed to agency fees payors. *See* notes 110-15 *infra* and accompanying text for a discussion of the exclusion of agency fees payors from union benefits financed in part by agency shop fees.

81 *Beck* at least recognizes the legitimacy of using agency fees for union institutional expenses such as journals, conventions, and maintenance of buildings. Such expenses are legitimate and important elements of a union's functioning and should be compensable even under the narrowest interpretation of *Street*. But the whole approach of confining agency fee extractions to the immediate costs of contract-related functions seems misguided. *Street's* holding was limited to political expenditures, and the opinion explicitly reserved judgment as to "other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 769 (1961). *Street's* interpretation of legislative intent was, as suggested above, an inaccurate appraisal of Congress' vision of the scope of union services warranting equitable contribution by all beneficiaries. *See* notes 57-65 *supra* and accompanying text. There would thus appear to be room for fresh consideration of whether the NLRA in its union security provision really excludes such items as union organizing (at least within the same industry as the fees payors) or contributions to labor federations from agency shop fee extractions. *See Associated Builders v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1275 (9th Cir. 1983).

82 T. HAGGARD, *supra* note 4, at 141; Merrill, *supra* note 33, at 743-46, 755.

83 *See* note 82 *supra*.

84 The duty of fair representation may well extend to the administration of union dues and dues equivalent fees. *See Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000-01 (9th

take representation of workers outside the collective bargaining sphere, for example before an administrative agency or legislative body.⁸⁵ But once it does choose to undertake representation in such forums, an obligation of fair representation follows.⁸⁶ In addition, while the logic of the agency shop fee is connected in part with the union's services as exclusive bargaining representative, the two are not necessarily congruent. Congress could and probably did have a variety of union services beyond the collective bargaining arena in mind when it authorized the agency shop as a means for equitable distribution of union costs.⁸⁷ It fixed the permissible fee as the equivalent of regular union dues while fully aware that they support a variety of union functions beyond collective bargaining. Legal boundaries on the use of agency shop fees can as easily flow from an implied fiduciary obligation accompanying Congress' delegation of a mini-taxing power to a private institution like a union, as it can from the duty of fair representation.⁸⁸ There is, then, no inextricable link between the scope of fair representation and the scope of permissible uses of agency shop fees.

A much broader view of the scope of permissible union uses of agency shop fees is offered in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,⁸⁹ a recent Ninth Circuit decision currently under review by the Supreme Court. *Ellis* rejected a challenge by objecting fees payors to the use of their monies for any purposes beyond contract negotiation and administration. The *Ellis* court specifically upheld collection of agency shop fees for a variety of union institutional expenditures such as conventions, journals, litigation, and social activities.

To reach that result, the *Ellis* court interpreted the Supreme Court's expressions in *Street* and *Abood* as permitting fees collection for any union expenses "germane to the union's work in the realm of

Cir. 1970); *Brady v. Trans World Airlines*, 401 F.2d 87, 99 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969); *Kolinske v. UAW*, 530 F. Supp. 728, 734 (D.D.C. 1982), *rev'd sub nom. Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983); *cf. Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 576-78 (8th Cir. 1981) (applying fair representation to internal union communications).

85 See *Lacy v. UAW Local 287*, 102 L.R.R.M. 2847, 2849-50 (S.D. Ind. 1979), *aff'd*, 106 L.R.R.M. 2546 (7th Cir. 1980).

86 See *Nedd v. UMW*, 556 F.2d 190, 200 (3d Cir. 1977); *Mahoney v. Chicago Pneumatic Tool Co.*, 111 L.R.R.M. 2839, 2840 (W.D. Mich. 1982).

87 See notes 54-57 *supra*.

88 See note 64 *supra*.

89 685 F.2d 1065 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1767 (1983).

collective bargaining.”⁹⁰ Using the standard of “germane to collective bargaining,” the Ninth Circuit had little difficulty sustaining the various union institutional expenses in issue. Each expense category was separately considered and upheld as promoting the union as an effective bargaining agent, and therefore as germane to collective bargaining.⁹¹ Union conventions were deemed to provide an important forum for electing officers and making strategic decisions on important policy matters.⁹² Union publications were viewed as fostering important internal communications concerning bargaining and contract administration.⁹³ Litigation expenses connected with defense of Title VII and fair representation claims, as well as attacks on employers’ unfair labor practices, were deemed germane to the union’s function as collective bargaining agent.⁹⁴ Even expenditures for union social activities⁹⁵ were upheld as promoting morale among workers and smoothing union institutional operations.⁹⁶

In assessing actual congressional intent in authorizing the union security arrangements permitted by the NLRA and the RLA, *Ellis* is right and *Beck* is wrong. Congress, in § 8(a)(3) and the corresponding RLA provision, permitted unions to collect from fees payors an amount equivalent to full union dues. Congress was well aware that union dues commonly support a variety of union functions beyond core contract-related activity.⁹⁷ Yet no statutory distinction was drawn between contract-related union efforts and general union activity aimed at promoting worker interests, including various institutional expenses such as publishing journals and maintaining buildings. While collective bargaining functions were stressed by

90 685 F.2d at 1072. According to the court, the critical question is: “Are the challenged union costs political-ideological expenditures that cannot be charged to protesting employees, or are such expenditures sufficiently germane to collective bargaining, so that all employees under a union shop or agency fee agreement must contribute toward their payment?” *Id.*; see also *Associated Builders v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1275 (9th Cir. 1983).

91 685 F.2d at 1074-75.

92 *Id.* at 1073.

93 *Id.* at 1074.

94 *Id.* at 1073-74. Union expenditures for organizing non-union competition were also held to be “germane” to the union’s task as collective bargaining agent. *Id.* at 1074; see *Associated Builders*, 700 F.2d at 1275.

95 These social activities were open to both union members and agency shop fees payors. 685 F.2d at 1074.

96 The Ninth Circuit in *Ellis* did not decide whether expenditures which enhance the union’s status and image, such as charitable contributions, could be supported by agency shop fees despite payor objections.

97 See *Retail Clerks Int’l Ass’n Local 1625 v. Schermerhorn*, 373 U.S. 746, 753-54 (1963); see also note 57 *supra*.

spokesmen articulating the free-rider justification for union security,⁹⁸ there was no indication that those union costs to be equitably distributed should be confined to contract-related costs as opposed to other aspects of worker representation.⁹⁹ The effort of *Beck* and similar decisions to narrowly confine agency fees to support of expenses necessary for collective bargaining artificially distorts congressional intent.¹⁰⁰

A harder task is to assess the implications of *Abood*, with its constitutional underpinnings, for resolving the gray area left by *Street*, including the kinds of union "institutional" expenditures addressed in *Ellis*. Both *Street* and *Abood* were grounded on a constitutional concern about forced ideological association. This apparently encompasses freedom to associate (or to refuse to associate) for the advancement of ideas, whether or not those ideas can be classified as "political."¹⁰¹ For example, the majority opinion in *Abood* appeared to treat a union fees payor's objections to supporting a union health clinic furnishing abortions as raising a significant first amendment claim.¹⁰² *Ellis* may therefore be wrong in its threshold assumption that union institutional expenditures do not involve "political or ideological" matters.¹⁰³ Some workers will assert ideological objections

98 See note 54 *supra*.

99 See note 56 *supra*. A distinction between "service fees" (covering immediate contract-related expenses) and "dues" has surfaced in cases arising in "right to work" states, where unions have sought to evade state limitations on union security measures by charging service fees. See also *United Ass'n of Journeymen Local 141 v. NLRB*, 675 F.2d 1257 (D.C. Cir. 1982). In that context, it has been held that states are free to bar all forms of union security agreements, including such service fees.

100 See notes 53-56 *supra* and accompanying text for more detailed treatment of the relevant legislative history.

101 Justice Stewart in *Abood* defined the constitutional interest at stake as "the freedom of an individual to associate for the purpose of advancing beliefs and ideas." 431 U.S. at 233.

Abood undermines the notion that "political" expenditures constitute a determinative boundary for constitutional purposes. The Court acknowledges that all union functions in the public sector are political in a sense, yet the Court upholds the maintenance of an agency shop in the face of a first amendment constitutional challenge. The majority opinion of Justice Stewart even suggests that some public sector union efforts in the traditional political arena of legislative lobbying will be sustained over fees payors' objections. *Id.* at 227-32. The focal point of *Abood* seems to be ideological affront to the coerced payor, whether the objection is politically grounded or not. This de-emphasis on the political category is consistent with the notion that the first amendment safeguards freedom of speech, thought, and belief in matters beyond political expression. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777-78 (1978); Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372, 375-76 (1981).

102 431 U.S. at 222.

103 *Ellis*, 685 F.2d at 1068.

to unionism generally, and hence to any financial support of union activities whether within or without the political arena.

On a constitutional plane, permissibility of agency fee expenditures hinges in part on the degree to which they impinge on constitutional interests in ideological association. It matters, therefore, whether the ideological injury from supporting union institutional expenses is equivalent to the ideological harm from compelled financial support of objectionable "political" causes.¹⁰⁴ Will the Court really treat workers' objections to union institutional expenditures for building maintenance or social activity on a plane with conscientious objections to expenditures for political candidates?¹⁰⁵ It would be more sensible to acknowledge the special status accorded to speech aimed at propagating ideas and to so confine the bounds of freedom of ideological association.¹⁰⁶

Even if the answer to the last question is positive, *Abood* leaves an opening for finding that the scope of permissible union uses of agency shop fees extends well beyond the narrow, contract-related functions endorsed in *Beck*. Only shades of importance distinguish core-function union activity — contract negotiation and administration — from other concerted union activity promoting workers' employment interests — strike-funds, conventions, journals, and the like. Congress did not differentiate among these union expenditures when it endorsed union security arrangements. The approach of *El-Is* is to find that these traditional union activities are sufficiently germane to collective bargaining to form part of the compelling

104 Presumably, the Court will continue to reject my position that freedom from forced ideological association is not materially impinged upon in the absence of compelled identification with, or obeisance to, an ideological position. See notes 41-47 *supra* and accompanying text.

105 Compare *Wooley v. Maynard*, 430 U.S. 705 (1977) with *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). "[N]ot every 'association' is for First Amendment purposes or serves to promote the ideological freedom that the First Amendment was designed to protect." *Moore v. City of E. Cleveland*, 431 U.S. 494, 535-36 (1977) (Stewart, J., dissenting). A principal source of the first amendment freedom of ideological association upheld in *Abood* lies in free political association. See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). This is not to say that only *political* ideology is protected. See note 101 *supra*. But every personal objection to fees payments does not necessarily rise to the level of significantly impinging on ideological association. A union may test in some forum the sincerity of a fees payor's purported conscientious objections. Cf. *United States v. Seeger*, 380 U.S. 163, 185 (1965); *Gillette v. United States*, 401 U.S. 437, 456-57 (1971). Workers may refrain from joining a union for a variety of reasons other than principled objection to unionism, such as to avoid union disciplinary machinery, to oppose certain union leadership, or to oppose a particular union rather than unionism in general. This issue potentially exacerbates the administrative problem already presented by cases like *Beck*.

106 Cf. *Connick v. Myers*, 103 S. Ct. 1684, 1689 (1983).

governmental interests in maintaining stable unions and equitable financing of representational services acknowledged in *Abood*. The alternative represented in *Beck*, case by case consideration of the proximity of classes of union institutional expenses to core contract-related functions, is a complex, costly, and wasteful exercise.¹⁰⁷

3. Special Purpose Benevolent Funds

Unions commonly provide a variety of benevolent programs aimed primarily at promoting the health and welfare of their members. They include pension and insurance funds, credit unions, co-op stores, old-age homes, clinics, recreational activities, and the like. They are ordinarily funded by dues and agency shop fees. Their principal function is not so much to affect job conditions as to promote the general health and welfare of workers and their families.¹⁰⁸ Such programs are nevertheless relevant to the union's role as collective bargaining agent. They increase the general level of worker satisfaction, and, concomitantly, the union's stature and security.

These programs raise several questions with regard to agency fees payors. If the union uses agency shop fees to fund such programs, can agency fees payors be excluded from the programs' benefits? If the union uses agency shop fees for such programs, and agency fees payors are fully eligible for participation, can they opt out of such programs and pay a reduced agency shop fee (while renouncing all right to participate)? And finally, if the union does not finance benevolent programs from agency shop fees, can the fees payors nonetheless demand access to them?¹⁰⁹

Where a union funds a benevolent program with both regular dues monies and agency shop fees, a fees payor should be entitled to equal access to the program's benefits. This conclusion flows not just from equitable considerations,¹¹⁰ but also from the statutory framework. As a general proposition, a union may not negotiate economic

107 See notes 75-80 *supra* and accompanying text.

108 Many unions maintain special purpose funds for activity connected with a union's contract-related functions, such as a strike fund or building fund. See notes 133-82 *infra* and accompanying text.

109 See notes 183-226 *infra* and accompanying text.

110 The equity of equal access in return for equal financial contribution has been acknowledged in various settings. The UAW constitution recognizes a right of agency fees payors "to all material benefits" to which union members are entitled. See *Kolinske v. Lubbers*, 516 F. Supp. 1171, 1173 (D.D.C. 1981), *rev'd*, 712 F.2d 471 (D.C. Cir. 1983). Several state public sector labor-relations laws preclude using agency fees for benefits available only to union members. See N.J. STAT. ANN. § 34:13A-5.5(b) (West Supp. 1983-84); MASS. ANN. LAWS ch. 150E, § 12 (Michie/Law. Co-op. Supp. 1983); Note, *supra* note 72, at 537-38.

benefits exclusively for its members within a represented unit. Such economic discrimination against non-members creates an artificial incentive for fees payors to join a union and is deemed to interfere with the § 7 right of workers to refrain from unionization.¹¹¹ A similar principle applies to union administration of non-negotiated economic benefits. Where fees payors have helped to finance a benevolent fund in a fashion common with dues payors, exclusion from benefits either penalizes them for non-membership in the union or creates an economic bribe to join the union (in order to reap some benefit from the extracted contributions). While a union may reserve certain non-tangible benefits for full members,¹¹² this sort of economic bribe seems clearly inconsistent with the § 7 right to refrain.¹¹³

The same conclusion, that it is illegal to exclude fees payors from programs to which they have contributed, may be reached as well on a theory of fair representation.¹¹⁴ It seems arbitrary indeed to exclude fees payors from benevolent programs which they have supported financially in common with full union members. This is not to say that a fees payor must in fact receive benefits from any program to which he/she is compelled to contribute financially. Section 8(a)(3)'s union security proviso authorizes compulsory fees payments in return for services and programs from which fees payors at least *potentially* benefit. This includes financial support of the union

111 See *International Ass'n of Machinists Lodge 720*, 243 N.L.R.B. 697 (1979), *aff'd*, 626 F.2d 119 (9th Cir. 1980); *Prestige Bedding Co.*, 212 N.L.R.B. 690 (1974). See also the line of cases in which special contractual benefits for union officers have been deemed to create an impermissible incentive to participate in union activity. *E.g.*, *Teamsters Local 20 v. NLRB*, 610 F.2d 991 (D.C. Cir. 1979); *NLRB v. Local 443 Int'l Bhd. of Teamsters*, 600 F.2d 411 (2d Cir. 1979); *United Ass'n of Journeymen Local 119*, 255 N.L.R.B. 1056 (1981).

112 Certain privileges, such as participation in union governance, may be reserved for full union members, i.e., those workers who agree to support the union and to subject themselves to discipline for non-adherence to union rules and regulation. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 741-43 (1963); *Amoco Production Co.*, 262 N.L.R.B. No. 160, 1982-83 NLRB Dec. (CCH) ¶15,047 (1982). To obtain a full voice in determining how his monies are spent by a union, then, a worker must become a union member. This incentive to join a union is inherent in any agency shop arrangement and was apparently deemed by Congress to be a tolerable impetus to union membership. Besides, while a full member gets to enjoy participation in union governance, he also becomes subject to union disciplinary rules, a disincentive to membership.

113 *But see* *Wellington*, *supra* note 2, at 1047, in which the author assumes that unions can legally exclude non-members from benevolent programs to which the non-members have contributed and may continue to contribute.

114 See *Kolinske v. UAW*, 530 F. Supp. 728 (D.D.C. 1982) (finding a breach of the duty of fair representation in exclusion of a fees payor from a strike fund to which he had contributed), *rev'd sub nom.* *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983).

institution. But by excluding fees payors from a benevolent program to which they have contributed, a union forces fees payors to subsidize health and welfare payments to fellow workers without any possible return to them.¹¹⁵

Assuming that a fees payor is entitled to equal access to benevolent programs financed in part by agency fees, can the fees payor opt out and receive a pro rata deduction in the agency shop fee? Neither *Street* nor *Abood*, the two principal Supreme Court expressions on uses of agency shop fees, provides an answer.¹¹⁶ Nor has the Board given clear signals as to its response. In *Local 959 International Brotherhood of Teamsters*,¹¹⁷ the Board indicated that a union violated the NLRA by invoking a union security clause in order to collect a portion of dues allocable to an employee's credit union account and to a building fund. The Board's rationale was that union security had been approved merely to distribute "a fair share" of collective bargaining costs, and that special purpose funds such as a credit union were excluded from union security as "ends not encompassed" within the collective bargaining task.¹¹⁸ A few years later, though, in *Detroit Mailers Union No. 40*,¹¹⁹ another Board panel voted two to one to uphold a union security provision as applied to a portion of dues going to a pension plan, an old age home, and a mortuary fund for union members. The majority referred to such extractions as legitimate "institutional" expenses.

Detroit Mailers seems more consistent with the statutory framework as applicable to full members of a union. People who opt to become full members subject themselves to numerous obligations, an important one of which is paying of union dues. Such dues have customarily been used for benevolent programs, and there is no indication that Congress, in the Taft-Hartley Act's provisions on union security clauses, intended to circumscribe such uses of dues monies.¹²⁰

115 To the extent that government action is present, a serious substantive due process or "taking" issue would be presented. Cf. *State v. International Harvester Co.*, 241 Minn. 367, 63 N.W.2d 547 (1954), *appeal dismissed*, 348 U.S. 853 (1954).

116 *Street* reserved decision on whether agency fees could be extracted for such items as "death benefit funds." 367 U.S. 740, 770 n.18 (1961). *Abood* explicitly left open the question of union extractions for "social activities." 431 U.S. 209, 236 n.33 (1977).

117 167 N.L.R.B. 1042 (1967).

118 *Id.* at 1044.

119 192 N.L.R.B. 951 (1971).

120 The original Hartley bill in 1947 contained a provision, § 8(c)(3), which would have forbidden unions to force members to participate in benefit programs or plans. 1 NLRB, *supra* note 49, at 42, 322, 616. The provision passed the House but was not adopted by Congress in the final Taft-Hartley Act. *Id.* at 180.

Concern would more properly be focused on persons who refrain from membership but are coerced by union security clauses into financially supporting unions, i.e., agency shop fees payors.

In the case of agency fees payors, as opposed to full union members, there is a stronger case for the proposition that payors may exempt themselves from participation in and support of special benevolent funds. The legislative history of the Taft-Hartley Act confirms that retention of union security, as authorized in the § 8(a)(3) proviso, was grounded on the free rider rationale.¹²¹ Union security provisions were approved as a means of equitably distributing the union's costs for obtaining workers' benefits. The people to be assessed were "all workers who share the benefits."¹²² Arguably, fees payors inevitably benefit (willingly or not) from contract-related union activities from union efforts to secure employment benefits through legislative or administrative channels. Unit workers cannot readily opt out of such benefits, and they may therefore be assessed a fair share of all costs related to obtaining them.

Benevolent funds administered solely by unions, however, involve neither collective bargaining agreements (binding on all unit workers via exclusive representation) nor legislation benefitting all unit workers. Consequently, the free rider framework does not fit neatly. Without doing violence to the legislative rationale, fees payors might accordingly be allowed to renounce the potential benefits from benevolent programs and avoid paying a share of the costs.

Two additional factors might support allowing fees payors to withdraw from benevolent funds. First, if a worker can claim a conscientious objection to supporting unionism in any form, the rationale of *Aboud* might dictate exempting him. For even though the fund presumably offers potential benefit to the worker himself, it also enhances the prestige of the union which initiates or maintains the fund. Second, a participant in a special fund is probably subject to reasonable disciplinary machinery governing its administration.¹²³ For example, a participant in a credit union is normally bound by its rules against fraud. Even this modest imposition of a regulatory or disciplinary framework on an agency fees payor might be deemed to be in tension with the principle that a non-member is to be entirely

121 *See id.* at 412-13; 2 NLRB, *supra* note 12, at 1170.

122 2 NLRB, *supra* note 12, at 1170.

123 *Cf.* International Ass'n of Machinists Lodge 720, 243 N.L.R.B. 697 (1979) (discussing disciplinary rules relevant to an "unemployment stamp" program administered by a union); Boilermakers Local Lodge No. 40, 266 N.L.R.B. No. 86, 1983 NLRB Dec. (CCH) ¶ 15,653 (1983).

free of non-financial obligations to the union.¹²⁴ This principle is especially applicable where the conditions of participation in a union-administered fund entail involvement in concerted activities from which non-members are normally free to refrain.¹²⁵ To minimize tension with the fees payors' right to refrain, they might be allowed to opt out of participation in union benevolent programs.

On the other hand, if such benevolent programs do in fact accord benefits to contributors, and if fees payors are eligible for participation on the same basis as union members, the harm in compelling fees payors' participation in such funds would not appear very grave. The mere fact that a particular fees payor is not likely to utilize a particular program (e.g., an old-age home or a recreation league) does not dictate a contrary result so long as he is eligible to benefit. These are, in essence, compulsory insurance programs for the benefit of the group as a whole; a fees payor is in no worse position than a union member.¹²⁶

It should not be determinative that benevolent programs are the product of union initiative extrinsic to collective bargaining. Congress in 1947 was well aware of the array of channels, including benevolent programs, used by unions to confer benefits. Unions commonly diverted their general dues monies to such benevolent purposes, and Congress nonetheless defined the permissible agency fee amount as "the periodic dues and the initiation fees uniformly

124 See *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84 (1973); *NLRB v. Granite State Joint Bd.*, 409 U.S. 213, 217-18 (1972); *Pipefitters Union Local No. 120*, 260 N.L.R.B. No. 45, 1981-82 NLRB Dec. (CCH) ¶ 18,769 (1982). See notes 154-65 *infra* and accompanying text for further discussion of the tension between forced payments to support union activity and the right to refrain from concerted activity.

125 See *Kolinske v. Lubbers*, 516 F. Supp. 1171 (D.D.C. 1981); *Kolinske v. UAW*, 530 F. Supp. 728 (D.D.C. 1982) (involving conditions for receiving benefits from a union strike fund), *rev'd sub nom.* *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983).

126 See *Briggs v. Commissioner*, 694 F.2d 614, 615 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 2089 (1983) (union benefits intended to benefit members even if some members cannot or do not take advantage of the particular benefits).

In some programs, the fees payor will accumulate accrued benefits which are valuable, like a pension or credit union plan. In other instances, when the payor chooses not to utilize a program like a recreation league, he is like a taxpayer who supports the school system even though he is childless. *Cf.* *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-625 (1981); *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 111 (1981) (taxpayers cannot demand a return of benefits equal to burdens incurred). Similarly, a union may bargain for gains which will benefit part of a unit but not all workers. So long as the non-benefiting worker has not been invidiously excluded, he has no legal complaint. See *Pennsylvania Labor Relations Bd v. Eastern Lancaster County Educ. Ass'n*, 58 Pa. Commw. 78, 427 A.2d 305 (1981).

required as a condition of acquiring or retaining membership.”¹²⁷ This broad definition of the agency fees amount was not adopted in Congress without dissent. The House of Representatives, as part of a general “bill of rights” for represented workers, had adopted a provision which would have exempted even full union members from having to participate in “any insurance or other benefit plan.”¹²⁸ The relevant House report explained:

Arrangements by which unions provide insurance, health and accident benefits, and similar plans, when well managed and when voluntary, are to be encouraged. But workers, whether or not members of the unions, should be free to decide for themselves whether such arrangements are well managed, are safe investments for them, are economical, are fair, and are otherwise desirable. The merits of such arrangements, not compulsion, should lead workers to contribute to them.¹²⁹

Despite the House’s uneasiness with compulsory payments to benevolent funds, the provision was dropped in the joint conference which hammered out the Act finally adopted by Congress in 1947.¹³⁰ While congressional failure to adopt a proposal can sometimes mean something other than rejection of the proposal — e.g., a belief that the provision duplicated another provision, or that it was already embodied within existing legislation — that does not appear to have been the case here. The House simply failed to push through its effort to circumscribe union collections for benevolent funds. And Congress went on to adopt a definition of permissible union security amounts which made agency shop fees equal to regular union dues. Thus congressional intent seems to have been to allow unions to continue including workers’ benevolent funds within dues and dues-equivalent payments.

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,¹³¹ the Ninth Circuit recently upheld including a payment to a union “death benefit plan” within amounts which could be collected pursuant to an agency shop clause. The court there found that such funds were “germane” to the union role as collective bargaining representative because, by separately providing a worker benefit which might

127 29 U.S.C. § 158(a)(3) (1976).

128 See 1 NLRB, *supra* note 49, at 53, 180.

129 *Id.* at 322; see also 2 NLRB, *supra* note 12, at 1399.

130 2 NLRB, *supra* note 12, at 1618. The entire “bill of rights” which had been contained in the House version of H.R. 3020 was omitted from the final Taft-Hartley Act. Section 302 of the Act placed restrictions on administration of certain welfare funds instituted through collective bargaining and to which an employer contributes. *Id.* at 1050, 1323.

131 685 F.2d 1065, 1074 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1767 (1983).

otherwise be secured through collective bargaining, the union cleared the way for wresting additional benefits from the employer in subsequent negotiations.¹³² Both because this result sustaining use of agency shop fees for benevolent programs is consistent with the congressional intent described above, and because the constitutional rationale of *Aboud* ought not to be extended to such fees payments, *Ellis* should be upheld.

II. Agency Fees Payors, Union Security, and Concerted Union Activities — To What Extent Can a Union Compel Conduct from Fees Payors?

Job status for both agency fees payors and union members is supposed to be insulated from union efforts to enforce institutional rules.¹³³ This determination by Congress in the Taft-Hartley Act was a reaction to certain abusive union practices, between 1935 and 1947, of arbitrarily ousting workers from union membership and then invoking union security provisions to force the affected workers from their jobs.¹³⁴ The resultant statutory protections include § 8(b)(1),¹³⁵ prohibiting union restraint of a worker's § 7 right to refrain from concerted activity; § 8(b)(2),¹³⁶ prohibiting a union from causing an employer to discriminate against a worker on the basis of union status; and the proviso to § 8(a)(3),¹³⁷ preventing invocation of

132 *Id.* The court also gave other, less persuasive reasons for upholding financial extractions for a death benefit fund. The court noted that compulsory payments by all workers help ensure the financial stability of the fund and that benevolent funds "strengthen employees' ties to the union." *Id.* The "substitution for negotiated benefits" rationale seems more persuasive, as it is tied to the free rider rationale which is the firmest underpinning for an agency shop arrangement.

133 *See* Pipefitters Union Local No. 120, 260 N.L.R.B. No. 45, 1981-82 NLRB Dec. (CCH) ¶ 18,769 (1982). Union security agreements cannot be used for any purpose other than to compel payment of union dues and fees. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-43 (1954). The Board has crafted a limited exception allowing union disciplinary machinery to affect job status where necessary to effective administration of a joint employer-union undertaking such as a hiring hall arrangement. In that setting, a union can suspend job referral service for persons who have violated valid rules relating to the hiring hall. *See NLRB v. Pipefitters Union Local No. 120*, No. 82-1296, slip op. (6th Cir. Oct. 13, 1983); *Boilermakers Local Lodge No. 40*, 266 N.L.R.B. No. 86, 1983 NLRB Dec. (CCH) ¶ 15,653 (1983); *International Bhd. of Elec. Workers Local 1547*, 245 N.L.R.B. 716, 718 (1979). This does not mean that the union can use the hiring hall to enforce discipline unrelated to the administration of the hiring hall itself. *See International Longshoremen's Ass'n Local 1408 v. NLRB*, 705 F.2d 1549, 1552 (11th Cir. 1983).

134 *See, e.g.*, S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947); T. HAGGARD, *supra* note 4, at 66, 81; Rosenthal, *supra* note 11, at 58, 69; *see also* note 53 *supra*.

135 29 U.S.C. § 158(b)(1) (1976).

136 29 U.S.C. § 158(b)(2) (1976).

137 29 U.S.C. § 158(a)(2) (1976); *see* note 1 *supra*.

a union security clause for any reason other than a worker's failure to pay dues or their equivalent. As a practical matter, these provisions mean that a union cannot use a union security provision to try to collect internal fines imposed on members,¹³⁸ or use dues and fees structures to affect workers' conduct in ways favored by a union.¹³⁹ For example, it was deemed unlawful to charge senior workers in a unit who joined the union fifteen dollars per month dues and junior workers who joined five dollars per month. The effect was to penalize workers for having previously exercised their statutory right not to join the union.¹⁴⁰ Nor can a union even insist on particular modes of payment.¹⁴¹ The sole permissible function of a union security provision is to collect dues and dues equivalency payments.¹⁴²

While the relevant principles are clear in theory, it is not always easy to discern whether a dues or fees structure impermissibly forces union members or fees payors to engage in conduct. One illustration is the union custom of rebating a small portion of dues to those workers who attend union meetings.¹⁴³ The issue is not whether unions can use customary disciplinary channels to penalize members for not attending meetings, but whether manipulating dues and fees to achieve the desired attendance is lawful. Originally, the Board disapproved such attendance-rebate provisions as creating a non-uniform dues structure.¹⁴⁴ According to the Board: "A charge which distinguishes between individual members who attend particular meetings and those who do not attend particular meetings . . . is not

138 See *International Union of Elevator Constructors Local Union No. 8 v. NLRB*, 665 F.2d 376, 382 (D.C. Cir. 1981); *NLRB v. Bakery & Confectionery Workers Union*, 245 F.2d 211, 213 (3d Cir. 1957); *Local Union No. 1445, Laborers Int'l Union*, 266 N.L.R.B. No. 78, 1983 NLRB Dec. (CCH) ¶ 15,632 (1983); Rosenthal, *supra* note 11, at 69-71.

139 See *NLRB v. Fishermen Union, Local 33*, 448 F.2d 255 (9th Cir. 1971); *AMF Wheel Goods Div.*, 247 N.L.R.B. 231 (1980); *Local 153, UAW*, 99 N.L.R.B. 1419 (1952). The requirement that dues or fees collected via a union security clause be "uniform" also helps guard against using variations in dues structures to affect behavior. See *NLRB v. Kaiser Steel Corp.*, 506 F.2d 1057, 1059-60 (9th Cir. 1974); see also *NLRA* § 8(b)(5).

140 *Local 153 UAW*, 99 N.L.R.B. 1419, 1420 (1952); see *Ferro Stamping & Mfg. Co.*, 93 N.L.R.B. 1459, 1460 (1951). *But see* *Food Mach. & Chem. Corp.*, 99 N.L.R.B. 1430 (1952).

141 In *AMF Wheel Goods Div.*, 247 N.L.R.B. 231 (1980), a union was barred from insisting on check or money order rather than cash payments.

142 *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40-41 (1954).

143 See *P. TAFT, RIGHTS OF UNION MEMBERS AND THE GOVERNMENT* 79 (1975); *Kalish v. Hosier*, 256 F. Supp. 853 (D. Colo. 1965), *aff'd*, 364 F.2d 829 (10th Cir. 1966), *cert. denied*, 386 U.S. 944 (1967).

144 *Leece-Neville Co.*, 140 N.L.R.B. 56 (1962), *modified*, 330 F.2d 242 (6th Cir.), *cert. denied*, 379 U.S. 819 (1964); *Electric Auto-Lite Co.*, 92 N.L.R.B. 1073 (1950), *aff'd*, 196 F.2d 500 (6th Cir.), *cert. denied*, 344 U.S. 823 (1952).

one 'uniformly' applied."¹⁴⁵ The dues differential was deemed an impermissible imposition of a penalty or fine for non-attendance, a penalty which could not be extracted via a union security clause.¹⁴⁶ More recently, the Board adopted a different position, upholding a dues refund practice on the basis that the reward for attending a meeting is no different from using union revenues to induce attendance by providing refreshments or entertainment.¹⁴⁷ The Board dissent sagely pointed out that the cost of refreshments at meetings would be spread over the entire membership while the dues rebate system penalized only those workers who did not attend.¹⁴⁸

Agency fees payors may confront similar schemes to vary fees structures in order to induce conduct.¹⁴⁹ In *Bagnall v. Air Line Pilots Association*,¹⁵⁰ the union imposed on both members and fees payors a "finance charge" for paying of dues (or their equivalent) monthly rather than in an annual lump sum. The finance charge was contested by agency fees payors as being beyond the dues equivalent payments which could legally be extracted from them. A Fourth Circuit panel, by a two to one margin, agreed that the agency fees payors could not be "penalized" or charged for financing so long as they paid the equivalent of monthly dues.¹⁵¹ The dissent argued that the "finance charge" was, in effect, simply part of the dues structure. According to that view, if workers failed to meet the union's lump sum dues requirement, the union could legitimately be compensated

145 92 N.L.R.B. at 1077.

146 United Packinghouse Workers, Local 673, 142 N.L.R.B. 768, 769, 779 (1963).

147 Local No. 171, Ass'n of Western Pulp & Paper Workers, 165 N.L.R.B. 971, 972 (1967) (three to two Board decision expressly overruling *Leece-Neville* and *United Packinghouse*).

148 *Id.* at 973. Presumably an agency fees payor in a shop with a dues rebate structure should get the benefit of the lower dues rate available to persons who attend meetings. While the union can legitimately try to induce conduct from its members, *see* *Amalgamated Meat Cutters Local 593*, 237 N.L.R.B. 1159 (1978), a non-member has a clear right to refrain from concerted activity. To the extent that the dues structure is being manipulated to induce concerted activity, the fees payor should be exempt from such efforts. *Cf. Bagnall v. Air Line Pilots Ass'n*, 626 F.2d 336 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

149 Union security arrangements which discriminate against agency fees payors are patently unlawful. For example, a union cannot give members a longer grace period than fees payors before invoking contractual machinery against delinquent payors. *NLRB v. Hospital & Nursing Home Employees Union Local 113*, 567 F.2d 831 (8th Cir. 1977). Such pro-member discriminations constitute unlawful encouragements to membership in violation of a worker's § 7 right to refrain from concerted activity.

150 626 F.2d 336 (4th Cir. 1980)(decided pursuant to the RLA union security provisions), *cert. denied*, 449 U.S. 1125 (1981).

151 626 F.2d at 341. The Board recently ruled that a union must accept a fees payor's tender of cash and could not compel use of a checking account or money orders. *AMF Wheel Goods Div.*, 247 N.L.R.B. 231, 233 (1980).

for the temporary use of its money and for the operational costs of monthly collections.¹⁵² *Bagnall* was probably correctly decided on its facts. The union itself had differentiated between an amount prescribed as dues and a separate sum labelled a finance charge.¹⁵³ But the case illustrates the difficulty of differentiating between exacting a legitimate dues equivalent and attempting to exact conduct from agency fees payors in a manner beyond the union's province.

The tension between legitimate extraction of agency fees in order to spread union costs of effectively representing the bargaining unit, and the privilege of fees payors to refrain from concerted activities, is illustrated by strike insurance funds supported in part by agency fees payors.¹⁵⁴ On the one hand, an agency fees payor is protected by the § 7 right to refrain from concerted activity, and as a non-member of the union is supposed to be free of union disciplinary control.¹⁵⁵ On the other hand, agency fees payors must, under union security provisions authorized by Congress, contribute financially to customary union activities which are aimed at securing benefits for the unit. That is, a fees payor must pay in common with full members to support the union's representational efforts. And a strike is a critical adjunct to a union's effort to force maximum collective bargaining gains from an employer.¹⁵⁶ As returns from the strike insurance fund go only to workers who participate in the strike, there is a strong economic inducement for the fees payor to engage in the concerted activity of striking.

In *Kolinske v. Lubbers*,¹⁵⁷ an agency fees payor challenged the legality of a UAW strike insurance system under which payments went only to persons who honored a picket line *and* performed picket duty. The worker sought either a return of his contributions to the strike fund or an award of strike benefits based on his having honored the union picket line (though he refused picket duty).¹⁵⁸ Although the

152 626 F.2d at 344-45.

153 The result might have been different in *Bagnall* if the union had included costs of monthly administration in the regular dues formula and then offered a discount for persons paying in an annual lump sum, though this might elevate form over substance. Cf. *NLRB v. Bakery & Confectionery Workers Union*, 245 F.2d 211, 214-15 (3d Cir. 1957) (involving a dues structure giving a discount for timely payment).

154 The UAW, for example, places 30% of union security payments (members' dues and agency shop fees) in a UAW strike insurance fund. See *Kolinske v. Lubbers*, 516 F. Supp. 1171, 1173 (D.D.C. 1981), *rev'd*, 712 F.2d 471 (D.C. Cir. 1983).

155 See *NLRB v. Granite State Joint Bd.*, 409 U.S. 214, 217-18 (1972); *Scofield v. NLRB*, 394 U.S. 423, 435 (1969); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-43 (1954).

156 See *Allis-Chalmers Mfg. Co. v. NLRB*, 388 U.S. 175, 181 (1967).

157 516 F. Supp. 1171 (D.D.C. 1981), *rev'd*, 712 F.2d 471 (D.C. Cir. 1983).

158 *Id.* at 1173-74.

Board general counsel refused to issue an unfair labor practice charge,¹⁵⁹ the district court found that causes of action had been stated based on both constitutional free association and breach of fair representation.¹⁶⁰ The court reasoned that forcing a fees payor to participate in a public picket line as a condition of receiving strike benefits violated his rights of free speech and association.¹⁶¹ The court ruled that an agency fees payor can be compelled to support a strike insurance fund whose proceeds are available only to workers who engage in a strike,¹⁶² but that auxiliary conduct beyond honoring the picket line, such as work in a strike kitchen, could not be demanded from the payor.¹⁶³

The bounds of permissible use of fees as shaped by the district court in *Kolinske* are probably correct. But the problem ordinarily must be addressed not under constitutional doctrine but under the rubric of union interference with fees payors' § 7 rights to refrain from concerted activity.¹⁶⁴ An agency fees payor can clearly be compelled to support financially some union concerted activities, at a minimum, contract negotiation and grievance administration. That is the very purpose of a union security provision. Just as a fees payor has to pay to support union negotiators and union grievance and arbitration handlers, he can probably be expected to support union picketers as well. For just as the fees payor is deemed to benefit from contract negotiation or administration, he can be deemed to benefit

159 *Id.* at 1173.

160 *Id.* at 1179-81; *see also* *Kolinske v. UAW*, 530 F. Supp. 728, 735 (D.D.C. 1982) (awarding summary judgment in the same case), *rev'd sub nom.* *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983). The D.C. Circuit recently reversed the lower court in *Kolinske*, finding that no government action was present to trigger constitutional constraints and that the duty of fair representation did not extend to internal union administration of the agency shop clause so long as the employee's job status was not affected. *See* *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983). The D.C. Circuit may be correct that government action was not implicated in *Kolinske*, *see* note 36 *supra*, but the legal bounds of union administration of agency shop clauses must still be faced. *See* note 164 *infra*.

161 530 F. Supp. at 733-34. The first *Kolinske* court found, without extensive discussion, that government action was sufficiently intertwined with a union security arrangement to permit invocation of constitutional protections. 516 F. Supp. at 1177-79. The D.C. Circuit overturned this determination. For full discussion of this state action issue, *see* note 36 *supra*.

162 530 F. Supp. at 732; *see also* *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 108 L.R.R.M. 2648 (S.D. Cal. 1980) (endorsing a system under which strike insurance benefits would be paid to agency fees payors who joined the union's strike), *rev'd on other grounds*, 685 F.2d 1065 (9th Cir. 1982), *cert. granted*, 103 S.Ct. 1267 (1983).

163 530 F. Supp. at 733.

164 Even if state action is not present in an NLRA union's administration of an agency shop clause, the union's capacity to condition fees payors' access to services operated by the union, or to make a partial return of fees monies conditioned on payors' compliance with union regulations, may certainly be tested under the NLRA.

from a strike effort on behalf of the unit. All this may be deemed permissible even though there is created an inherent incentive to join the representing union (to participate in union governance and thus exercise maximum influence over the use of monies contributed) or to join a strike (to receive strike insurance payments). The right to refrain does not mean that an agency fees payor will be free of all incentives to join a union or its concerted activity.¹⁶⁵

Not only may a fees payor be forced to support financially the union's representational functions, including conduct of a strike, but the union presumably can impose certain conditions on a worker's access to benefits from a union-administered program financed by dues and agency shop fees, as long as the conditions are reasonably related to the program's legitimate purposes. For example, in order to be represented in grievance or arbitration proceedings, a worker may be required to follow the union's reasonable and uniform procedures for grievance processing, e.g., filing a written complaint and adhering to filing deadlines. Or beneficiaries of benevolent programs may be compelled to adhere to administrative rules governing registration, fraud, and the like. This still does not mean that an agency fees payor can be forced to participate actively (beyond financial support) in a particular concerted activity in order to receive its benefits. Even though an agency fees payor must help pay for negotiating or grievance committees, he presumably cannot be compelled to serve on such a committee. The lower court in *Kolinske* correctly indicated that a worker could not be required to perform picket line duty (or substitute activity such as working in a strike kitchen or handing out strike benefits checks) as a condition of receiving strike benefits. At the same time, the worker's agency shop fees could be used by the union to finance fellow workers performing picket line duty. Also, the provision that strike insurance benefits are payable only to *strikers* probably falls within the category of conditions reasonably related to the integral purposes of a particular union program without excessively impinging on the fees payor's right to refrain from concerted activity. The fees payor is free to cross the picket line and work for full salary. Although he would forfeit his strike insurance benefits, the strike insurance monies to which he had contributed would still be going to support a core union activity — a strike by fellow workers — for which fees payors can properly be

165 See *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 675-76 (1961); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41-43 (1954); *Baltimore Rebuilders, Inc. v. NLRB*, 611 F.2d 1372, 1378 (4th Cir. 1979), *cert. denied*, 447 U.S. 922 (1980).

charged. The incidental economic incentive to participate in the strike is a price Congress was apparently willing to impose.

There is obvious tension here between return of agency shop payments conditioned on participation in a concerted activity and the § 7 right to refrain from concerted activity. The Supreme Court cases assume that a non-member is devoid of non-financial responsibilities to a union.¹⁶⁶ If unions could readily use agency fees to help finance concerted activities, and condition return of payments on participation in the concerted activity, this framework would be circumvented. Workers would be impelled to participate in concerted activity by the bribe of a partial return of fees paid. For example, could a union use agency shop fees in setting up a fund rewarding persons who adhered to work rules instituted by the union?¹⁶⁷ On the one hand, it is clear that a fees payor, as a non-member of the union, could not be compelled by union fines to obey union work rules or any other form of union discipline. On the other hand, the union could probably use agency shop fees (in common with regular dues) to pay monitors to help enforce union work rules. The answer to the hypothetical is probably that as long as the union's concerted activity (including establishing and maintaining work rules) is aimed at securing workers' benefits, a fees payor may be required to contribute to a fund rewarding adherence to the beneficial work rules.¹⁶⁸ The incentive thereby created to join the concerted activity in order to reap maximum return on the fees payor's investment is a price Congress intended to tolerate when it authorized extraction of dues equivalent fees, despite the obvious tension with the § 7 right to refrain. Unlike the union member who is subject to union discipline to force participation in concerted activity,¹⁶⁹ the agency fees payor is only subject to the incidental economic incentive flowing from forced payments toward the activity. Unions principally extract adherence to their policies not by financial rewards from union treasuries, but rather by imposition of sanctions against violators. As long as this is the case, the financial incentives influencing fees payors will not unduly affect their rights to refrain from concerted activity.

166 See note 155 *supra*.

167 Cf. *Scofield v. NLRB*, 394 U.S. 423 (1969) (in which a union's practice of finding members who exceeded a production ceiling was found not to be an unfair labor practice).

168 It is assumed here that such a fund would be created from union dues and regular agency shop fees payments rather than by assessment. There are special constraints on assessments. See notes 12-15 *supra*.

169 See *Allis-Chalmers Mfg. Co. v. NLRB*, 388 U.S. 175, 196 (1967); *Amalgamated Meat Cutters*, 237 N.L.R.B. 650, 652-53 (1978).

Another clash between agency fees payors and union discipline occurs where a union invokes a union security clause against a former member who has been ousted or suspended for breach of union rules. In such instances, a former member has sometimes refused to pay agency shop fees, apparently as a protest against the union's imposition of discipline. For example, in *Local 1104, Communication Workers*¹⁷⁰ and *Telephone Traffic Union*,¹⁷¹ unions invoked a union security clause against workers who refused to pay agency fees after they had been expelled for organizing on behalf of a rival union. In such circumstances, the Board finds that the union cannot continue to collect dues or dues equivalents from the ousted workers despite the presence of a union security clause ostensibly requiring payments from all workers.¹⁷² The Board appears to regard the attempt to invoke union security as an extension of the original discipline (expulsion or suspension), and therefore an impermissible effort to use a union security provision to enforce discipline.¹⁷³

The Board's position is puzzling and probably wrong. In the first place, it is not clear that an employee should be permitted, in effect, to contest union discipline by refusing to make payments required by the union security clause. But even assuming that this is an appropriate forum, it is not clear why, if the union's original imposition of discipline was valid,¹⁷⁴ the worker can avoid an equally valid union security obligation. Why should a legitimately disciplined worker be exempt from the common financial obligation imposed on everyone in the union via an agency shop clause? How can a worker who has voluntarily submitted to union discipline by be-

170 211 N.L.R.B. 114 (1974), *enforced*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 432 U.S. 1051 (1976); *see also* NLRB v. Pipefitters Union Local No. 120, No. 82-1296, slip op. (6th Cir. Oct. 13, 1983).

171 241 N.L.R.B. 826 (1979).

172 "Even though [plaintiff worker] was suspended legally, she was entitled to be informed that during her suspension the union-security provision would not force her to continue paying dues or its equivalent. . . ." *Id.* at 829 n.4.

173 *See* Local 1104, *Communication Workers*, 520 F.2d 411 (2d Cir. 1975); Local 4186, *United Steelworkers*, 181 N.L.R.B. 992, 995 (1970).

174 There are, of course, public policy restraints on the kinds of worker conduct which unions can punish. *See generally* Gould, *Some Limitations Upon Discipline Under the NLRA*, 1970 DUKE L.J. 1067; Wellington, *supra* note 2, at 1022. Because of such public policy limitations on union discipline, the Board's practice of regarding the firing of an employee for non-payment of dues as an unlawful extension of discipline might be sustainable where the original disciplinary action was impermissible. This might be the explanation for the Board's result in Local 4186, *United Steelworkers*, 181 N.L.R.B. 992 (1970), where the union had punished a member for filing a decertification petition. *See generally* Annot., 27 A.L.R. FED. 316 (1976). But in *Local 1104, Communication Workers*, 520 F.2d at 419-20, and *Telephone Traffic Union*, 241 N.L.R.B. at 829 n.4, it was conceded that the expulsion of the worker in question was valid.

coming a full union member, and then incurred valid punishment for violation of valid union rules, be placed in a better position in terms of financial responsibility than the agency shop fees payor who never joined the union? The Board's current position fails to recognize the union's prerogative to impose internal discipline under the proviso to § 8(b)(1).¹⁷⁵ So long as the former member has failed to meet union security obligations, and so long as the underlying discipline which resulted in the employee's changed union status is valid, no statutory violation has occurred by enforcing an agency shop clause.

The court of appeals in the *Local 1104, Communication Workers* case relied on the proviso language in § 8(a)(3),¹⁷⁶ which bars an employer from acting against an employee because of "nonmembership in a labor organization" if "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."¹⁷⁷ As the worker in *Local 1104, Communication Workers* had originally been expelled from the union for rival organizing, he seemed to fit within this protective language. But a more sensible result, more consistent with legislative intent, is obtained by confining the "membership . . . denied or terminated" safeguard to the non-payment which prompts the employer's discharge action. That is, if an employer terminates a worker for not paying the dues-equivalent, that action should not be tainted because the worker had previously been excluded from full union membership.

This approach is consistent with Congress' intention as reflected in the legislative history relating to the § 8(a)(3) proviso permitting certain union security arrangements. Congress' central object was to prevent workers ousted from unions for arbitrary or capricious reasons from losing their jobs.¹⁷⁸ At the same time, Congress was recep-

175 *Accord* Comment, *Agency Shop and Anti-Union Activities*, 8 CONN. L. REV. 715, 724 (1976). This proviso states: "[T]his paragraph [8(b)(1)] shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

176 520 F.2d 411 (2d Cir. 1975).

177 NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

178 See S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947); Rosenthal, *supra* note 11, at 58, 69; see also notes 53 and 134 *supra*. The relevant House and Senate reports confirm that the object of the union security provisions in Taft-Hartley was to ensure that no worker would lose a job because of "misconduct" toward a union, other than failure to pay dues-equivalent fees under a valid union security provision. See 1 NLRB, *supra* note 49, at 300, 323, 325, 413, 427, 545.

tive to the notion that free riders could legitimately be prevented by union security clauses¹⁷⁹ and that unions should retain control over their own membership policies.¹⁸⁰ The result was the current proviso to § 8(a)(3), insulating workers from job loss resulting from their lack of union membership, so long as they pay dues equivalents. There is no indication in the legislative history that lawfully expelled members would be free of the financial obligation imposed by a union security agreement.¹⁸¹ Pro-union opponents of the Taft bill complained bitterly about the § 8(a)(3) proviso, but on the basis that the prohibition against a worker losing his job following his ouster from the union, so long as dues equivalency payments continued, deprived the union of its most effective sanction and insured the continued presence in the workplace of “troublemakers.”¹⁸²

179 See note 54 *supra*.

180 This object is reflected both in the proviso to § 8(b)(1), note 175 *supra*, explicitly affirming the union’s prerogative to shape membership policy, and in the relevant committee reports. The Senate committee report on the version of the § 8(a)(3) proviso which eventually became part of the Taft-Hartley Act commented: “The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership.” 1 NLRB, *supra* note 49, at 426; see H.R. REP. NO. 510, 80th Cong., 1st Sess. (1947); 1 NLRB, *supra* note 49, at 545. The House report observed:

[I]f the suspension or expulsion results from anything other than nonpayment of [dues], the union may not require an employer to discharge the member [A] union may deny membership to an employee upon any ground it wishes, but the only ground on which it can have him discharged under a ‘union security’ clause is nonpayment of [dues].

Id. at 323. See also note 53 *supra*. A House-backed proposal to limit the grounds on which unions could impose discipline was not adopted as part of the final Act. *Id.* at 616, 800.

181 The congressional debates basically support my thesis that the § 8(a)(3) proviso insulated workers expelled from the union against job loss but not against agency shop fees. See 1 NLRB, *supra* note 49, at 906; 2 NLRB, *supra* note 12, at 1061-62, 1068, 1094-97, 1416, 1569.

Senator Taft’s comments were ambiguous. On the one hand, he stressed that the thrust of the § 8(a)(3) proviso was to protect workers’ jobs. He noted: “The employee has to pay the union dues. But . . . if the union discriminates against him and fires him from the union, the employer shall not be required to fire him from the job.” *Id.* at 1010. “[I]f a union fires a man for some reason other than the nonpayment of dues: if the employee is willing to pay his dues to the union, then the union cannot compel the employer to fire him because he is no longer a member of the union” *Id.* at 1096; see also *id.* at 1142. But at another point Sen. Taft made the apparently erroneous observation that workers “continue to be members of the union as long as they continue to pay their union dues.” *Id.* at 1097. Perhaps this was an imprecise reference to the fact that workers could not be fired from their jobs so long as they continued to pay a dues equivalent.

182 See H.R. REP. NO. 245, 80th Cong., 1st Sess. 471 (1947), reprinted in 1 NLRB, *supra* note 49, at 371-72; S. REP. NO. 105, 80th Cong., 1st Sess. (1947), reprinted in 1 NLRB, *supra* note 49, 875, 1041, 1094, 1098, 1569, 1578. For example, Sen. Murray commented in his complaint that unions were being deprived of effective disciplinary sanctions:

[I]f he [a member defying 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

III. Disparate Treatment of Agency Fees Payors in Access to Union Services and Privileges — What Must the Fees Payor Receive in Return for Payments?

A labor union is a private membership association composed of workers who choose to join.¹⁸³ Its functions include representing workers in collective bargaining units, as well as advancing the health and welfare of workers who elect to become members. Members not only pay dues, they also pledge to support the union's efforts and to be bound by its various rules and regulations.¹⁸⁴ In return, a union regularly reserves certain benefits and privileges to its members. The question is how far the union, as a voluntary organization seeking to attract members, can go in reserving benefits to members. Limitations include the duty of fair representation to all workers within a represented unit¹⁸⁵ and the principle that a union may not discriminate against non-members in a fashion which restrains their right to refrain from union membership.¹⁸⁶

A. Access to Union Services and Benevolent Programs

As an adjunct to a collective bargaining representative's statutory privilege of exclusive representation,¹⁸⁷ a duty of fair representation is imposed. A union is obligated to extend its representational services to all workers in good faith and without arbitrary distinctions.¹⁸⁸ This means, for example, that a union cannot favor the in-

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 1040-41.

183 In theory union membership is purely voluntary, as even under a "union shop" agreement the NLRA provides that workers can only be coerced into financial support of a union rather than full membership. *See, e.g.,* International Bhd. of Boilermakers v. NLRB, 466 F.2d 343 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); Buckley v. American Fed'n of Television & Radio Artists, 496 F.2d 305 (2d Cir. 1974), *reh'g denied*, 420 U.S. 956 (1975); Wine & Liquor Store Employees, 261 N.L.R.B. No. 152, 1982 NLRB Dec. (CCH) ¶ 19,066 (1982). In practice, some members may join under the impetus of "union shop" clauses in collective bargaining agreements not realizing that they are legally free to remain agency fees payors if they choose. *See* Merrill, *supra* note 33, at 728-29; Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485, 1506 n.86 (1979); *see also* note 2 *supra*.

184 *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Amalgamated Meat Cutters, Local 593, 237 N.L.R.B. 1159 (1978).

185 *E.g.,* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

186 *E.g.,* Prestige Bedding Co., 212 N.L.R.B. 690, 691 (1974); B.G. Costich & Sons, 243 N.L.R.B. 79 (1979).

187 *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1974).

188 *See* Vaca v. Sipes, 386 U.S. 171 (1966); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

terests of members over non-members in negotiating terms and conditions of employment.¹⁸⁹ The same principle applies to contract administration and the operation of grievance-arbitration machinery. It is an unfair labor practice for a union to refuse to process a non-member's grievance on grounds of non-membership or to treat it differently from a member's grievance.¹⁹⁰

Indeed, not only agency shop fees payors are entitled to representational services. Even in the absence of a union security provision and financial contribution by non-members, such services must be provided to non-members without charge.¹⁹¹ This union obligation flows from two sources. First, free representation of non-members can be viewed as a burden imposed upon unions in exchange for the privilege of exclusive representation of all workers within a bargaining unit.¹⁹² As such, it is part of the duty of fair representation. Unions have argued strenuously that assessment of charges for services to non-members simply equalizes the financial burden otherwise absorbed entirely by union members in the unit.¹⁹³ That is, unions have advanced the free-rider argument to justify fees for service. But the Board's response has been that basic representational services must be provided as a matter of right to all workers represented by a union, whether or not they have financially supported the union's activity.¹⁹⁴ The union's means to prevent free riders is to negotiate a union security clause in the collective bargaining agreement.

Second, charging non-members for representational services is sometimes classified as an impermissible restraint on their right to refrain from concerted activity.¹⁹⁵ This is understandable if the fee for service charged to a non-member is greater than the pro-rata portion of a union member's dues allocable to the particular service, e.g.,

189 *Prestige Bedding Co.*, 212 N.L.R.B. 690 (1974); *Schorr Stern Food Corp.*, 248 N.L.R.B. 292 (1980).

190 *Highway & Local Motor Freight Employees Local 667*, 228 N.L.R.B. 398 (1977); *International Bhd. of Elec. Workers Local 1504*, 211 N.L.R.B. 580 (1974); *United Steelworkers Local 937*, 200 N.L.R.B. 40 (1972); *see also International Bhd. of Boilermakers Local 72*, 260 N.L.R.B. No. 33, 1981-82 NLRB Dec. (CCH) ¶ 18,726 (1982).

191 *See Del Casal v. Eastern Airlines*, 634 F.2d 295, 300-01 (5th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981); *International Ass'n of Machinists Local 697*, 223 N.L.R.B. 832 (1976).

192 *See Exxon Co. USA*, 253 N.L.R.B. 213, 213 n.1, 218 (1980); *Brown & Williamson Tobacco Co.*, 227 N.L.R.B. 2005, 2006 n.7 (1977); *Machinists Local 697*, 223 N.L.R.B. at 834; *Hughes Tool Co.*, 104 N.L.R.B. 318, 326, 329 (1953).

193 104 N.L.R.B. at 324; *see Union of the United Ass'n of the Plumbing Indus. Local 141 v. NLRB*, 675 F.2d 1257, 1270-72 (D.C. Cir. 1982) (Mikva, J., dissenting); *Machinists Local 697*, 223 N.L.R.B. at 837.

194 104 N.L.R.B. at 328; *J.J. Hagerty, Inc.*, 153 N.L.R.B. 1375, 1379 (1965).

195 *International Ass'n of Machinists Local 697*, 223 N.L.R.B. 832 (1976).

processing grievances. This arrangement arguably constitutes discrimination and creates some economic incentive to join the union.¹⁹⁶ As union members ordinarily benefit from an insurance-pooling principle in financing such services, a differential cost favoring union members might be present if non-members were charged on a fee for service basis.

Outside the framework of representational services in the collective bargaining context, the union has more flexibility towards non-members and may charge them on a fee for service basis.¹⁹⁷ The boundaries of the collective bargaining context, within which union representational services are required to be gratis, are not always easy to discern. Union administration of a negotiated health insurance plan has been deemed a service which must be provided free of charge to non-members.¹⁹⁸ Yet non-members can be assessed a fee for union costs in administering a hiring hall,¹⁹⁹ even though the hiring hall is part of a union-employer arrangement established through collective bargaining.²⁰⁰ The distinction between these two services is not self-evident. Courts seem to have assumed without discussion that non-members can be assessed for job referral services.²⁰¹ The Board has suggested that because job applicants using a hiring hall are not yet unit employees, they are not yet entitled to the services (without special fees) due to all unit employees.²⁰² This rationale is not fully convincing, as the Board has ruled elsewhere that the duty of fair representation extends to *prospective* unit employees utilizing a

196 *Cf.* NLRB v. Local 138, Int'l Union of Operating Eng'rs, 385 F.2d 874, 877 (2d Cir. 1967) (discussing hiring hall fees).

197 T. HAGGARD, *supra* note 4. Of course, this separate charge assumes that the union service is not being funded by agency shop fees in common with union dues. If the latter were the case, agency fees payors would be entitled to access to the service without charge. *See* notes 110-13 *supra* and accompanying text.

198 *See* Exxon Co. USA, 253 N.L.R.B. 213, 218 (1980).

199 NLRB v. Local 138, Int'l Union of Operating Eng'rs, 385 F.2d 874, 876-77 (2d Cir. 1967); Local 1351, S.S. Clerks v. NLRB, 329 F.2d 259, 262 (D.C. Cir. 1964); Boston Cement Masons Union No. 534, 216 N.L.R.B. 568 (1975).

200 Hiring hall referral, as an aspect of hiring, has been deemed a term and condition of employment and hence a mandatory subject of bargaining. NLRB v. Tom Joyce Floors, Inc., 353 F.2d 768, 771 (9th Cir. 1965); NLRB v. Houston Chapter, Assoc. Gen. Contractors, Inc., 349 F.2d 449, 452 (5th Cir. 1965).

201 *See* 385 F.2d at 876-78; 329 F.2d at 262.

202 [T]he non-member applicant for employment, who utilizes the hiring hall, is clearly not an employee in the unit which is represented by the Union and is therefore not entitled as a matter of right to the unconditional provision of services that the Union must make available to all unit employees without imposition of special fees on those who are not among its members.

223 N.L.R.B. at 835 n.4.

union hiring hall.²⁰³

Presumably, a union may not exclude non-members entirely from important job-related services. Conditioning access to such services on union membership would appear to create an impermissible restraint on the workers' § 7 right to refrain from unionization. Thus, it is clearly impermissible for a union to discriminate against non-members in administration of a job referral service.²⁰⁴ However, when the particular union service is not integral to job status, and is not undertaken as part of the union's representational responsibility, the union may reserve access exclusively to union members.²⁰⁵ For example, the Board general counsel's office has suggested that a union may reserve to union members a service which provides assistance in filing workers' compensation claims.²⁰⁶ The service was deemed to be extrinsic to the terms and conditions of employment and so to the union's obligations as exclusive bargaining representative.

A similar pattern would appear to apply to the range of benevolent and welfare funds initiated by unions outside of the collective bargaining framework, including insurance, pension, credit union, and similar programs. If the union funds such programs with agency fees in common with union dues, agency fees payors can demand equal access.²⁰⁷ But if the supporting monies are collected solely from union members, such benevolent programs may be restricted to union members as an attribute of a private membership association's special relationship to its members.²⁰⁸

One caveat is that the union may not attain its benevolent objectives by manipulating the dues structure in the context of a union security provision to give relief to union members in distress. In *International Association of Machinists Lodge 720*,²⁰⁹ union members on layoff or disability leave were allowed to purchase "monthly unemployment stamps" in lieu of dues at a fraction of the normal dues

203 See International Union of Operating Eng'rs Local 406, 262 N.L.R.B. No. 6, 1981-82 NLRB Dec. (CCH) ¶ 19,037 (1982).

204 See *NLRB v. Local Union 633, United Ass'n of the Plumbing Indus.*, 668 F.2d 921 (6th Cir. 1982); *Wine & Liquor Store Employees Union Local 122*, 261 N.L.R.B. No. 152, 1981-82 NLRB Dec. (CCH) ¶ 19,066 (1982).

205 Again, this assumes that the service is not funded by agency fees in common with union dues.

206 N.L.R.B. Advice Memo., American Postal Workers Union, No. 31-CB-3755 (1980).

207 See note 197 *supra*.

208 See *Hughes Tool Co.*, 104 N.L.R.B. 318, 324 (1953).

209 *International Ass'n of Machinists Lodge 720*, 243 N.L.R.B. 697 (1979), *aff'd*, 626 F.2d 119 (9th Cir. 1980).

cost. The union refused to extend the same privilege to agency fees payors. Both the Board and the Ninth Circuit held that this discrimination in favor of members unlawfully restrained non-members' rights to refrain from unionization. The practical effect of the "unemployment stamps" program was to reduce the dues requirement for disabled union members; consequently, disabled agency fees payors — who could be compelled only to pay the equivalent of union dues — were equally entitled to the benefit of reduced dues.²¹⁰

B. *Participation in Union Governance and Decision-Making*

It is widely understood that non-members, including agency fees payors, are excluded from union governance.²¹¹ Absent special union dispensation, non-members cannot hold union office, vote for union officers, or vote on critical issues such as strike declaration or contract ratification. Even though this structure creates an incentive to join a union, it is reconcilable with the § 7 right to refrain from membership on the basis that control of a membership association may be reserved to those who pledge support and bind themselves to its rules. As applied to agency fees payors, the system is to some extent one of taxation without voice in decision-making. But there are

²¹⁰ 243 N.L.R.B. at 700 n.6 (opinion of the administrative law judge).

One union objection to giving non-members access to unemployment stamps was that non-members would be exempt from the disciplinary penalties applicable to union members for fraud or other abuse of the stamp program. The response of the administrative law judge and of the Ninth Circuit was that an agency fees payor could be disciplined for abuse of the program by invocation of the union security machinery of the collective bargaining agreement, such as discharge from employment. For the defrauding non-member "would not have validly fulfilled his or her dues equivalency obligation." 243 N.L.R.B. at 701. This suggestion seems dubious. Invocation of the union security provision to get a worker fired for fraud against the union would appear to constitute union discipline without the procedural protections normally dictated by the LMRDA. *See generally* Ritz v. O'Donnell, 566 F.2d 731 (D.C. Cir. 1977); Beaird & Player, *Union Discipline of its Membership under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and how much Process is Due?*, 9 GA. L. REV. 383 (1975). Moreover, dismissal from employment might constitute rather draconian punishment for some abuses of the unemployment stamp program. The solution is to view the non-member's application for unemployment stamps as an implied agreement to abide by the salutary administrative rules applicable to the program and to submit to union disciplinary machinery in the event of breach of such rules. In that fashion, the non-member is given access to the reduced-dues benefit on the same basis as union members, and the union's interest in preserving the fund from abuse is protected. Of course, the rules enforced by the union would have to relate to sound administration of the fund and could not extend to imposing an obligation on the non-member to participate in concerted activities. *See* note 166 *supra* and accompanying text.

²¹¹ *See* NLRB v. General Motors Corp., 373 U.S. 734, 737 (1963); Kolinske v. Lubbers, 516 F. Supp. 1171, 1173 (D.D.C. 1981), *rev'd*, 712 F.2d 471 (D.C. Cir. 1983); Amoco Production Co., 262 N.L.R.B. No. 160, 1982-83 NLRB Dec. (CCH) ¶ 15,047 (1982); Wellington, *supra* note 2, at 1046.

several consolations and safeguards against abuse which help diminish any ostensible injustice. The fees payors receive the benefits of collective representation.²¹² In such representation and beyond, the union is under legal constraints to treat the fees payor fairly and to administer their monies according to fiduciary standards.²¹³ To the extent that a fees payor opts not to join the union, he remains essentially free from the allegiances and non-financial obligations imposed on full union members. 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.²¹⁴

An emerging line of cases offers an agency fees payor a limited guarantee of access to union decision-making machinery under the rubric of fair representation. These cases have arisen primarily where the union has chosen to delegate the final decision on an employment issue to a referendum confined to union members.²¹⁵ *Branch 6000, National Association of Letter Carriers*²¹⁶ provides an illustration. The union, pursuant to a collective bargaining agreement, had an option to select one of two systems for fixing days off. The union made the actual selection by a referendum of thirty-five union

212 There are commentators who contend that unions benefit only marginal workers and not the bulk of the work force. See Merrill, *supra* note 33, at 716-23; Viera, *supra* note 42, at 453-54. But this argument has never gained significant judicial acceptance. On the contrary, many courts have endorsed the proposition that unions generally provide a variety of gains and benefits to workers. See, e.g., note 42 *supra*.

213 See note 64 *supra*.

214 Some persons might dispute the fairness of forced financial support for an institution in which the payor has no voice. There are several responses. Membership is generally available to the fees payor, and it is his choice not to join. While the choice not to join may be dictated by conscience, the fees payor's resulting status as a non-participant is a tolerable price to pay; a union can reasonably require that its governance be confined to those who bear all the burdens and obligations of membership. Agency fees payors are immune from the union's requirements that members adhere to union rules and regulations and that they support the union in various non-financial ways. Thus the agency fees payor avoids the non-financial burdens imposed on union members. That the objecting fees payor is "taxed" financially without full participation in union governance does not violate any sacrosanct principle. The fees payor presumably receives benefits from union representation (some opinion to the contrary notwithstanding), and the payor's interests are guarded by various fiduciary obligations imposed on the representing union. Congress has, however, given some relief from fees payments to workers with religiously grounded conscientious objections. See 29 U.S.C. § 169 (1976); see also note 65 *supra* and accompanying text.

215 See *Janow v. Schweitzer Div. of Kimberly-Clark*, 503 F. Supp. 973 (D.N.J. 1981); *Lodge No. 10, Int'l Ass'n of Machinists*, 257 N.L.R.B. 587 (1981); *Pennsylvania Labor Relations Bd. v. Eastern Lancaster County Educ. Ass'n*, 58 Pa. Commw. 78, 427 A.2d 305 (1981).

216 595 F.2d 808 (D.C. Cir. 1979).

members, conducted at a meeting from which the two non-union unit members were excluded. Though there was not the slightest intimation that either work schedule was unfair or unacceptable to non-union workers' interests, the Board found the decision-making process violated fair representation. It ordered a new referendum among all the unit workers.

The District of Columbia Circuit upheld the Board's determination that the decision-making system had been "an abdication of the representative function."²¹⁷ "The referendum merely computed the composite personal preferences of individual union members without consideration of the views or interests of non-union employees."²¹⁸ Judge Leventhal suggested that union members could still exercise decision-making authority if appropriate safeguards were present. This required that the union members' vote "reflect some consideration of the interests of all employees."²¹⁹ Judge Leventhal's opinion purported to uphold the common practice of contract ratification by union membership vote. He attempted to distinguish contract ratification from the referendum on work schedules by a vague reference to the bargaining agent's ascertaining and considering the wishes of non-union employees in the case of contract ratification.²²⁰

The import of *Branch 6000* is hard to gauge. Even though the Board imposed as a remedy a re-vote including all workers within the unit,²²¹ I doubt that the case stands for the proposition that non-union employees must be allowed to vote on contract issues decided by vote of workers. The key appears to be "some consideration" of the interests of non-union workers, which can be given only by providing them with a significant opportunity to be heard in the actual decision-making process.²²² Presumably, this means that the bargaining agent can shape substantive options for the members, consistent with fair representation of all elements within the unit,²²³ and

217 *Id.* at 812.

218 *Id.*

219 *Id.*

220 *Id.* at 813.

221 *Id.* at 811; *see also* Lodge No. 10, Int'l Ass'n of Machinists, 257 N.L.R.B. 587 (1981).

222 In both *Branch 6000* and *Machinists Lodge*, non-union members were excluded from the meeting at which a referendum was conducted and were not given any clear alternative channel for expressing their preferences. *See also* Waiters Union, Local 781 v. Hotel Ass'n, 498 F.2d 998, 1000 (D.C. Cir. 1974); *cf.* Pennsylvania Labor Relations Bd. v. Eastern Lancaster County Educ. Ass'n, 58 Pa. Commw. 78, 427 A.2d 305 (1981), where non-union members were present at a ratification vote and were invited to express their views.

223 *See* Alvey v. General Elec. Co., 622 F.2d 1279, 1289 (7th Cir. 1980) (union implementation of rank and file referendum decision must not be arbitrary or discriminatory).

the fees payors' opportunity to be heard may be injected before the membership vote. This might mean a fees payor's prerogative to attend and be heard at the union meeting at which the membership takes its vote. *Branch 6000* offers some support for this interpretation by its specific reference to the absence of any process for considering non-union employees' views.²²⁴ Judge Leventhal noted: "There must be communications access for employees with a divergent view, although there is no requirement of formal procedures."²²⁵

This focus on communications channels to non-members is consistent with *Branch 6000*'s expressed willingness to reserve contract ratification exclusively to union members. In contract ratification by the union's membership, as in membership referenda, the assumption must be that the substantive choice presented by a bargaining agent has been shaped with awareness that all elements within the unit must be fairly represented. In *Branch 6000*, for example, there was no suggestion that the substantive interests of the two non-union letter carriers were any different from the interests of the union letter carriers. Nor is there any indication that a contract ratification vote reflects any less the voting members' preferences and conveniences than would a referendum vote. The basic defect in *Branch 6000*, then, must have been the exclusion of non-members from the deliberations leading up to the membership vote and the absence of alternative communications machinery. The court and Board apparently assumed that communications channels normally are open to non-members in the context of a ratification vote. This focus on communications opportunities is also consistent with a trend in fair representation decisions to stress the union's responsibility to communicate with all persons who will be affected by its decisions and to use rational decision-making processes.²²⁶

224 *Branch 6000*, Nat'l Ass'n of Letter Carriers, 595 F.2d 808, 813 (D.C. Cir. 1979).

225 *Id.*; see also *Waiters Union, Local 781 v. Hotel Ass'n*, 498 F.2d 998, 1000 (D.C. Cir. 1974).

226 See *Lodge No. 10, Int'l Ass'n of Machinists*, 257 N.L.R.B. 587 (1981); *Abilene Sheet Metal v. NLRB*, 619 F.2d 332 (5th Cir. 1980); *NLRB v. Local 315, Int'l Bhd. of Teamsters*, 545 F.2d 1173, 1175 (9th Cir. 1976); *Parker v. Local 413, Int'l Bhd. of Teamsters*, 501 F. Supp. 440 (S.D. Ohio 1980); *Pennsylvania Labor Relations Bd. v. Eastern Lancaster County Educ. Ass'n*, 58 Pa. Commw. 78, 427 A.2d 305 (1981).

The genesis of this obligation was dictum in *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944), suggesting that unions must give bargaining unit members an opportunity to express their views on collective bargaining issues affecting the workers. Silverstein, *supra* note 183, at 1527 n.157.

IV. Conclusion

Although Congress in 1947 apparently authorized unions, pursuant to union security clauses covering all workers in a represented unit, to collect amounts equal to union dues, the courts have whittled down the range of uses which unions can make of agency shop fees. The Supreme Court has ruled that unions may not use such fees over payors' objections for "political" expenditures. While the decision rests both on dubious constitutional analysis and distorted legislative history, it is prevailing doctrine. Lower courts have gone even further, constructing a bar to collecting agency fees over payors' objections for union expenditures beyond those necessary for negotiation and administration of a collective bargaining agreement. This judicial posture represents both an unwarranted extension of the Supreme Court precedent and an inaccurate appraisal of congressional intent in endorsing union security provisions.

Tension inevitably exists between a fees payors' financial obligation to support union representational activity and the § 7 right to refrain from concerted activity. At times union offers to rebate a portion of dues or dues equivalent fees in return for participation in concerted activity, such as through a strike insurance fund, create an incentive for a fees payor to participate in the concerted activity. If the union activity in question is a basic one which fees payors could legitimately be compelled to subsidize, such as a strike, the artificial economic incentive for the fees payor to participate is a tolerable concomitant of union security provisions. But the Board and the courts will have to be alert to ensure that the economic leverage of agency fees is not used to ride roughshod over a non-member's right to refrain from concerted activity.

A union owes a variety of duties to agency shop fees payors. Where agency fees are used in common with union dues to fund union programs or services, fees payors must be granted equal access to the benefits. Services which are part of a union's collective bargaining function must be provided even if agency fees do not purport to cover them, for such services must be provided by the union to all workers within a represented unit. As to purely benevolent programs administered by unions outside the collective bargaining setting, unions may exclude agency shop fees payors so long as their fees are not funding the programs. If the union uses agency shop fees for such programs, the fees payor must be accorded equal access to the benefits and cannot opt for non-participation. Finally, while a union owes a basic duty of fair dealing to fees payors, these non-members

are not entitled to participate in union governance on the same plane as full members. Non-members must, however, be offered a means to communicate their preferences when a union delegates decision-making to a membership referendum.