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Toward a More Reasonable Accommodation for Union Religious Objectors

Christopher J. Conant

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Toward a More Reasonable Accommodation for Union Religious Objectors

Christopher J. Conant*

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I. INTRODUCTION

Passed in 1935, the National Labor Relations Act (NLRA)¹ was an attempt by Congress to protect the rights of workers to organize and collectively bargain with their employers while ensuring that the “free flow of commerce”² was not obstructed in the process.³ The NLRA provides that unions and employers may enter into a union security agreement whereby the union can condition a worker’s employment on being a member of and paying dues to the union or being a non-union member but paying the equivalent of union dues to the union.⁴ However, workers challenged this compulsory unionism because in many cases a large portion of the dues went to support political or ideological causes with which the workers disagreed.⁵ These objectors were successful, and were granted the remedy of only having to pay an amount that represented the union’s cost of collectively bargaining.⁶

Other workers objected to paying any money to the union because doing so would conflict with their religious beliefs.⁷ These religious objectors found success under Title VII, and the courts granted a “charitable substitution” remedy whereby religious objectors would pay the equivalent of member dues to a charity in lieu of paying the union.⁸

The remedies granted to the two types of objectors, secular and religious, are similar in that both objectors are allowed to not financially support the union in a way that conflicts with their convictions.⁹ However, there is an inequality between the two remedies. The religious objector pays the full equivalent of union dues out-of-pocket while the secular objector pays a lesser amount representing only collective bargaining costs.¹⁰ This Comment argues that this discrimination is an unreasonable accommodation under Title VII for the religious objector.

The federal courts have addressed this issue only twice and have reached opposite conclusions.¹¹ In *Madsen*,¹² the court found that under Title VII, it was a reasonable accommodation to require a religious objector to pay the full amount

1. The Act, as amended, is codified at 29 U.S.C.A. §§ 151-169 (West 1998).

2. 29 U.S.C.A. § 151.

3. See *infra* text accompanying notes 16-17.

4. See *infra* text accompanying notes 22-24.

5. See *infra* Part III.A.

6. See *infra* text accompanying notes 59-60.

7. See *infra* text Part III.B.

8. See *infra* text accompanying notes 67-81.

9. See *infra* Part III.A & B.

10. See *infra* text accompanying notes 82-85.

11. Compare *Madsen v. Associated Chino Teachers*, 317 F. Supp. 2d 1175 (C.D. Cal. 2004) with *O'Brien v. City of Springfield*, 319 F. Supp. 2d 90 (D. Mass. 2003).

12. *Madsen*, 317 F. Supp. 2d 1175.

of union dues to a charity and not the lesser amount paid by a secular objector.¹³ On the other hand, in *O'Brien*,¹⁴ the court found that under Title VII, it was an unreasonable accommodation to require a religious objector to pay more to a charity than his or her secular counterpart is required to pay to the union.¹⁵

Part II of this Comment discusses the relevant background of the NLRA, then shifts focus toward the manner in which unions have used member dues to finance their political and ideological causes, often supporting candidates or causes that their members would not otherwise support. Part III discusses the case law that gives secular and religious objectors the right to limit their financial contributions to their unions. Part IV illustrates how the rights of the two types of objectors create an inequality in treatment between them. It then discusses the federal court treatment of this issue in the *Madsen* and *O'Brien* cases. Part V critiques these two cases in light of circuit and Supreme Court interpretations of Title VII and argues that the *O'Brien* decision is the better result.

II. BACKGROUND

A. A Brief overview of the NLRA

In 1935, Congress enacted the National Labor Relations Act. The impetus behind the Act was to encourage the process of collective bargaining and thereby prevent an economic slow down when both organized labor and management engaged in activity that resulted in industrial strife.¹⁶ In addition, Congress sought to protect the right of workers to organize and determine who would represent them in employment negotiations.¹⁷ Effectively, the NLRA provides that employees may organize as a union and obliges an employer to bargain in good faith over the terms and conditions of union members' employment.¹⁸

Two statutory provisions of the NLRA are relevant to understanding how the union serves as the "collective bargaining"¹⁹ agent for its members. The first is the exclusive representation provision. Under 29 U.S.C.A. § 159, when a majority of voting employees in a bargaining unit elect a particular union to represent them for collective bargaining purposes, that union is certified to be the exclusive representative of those employees for that purpose. The significance of this provision is that a union certified through this process "represents all the workers who voted for it, all the workers who voted against it, and all the

13. *Id.* at 1181-84.

14. *O'Brien*, 319 F. Supp. 2d 90.

15. *Id.* at 106-07.

16. 29 U.S.C.A. § 151 (West 1998).

17. *Id.*

18. *Id.* § 158(d).

19. Collective bargaining generally includes the union dealing with the employer to resolve issues "concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." *See id.* § 152(5) (defining "labor organization" as an organization which exists for these enumerated purposes).

workers who did not vote.”²⁰ Moreover, individual employees are unable to negotiate directly with the employer over the terms of employment.²¹

The second important provision of the NLRA is the union security provision.²² This provision provides that a union may place a “union security” clause in its collective bargaining agreement whereby the union and the employer agree that an employee’s employment will be conditioned upon union membership or paying to the union the equivalent of membership dues.²³ In 1963, the Supreme Court held that despite a union security agreement, an employee need not be a member of the union as a condition of employment so long as the employee pays the requisite union fees.²⁴

In looking at how the exclusive bargaining and union security provisions relate, the limited rights of the employee are apparent. An employee represented by a union cannot discuss or negotiate the terms of his or her employment with the employer because the union is the only entity that has the right to do so.²⁵ Furthermore, under a security provision, a worker’s very employment is conditioned upon being a member of the union or paying the equivalent of membership dues and fees to the union.²⁶ Accordingly, some people refer to union security clauses as “forced-unionism”²⁷ provisions because an employee must be a union member and pay union fees, unless the employee is willing to face unemployment.²⁸

The above provisions fall within the NLRA and are generally applicable to private sector labor relations outside the airline and railway industries.²⁹ However, with regard to union security agreements, states may legislate to

20. Charles W. Baird, Cato Institute, *The Permissible Uses of Forced Union Dues: From Hanson to Beck* (Cato Policy Analysis No. 174) (July 24, 1992) available at http://www.cato.org/pub_display.php?pub_id=1034&full=1 (copy on file with the *McGeorge Law Review*).

21. *Id.*

22. 29 U.S.C.A. § 158(a)(3).

23. *Id.*; R.D. Hursh, Annotation, *Discharge or other Discriminatory Treatment of Employee Pursuant to Union Security Clause as Within Unfair Labor Practice Provisions of Taft-Hartley Act*, 36 A.L.R.2d 630 § 1 (1954).

24. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

25. See *supra* text accompanying note 20 (illustrating how an employee may be represented by a union even if the employee was in the minority of voters who rejected the union or did not vote at all). Furthermore, employees often enter into employment where there is already an exclusive bargaining agent representing the current employees. Attempting to obviate or change the exclusive bargaining agent is too onerous a task for many employees to undertake. See 29 U.S.C.A. § 159(e)(1) (West 1998) (providing that to have the National Labor Relations Board conduct a secret ballot of the employees to vote whether or not to rescind the authority of their current union to be their exclusive representative, the employees must obtain petition signatures consisting of at least of 30% of the employees within the bargaining unit).

26. See *supra* text accompanying notes 22-24.

27. *Quick v. NLRB*, 245 F.3d 231, 236 n.1 (3d Cir. 2001).

28. See Press Release, Congressman Bob Goodlatte, *Fundamental Rights for Every American* (March 23, 2001) available at <http://www.house.gov/goodlatte/NRTW032301wc.htm> (copy on file with the *McGeorge Law Review*) (stating that “[c]urrent federal law allows unions to force individuals to pay membership dues to the union for the simple right of obtaining and keeping a job”).

29. See 29 U.S.C.A. § 152(2) (excluding from the definition of employer the United States Government, state governments and any person subject to the Railway Labor Act). The Railway Labor Act not only governs railway carriers but also airline carriers. 45 U.S.C.A. §§ 151, 181 (West 1986 & Supp. 2004).

prohibit such agreements from conditioning employment on union membership or paying the equivalent of union fees.³⁰ These laws are known as “right-to-work” laws and exist in twenty-two states.³¹ These laws allow employees to resign from union membership and not pay union dues or fees to the union³² while preventing the union or the employer from discriminating against them because of their non-membership in the union.³³

Employees who do not live in right-to-work states and whose employment is subject to union-security clauses are required to pay their union dues as a condition of employment.³⁴ However, employees often raise questions as to how unions spend that money in light of the fact that they do not voluntarily give that money to the unions.³⁵

B. Union Dues and Where they Go

1. Union Income

It is estimated that private sector and some public sector unions receive an annual income of approximately \$19.4 billion dollars.³⁶ Of this \$19.4 billion dollars, \$8.5 billion derives from employees who are subject to forced unionism clauses.³⁷

2. Union Expenditures

Aside from payroll expenses, many union members assume that a large percentage of their dues covers the cost incurred by the union to collectively

30. 29 U.S.C.A. § 164(b); *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Las Vegas-Tonopah-Reno Stage Line Inc.*, 319 F.2d 783, 786 (9th Cir. 1963) (holding that notwithstanding the language of section 164(b), which only allowed states to prohibit union security clauses that conditioned employment on union “membership;” states could also prohibit union security clauses that required employees to pay an “agency fee” or sum of money equivalent to membership dues and fees).

31. Michael F. Alberti, Annotation, *Validity, Construction, and Application of State Right-to-Work Provisions*, 105 A.L.R.5th 243 § 2 (2003); see National Right to Work Foundation, *Right to Work States at* <http://www.nrtw.org/rtws.htm> (last visited November 11, 2004) (copy on file with the *McGeorge Law Review*) (listing the following right-to-work states: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming).

32. National Right to Work Foundation, *Issue Paper: Employees in Right to Work States at* <http://www.nrtw.org/artwempl.htm> (last visited February 17, 2005) (copy on file with the *McGeorge Law Review*).

33. Alberti, *supra* note 31, § 2.

34. See *supra* text accompanying notes 22-24.

35. See *infra* Part II.B.

36. NATIONAL INSTITUTE FOR LABOR RELATIONS RESEARCH, *BIG LABOR: A \$19 BILLION-A-YEAR BUSINESS 1* (June 7, 2004), at [http://www.nilrr.org/BigLabor\\$19%20BillionAYearBusiness.pdf](http://www.nilrr.org/BigLabor$19%20BillionAYearBusiness.pdf) (copy on file with the *McGeorge Law Review*) (obtaining this figure based on union receipts as disclosed on U.S. Dep't of Labor financial forms LM-2 and LM-3).

37. *Id.*

bargain on their behalf.³⁸ However, the actual amount that any one union might spend on collective bargaining is uncertain. For example, the “former Solicitor of the Department of Labor, states that as much as 80 percent of union dues is used for non-collective bargaining activities, while union attorneys claim the same 80 percent figure as the amount used for collective bargaining-related expenses.”³⁹

The amount unions spend on collective bargaining expenses is not easy to track because “unions possess the facts and records from which the [union’s total] expenditures can reasonably be calculated,”⁴⁰ and are therefore typically accountable only to themselves with regard to those expenses.⁴¹ However, on two occasions the Supreme Court reviewed union financial records to determine the actual amount of members’ dues that consisted of representation costs and the portion of dues that consisted of non-representation or political costs.⁴² In those cases, the Court found that seventy-nine percent and ninety percent, respectively, of the unions’ dues went to expenses unrelated to employee representation.⁴³

3. Who and What do Unions Support With their Political Expenditures

Unions spend an overwhelming percentage of their political contributions on Democratic candidates.⁴⁴ In spending so much money supporting one political agenda, it is unavoidable that the political candidates and causes that unions support are not necessarily those supported by all of their 15.5 million⁴⁵

38. See ROBERT P. HUNTER ET AL., MACKINAC CENTER FOR PUBLIC POLICY, THE MICHIGAN UNION ACCOUNTABILITY ACT: A STEP TOWARD ACCOUNTABILITY AND DEMOCRACY IN LABOR ORGANIZATIONS 5 (Dec. 2001), available at <http://www.mackinac.org/archives/2001/s2001-02.pdf> (copy on file with the *McGeorge Law Review*) (explaining how many union members are now discovering that the funds they believed were going to represent them are too often being diverted to the union’s political operations).

39. KENNETH R. WEINSTEIN & THOMAS M. WIELGUS, THE HERITAGE FOUNDATION, BACKGROUND, HOW UNIONS DENY WORKERS’ RIGHTS 10 (July 18, 1996) available at <http://www.heritage.org/Research/GovernmentReform/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=22115> (copy on file with the *McGeorge Law Review*).

40. *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen*, 373 U.S. 113, 122 (1963).

41. Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 WAYNE L. REV. 705, 727-28 (2003) (discussing how unions face only minimal financial disclosure laws and that unions take advantage of this by failing to report accurately their income and expenses to their members).

42. *Communication Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991).

43. Hunter et al., *supra* note 38 at 15.

44. See Center for Responsive Politics, *Labor: Long-Term Contribution Trends*, at <http://www.open.secrets.org/industries/indus.asp?Ind=P> (last visited Nov. 15, 2004) (copy on file with the *McGeorge Law Review*) (showing that in 2004, 87% of union political spending went to Democrats and that, on average, unions have spent 93% of their political expenditures supporting Democrats over the past fourteen years).

45. News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Members in 2004 at 2 (Jan. 27, 2005), available at http://www.bls.gov/news.release/archives/union2_01272005.pdf (copy on file with the *McGeorge Law Review*).

members.⁴⁶ In fact, in the 2004 presidential election, 38 percent⁴⁷ of union members voted for President Bush even though unions spent more than \$180 million trying to unseat him, and the nation's largest union federation, the AFL-CIO, officially endorsed the Democratic candidate.⁴⁸

Ordinarily, no problem arises when an individual out of his or her own free will financially contributes to an organization that spends the money on certain political or social causes.⁴⁹ However, a more troubling situation occurs when an employee must make contributions to an organization which uses that money to support causes to which that employee objects. As Thomas Jefferson said, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors*, is sinful and tyrannical"⁵⁰

III. A BREAKTHROUGH FOR UNION OBJECTORS

The concept of being a union objector evolved from the compulsory unionism scheme that forces employees indirectly to support political or ideological causes with which they disagree.⁵¹ There are two different roads that union objectors in non-right-to-work states can take in asserting their right to withhold financial support of their union. The first road is political objection and the second road is religious objection. As outlined below, each road is a distinct path leading to a different remedy.

A. Beck and the Political Objector

As discussed above, unions have funneled hundreds of millions of dollars of union dues to support Democratic candidates and liberal causes.⁵² Understandably,

46. See Lynn Vincent, *Dues & Don'ts*, WORLD MAG., Nov. 30, 2002 at 17 (relating several stories of union members who sought to become non-members and withhold their payments when they learned that their unions were supporting political and ideological causes inapposite of their own beliefs).

47. CNN, *Election Results, Full National Exit Poll*, CNN.com, at <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html> (last updated Nov. 15, 2004) (copy on file with the *McGeorge Law Review*).

48. Press Release, AFL-CIO, AFL-CIO Votes to Endorse Senator John Kerry for President (Feb. 19, 2004), available at <http://www.aflcio.org/mediacenter/prspmt/pr02192004.cfm> (copy on file with the *McGeorge Law Review*); see Leigh Strope, *Despite Massive Effort and Spending, Unions Couldn't Deliver Votes for Kerry*, ASSOCIATED PRESS NEWSWIREs, Nov. 4, 2004 (explaining how union spending in support of John Kerry is expected to double that of the \$90 million spent by the unions to elect Al Gore in 2000).

49. Many unions not only support particular political candidates but also support "social" issues such as abortion-on-demand and school based sexual health clinics. See Vincent, *supra* note 46, at 17.

50. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in 2 THE PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd et al. eds., 1950) (emphasis in original).

51. See Vincent, *supra* note 46 at 17 (describing the situations faced by some union members when they tried to stop their union from using their dues to support social causes, such as abortion, homosexuality and pornography).

52. *Big-Labor Pains*, WASH. TIMES, Sept. 6, 2004, at A16.

this use of dues money in a forced-unionism state frustrated “agency fee”⁵³ payers who did not want to see their money used to support candidates or causes to which they politically objected.⁵⁴ In *Beck*,⁵⁵ Harry Beck and other employees challenged the Communication Workers of America’s (“CWA”) spending of agency fees for purposes unrelated to collective bargaining.⁵⁶ Beck and his fellow employees alleged that CWA’s spending of their agency fees on “lobbying, and participating in social, charitable, and political events, violated [its] duty of fair representation as required by [section] 8(a)(3) of the NLRA”⁵⁷

In interpreting section 8(a)(3), the Court found that Congress intended union security clauses to force employees to pay for the cost of collective bargaining but did not intend to allow unions to force employees to financially support causes, which they opposed.⁵⁸ Accordingly, the Court held that a union may not charge an agency fee-payer for money spent on non-collective bargaining activities such as lobbying, social, political and charitable events.⁵⁹

In short, “*Beck* makes clear that nonmembers required to pay union fees as a condition of employment have a right under the NLRA to object and obtain a reduction of their compulsory payments so that they do not include union expenses for purposes other than collective bargaining, contract administration, and grievance adjustment.”⁶⁰

B. *The Religious Objector*

In contrast to section 8(a)(3), Congress specifically provided for religious objectors in its amendments to the NLRA.⁶¹ Under 29 U.S.C.A. § 169,

53. “Agency fee” refers to an amount of money charged by a union to employees who are subject to a union security provision but who choose not to become members. Prior to *Beck*, unions could charge these “agency fee payers” the equivalent of member dues but after *Beck*, the agency fee may only represent that amount of money incurred by the union to collectively bargain on behalf of the employee. See *Communication Workers of Am. v. Beck*, 487 U.S. 735 (1988).

54. *Beck*, 487 U.S. at 739-40.

55. *Id.* at 735.

56. *Id.* at 739-40.

57. Representative Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Issue of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 352-53 (1998).

58. *Beck*, 487 U.S. at 751 (quoting *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 764 (1961)).

59. See *Beck*, 487 U.S. at 739-40 (listing those activities that Beck and his fellow employees complained that CWA could not spend their money on and holding that CWA could not spend their money on such activities). See also *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961) (arriving at the same result as in *Beck* but with respect to the Railway Labor Act).

60. National Right to Work Legal Defense Foundation, Inc., *Your Legal Rights: Private Sector Employee*, at http://www.nrtw.org/a/a_1_p.htm (last visited Nov. 15, 2004) (copy on file with the *McGeorge Law Review*).

61. 29 U.S.C.A. § 169 (West 1998). This provision provides:

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such

“employees belonging to religious organizations which have historically held conscientious objections to joining or financially supporting labor organizations” cannot withhold paying all of their dues to the union but may be required, “in lieu of financially supporting the union, [to] pay the equivalent of union dues to a non-labor charitable organization”⁶² Despite this accommodation for religious objectors, the scope of § 169 is limited in that only members of a “*bona fide* religion . . . which has *historically* held conscientious objections” to financially supporting unions may take advantage of the provision.⁶³ Furthermore, the number of organized religions that officially object to their members financially supporting unions is insignificant.⁶⁴ Accordingly, individuals who do not belong to a particular church or sect that officially objects to its members supporting unions yet nevertheless object religiously to supporting a union may not rely on § 169 to withhold their dues.⁶⁵

However, employees with sincerely held religious beliefs against financially supporting unions but who are not members of a religion contemplated by § 169 have found success in diverting their dues payments to charities under Title VII of the Civil Rights Act of 1964.⁶⁶ Title VII makes it an unlawful employment

employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of Title 26, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

62. W. Sherman Rogers, *Constitutional Aspects of Extending Section 701(j) of Title VII and Section 19 of the NLRA to Religious Objections to Union Dues* 11 T. MARSHALL L. REV. 1, 6-7 (1985).

63. 29 U.S.C.A. § 169 (emphasis added).

64. See Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & LAB. L. 185, 187 n.2 (1996) (listing the religions with an established objection to financially supporting unions; the Seventh-day Adventists, the Amish, the Mennonites, Plymouth Brethren IV, the National Association of Evangelicals, the Christian Missionary Alliance, the Old German Baptists, Orthodox Jews, and the Islamic and Zoroastrian faiths).

65. See Int'l Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co., 833 F.2d 165 (9th Cir. 1987) (discussing how an employee could not take advantage of § 169 even though she had sincerely held religious beliefs based on her personal study of the Bible because she did not belong to a church that traditionally objected to its members financially supporting unions); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) (noting that an employee did not qualify for exemption from paying union dues as a religious objector under § 169 because he was not a member of an organized religious group that historically has held an objection to its members financially supporting unions).

66. See e.g., *Boeing*, 833 F.2d 165; *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445 (7th Cir. 1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978); *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978). See also Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 622 (2000) (explaining how courts have unanimously held that employees asserting their rights under Title VII to a reasonable accommodation for their religious beliefs to not financially supporting a union should be allowed to pay an amount equal to their union dues to a charity).

practice for an employer or labor organization to discriminate against an employee because of his or her religion.⁶⁷ Religion is defined as “all aspects of religious observance and practice, as well as belief.”⁶⁸ Using the “all aspects of religious observance” language, it is easy to see why employees have had more success in diverting their payments to charity under Title VII than under the more restrictive language of the NLRA which requires that the employee be a member of a “bona fide” religion which has “historically held conscientious objections” to joining unions.⁶⁹ Under Title VII, employees may base their religious objection upon religious convictions that are separate from any organized religion.⁷⁰

Title VII requires that an employer or a union make a reasonable accommodation to an employee’s religious beliefs.⁷¹ While the employer typically chooses the accommodation, the accommodation must not be discriminatory.⁷² All of the circuit courts that have decided cases involving employee religious objections to joining or financially supporting a union have determined that a reasonable accommodation under Title VII is to allow the employee to withhold the union fees from the union; most commonly, the withheld fees must be contributed to a mutually agreed upon charity.⁷³

In these cases, the unions typically made two arguments against the charitable substitution. First, the unions argued that allowing the religious objector to divert his or her dues to a charity would create an undue hardship by making that employee a free-rider and thereby discriminate against the non-

67. 42 U.S.C.A. § 2000e-2(a), (c) (West 2003).

68. *Id.* at § 2000e(j) (West 2003).

69. *See Boeing*, 833 F.2d at 169 (discussing how the “protections afforded employees’ religious beliefs are not as broad under [§ 169] as they are under [§ 2000e(j)]”).

70. *See* 29 C.F.R. § 1605.1 (2004). The Guidelines on Discrimination because of Religion provide that: In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.

Id. *See also Boeing*, 833 F.2d at 169 (discussing how the employee’s religious opposition to unions qualified under Title VII even though her church permitted its members to join unions).

71. 42 U.S.C.A. § 2000e(j). *See Tooley*, 648 F.2d at 1241 (holding that even though 42 U.S.C.A. § 2000e(j) on its face applies only to employers, the duty to accommodate an employee’s religious beliefs extends to unions as well); *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979).

72. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69, 71 (1986) (holding that “unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones”).

73. *EEOC v. Univ. of Detroit*, 904 F.2d 331, 335 (6th Cir. 1990) (withhold and redirect fees away from offending union); *Boeing*, 833 F.2d at 168-69; *Notelson*, 643 F.2d at 451; *Tooley*, 648 F.2d at 1242; *McDaniel v. Essex Int’l Corp.*, 571 F.2d 338, 343-44 (6th Cir. 1978) and 696 F.2d 34, 36-38 (1982); *Anderson*, 589 F.2d at 401-02; *Burns*, 589 F.2d at 406-07; *Cooper v. Gen. Dynamics*, 533 F.2d 163, 168-70 (5th Cir.1976) (exemption from payment). *See also* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 398 (1997) (explaining in detail how the courts upheld the validity of charitable contributions in lieu of paying dues under Title VII).

objecting dues paying employees by making them pay higher dues as a result.⁷⁴ The courts disagreed and found that assumptions and hypothetical facts cannot be a basis for finding an undue hardship.⁷⁵

Second, the unions argued that allowing the religious objector to divert his or her dues to charity gives that employee preferential treatment over other employees in contravention of Title VII's reasonable accommodation provision.⁷⁶ The Ninth Circuit responded to this argument by finding that the charitable substitution does not result in preferential treatment because the religious objector "suffer[s] the same economic loss as the union member employees."⁷⁷

The union in *Tooley v. Martin-Marietta*⁷⁸ took a different path from other unions and argued that the substituted charity accommodation is unreasonable because it is inconsistent with the NLRA policy of promoting union shop agreements.⁷⁹ The court disagreed and responded that there was indeed a "tension and conflict" between the policy in favor of union shop agreements and employees' interest in not being discriminated against for their religious beliefs but that the reasonable accommodation provision of Title VII strikes a balance between these competing interests and that the substituted charity accommodation is consistent with this balancing of interests.⁸⁰ Specifically, "[u]nder this accommodation, the union is entitled to enjoy the benefits of the union shop agreement while the plaintiffs are entitled to practice in accordance with their religious convictions."⁸¹

IV. THE INEQUALITY IN TREATMENT BETWEEN RELIGIOUS AND POLITICAL OBJECTORS IN THE FEDERAL COURTS

An employee who objects on political grounds to being a union member and to financially supporting the union is entitled to pay to the union only that amount which represents the cost to the union to collectively bargain on his or her behalf.⁸² In other words, the political objector pays out-of-pocket to the union the dues amount minus that portion of dues that do not go toward collective

74. Engle, *supra* note 73 at 399.

75. *Anderson*, 589 F.2d at 402; *McDaniel*, 571 F.2d 338. See also Engle, *supra* note 73 at 399 (noting how the other circuits decided the religious objector cases in a similar manner). The term "free-riders" is used to refer to those "employees who enjoy the benefits of union representation but are unwilling to contribute their share financially." Buchanan Ingersoll, *Sometimes there is a Free Ride*, 11 No. 12 Pennsylvania. Empl. Law Letter 5 (Sept. 2001).

76. Engle, *supra* note 73 at 399; *Tooley*, 648 F.2d at 1243 (citing *Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63, 81 (1977) for the proposition that the religious accommodation provision does not allow preferential treatment of employees by having the employer or union to "incur substantial costs of accommodation for the benefit of those to be accommodated").

77. *Tooley*, 648 F.2d at 1243.

78. *Tooley*, 648 F.2d 1239.

79. *Id.* at 1242.

80. *Id.*

81. *Id.*

82. See *supra* text accompanying notes 52-60.

bargaining, while the religious objector pays out-of-pocket to a charity the entire dues amount.⁸³ For example, suppose union Y requires \$100 per month from its members in dues but only \$60 dollars of those dues goes toward collective bargaining expenses. A, a political objector subject to a union shop agreement between his employer and the union, would be required to pay only sixty dollars to the union.⁸⁴ However, B, a religious objector subject to the same agreement as A, would be required to pay the full one hundred dollars to charity.⁸⁵ This example illustrates the difference between the alternatives available to the religious and political objectors; both A and B object to being members of and financially supporting union Y but because B bases his objection on religious grounds he is out-of-pocket forty dollars every month, or \$480 a year more than his secular counterpart.

This issue has surfaced only twice at the federal district court level and those courts arrived at opposite resolutions. One court held that requiring religious objectors to pay more out-of-pocket was a reasonable accommodation while the other court held that it was not.⁸⁶

A. Madsen v. Associated Chino Teachers

In *Madsen*, the Associated Chino Teachers (ACT) was the exclusive bargaining agent for teachers employed by the Chino Valley School District.⁸⁷ The agreement⁸⁸ between ACT and the school district provided that all teachers must be either members of ACT and thereby pay member dues, or be agency fee payers and pay a fee “equivalent to that portion of the membership dues which is used for representation.”⁸⁹ This representation fee was \$484.74 annually, whereas

83. See *supra* text accompanying notes 73-81.

84. See *supra* text accompanying note 60 (discussing how an agency fee payer who objects to the unions expenditures on other than collective bargaining costs need only pay to the union an amount that reflects the cost of collective bargaining).

85. See *supra* text accompanying note 73 (explaining how the religious objector accommodation under Title VII is to pay to a charity an amount equivalent to union dues).

86. See *Madsen v. Associated Chino Teachers*, 317 F. Supp. 2d 1175 (C.D. Cal. 2004); *O'Brien v. City of Springfield*, 319 F. Supp. 2d 90 (D. Mass. 2003). There was a third and similar case in the United States District Court for the Southern District of Texas. *Christensen v. Continental Master Executive Council/Continental Airline Pilots Ass'n*, No. H-05-0383 (S.D. Tex. filed Feb. 4, 2005). In that case the plaintiffs/employees religiously objected to union membership and requested that they be allowed to divert the amount paid by secular objectors to a mutually agreed upon charity. Instead, the union demanded that these religious objectors actually pay more to a charity than any other employee is required to pay in dues or fees to the union. The union eventually agreed to a consent decree in favor of the plaintiffs/employees. See Consent Decree, *Christensen v. Continental Master Executive Council/Continental Airline Pilots Ass'n*, No. H-05-0383 (S.D. Tex. filed May 19, 2005) (copy on file with the *McGeorge Law Review*).

87. *Madsen*, 317 F. Supp. 2d at 1178.

88. This agreement consisted of a collective bargaining agreement and a Memorandum of Understanding (MOU). *Id.* The pertinent agreement governing the membership and dues paying requirements is contained in the MOU but, for purposes of this discussion, the documents will be referred to as the “agreement.”

89. *Id.* at 1178-79.

the regular membership dues were \$782.00 annually.⁹⁰ The agreement also provided that religious objectors need not join or financially support the union but instead must pay a sum equal to the membership fee to a charity.⁹¹

Ms. Madsen was a teacher in the Chino Valley School District who claimed religious objector status under the aforementioned provision.⁹² However, she claimed that she was required to pay to charity only that amount paid by agency fee payers and not the greater amount paid by regular ACT members.⁹³ According to her, “[i]t is discriminatory to require a religious objector to pay a greater sum than that of other agency fee payers” since “fee payers receive a rebate for that portion of union dues used for ideological and political purposes.”⁹⁴ ACT disagreed however, and Ms. Madsen accordingly filed a Title VII action alleging religious discrimination.⁹⁵

Specifically, Ms. Madsen argued that the discrimination she faced by not being allowed to pay the lesser amount was “disparate treatment” as opposed to a failure by ACT to reasonably accommodate her religious beliefs.⁹⁶ Under this theory, she claimed that she was similarly situated to the agency fee payers but that she, as a religious objector, was being discriminated against by having to pay \$782.00 to charity.⁹⁷ ACT argued that the difference in treatment was legitimate because agency fee payers pay money to the union while religious objectors do not.⁹⁸ In response, Ms. Madsen argued that since the religious objector paid no money at all to the union, it makes no difference to ACT whether the religious objector pays the lesser amount.⁹⁹ She further argued that making the religious objector pay more than the agency fee payer created a scheme whereby an employee who would otherwise be a religious objector would become an agency fee payer in order to pay the lesser amount while at the same time allowing the union to pocket the money that the employee would otherwise donate to charity.¹⁰⁰

The court, however, disagreed with Ms. Madsen for three reasons. First, the court said that her position disregarded the policy against free-riders found in California’s Education Employment Relations Act,¹⁰¹ which guided ACT’s policy pertaining to agency fee and religious objectors.¹⁰² Second, the court said that

90. *Id.* at 1179.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1178.

96. *Id.* at 1180 n.3.

97. *Id.* at 1181.

98. *Id.*

99. *Id.*

100. *Id.*

101. CAL. GOV’T CODE § 3540-3549.3 (West 1995 & Supp. 2005).

102. *Madsen*, 317 F. Supp. 2d at 1181-82.

because religious objectors cannot be required to pay money to the union, the only way to treat agency fee and religious objectors similarly would be to require agency fee payers to pay to a charity.¹⁰³ This, said the court, would have the undesirable result of placing a significant burden on regular ACT members.¹⁰⁴ Thus, requiring agency fee payers to pay only for that which they are receiving in the form of representation is appropriate and ACT appropriately treated differently the different groups of objectors as Ms. Madsen requested.¹⁰⁵

Finally, the court rejected Ms. Madsen's argument on the basis that Title VII does not require a labor union to give some employees preferential treatment to accommodate their religious beliefs.¹⁰⁶ Moreover, the court said that Ms. Madsen was not even discriminated against in comparison to agency fee payers by having to pay the greater amount to charity.¹⁰⁷ As to both these points, the court said that religious objectors already receive a benefit which members and agency fee payers do not receive; namely, using the full equivalent of member dues to support a charity "with which they agree and pay nothing for representational benefits."¹⁰⁸ The court reasoned that no other group had such control over their money and that it was not "discriminatory to attach a small, ancillary burden to the acceptance of this benefit available to no other employees."¹⁰⁹ Consequently, the court said that if religious objectors were allowed to pay only the agency fee amount, they would be receiving more favorable treatment than any other group of employees because they would be maintaining control over their money yet paying nothing for representation and Title VII does not require such favorable treatment.¹¹⁰

B. O'Brien v. City of Springfield

In *O'Brien*, the plaintiff, Mr. O'Brien, was a public school teacher subject to a Massachusetts law which provided that individual teachers could not be compelled to join a teacher's union but could be compelled to pay to a union a "fair share fee" which represented the union's cost to collectively bargain on behalf of the individual teacher.¹¹¹ When Mr. O'Brien learned that his local union, the Springfield Education Association (SEA), was officially affiliated with the Massachusetts Education Association (MEA) and the National Education Association (NEA), he requested that he be allowed to make a charitable substitution in lieu of paying a "fair share fee"¹¹² to the SEA because the NEA and MEA officially promoted condom

103. *Id.* at 1183.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1183-84.

109. *Id.*

110. *Id.*

111. *O'Brien*, 319 F. Supp. 2d at 93; MASS. GEN. LAWS ANN. ch. 150E, § 12 (West 2004).

112. The terms "agency fee" and "fair share fee" refer to the same concept, paying only the "proportional

distribution in schools and pro-choice policies, both of which conflicted with his Roman Catholic beliefs.¹¹³ The SEA refused Mr. O'Brien's requested accommodation and after three unacceptable offers of accommodation by the SEA, Mr. O'Brien sought relief under Title VII.¹¹⁴

Mr. O'Brien's desired religious accommodation was exactly what Ms. Madsen sought: to pay only the "agency fee" or "fair share fee" to charity and not the greater member dues amount.¹¹⁵ In determining what would be a reasonable accommodation under Title VII to Mr. O'Brien's religious beliefs, the court considered the three offers of accommodation previously made by the SEA but found that each suffered from a fatal defect.¹¹⁶ Specifically, each offer of accommodation, though different in some respects, required that Mr. O'Brien pay more than what a non-union member is required to pay; the full union dues amount.¹¹⁷ The court reasoned that because a union may only charge the agency service fee to a non-member, it is not entitled to charge any amount it wishes to a religious objector making a charitable substitution.¹¹⁸ Accordingly, the court concluded, "any demand of a non-union member at the full dues level (as opposed to the agency service fee) is a *per se* unreasonable accommodation."¹¹⁹

V. A BETTER RESULT: A CRITIQUE OF *MADSEN* AND *O'BRIEN*

To understand which court concluded more in line with Title VII as applied to religious accommodation in the union dues context, an analysis of the reasoning behind each decision is necessary.

A. A Critique of Madsen

1. The Court's Opinion is Based on an Incorrect Factual Premise

The *Madsen* court said that religious objectors are treated more favorably than union members and agency fee payers because they are able to "pay to support

share of the costs of collective bargaining and contract administration." *O'Brien*, 319 F. Supp. 2d at 93.

113. *Id.* at 94.

114. *Id.* at 93-97.

115. Compare *id.* at 97 (stating "O'Brien wishes to pay his current and future agency service fees to charity") with *Madsen*, 317 F. Supp. 2d at 1179 (quoting Ms. Madsen in a letter to her union as saying "I am also requesting that I pay the same reduced amount as with other fee payers to a charity of my choice. It is discriminatory to require a religious objector to pay a greater sum than that of other agency fee payers.").

116. *O'Brien*, 319 F. Supp. 2d at 105-08. The three offers of accommodation were: (1) O'Brien paying an amount equal to full union dues to the SEA with the promise that the SEA would not remit any of those funds to the MEA and NEA; (2) O'Brien would be required to pay the full dues amount to the SEA with a promise that it would then remit that amount to a charity; and (3) much like offer (2) the SEA would remit the full dues amount to charity but O'Brien would have to pay other costs not pertinent to this discussion. *Id.*

117. *Id.* at 106 (citing MASS. GEN. LAWS ANN. ch. 150E, § 12, which outlines the amount that a non-union member is legally obligated to pay)

118. *Id.*

119. *Id.* at 106-07.

ideological activities by contributing to *charities of their choice*” and thereby “receive the benefit of supporting ideological causes with which they agree”¹²⁰ while paying nothing for representational benefits.¹²¹ To support the assertion that religious objectors pay to support charities of *their choice*, the court quotes California Government Code section 3546.3.¹²² In quoting section 3546.3, the court says that religious objectors “may be required, in lieu of a service fee, to pay sums equal to such service fee . . . to a . . . charitable fund . . . chosen by the employee.”¹²³ What the court omitted in quoting section 3546.3 is that employees may choose a charity of their choice only if the union failed to designate three charities in the union security agreement, in which case, the employee must choose one of the three charities designated by the union.¹²⁴

The omitted statutory language is material not only because it misleads the reader into believing that religious objectors always are allowed to choose a charity of their choice and therefore allowed to “support[] ideological causes with which they agree,”¹²⁵ but more importantly, as applied to this case, it is simply wrong. The court says that Ms. Madsen was allowed to choose a charity of her choice.¹²⁶ In fact, Ms. Madsen was not allowed to choose a charity of her choice, but had to choose from three charities designated by ACT.¹²⁷ Admittedly, being able to choose among three charities designated by a union is a choice but it is no more a meaningful choice than if the federal government said that all citizens had a choice of which car to purchase so long as the car was a Ford, Chevy or Buick. Thus, the court’s omission of material statutory language and facts is a misapplication of the relevant statutory law and of the facts.

120. *Madsen*, 317 F. Supp. 2d at 1183 (emphasis added).

121. *Id.* at 1184.

122. *Id.* at 1182.

123. *Id.* (quoting CAL. GOV’T CODE § 3546.3) (omission in original).

124. See CAL. GOV’T CODE § 3546.3 (West 1995), reading in pertinent part:

A]ny employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c) (3) of Title 26 of the Internal Revenue Code, *chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee.* (emphasis added).

125. *Madsen*, 317 F. Supp. 2d at 1183.

126. See *id.* at 1184 (discussing how if Ms. Madsen was able to pay only the \$484.74 to a charity of her choice rather than the \$782.00 then she would be receiving preferential treatment).

127. See Chino Valley Unified School District, Memorandum of Understanding at 2 (copy on file with the *McGeorge Law Review*) (listing the American Cancer Society, Mt. Baldy United Way, and the American Heart Association as the charities available to a religious objector within ACT).

2. *The Circuit Courts Have Rejected the Arguments Advanced by the Madsen Court*

The charitable substitution for religious objectors under Title VII has been held valid in every circuit to decide the issue.¹²⁸ *Madsen* is unique among these cases because it is one of two cases litigated in federal court where a religious objector sought to pay to a charity the agency fee amount and not the equivalent of union member dues. However, the arguments advanced by the *Madsen* court in support of its decision are the same arguments that were rejected by the circuit courts when unions argued that the Title VII charitable substitution was invalid.

First, the court said that ACT's membership policy was consistent with the California Education Employment Relations Act (EERA) by reducing the possibility that other union members would view religious objectors as "free-riders."¹²⁹ Along this same line of reasoning, the court went on to say that it was appropriate for ACT to encourage those members who do not religiously object to union membership but who object to some union expenses, to be agency fee payers so as not to make dues paying members bear the burden of paying for the representational benefits of the religious objectors.¹³⁰ In arriving at these conclusions, the court was taking the EERA's policy position that amicable employee-employer relations are best effected by compulsory union membership and that exceptions to union membership should be limited.¹³¹ This policy position raises the question of whether it is appropriate for a federal court to favor a state labor policy over Title VII.

Two circuits say it is not appropriate to do so for two different reasons. First, in *McDaniel*,¹³² the Sixth Circuit compared the national labor law policy with Title VII and concluded, "there has been no national policy of higher priority than the elimination of discrimination in employment practices."¹³³ Thus, in a head-to-head challenge, the policy of Title VII prevails. Second, the Ninth Circuit in *Boeing*¹³⁴ said that federal labor law and Title VII provide: (1) separate and independent rights and (2) Title VII is in no way limited by the NLRA.¹³⁵ If the rights are separate and independent, then it is improper for the *Madsen* court to interpret the EERA policy as a limit on Title VII remedies.

128. *Univ. of Detroit*, 904 F.2d at 335; (withholding and redirecting fees away from offending union); *Boeing*, 833 F.2d at 168-69; *Nottelson*, 643 F.2d at 451; *Tooley*, 648 F.2d at 1242; *McDaniel*, 571 F.2d at 343-44 and 696 F.2d at 36-38; *Anderson*, 589 F.2d at 401-02; *Burns*, 589 F.2d at 406-07; *Cooper*, 533 F.2d at 168-70 (allowing exemption from payment to unions on religious grounds).

129. *Madsen*, 317 F. Supp. 2d at 1182.

130. *Id.* at 1183.

131. *Id.* at 1181-82.

132. *McDaniel*, 571 F.2d 338.

133. *Id.* at 343.

134. *Boeing*, 833 F.2d 165.

135. *Id.* at 169-70 (stating that the "rights created by Title VII are independent and separate of the rights created by the NLRA" and how even though the rights under Title VII may be broader than those of the NLRA, this simply reflects Congress's desire to "more thoroughly eradicate discrimination in the workplace").

Essentially, the *Madsen* court was subtly using the policy of the EERA to read into Title VII a limitation on the rights of religious objectors.¹³⁶ Every federal district court which has overtly done this with respect to the NLRA – by rejecting the charitable substitution at the full dues amount and requiring religious objectors to pay fees to the union – has been reversed on appeal.¹³⁷ With this in mind, had Ms. Madsen asked only to divert the full amount of her union dues to charity and the court maintained that the EERA policy prevented her from doing so, the court most certainly would have been reversed on appeal.¹³⁸ Yet the court does not explain why the same arguments that denied religious objectors the charitable substitution, which the circuit courts later rejected, should now be sound arguments in denying religious objectors a charitable substitution at the agency fee amount.¹³⁹ In sum, the *Madsen* decision is weak precedent because it relied on arguments that failed at the appellate level with respect to a substantially similar issue, yet offered no reason why those previously failed arguments should now be successful.

3. *The Madsen Decision Diverges from Title VII Jurisprudence with Respect to the Union Dues Cases*

In one of its final arguments, the *Madsen* court cites *Trans World Airlines, Inc., v. Hardison*¹⁴⁰ for the proposition that “Title VII does not require an employer to give preferential treatment to some employees to accommodate their religious beliefs.”¹⁴¹ The court found that by allowing Ms. Madsen to pay the agency fee amount to a charity instead of the full dues amount, ACT would be treating her more favorably “than any other group of employees because she would receive the benefits of representation and yet maintain control of the use of her money” by keeping the nearly \$300 difference and supporting a charity

136. See *Madsen*, 317 F. Supp. 2d at 1182-84 (discussing how ACT’s policy conforms with the EERA policy against free-riders while later discussing how Ms. Madsen’s request conflicts with that policy and that Title VII does not support her request).

137. EEOC v. Patrick Henry Educ. Ass’n, 741 F. Supp. 670, 677 (N.D. Ohio 1990), vacated, 909 F.2d 1483 (6th Cir. 1990); EEOC v. Univ. of Detroit, 701 F. Supp. 1326, 1340-41 (E.D. Mich. 1988), rev’d, 904 F.2d 331 (6th Cir. 1990); Burns v. Southern Pac., 11 FEP Cases 1441, 1446 (D. Ariz. 1976) (waiver of membership and union participation requirements a reasonable accommodation), rev’d, 589 F.2d 403 (9th Cir. 1978); McDaniel v. Essex, 14 FEP Cases 807, 808-09 (W.D. Mich. 1976) (eliminating requirement of formal membership and only requiring “financial core” membership is sufficient), rev’d, 571 F.2d 338 (6th Cir. 1978); Cooper v. General Dynamics, 378 F. Supp. 1258, 1262 (N.D. Tex. 1974) (paying for collective bargaining costs does not violate beliefs), rev’d, 533 F.2d 163 (5th Cir. 1976).

138. See *supra* note 137 (listing the cases in which the circuit courts reversed the lower courts’ decision to reject the charitable substitution).

139. See *Madsen*, 317 F. Supp. 2d at 1175-1184 (examining the opinion will reveal a distinct lack of precedent with regard to charitable substitution accommodation for religious objectors).

140. 432 U.S. 63 (1977).

141. *Madsen*, 317 F. Supp. 2d at 1183 (citing *Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63, 84 (1977)).

with which she agreed.¹⁴² Accordingly, the court concluded that “[t]here can be no support under Title VII for Ms. Madsen’s request for preferential treatment, i.e., to pay to a charity an amount lower than the equivalent of ACT membership dues.”¹⁴³

While it is true that *Hardison* stands for the proposition that Title VII does not require employers to give preferential treatment to religious employees,¹⁴⁴ the *Madsen* court’s application of this rule is misplaced in light of circuit precedent with respect to union dues cases.

The courts in most religious accommodation cases have taken the approach that a reasonable accommodation for an employee’s religious beliefs should not discriminate against other employees by treating the religious employee more favorably.¹⁴⁵ For example, granting an employee an accommodation that would allow him to observe the Sabbath, and therefore not work Saturdays, would be an unreasonable accommodation because it would discriminate against more senior employees who would otherwise have the first choice for job shifts and would presumably choose not to work on Saturdays.¹⁴⁶

However, the religious accommodation union dues cases “stand in sharp contrast”¹⁴⁷ to other employment religious accommodation cases.¹⁴⁸ In these cases, the courts have looked not to whether allowing an employee the charitable substitution would discriminate against other employees while treating the religious objector more favorably, but “have focused on the equal burden ‘suffered’ by union members and [religious objectors].”¹⁴⁹ Specifically, even though exempting religious objectors from mandatory union dues is necessarily discriminatory with respect to other dues paying employees, it is not necessarily unreasonable because the religious objectors “suffer the same economic loss as . . . union member employees.”¹⁵⁰

With this distinction between union dues religious accommodation cases and the non-union dues religious accommodation cases in mind, it is easy to see how the *Madsen* court’s analysis is flawed. The *Madsen* court discusses how union members and agency fee payers are burdened by having to pay “higher than

142. *Id.* at 1184.

143. *Id.* at 1183.

144. *Hardison*, 432 U.S. at 81, 84; *see also Tooley*, 648 F.2d at 1243 (stating that “[t]he religious accommodation provisions [of Title VII] do not authorize preferential treatment of employees”); *but see* James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525, 535 (2004) (discussing how “despite the limits announced by the Supreme Court in *Hardison* and *Ansonia*, Title VII still requires employers to provide religion with ‘preferential treatment’ in ‘some circumstances.’”).

145. Engle, *supra* note 73, at 398.

146. *Hardison*, 432 U.S. at 81.

147. Engle, *supra* note 73, at 398.

148. *See generally id.* at 398-406 (distinguishing between the union dues religious accommodation cases and other religious accommodation cases such as cases dealing with accommodations for Sabbath observance, holiday observance wearing beards and religious garb).

149. *Id.* at 398.

150. *Tooley*, 648 F.2d at 1243; *see Engle*, *supra* note 73, at 398.

proportionate representation fees” because religious objectors are able to divert their dues to charity.¹⁵¹ The court also discusses how religious objectors would receive favorable treatment by paying the same amount paid by agency fee payers.¹⁵² In making these discrimination and preferential treatment arguments in support of its decision, the *Madsen* court erred because it failed to see the distinction between the non-union dues religious accommodation cases, where its arguments prevail, and the union dues religious accommodation cases where the focus is on the equal burden suffered by the union members and religious objectors. Thus, by failing to see this distinction, the *Madsen* court has supported its holding on reasoning that is misplaced and without precedent in the union dues context.¹⁵³

4. *The Outcome had the Madsen Court not Diverged from the Appropriate Precedent*

Because the *Madsen* case is a union dues religious accommodation case, the proper inquiry to determine if Ms. Madsen should be allowed to pay the agency fee amount instead of the union member amount, is whether she would suffer the same economic loss as other employees.¹⁵⁴ Admittedly, Ms. Madsen would not suffer the same economic loss as ACT members by diverting only the \$484.74 agency fee amount to charity because the members have to pay \$782.00 to ACT. However, if the “equal burden” comparison is made between the two groups of objectors, religious objectors and agency fee payers, then religious objectors and agency fee payers most certainly share in the same economic loss since both pay \$484.74. Under this analysis, Ms. Madsen’s request to pay the agency fee amount is a reasonable accommodation.

Of course, why should the “equal burden” comparison be made between religious objectors and agency fee payers and not between religious objectors and union members? The reason the former comparison should be made is because of the Supreme Court’s decision in *Ansonia*.¹⁵⁵

In *Ansonia*, the Supreme Court considered whether a school board’s policy of only giving unpaid leave for an employee to observe holy days beyond the paid leave already provided for religious observance was a reasonable accommodation.¹⁵⁶ The Court found that such a policy was reasonable.¹⁵⁷ The

151. *Madsen*, 317 F. Supp. 2d at 1183.

152. *Id.* at 1184.

153. See Engle, *supra* note 73, at 398-99 (explaining how the union dues cases present a sharp contrast to other religious accommodation cases because the courts have rejected the disparate treatment arguments normally advanced in the religious accommodation cases but have instead looked to the “equal burden” suffered by religious objectors and other union members).

154. See *supra* text accompanying notes 147-150.

155. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

156. *Id.* at 70.

157. *Id.*

Court noted, however, that “unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones. ... Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.”¹⁵⁸

Just as the Court in *Ansonia* found that it would be discriminatory and therefore unreasonable to make paid leave available for all but religious purposes,¹⁵⁹ so too is it discriminatory and therefore unreasonable not to allow religious objectors to pay the agency fee amount when it is available to any employee who secularly objects to joining and financially supporting the union.¹⁶⁰ Thus, in doing the “equal burden” comparison, as is appropriate in the union dues cases,¹⁶¹ it is necessary to compare the economic loss suffered by the religious objectors and the agency fee payers.¹⁶² To conclude otherwise and compare the economic loss suffered by the religious objectors and the union members would necessarily “display a discrimination against religious practices”¹⁶³ because the option of paying the agency fee amount would be available to all but religious objectors.¹⁶⁴

B. A Critique of O’Brien

The *O’Brien* court failed to rely on much, if any, union dues religious accommodation precedent in reaching its conclusion.¹⁶⁵ That is not to say, however, that the *O’Brien* court was without authority. In reaching the conclusion that it is unreasonable to charge religious objectors more than the agency fee, the court relied on Massachusetts labor law proscribing unions from charging non-union employees anything more than an agency service fee.¹⁶⁶ According to the court, because religious objectors are non-members, “[a]t most, the union can levy an amount only equal to the agency service fee.”¹⁶⁷ Therefore, “any demand of a non-union member at the full dues level (as opposed to the

158. *Id.* at 71 (emphasis in original).

159. *Id.*

160. *See Madsen*, 317 F. Supp. 2d at 1179 (illustrating how agency fee payers objections may be based on a number of things secular grounds including ideological and political convictions that diverge from those of the union).

161. *See supra* text accompanying notes 147-150.

162. *See supra* text accompanying note 158 (outlining the decision in *Ansonia* where the Court held that it is unreasonable to provide a benefit to all employees except those seeking the benefit for religious purposes).

163. *Ansonia*, 479 U.S. at 71.

164. *See id.* (discussing how it is unreasonable and therefore discriminatory under Title VII to provide paid leave for all but religious purposes).

165. *See O’Brien*, 319 F. Supp. 2d at 106-07 (concluding that “any demand of a non-union member at the full dues level (as opposed to the agency service fee) is a *per se* unreasonable accommodation” without citing precedent in support of this conclusion).

166. *Id.* at 106; MASS. GEN. LAWS ANN. ch. 150E, § 12 (West 2004).

167. *O’Brien*, 319 F. Supp. 2d at 106.

agency service fee) is a *per se* unreasonable accommodation,”¹⁶⁸ presumably because it violates Massachusetts labor law.¹⁶⁹

While the *O’Brien* court interpreted Massachusetts labor law and did not overtly rely on Title VII, its holding nonetheless has a nationwide application. The Massachusetts law in question provides that non-union employees must pay an agency fee to the union.¹⁷⁰ This agency fee amounts only to those costs that are “germane”¹⁷¹ to the union’s collective bargaining expenditures and not costs associated with political or ideological expenses.¹⁷² This law codifies the holding in *Beck*¹⁷³ where the Supreme Court found that non-union employees who were otherwise compelled to pay fees to a union could only be charged for those costs associated with collective bargaining.¹⁷⁴ Moreover, in interpreting the Massachusetts law, the *O’Brien* court reiterated what the Supreme Court said in *Beck*, that unions were not “free to exact dues equivalent from nonmembers in any amount they please”;¹⁷⁵ instead, they may only charge “those fees necessary to finance collective-bargaining activities.”¹⁷⁶

Thus, because the Massachusetts labor law at issue in *O’Brien* codifies the Supreme Court’s decision in *Beck* and because the *O’Brien* court’s reasoning in interpreting Massachusetts law is parallel to that used in *Beck*, its decision is not limited to Massachusetts law but is applicable nationwide.

If, as the Supreme Court said and the *O’Brien* court reiterated,¹⁷⁷ unions are not free to charge nonunion employees (such as agency fee payers) any amount they wish but are limited to charging nonunion employees only for collective bargaining expenses,¹⁷⁸ then it necessarily follows that unions cannot demand that religious objectors (who are also nonunion employees) pay more than the agency fee amount to charity since the unions did not have a right to demand any more from the religious objectors in the first place.¹⁷⁹

168. *Id.* at 106-07 (emphasis in original).

169. *Id.* at 107.

170. MASS. GEN. LAWS ANN. ch. 150E, § 12 (West 2004).

171. *Id.* § 12(4).

172. *Id.* § 12.

173. *Communication Workers of Am. v. Beck*, 487 U.S. 735 (1988).

174. *Id.* at 762-63.

175. *Id.* at 759.

176. *Id.* at 762-63; see *O’Brien*, 319 F. Supp. 2d at 106 (stating that “[a] union . . . is not entitled to charge whatever amount it wishes to someone making a charitable substitution: At most, the union can levy an amount only equal to the agency service fee . . .”).

177. See *supra* text accompanying note 175.

178. See *supra* text accompanying note 176.

179. See *supra* text accompanying note 174.

VI. CONCLUSION

The union dues cases are contentious because unions have a strong and legitimate desire to ensure that employees pay their fair share for the benefit of collective bargaining.¹⁸⁰ On the other hand, both religious and secular objectors have just as strong a desire and right not to support financially an organization when doing so would conflict with their beliefs.¹⁸¹ In settling this conflict, the courts have favored the union objectors over the unions.¹⁸² However, the remedies fashioned by the courts for the religious and secular objectors differ such that the religious objector pays more out-of-pocket than his or her secular counterpart.¹⁸³ In determining whether such a scheme is a reasonable accommodation under Title VII, the two district courts to decide the issue reached opposite conclusions.¹⁸⁴ One court misapplied the applicable precedent and policy to determine that Title VII did not require the union to make the religious objector pay to a charity the same amount paid by a secular objector.¹⁸⁵ The other court used reasoning similar to that used by the Supreme Court to resolve a closely related issue, and concluded that it is an unreasonable accommodation under Title VII to require a religious objector to pay more to a charity than what a secular objector is required to pay to the union.¹⁸⁶ Thus, the correct result appears to be allowing the religious objector to pay only that amount to a charity that his or her secular counterpart pays to the union, not the entire member dues amount.

Moreover, in enacting Title VII, the fact that Congress found “there [to be] no national policy of higher priority than the elimination of discrimination in employment practices,”¹⁸⁷ further bolsters the conclusion that religious objectors should not have to pay more than their secular counterparts because it is necessarily discriminatory to allow employees to pay the agency fee amount for all but religious purposes.¹⁸⁸

180. See Emily C. Chi, *Star Quality and Job Security: The Role of the Performers' Unions in Controlling Access to the Acting Profession*, 18 *CARDOZO ARTS & ENT. L.J.* 1, 44-45 (2000) (discussing the interests of the unions in expanding membership to increase its bargaining power and to prevent other employees from free-riding on those efforts).

181. See *supra* Part III.B.

182. See *supra* Part III.

183. See *supra* text accompanying notes 82-86.

184. See *supra* Part IV.A-B.

185. See *supra* Part V.A.2-3.

186. See *supra* Part V.B.

187. *McDaniel*, 571 F.2d at 343.

188. See *Ansonia*, 479 U.S. 60 (holding it is unreasonable and therefore discriminatory under Title VII to provide paid leave for all but religious purposes).
