UNIONS, UNION MEMBERSHIP, AND UNION SECURITY

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I. Introduction

During the recent observance of the National Labor Relations Act's (NLRA)[1] fiftieth anniversary, American labor leaders were clearly in no mood to celebrate. Instead of extolling the NLRA's historic role in guaranteeing American workers the right to form unions and bargain collectively, they spent much of their time publicly decrying the steady decline in union membership since the heyday of union representation in the early 1950's.[2] However, this public breast-beating was not unjustified, as demonstrated by the decline of union membership in the private sector workforce from thirty-eight percent in 1954 to nineteen percent in 1984.[3]

Accompanying this gradual reduction in the percentage of the unionized workforce has been a less publicized, but perhaps equally important, transformation in the way the courts perceive unions and union membership. By placing the rights of the individual employee in a position of superiority over the often legitimate institutional interests of a union,[4] the courts no longer are

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[1] National Labor Relations Act, 29 U.S.C. §§ 151-159 (1982) [hereinafter NLRA].

[2] For example, Laurence Gold, general counsel for the AFL-CIO, recently offered this bitter remark at a forum sponsored by the Bureau of National Affairs celebrating the NLRA's 50th anniversary: "[d]espite its professed concern over the 'inequality of bargaining power' between workers and employers, the [NLRA] contributes to maintaining that inequality by placing significant restrictions on the economic weapons available to unions but not on the weapons of management." BUREAU OF NATIONAL AFFAIRS, INC., NLRB AT 50: LABOR BOARD AT THE CROSSROADS 8, 30 (1985).

[3] Perhaps more significantly, union members as a proportion of all employees fell from 23% in 1980 to 19.1% in 1984. *See* Adams, *Changing Employment Patterns of Organized Workers*, 108 MONTHLY LAB. REV. 26 (1985). For a discussion of the difficulties plaguing the compilation of these statistics, see Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1, 3 n.4 (1986).

[4] The Supreme Court's recent decision in Pattern Makers' League of N. Am., AFL-CIO, v. NLRB, — U.S. —, 105 S. Ct. 3064 (1985), is a good example of the Court's deference to the rights of the individual worker even when such deference directly obstructs the union's interest in maintaining the solidarity of its members. In *Pattern Makers'*, the Court accepted the NLRB's conclusion that § 8(b)(1)(A) of the NLRA did not allow unions to make rules restricting the right of their members to resign. Consequently, the Court ruled that the Pattern Makers' League of North America, AFL-CIO, had violated § 8(b)(1)(A) when it fined 10 employees for resigning their memberships and returning to work during a strike. Although the union imposed the fines pursuant to a provision in its constitution which stated that "[n]o resignation or withdrawal from an association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears

receptive to the argument that a union must maintain the solidarity[5] of its members in order to represent them adequately in collective bargaining. As a result, the courts have developed a very narrow interpretation of the union as an organization whose primary, if not sole, function is to provide the service of representation in collective bargaining.[6]

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imminent," the Court concluded . . . that the policy of voluntary unionism implicit in § (a)(3) superseded the union's interest in preventing the erosion of its membership during a strike. *Id.* at 3070-71. For a discussion of how restrictions on the right to resign serve the institutional interests of unions, see Note, *A Union's Right to Control Strike-Period Resignations*, 83 COLUM. L. REV. 339, 359-69 (1985). I do not mean to suggest here, however, that the courts, particularly the Supreme Court, have not been entirely apathetic toward the institutional interests of unions. *See, e.g.*, United Steelworkers of Am., AFL-CIO v. Sadlowski, 457 U.S. 102 (1982) (holding that a union rule prohibiting candidates from accepting campaign contributions from nonmembers does not violate 29 U.S.C. § 101(a)(2) (1982) (Labor-Management Reporting and Disclosure Act)).

[5] When defending their disciplinary rules, unions often explain that these rules are necessary to maintain their unity of purpose, or solidarity. On a number of occasions, the courts have accepted this explanation. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (pointing out that national labor policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees"); *see also* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61-64 (1975) (citing *Allis-Chalmers* to explain the policies underlying the principle of majority rule); Machinists Local 1327 v. NLRB (Dalmo Victor II), 725 F.2d 1212, 1217 (9th Cir. 1984) (emphasizing that union members who participate in a strike vote mutually rely on each other to adhere to the requirements of the vote). At the same time, however, the courts have dismissed the goal of union solidarity in order to defend the associational rights of individual employees. *See* Scofield v. NLRB, 394 U.S. 423, 430 (1969) (explaining that a union member must be free to resign his membership in order to avoid a union work rule); *see also* NLRB v. Granite State Joint Board, Textile Workers Union, 409 U.S. 213, 217-18 (1972) (declaring that "[an employee's] section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime"). Recently, the Supreme Court and the NLRB have demonstrated a heightened skepticism towards arguments based on the need to maintain union solidarity. In *Pattern Makers'*, for example, the Supreme Court accepted the Seventh Circuit's conclusion that an employee's right to resign "cannot be overridden by union interests in 'group solidarity and mutual reliance. . . .'" *Pattern Makers'*, 105 S. Ct. at 3076. *See also* International Ass'n of Machinists and Aerospace Workers, Local Lodge 1414 v. Neufeld Porsche-Audi, Inc., 270 NLRB Dec. (CCH) ¶ 16,436 at 28,095 n.12 (1984) (accepting the *Granite State* Court's rejection of the "mutual subscription" theory requiring the preservation of solidarity during a strike).

[6] Of course, I am not suggesting that conceiving of unions as service organizations is at all a novel idea. *See* Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 644 (1959) [hereinafter Cox].

The AFL-CIO's recent decision to offer "associate memberships" to millions

Underlying this conception is the Supreme Court's ever-constricting interpretation of an employee's membership obligations to his union. The starting point for this analysis is the Supreme Court's decision in *Radio Officers v. NLRB*,[7] in which the Court stated that a union can require nothing more than the payment of dues and fees from its members.[8] By defining union membership in this way, the Court has acknowledged that membership has been "whittle[d] down to its financial core."[9] Since the courts and Congress have imposed similar financial obligations on those nonmembers whose union representative enjoys the protections of a security clause,[10] there is consequently no discernible difference between the "financial core" member and the nonmember. Nonetheless, only the full union member—the employee who chooses to take a membership oath, sign a membership card, and attend union meetings—is required to pay union fees and dues and to adhere to union-imposed disciplinary measures.[11]

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of non-union workers, however, seems to reflect the evolving judicial conception of unions as organizations devoted primarily to the provisions of collective bargaining and representation services. As a way of halting the decline in the number of union members, these associate memberships would offer such benefits as supplemental health and life insurance, dental and prescription drug plans, legal services, and even access to a union-sponsored, low-interest credit card. English, *Now It's Unions Offering Fringe Benefits to Workers*, 99 U.S. NEWS AND WORLD REP. 86 (Nov. 11, 1985). Union constitutions permitting only dues-paying members to receive the benefits of union services, however, may complicate the introduction of associate memberships. *Id.*

[7] 347 U.S. 17 (1954).

[8] *Id.* at 41.

[9] *See* NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); *see also* United Stanford Employees, Local 680, Service Employees Int'l Union v. NLRB, 601 F.2d 980 (9th Cir. 1979); NLRB v. Hershey Foods Corp., 513 F.2d 1083, 1087 (9th Cir. 1975).

[10] Under an agency shop agreement, for example, nonmembers must pay union dues and fees as a condition of employment. *See infra* notes 25-26 and accompanying text.

[11] The courts and the NLRB have distinguished full union membership from "financial core" membership. Although "financial core" membership requires nothing more than the payment of union dues and fees, full union membership generally requires an employee to sign a membership card, *see* NLRB v. Delaware-New Jersey Ferry Co., 128 F.2d 130, 134 (3d Cir. 1942), participate in union activities and maintain "good standing," *see* Plumbers' Union v. Borden, 373 U.S. 690, 695 (1963), and take an oath and attend meetings, *see* Union Starch and Refining Co. v. NLRB, 186 F.2d 1008, 1011 (7th Cir. 1951). Full union members are also subject to union-imposed disciplinary measures enforceable in state courts. *See United Stanford Employees*, 601 F.2d at 981; *Hershey Foods Corp.*, 513 F.2d at 1085.

In a number of subsequent decisions under § 2, Eleventh of the Railway Labor Act (RLA),[12] the Court has chipped away at the financial obligations of nonmembers by relieving them of their responsibility to finance activities the Court has characterized as unrelated to the union's role in collective bargaining.[13] In these cases, the Court interpreted § 2, Eleventh, as denying unions organized under the RLA the statutory power to spend the dues and fees of dissenting employees not only on political or ideological activities, but also on any activity unrelated to the union's role as exclusive bargaining agent. The Court reached a similar result in *Abood v. Detroit Board of Education*,[14] a case involving a public employer and a public employee union. In *Abood*, the Court declared that the expenditure of union fees for "ideological activity unrelated to collective bargaining"[15] violated the first amendment rights of any objecting nonmember.

As these cases demonstrate, the Supreme Court has reduced the financial obligations of nonmembers under the RLA and in the public sector to something less than the payment of dues and fees. Because the obligations of both the nonmember and the "financial core" member are virtually identical, there is little reason to doubt that "financial core" members are entitled to a similar reduction of their dues and fees. Consequently, the Supreme Court, perhaps unknowingly, has reshaped the contours of the union-member relationship: just as the commuter must pay a daily service fee for the use of public transportation, the railroad worker or the public employee, as a member of a union, must pay for the service of union representation, but for nothing more.

The Court has not fully embraced this *de minimis* conception of union membership, since it has never directly addressed the question of whether a union organized under the NLRA may legally spend the dues and fees of a dissenting employee on activi-

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[12] 45 U.S.C. § 152, Eleventh (1982). Section 2, Eleventh permits the inclusion of union security clauses in collective bargaining agreements made in the railroad and airline industries. Although it closely tracks the language of section 8(a)(3) of the NLRA, § 2, Eleventh, permits employees to join unions other than the contracting union. *See* T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS 115-16 (1977) [hereinafter HAGGARD].

[13] *See infra* text accompanying notes 68-103.

[14] 431 U.S. 209 (1977).

[15] *Id.* at 236.

ties unrelated to collective bargaining.[16] Nonetheless, this issue will surely be placed before the Court in the near future. As a basis for constructing an acceptable answer, Part One of this article will examine the link between union membership and the union security clauses typically included in most collective bargaining agreements. Part Two will explore in greater detail the collapse of "financial core" membership under the RLA and in the public sector. Part Three will evaluate the appropriateness of applying the Supreme Court's interpretation of the RLA to the NLRA and will determine whether union action under the NLRA should be considered "state action," thereby allowing for the possibility that union expenditures on activities unrelated to collective bargaining may implicate the first amendment. Part Four will conclude that Congress, and not the Supreme Court, should outline the permissible scope of union expenditures under the NLRA.

II. Union Security and Union Membership

A. *The Types of Union Security*

Section 8(a)(3)[17] of the NLRA guarantees unions the right to require union membership as a condition of employment. As the text of section 8(a)(3) indicates, a collective bargaining agreement between an employer and a union may insist on this requirement:

> It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization: *Provided*, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the

[16] A number of lower courts, however, have addressed this question but have reached different conclusions. *Compare, e.g.*, Price v. International Union, United Automobile, Aerospace and Agric. Implement Workers, 620 F. Supp. 1243 (D. Conn. 1985) (NLRA places no restrictions on union expenditures) *with* Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970) (NLRA prohibits the use of a dissenting nonmember's agency shop fees for political purposes).

[17] 29 U.S.C. § 158(a)(3) (1982).

later. . . .[18]

Collective bargaining agreements enforce the membership requirement of section 8(a)(3) in provisions commonly known as union security clauses.[19] Although Congress has prohibited the most burdensome and coercive type of union security clause, the closed shop,[20] it has permitted private sector unions to negotiate the union shop, the agency shop, the maintenance of membership agreement, and the representation fee agreement.

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[18] Section 8(a)(3) also prohibits an employer from discriminating against an employee for the employee's nonmembership in a union for any reason other than the employee's failure "to tender the periodic dues and the initiation fees" that are generally required as a condition for union membership.

[19] The overwhelming majority of private sector collective bargaining agreements contain some type of union security provision. A recent study conducted by the Bureau of Labor Statistics, for example, found that "union security provisions . . . were negotiated in 1,100 (83 percent) of the 1,327 major agreements covered by [the] study." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. 1421-25, MAJOR COLLECTIVE BARGAINING AGREEMENTS: UNION SECURITY AND DUES CHECKOFF PROVISIONS 5 (1982) [hereinafter BLS BULLETIN]. Studies conducted by the Bureau in 1975 and 1978 demonstrate that a similarly high proportion of collective bargaining agreements contained security provisions.

Union security provisions are also common in public sector agreements. These provisions are typically authorized by state statute. Although no state except Vermont legislatively authorized union security before the 1970's, *see* Note, *Public Sector Labor Relations: Union Security Agreements in the Public Sector Since Abood*, 33 S.C.L. REV. 521, 523 (1982) [hereinafter *Union Security Agreements*], today 19 states permit the negotiation of agency shop or service fee agreements by public employee unions. *See* Clark, *A Guide to Changing Court Rulings on Union Security in the Public Sector: A Management Perspective*, 14 J.L. & EDUC. 71, 71 n.1 (1985) [hereinafter Clark]. For a concise treatment of union security in the public sector, see Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1726-34 (1984).

[20] A typical closed shop agreement requires that "[a]n individual . . . be a member of the union as a condition of continued employment with the contracting employer." HAGGARD, *supra* note 12, at 4. By 1946, 7.9 million workers, or one-half of all employees covered by collective bargaining, were subject to the requirements of either a closed shop or a union shop. *See* 64 MONTHLY LAB. REV. 767 (1947). Troubled by the broad powers granted to a union under a closed shop agreement, Congress outlawed these agreements in the Taft-Hartley Amendments. Labor-Management Relations Act, ch. 114, § 8(a)(3), 61 Stat. 140-41 (1947) (codified at 29 U.S.C. § 158).

> Why should a union be able to say to an employee "If you do not join this union we will see that you cannot work in this plant."? They have said to them, "Sooner or later we are going to organize this plant with a closed shop and you will be out." It seems to be perfectly clear that this is a reprehensible practice.

93 CONG. REC. 4142 (1947) (statement of Sen. Taft (R-Ohio)); *see also* A. COX, D. BOK, & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 84 (9th ed. 1981) [hereinafter COX, BOK, & GORMAN].

The union shop clause, the most common form of union security,[21] requires that "[a]n individual who is not a member of the union may be hired but within a specified time after hire must become and remain a member as a condition of continued employment with the contracting employer."[22] Very often a union shop clause will provide for a thirty day "grace period" during which an employee must become a union member. A provision that shortens the "grace period" to less than thirty days is unenforceable.[23] For purposes of classification, some commentators have also recognized a modified union shop clause, the equivalent of the union shop except that certain employee groups may be exempted from the clause's requirements. These groups typically consist of those who had not previously joined the union but were employed at the time the union negotiated the clause.[24]

The second most common form of union security is the agency shop clause.[25] In an agency shop, an employee does not have to become a member of the union. In order to continue his employment, he must simply pay to the union the equivalent of initiation fees and periodic dues.[26] Of course, how "periodic" these dues are assessed varies from union to union.

The third form of union security—the maintenance of membership clause—requires that an employee who is a union member at the time the collective bargaining agreement is signed, or who becomes a member during the term of the agreement, must remain a member until the agreement terminates.[27] Since many maintenance of membership clauses do not compel nonmembers in the bargaining unit to contribute union dues and fees,[28] they are a relatively

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[21] In a recent Bureau of Labor Statistics study, 72% of all the collective bargaining agreements surveyed contained a union shop clause. BLS BULLETIN, *supra* note 19, at 5.

[22] HAGGARD, *supra* note 12, at 4.

[23] 29 U.S.C. § 158(a)(3) (1982). *See also* Zipp, *Rights and Responsibilities of Parties to a Union-Security Agreement*, 33 LAB. L.J. 203, 207 (1982) [hereinafter Zipp].

[24] BLS BULLETIN, *supra* note 19, at 6.

[25] *Id.* at 5.

[26] Under a typical agency shop agreement, "[a]n individual who is not a member of the union may be hired and retained in employment without the necessity of becoming a member of the union, but he is required to tender the equivalent of initiation fees and dues to the union as a condition of continuing employment with the contracting employer." HAGGARD, *supra* note 12, at 4.

[27] *See* BLS BULLETIN, *supra* note 19, at 8.

[28] *Id.*

weak form of union security, and are found in a very small fraction of collective bargaining agreements.[29]

The final, and most narrowly tailored, form of union security is the representation or service fee clause. The representation fee clause normally does not require an employee to become a union member in order to be hired or to retain his employment. Nonetheless, it does require the employee "to tender to the union his *pro rata* share of the costs incurred by the union in performing its statutory function as the exclusive bargaining representative."[30] Since the sum of initiation fees and dues is generally higher than an employee's *pro rata* share of representation costs,[31] the representation fee arrangement is less demanding of the employee than the agency or union shops.

B. *The Union Shop as Agency Shop*

Although categorizing the types of union security clauses in this way is helpful for analytical purposes, it nonetheless overstates the differences between the union and agency shops. In fact, in light of both the legislative history of the Taft-Hartley amendments and judicial interpretations of the scope of union security, it appears that a valid union shop agreement can neither require formal membership in the union nor automatically subject an employee to union discipline. Because the courts have declared that "membership" in a labor organization includes only the obligation to pay dues and initiation fees,[32] an employee bound by a union shop agreement is not required to become a full or formal member of the union either by taking an oath of allegiance to the union, participating in various union activities, or signing a membership card.[33] Since the courts have declared that employees in a union shop must do no more than pay to the union the equivalent of dues and fees, collective bargaining agreements requiring union shops effectively require only agency

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[29] *See id.*

[30] HAGGARD, *supra* note 12, at 4-5.

[31] *See* International Union of the United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus. v. NLRB, 675 F.2d 1257, 1267 (D.C. Cir. 1982).

[32] The two most prominent Supreme Court cases stating that § 8(a)(3) merely requires "financial core" membership are Radio Officers v. NLRB, 347 U.S. 17, 41 (1954), and NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

[33] *See supra* text accompanying note 11.

shops.[34] Consequently, the obligation of a "financial core" member under a union shop is equivalent to the obligation of those employees who have chosen *not* to join the union in an agency shop. Like the "financial core" member in the union and agency shops, these nonmembers must pay "regular" and "periodic" fees to the union representing them in collective bargaining.[35]

C. *Union Security and Union Discipline*

It may seem strange that the union shop and the agency shop are functionally equivalent, particularly since section 8(a)(3) specifically allows an employer to condition employment on *membership* in a union. But the absence of any recognizable distinction between the union shop and the agency shop makes sense if we analyze the right of a union to discipline its members. This analysis involves consideration of two important provisions of the NLRA: section 7 and section 8(b)(1)(A).

Although section 7 grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. . .," it also grants employees the "right to refrain from any or all such activities. . . ."[36] The Supreme Court has

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[34] A number of commentators have noted that there is no meaningful distinction between a union shop and an agency shop. *See* Gould, *Solidarity Forever—or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74, 78 (1980) [hereinafter Gould]; Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME LAW. 61, 61 n.2 (1983) [hereinafter Cantor]; *see also* Haggard, *Right to Work Laws in the Southern States*, 59 N.C.L. REV. 29, 33 n. 20 (1980) (arguing that state right-to-work laws may prohibit agency shop fees "because federal law prohibits anything more stringent [than the agency shop]").

[35] Determining whether a particular union fee is sufficiently "periodic" to be permitted under § 8(a)(3), however, is sometimes a difficult task. Generally, both the National Labor Relations Board and the courts have ruled that assessments temporary in duration and levied for a special purpose not intimately related to the union's role as exclusive bargaining agent cannot be collected under a security clause. *See* Cantor, *supra* note 34, at 63-65.

[36] 29 U.S.C. § 157 (1982). The "right to refrain" provision was first incorporated in the Taft-Hartley Amendments of 1947. Labor-Management Relations Act, ch. 114, § 7, 61 Stat. 140 (codified in scattered sections of 29 U.S.C. (1982)). Congress adopted these amendments in order to protect employees from union coercion. The "right to refrain" provision was specifically designed "to protect members of those unions that . . . treat their members as pawns and exploit them . . . and to assure to the employees whom [Congress subjects] to union control

recently declared that this "right to refrain" also encompasses the "right to resign" from the union itself.[37] Section 8(b)(1)(A) prohibits a union from interfering with the rights guaranteed by section 7. Nevertheless, it explicitly permits a union "to prescribe its own rules with respect to the acquisition or retention of membership. . . ."[38]

Accommodating the union's right to enforce its own internal rules with the employee's section 7 right to refrain from union activities is not an easy task. Nonetheless, it is clear that in an agency shop an employee exercises his section 7 right by choosing either to become a member of the union or to remain a nonmember. By refusing to join the union, the employee avoids union discipline, since the courts have declared that only full members are subject to union-imposed fines.[39] Therefore requiring full membership under a union security clause would circumvent the nonmember's section 7 right to refuse participation in union activities and escape potential union discipline.

Under this analysis, a union shop clause requiring full membership would impermissibly abridge the section 7 rights of those

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some voice in the union's affairs." H.R. REP. No. 245, 80th Cong., 1st Sess. 28 (1947); *see also* COX, BOK, & GORMAN, *supra* note 20, at 83-85.

[37] *See* Pattern Makers' League of N. Am., AFL-CIO v. NLRB, 105 S. Ct. 3064, 3073 (1985); *but see* Brief for the Petitioners at 24-32, Pattern Makers' League of N. Am. v. NLRB, 105 S. Ct. 3064 (1985) (arguing that it is unclear whether "the addition of 'right to refrain' to section 7 is intended to grant union members a right to resign at will in contravention of the union's rules limiting resignations").

[38] 29 U.S.C. § 158(b)(1)(A) (1982). The full text of § 158 (b)(1)(A) reads as follows:

> It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of rights guaranteed in Section 7: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership thereon.

[39] *Pattern Makers'*, 105 S. Ct. at 3071 n.16 (1985); NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 196-97 (1967); *see also* Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022 (1976) [hereinafter Wellington] (which suggests that "[s]o long as a worker pays his union dues as required by a union security clause, his employment rights are theoretically safe from union interference"). The Supreme Court has refrained from evaluating the reasonableness of union discipline. In NLRB v. Boeing Co., 412 U.S. 67, 74 (1973), for example, the Court held that state courts should determine the reasonableness of union fines based on application of "the law of contracts, voluntary associations, or such other principles of law...." Consequently, full union members may have no federal court remedy against an unreasonably large fine. *See* Wellington, at 1033.

employees represented by the union. Just as the section 7 right of a nonmember in an agency shop is meaningful only to the extent that he can refuse union membership, so too is the section 7 right of an employee in a union shop meaningful only to the extent that he can refuse *full* union membership. Otherwise, the employee would be subject to union discipline every time he exercised his section 7 right and refused to participate in union activities. The courts have recognized this possibility and have therefore declared that a union shop clause, like an agency shop clause, cannot require full membership in the union.[40]

Under both an agency shop and a union shop, employees can decide to become full union members. Not surprisingly, courts have not hesitated to uphold the imposition of fines on those full members who have failed to adhere to internal union rules.[41] To support their enforcement of these fines, the courts have emphasized the voluntary and contractual nature of the union-member relationship.[42] Since the disciplined employee

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[40] *See* NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); Radio Officers v. NLRB, 347 U.S. 17, 41 (1954).

[41] *See, e.g., Allis-Chalmers*, 388 U.S. 175 (1976) (holding that the exercise of union disciplinary power over employees who maintained full membership in the union did not constitute "restraint" or "coercion" of a section 7 right within the meaning of section 8(b)(1)(A)). For a brief discussion of the relationship between union discipline and union membership, see Gould, *supra* note 34, at 82-83. Although full members are subject to the whole weight of union discipline, "financial core" members can be disciplined only for the nonpayment of union dues. *See* Local Union No. 167, Progressive Mine Workers v. NLRB, 422 F.2d 538 (7th Cir. 1970), *cert. denied*, 399 U.S. 905 (1970); UAW Local 1756 (Am. Horscht Corp.), 240 NLRB No. 13, 100 L.R.R.M. (BNA) 1208 (1979).

[42] In *Allis-Chalmers*, for example, the Court defended its enforcement of union discipline of several strike-breaking employees on the ground that the employees "had fully participated in the proceedings leading to the strike." 388 U.S. at 196. Nonetheless, many commentators have remarked that the average employee is unaware of the limited scope of his membership. *Mr. Buckley and the Unions: Of Union Discipline and Member Dissidence*, in UNION POWER AND PUBLIC POLICY 45 (1975); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers*, 123 U. PA. L. REV. 897, 914 (1975); *see also* HAGGARD, *supra* note 12, at 70. In fact, the Ninth Circuit recently questioned whether even union representatives would know anything about "the gloss which the NLRB and the courts have superimposed upon the statutes authorizing [union security clauses]." *See* Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, 772 F.2d 530, 533 (9th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3505 (U.S. Jan. 28, 1986). On a previous occasion, the Ninth Circuit concluded that a union had committed an unfair labor practice when it notified bargaining unit employees that a union shop clause required them to fill out the union's membership application card and pledge an oath

had the option of insulating himself from union discipline by choosing "financial core" membership, the courts assume that the employee affirmatively decided to accept the burdens of full membership in the union, perhaps because of a belief that full membership would enable him to be a more effective participant in union affairs.[43]

The Supreme Court's recent decision in *Pattern Makers' League of North America, AFL-CIO v. NLRB*,[44] however, represents a serious challenge to this contractual interpretation of the union-member relationship. In *Pattern Makers'*, the Court declared that any employee, even a full member, may resign from the union at any time and still avoid union discipline.[45] Under the Court's ruling, it seems that a full member fined by his union for participating in an activity prohibited by the union's constitution or by-laws could avoid payment of the fine simply by resigning his membership.[46] Similarly, if the full member had personally voted in favor of a strike and then resigned his membership during the strike, he would still be able to escape union discipline despite his apparent fickleness. In both situations, the employee would have to continue to pay union dues and fees after his resignation,[47] but only if the union's collective bargaining agreement

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of allegiance. United Stanford Employees v. NLRB, 601 F.2d 980 (9th Cir. 1979). As a way of enlightening employees about their membership obligations, Dean Harry H. Wellington has suggested that the NLRB declare a union in violation of § 8(1)(a)(A) "when it disciplines a member who was not previously informed of his right to limit his membership to the payment of dues and initiation fees." Wellington, *supra* note 39, at 1057.

43 When an employee resigns from the union, he "surrenders his right to vote for union offices, to express himself at union meetings, and even participate in determining the amount or use of dues he may be forced to pay under a union security clause." *Id.* at 1046.

44 105 S. Ct. 3064 (1985).

45 *Id.* at 3071.

46 In *Pattern Makers'* the union fined the employees because they had tendered their resignations. The employees did not resign because they had been previously fined for violating another union rule. Although *Pattern Makers'* is unclear as to whether an employee who resigns can avoid paying the fine for this previous violation, a union can certainly not obtain the employee's discharge from employment under section 8(a)(3) as long as he continues to pay union dues.

47 *See* Marlin Rockwell Corp., 114 NLRB 553, 561 (1955) (an employee may resign from a union, protected by a security clause in its collective bargaining agreement, only if the employee continues to tender union dues); *see also* Note, *Restrictions on the Right to Resign: Can a Member's Freedom to "Escape the Union Rule" Be Overcome by Union Boilerplate?*, 42 GEO. WASH. L. REV. 397, 410 (1974) (pointing out that the

contained either an agency or union shop clause.

By allowing a full union member to resign his membership at any time, the Court's decision in *Pattern Makers'* rejects treating the relationship between a union and its full members as one governed by contract law.[48] Consequently, there is very little substance in the distinction between a full member, who in theory joins the union voluntarily and subjects himself to the possibility of union discipline, and a "financial core" member, who must pay union dues and fees. For if the duties of union membership become too rigorous, the full member can simply change his status to that of a "financial core" member without suffering any penalty. Of course, a full member may decide that the benefits of full participation in union affairs outweigh the inconvenience created by union rules and choose not to resign.[49]

By permitting resignations at will, the Court in *Pattern Makers'* also reaffirms, though not explicitly, the equivalency of the union shop and the agency shop. For example, if the Court decided to enforce a union shop clause requiring *full* union membership—as many such clauses do, at least on their face[50]—then

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NLRB in *Marlin Rockwell* recognized an employee's obligation to continue paying union dues after his resignation from the union).

[48] In his dissent in *Pattern Makers'* Justice Blackmun suggests that the law of contracts should govern the relationship between a union and its members:

> Once an employee freely has made the decision to become a member of the union, has agreed not to resign during a strike, and has had the opportunity to participate in the decision to strike, his faithfulness to his promise is simply the quid pro quo for the benefits he has received as a result of his decision to band together with his fellow workers and to join in collective bargaining.

105 S. Ct. at 3083 (Blackmun, J., dissenting). The majority, however, rejected the application of contract law to union membership. *Id.* at 3075 n.26. In a previous dissent in NLRB v. Granite State Joint Bd., Textile Workers Union, 409 U.S. 213 (1972) (Blackmun, J., dissenting), Justice Blackmun also insisted that the resigning employees were *contractually* obliged to adhere to the union rule against strikebreaking, because they had participated in the strike vote and had joined in the decision to impose fines on strike breakers. *Id.* at 220.

[49] The Supreme Court, for example, recently overturned a ruling by the NLRB that a union's decision to affiliate with another union was invalid because only union members, and not all bargaining unit employees, were allowed to vote in the affiliation election. *See* NLRB v. Financial Inst. Employees of Am., Local 1182, — U.S. —, 54 U.S.L.W. 4203, 4208 (1986). As a consequence, the Supreme Court now authorizes unions to exclude nonmembers from participation in affiliation elections. Such an exclusion is therefore one factor that a full member must consider before choosing to resign.

[50] Although some union shop clauses state that they require *full* membership,

the Court would completely eviscerate the right to resign. In this way, the right to resign cannot be reconciled with a requirement that all employees become and remain full union members during the term of a collective bargaining agreement. Consequently, if the courts wish to preserve the right to resign, they cannot enforce an agency shop or union shop clause requiring more than "financial core" membership.

If "financial core" membership is the maximum that any security clause can require, then the reasons commonly offered to justify these clauses must be reevaluated. The decision in *Pattern Makers'* demonstrates that one of these justifications—that union security clauses help to maintain the sense of solidarity among union membership—no longer has a convincing ring to the Court. Instead, the Court seems much more receptive to a second justification for union security: that union security clauses eliminate the free rider, the employee who receives the benefits of union representation without paying for them.[51] The Court has always been receptive to the free rider justification, but the Court's evolving conception of unions as purely service organizations seems to have enhanced the appeal of this justification. In other words, striking down the free-riding employee is perfectly consistent with the idea that the union is the provider of a service and that both union members and nonmembers are the service's consumers. In exchange for its status as exclusive bargaining agent, the union provides the service of representation; in exchange for this service, the member or nonmember provides the union with dues and fees whose payment is required under a union security clause.

D. *Eliminating the Free Rider: The Justification for Union Security Clauses*

As previously noted, the most prominent justification[52] for

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others define membership as "membership in good standing." *See* Keystone Coat, Apron and Towel Supply Co., 121 NLRB 880 (1958) (quoting a "model union security clause, deemed by the [NLRB] to be the maximum permissible in conformity with the policies of the [NLRA]").

[51] *See* Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 416 (1976).

[52] Another justification for union security clauses is that they reduce the militancy of union leaders in collective bargaining. As a result of the steady source of financial support provided by the clauses, union leaders may no longer feel re-

union security clauses is that these clauses eliminate the free rider by compelling all employees in a bargaining unit to pay for the services provided by the union. Underlying this justification are two crucial assumptions: (1) that there is a "need for coercion implicit in attempts to provide collective goods to large groups;"[53] and (2) that unions do indeed benefit all whom they represent in collective bargaining.

The first assumption concedes that the provision of any type of collective service necessarily requires some coercion. Consequently, since a union may represent a large number of employees in collective bargaining, it needs to extract fees from all these employees in order to provide adequately the service of representation. This need is particularly acute in light of the exclusivity principle[54] and the duty of the union to represent *all* employees in its bargaining unit fairly.[55] According to this assumption, any objection to the extracting of fees by the union

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quired to pursue a variety of ambitious bargaining goals in order to increase the union's popularity and to widen its membership. *See* Zipp, *supra* note 23, at 214; Note, *Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining*, WIS. L. REV. 134, 135 (1980) [hereinafter *Union Security in the Public Sector*]; *see also* W. ATHERTON, THEORY OF UNION BARGAINING GOALS 38-39 (1973); International Ass'n of Machinists v. Street, 367 U.S. 740, 750 n.6 (1960). Similarly, union leaders worried about reelection may be even more unyielding at the bargaining table. *See* Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U.L. REV. 13, 99 (1982); Mitchell, *Public Sector Union Security: The Impact of Abood*, 29 LAB. L.J. 697, 699 (1978).

[53] M. OLSEN, THE LOGIC OF COLLECTIVE ACTION 71 (1965). *See also* Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Respondents at 23-25, Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, — U.S. —, 104 S.Ct. 1883 (1984).

[54] Under section 9(a) of the NLRA, a union enjoys the exclusive right to represent the employees in its bargaining unit. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[55] *See* Vaca v. Sipes, 386 U. S. 171, 177 (1967). Labor leaders and the courts have noted how the duty of fair representation burdens the administrative apparatus of a union. *See Hearings on S.3295, Subcommittee of the Senate Committee on Labor and Public Welfare*, 81st Cong., 2d Sess. 283 [hereinafter *Hearings*] ("The Congress has already imposed on us the duty to make these agreements fairly, representing them all. . . . It costs money, and we think it is only fair that that should apply to the costs, which are the dues, fees,and other costs necessary to conduct the affairs of the union.") (statement of George Harrison, president of the Brotherhood of Railway and Steamship Clerks); *see also* International Union of the United Ass'n Journeymen and Apprentices of the Plumbing and Pipefitting Indus. v. NLRB, 675 F.2d 1257, 1264 (D.C. Cir. 1982) (Mikva, J., dissenting) (pointing out that the problem of free riders has become more pronounced as the union's duty of fair representation has expanded).

cannot be sustained. For to denounce union security clauses as coercive and restrictive of individual freedom requires a similar denunciation of all coercion used to support the provision of collective services, including the provision of services by the government.[56] In this way, compulsory union fees are functionally equivalent to taxes: just as the taxpayer cannot object to the financing of particularly controversial government programs with his tax payments, so too the bargaining unit employee should be unable to object to the activities for which his union dues are spent.[57]

The second assumption—that unions benefit all whom they represent—has been repeated on numerous occasions by the courts, Congress, and union leaders, as a way of justifying union security clauses.[58] Proponents of union security point to the higher wages, fringe benefits, and increased employee participation in the workplace that accompany union representation.[59] They claim that fairness requires the costs of these benefits to be shared equally by all who enjoy them.[60] Nonetheless, the assumption that employees enjoy a net economic benefit as a result of collective bargaining has recently been challenged. Although most of these challenges concede that some workers may benefit from union representation, they quickly point out that other workers do not fare so well.[61] To justify their conclusions, they

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56 *See* Cantor, *supra* note 34, at 70-71.

57 *See generally* Schiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980).

58 *See* NLRB v. General Motors, 373 U.S. 734, 740-41 (1963); *see also* International Ass'n of Machinists v. Street, 367 U.S. 740, 760-64 (1961); Railway Employees' Dept. v. Hanson, 351 U.S. 225, 235, 238 (1956); Merrill, *Limitations Upon the Use of Compulsory Union Dues*, 42 J. AIR. L. & COM. 711, 716 (1976) (pointing out that appellate courts have unquestionably accepted the union benefit doctrine) [hereinafter Merrill].

59 For a discussion of the standard arguments made on behalf of union security, see HAGGARD, *supra* note 12, at 272-78.

60 *See* Eissinger, *The Right-to-Work Imbroglio*, 51 NOTRE DAME L. REV. 571, 584 (1975) [hereinafter Eissinger]; Cantor, *Forced Payments to Service Institutions and Ideological Non-Association*, 36 RUT. L. REV. 3, 7 (1983). When responding to the notion that unions benefit their employees, opponents of union security sometimes question whether these employees should receive a *pro rata* reimbursement for the financial losses occasioned by union representation. *See, e.g.*, Bailey & Heldman, *The Right to Work Imbroglio: Another View*, 53 NOTRE DAME L.REV. 163, 169 (1976) [hereinafter Bailey & Heldman].

61 *See, e.g.*, BRADLEY, CONSTITUTIONAL LIMITS TO UNION POWER 20 (explaining that a factual demonstration of the proposition that unions benefit all whom they represent cannot be found in the congressional hearings and debates associated

often cite the wage losses that accompany long strikes and the reduction by the union of pay differentials among individual employees, thereby disadvantaging superior workers.[62]

Although section 14(b) of the NLRA allows each of the individual states to prohibit the adoption of security clauses in collective bargaining agreements,[63] it is clear that Congress enacted section 8(a)(3) primarily because of its fear that an army of free-riding employees would sap the financial strength of the union movement.[64] The courts, which once viewed the enforcement of internal union rules as an important means of maintaining union solidarity, have come to regard the need to impede free riders as the *exclusive* justification for union security. As the Supreme Court recently stated in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*:[65] "We remain convinced that Congress' essen-

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with the adoption of any of the national labor acts). For a libertarian response to the free rider problem, see Machan, *Some Philosophical Aspects of National Labor Policy*, 4 HARV. J. L. PUB. POL'Y 67, 154 (1981); Machan, *Resolving the Problem of Public Goods: Financing Government Without Coercive Measures*, in THE LIBERTARIAN READER (T. Machan, ed. 1981).

62 *See* BRADLEY, CONSTITUTIONAL LIMITS ON UNION POWER 22; Merrill, *supra* note 58, at 716-21; *see also* Bailey & Heldman, *supra* note 60, at 166.

63 Section 14(b) provides: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State of Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (1982). Twenty-one states have now adopted right-to-work laws. ALA. CODE §§ 25-7-30 to -36 (1975); ARIZ. CONST. amend. 34; ARIZ. REV. STAT. ANN. §§ 23-1301 to -1307 (1983); ARK. CONST. amend. 34; ARK. STAT. ANN. §§ 81-201 to -205 (1976); FLA. CONST. art. 1, § 6; FLA. STAT. ANN. § 447-09(11) (West 1981); GA. CODE ANN. §§ 34-6-23 to -28 (1982); Idaho Act of Jan. 31, 1985, H.B.2, 3 Empl. Rel. Wkly. (BNA) 134; IOWA CODE ANN. §§ 73.1-8 (West 1979); KAN. CONST. art. 15 § 12; LA. REV. STAT. ANN. §§ 23:981-987 (West Supp. 1985); MISS. CONST. art. 7, § 198-A; MISS. CODE ANN. § 71-1-47 (1972); NEB. CONST. art. 15, §§ 13-15; NEB. REV. STAT. § 48-217 (1978); NEV. REV. STAT. §§ 613.230-300 (1979); N.C. GEN. STAT. §§ 95-78-.83 (1983); N.D. CENT. CODE §§ 34-01-14, 34-08-02 (1980); TEX. REV. CIV. STAT. ANN. arts. 5156a, 5154g, 5207a (Vernon 1971); UTAH CODE ANN. §§ 34-34-1 to -17 (1974); VA. CODE ANN. §§ 40.1-58 to -69 (1981); WYO STAT. §§ 27-7-108 to 115 (1977). All of these state laws and constitutional provisions prohibit employers from requiring union membership as a condition of employment. Some of these laws also prohibit a union from requiring the payment of agency or service fees. *See* ILL. ANN. STAT. §§ 731-4-5 (West 1979); *see also* VA. CODE ANN. § 40.1-62 (1981); WYO. STAT. § 27-7-111 (1977); *see also Union Secuirty Agreements*, *supra* note 19, at 529.

64 *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 762-64 (1961).

65 104 S. Ct. 1883 (1984), *aff'g in part and rev'g in part*, 685 F.2d 1065 (9th Cir. 1982).

tial justification for authorizing the union shop [and presumably other types of union security] was the desire to eliminate free riders. . . ."[66]

Justifying union security in this way is consistent with the Supreme Court's drastic reduction of the membership obligations of the full union member. Since a full union member can satisfy his obligations to the union by paying dues and fees, imposing greater obligations on the "financial core" member or nonmember would be intellectually and jurisprudentially indefensible. In other words, to justify union security or any union rule on the ground that it gives the union the power to ensure the solidarity of its members is fundamentally at odds with the Supreme Court's conception of union membership. For as the Court has repeatedly noted in recent years, "[t]he only solidarity which the union is entitled to enforce is that which comes from its position as exclusive bargaining agent—*i.e.*, every employee's obligation to pay the costs reasonably related to the union's duties as exclusive bargaining agent."[67]

III. The Erosion of "Financial Core" Membership

The notion that "financial core" membership is the maximum that a union security clause may require is now well-settled. Nonetheless, the Supreme Court has eroded "financial core" membership in a number of decisions affecting public employees and employees organized under the RLA. In these decisions, the Court has applied a curious mix of constitutional analysis and statutory interpretation concluding that unions may not spend the dues and fees of a bargaining unit employee, over the employee's objection, on activities unrelated to the union's role as exclusive bargaining agent. Not surprisingly, these decisions have had the effect of shrinking the financial core of membership by limiting union expenditures to the service costs of representation. The Court has therefore transformed union shop agreements in the public sector and under the RLA into service or representation fee agreements.[68]

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[66] *Id.* at 1892.

[67] Brief for Respondent at 9-10, Pattern Makers' League of N. Am. v. NLRB, 105 S. Ct. 3064 (1985).

[68] *See supra* notes 27-29 and accompanying text.

A. *The Railway Labor Act Decisions*

The erosion of "financial core" membership under the RLA began in *International Association of Machinists v. Street*.[69] In *Street*, a group of railroad employees brought suit to enjoin a union shop agreement made pursuant to § 2, Eleventh of the RLA. The employees complained that their unions had used a substantial part of their initiation fees, dues, and assessments[70] to finance the campaigns of political candidates and "to promote the propagation of political and economic doctrines, concepts, and ideologies"[71] with which they disagreed. The employees specifically indicated to their unions their opposition to these expenditures.

After reviewing the legislative history of § 2, Eleventh, a plurality of four Justices concluded that the RLA allowed the railroad unions to require that all bargaining unit employees "share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes."[72] The Court interpreted § 2, Eleventh, however, as denying unions the power to spend an employee's union shop contribution on political causes to which he had expressed an objection.[73] The Court insisted that requiring the railroad workers to support these causes financially was beyond Congress' intent when it enacted the RLA. Although ultimately reversing the trial court's decision to enjoin the enforcement of the union shop agreement, the Court remanded the case for a consideration of an appropriate remedy for the dissenting employees.[74]

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69 367 U.S. 740 (1961).

70 The only conditions to union membership authorized by § 2, Eleventh are the payment of "periodic dues, initiation fees, and assessments." These assessments do not include the payment of any fines and penalties imposed by the union. *See* Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 104 S. Ct. 1883, 1890 n.8 (1984).

71 *Street*, 367 U.S. 740, 744 (1961).

72 *Id.* at 763-64.

73 *Id.* at 768-69. The Court in *Street* specifically distinguished the use of union shop funds for political purposes, which § 2, Eleventh prohibited over an employee's objection, and their use for nonpolitical purposes. *Id.* at 768-69 & n.17. The Court refused to judge whether the expenditure of union shop funds for purposes other than those necessary to meet the costs of negotiating and administering the collective bargaining agreement would either violate an objecting employee's first amendment rights or § 2, Eleventh itself. *Id.* at 769. The Court answered this question more than 20 years after *Street* in *Ellis*, 104 S. Ct. at 1883 (1984).

74 In particularly inelegant language, the Court did suggest one remedy though:

The most noteworthy feature of the Court's decision in *Street* is its explicit avoidance of the constitutional issue of whether the expenditure of union shop funds for political purposes violated the first amendment rights of the dissenting employees.[75] Although the Georgia courts ruled that the union shop agreement had violated these first amendment rights, the Supreme Court explicitly avoided making a constitutional ruling by interpreting § 2, Eleventh as prohibiting the expenditure of union shop funds for political purposes over an employee's objection.[76] The Court's avoidance of the first amendment issue is particularly unusual, since in *Railway Employees' Department v. Hanson*,[77] a case decided five years before *Street*, the Court confronted the more basic issue of the constitutionality of union shop agreements authorized by § 2, Eleventh.

In *Hanson*, the Court stated that since § 2, Eleventh expressly permits union shop agreements notwithstanding a state right-to-work law,[78] an "agreement made pursuant thereto has the impri-

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"an injunction against expenditure for political purposes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget." *Street*, 367 U.S. at 774-75.

75 In Lathrop v. Donahue, 367 U.S. 820 (1961), decided the same day as *Street*, the Court again avoided the constitutional issue. In *Lathrop*, the plaintiff contended that the Wisconsin State Bar had used his dues to oppose legislation which he favored. Since the payment of the dues was required in order to practice law, the plaintiff claimed that the bar's activities violated his rights of freedom of speech and association. The Court claimed that the constitutional issues were not ripe because it had not been "clearly appraised as to the views of the [plaintiff] on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily extracted from its members are used to support the organization's political activities." *Id.* at 845-46.

76 *See Street*, 367 U.S. at 750. The Court noted that an employee's objection to the use of union shop funds for political purposes is not to be presumed. Instead, the Court insisted that the employee must affirmatively state his objection. *Id.* at 774.

77 351 U.S. 225 (1956).

78 Section 2, Eleventh explicitly mentions that it supersedes any state right-to-work law prohibiting union security agreements. Section 14(b) of the NLRA, on the other hand, authorizes the states to regulate union security, even if this regulation results in the outright prohibition of union security clauses. The Court's discussion in *Hanson* emphasized the RLA's preemption of the right-to-work provision in the Nebraska state constitution when finding state action infringing first amendment interests:

If private rights are being invaded, it is by force of an agreement made

matur of the federal law upon it."[79] Consequently, the Court conceded that there was a sufficient nexus between the government and the union to justify a finding of "state action," even though a private employer and a private sector labor union had voluntarily made the agreement.[80] Although the Court also conceded that a union shop agreement under § 2, Eleventh does indeed interfere with the first amendment interests of bargaining unit employees, the Court concluded that this interference was justified by the government's interest in promoting industrial peace.[81] As a result, the Court in *Hanson* held that § 2, Eleventh did not violate either the first or fifth amendments in its authorization of the union shop.

Unfortunately, the Court simply asserted its conclusion, fail-

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> pursuant to federal law which expressly declares that state law is superseded. *Cf.* Smith v. Allwright, 321 U.S. 649, 663. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the federal statute authorizing unionshop agreement is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

Hanson, 351 U.S. at 232 (citations omitted). Other courts have questioned whether this difference between the NLRA and RLA has any relevance to the issue of whether union action constitutes state action. *See, e.g.*, Beck v. Communications Workers of Am., 776 F.2d 1187, 1206 (4th Cir. 1985), *cert. granted*, 56 U.S. L.W. 3025 (1987) (explaining that an agency shop agreement made in Maryland pursuant to § 8(a)(3) of the NLRA creates an agency shop under § 2, Eleventh of the RLA, since Maryland does not have a state right-to-work statute).

[79] *Hanson*, 351 U.S. at 232. *See generally* Wellington, *The Constitution, the Labor Union and "Governmental Action"*, 70 YALE L.J. 345 (1961) [hereinafter *Governmental Action*].

[80] Of course, the railroad unions vigorously disputed the notion that the adoption of a union shop agreement under § 2, Eleventh constituted "state action." *See, e.g.*, Brief for Appellants at 13-17; Brief of Railway Labor Executives' Association as *amicus curiae* at 8-17, *Hanson*, 351 U.S. 225 (1956). When arguing against a finding of "state action," the unions insisted that since § 2, Eleventh does not require them to adopt security provisions, it can be distinguished from a congressional order mandating union membership.

The AFL-CIO, however, surprisingly conceded in an *amicus curiae* brief that § 2, Eleventh was "state action" and must therefore meet the requirements of due process. Brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* at 5, *Hanson*, 351 U.S. 225 (1956).

[81] *Hanson*, 351 U.S. at 234. *See also* Gaebler, *Union Political Activity of Collective Bargaining: First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C. DAVIS L. REV. 592-93 (1981) [hereinafter Gaebler]. More specifically, the Court in *Hanson* stated that Congress' desire to spread the costs of collective bargaining among all those employees benefiting from it justifies the slight infringement of first amendment rights caused by a union shop agreement.

ing to specify the level of scrutiny it had applied to the union's adoption of the union shop. In reaching this conclusion, however, the Court employed a balancing approach.[82] Under this approach, the Court weighed the first amendment interests of dissenting employees and the government's interest in labor peace. Although it did not make explicit the constitutional standard it used to balance these interests, it does appear that the Court upheld the union shop under a more relaxed standard than strict scrutiny.[83]

In any event, the *Hanson* Court affirmed the position that the regulation of labor relations is a matter of economic policy.[84] Since union shop agreements serve to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation,"[85] their authorization or prohibition by Congress is within the range of constitutional legislative choice. In *Hanson*, however, the Court specifically reserved judgment on the enforceability of a union shop agreement used "as a cover for forcing ideological conformity or other action in contravention of the first or fifth amendments,"[86] since the plaintiffs in the case failed to present any evidence that union shop funds were being diverted for political purposes. In *Street*, of course, such evidence did exist, but the Court decided to skirt the admittedly difficult constitutional issues by finding a violation of § 2, Eleventh instead.[87]

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82 The Court has used a balancing approach in a variety of other first amendment contexts. *See* Elrod v. Burns, 427 U.S. 347, 360-62 (1976); *see also* Buckley v. Valeo, 424 U.S. 1, 10-19 (1976); Pickering v. Board of Educ., 391 U.S. 563 (1968).

83 *See* Cantor, *supra* note 34, at 75-76.

84 *See* K. HANSLOW, D. DUNN & J. ERSTLING, UNION SECURITY IN PUBLIC EMPLOYMENT: OF FREE RIDING AND FREE ASSOCIATION 23, 36-37 (1978).

85 Railway Employees Dep't v. Hanson, 351 U.S. 225, 233 (1956) (citing Texas & N.O.R. Co. v. Railway Clerks, 281 U.S. 548, 570 (1930)).

86 *Id.* at 238.

87 For a critical discussion of the Court's failure to address the constitutional issues in *Street* see Dirksen, *Individual Freedom Versus Compulsory Unionism: A Constitutional Problem*, 15 DE PAUL L. REV. 259, 269-72 (1966). Dirksen suggests that the right-to-work may be a fundamental right protected by the ninth amendment and that the government's interference with this right by authorizing union shop agreements may be unconstitutional. *See also* Brief for Appellants, at 9-14, *Hanson*, 351 U.S. 225 (1956) (arguing that any federal or state statute which conditions the "right to work" on membership in a private organization contravenes the first and fifth amendments).

The disaffected employees in *Hanson* also argued that § 2, Eleventh was an un-

Two years later, in *Railway Clerks v. Allen*,[88] the Court affirmed the interpretation of § 2, Eleventh that it first espoused in *Street*. In *Allen*, the Court once again stated that a union shop agreement under the RLA could not compel employees to contribute dues for political activities they opposed. Elaborating on the remedy suggested in *Street*, the Court recommended that the trial court issue a decree which "would order (1) the refund to [the employee] of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion."[89] The Court in *Allen* also stated that a dissenting employee may simply express his opposition to *any* political expenditures by the union in order to qualify for this remedy.[90] The dissenting employee, in other words, did not have to provide a detailed list of every union expenditure to which he objected.

The Court's most recent decision interpreting § 2, Eleventh of the RLA is *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*.[91] In *Ellis*, a group of employees brought an action challenging the union's expenditure of agency fees. They specifically questioned the legality of charging dissenting employees with the expenses incurred by the union for (1) the national union's quadrennial Grand Lodge convention; (2) litigation not involving the negotiation of agreements or settlement of grievances; (3) union publications; (4) social activities; (5) death benefits for employees; and (6) general organizing efforts.[92] As this list demonstrates, the types of activities objected to by the employees in

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constitutional delegation of legislative power, thereby violating not only the "right to work" but also Article 1, section 1 of the Constitution: "[b]y erecting an 'umbrella' under which a majority of workers may nullify an inalienable right, without state interference, the Federal Government has delegated to private persons the power to effect the final act on the suspension of the right to work." Brief for Appellees at 27, *Hanson*, 351 U.S. 225 (1956).

88 373 U.S. 113 (1963).

89 *Id.* at 122.

90 *Id.* at 118. In *Street*, however, the Court insisted that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." International Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961). *See also supra* note 76.

91 104 S. Ct. 1883 (1984).

92 *Id.* at 1885.

Ellis go beyond the purely "political" or "ideological" activities questioned in *Street* and *Allen*.

Although the Court of Appeals for the Ninth Circuit concluded that the expenditures for each of the six challenged activities strengthened the union and enhanced its ability to negotiate and administer collective bargaining agreements,[93] the Supreme Court concluded that § 2, Eleventh prohibited the use of agency fees to defray the costs of union organizing and certain types of litigation.[94] Before reaching this conclusion, however, the Court constructed a test to determine the permissibility of union expenditures. This test, the Court pointed out, was a refinement of the "germane to collective bargaining" test first outlined in *Allen*. According to the *Ellis* Court, a union expenditure is authorized by § 2, Eleventh if it is "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[95] Applying this test, the Court concluded that union expenditures for the national convention, social activities, and a monthly union magazine were justified because they were related, if not central, to the union's role in collective bargaining.[96]

At the same time, the Court concluded that union organizing expenses were not sufficiently related to collective bargaining

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93 Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 685 F.2d 1065, 1072-75 (9th Cir. 1982). The Court of Appeals pointed out, for example, that organizing other employees in an industry benefits those employees and bargaining units already organized. The court insisted, though without providing any empirical support, that "[s]uccessful organizing efforts . . . can strengthen the union's position at the collective bargaining table immeasurably." *Id.* at 1074.

94 The Court declined, however, to determine whether the Brotherhood could legally compel participation in its death benefits program.

95 *Ellis*, 104 S. Ct. at 1892. The Court of Appeals, on the other hand, applied the *Allen* test, stating "that the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining." *Ellis*, 685 F.2d at 1072. It is doubtful that the application of either of these two tests would necessarily lead to different rules.

96 *Ellis*, 104 S. Ct. at 1892-94. The Supreme Court commented favorably upon the union's existing rebate policy for its monthly magazine. Under this policy, dissenting employees were not charged for any portion of the magazine devoted to political causes. *Id.* at 1893. The Court then noted that since dissenting employees could not be charged for the union's organizing or for certain of its litigation expenses, these employees could not be charged for the expense of reporting these activities in the union's monthly magazine. *Id.* at 1894 n.11.

and were therefore outside the statutory authorization of § 2, Eleventh.[97] The Court specifically stated that there was not a single instance in the legislative history of § 2, Eleventh, which contemplated the use of union shop agreements as a tool for expanding the bargaining power of unions.[98] In addition, the Court emphasized that union expenditures on organizing employees outside the bargaining unit did not fulfill Congress' original intent to solve the free rider problem since these unorganized employees do not directly benefit from union representation.[99] Although this aspect of *Ellis* is highly questionable, the Court did implicitly affirm what it had first stated in *Hanson*: that the government's interest in promoting industrial peace by minimizing the destabilizing influence of the free-riding employee justified the union shop's interference with first amendment interests.

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97 *Id.* at 1894-95. For a critical analysis of the Court's decision that dissenting employees cannot be charged for the expense of organizing, see Henkel & Wood, *Limitations on the Uses of Union Shop Funds After Ellis: What Activities Are "Germane" to Collective Bargaining?*, 35 LAB. L.J. 736, 744-45 (Dec. 1984) [hereinafter Henkle & Wood]. The fact that union leaders have estimated that almost one-third of national union expenditures are for organizing purposes bespeaks the potentially sweeping impact of this aspect of the *Ellis* decision. *See* J. BARBASH, THE PRACTICE OF UNIONISM 37 (1979).

98 Ironically, the Brotherhood argued that there was nothing in the legislative history to support the notion that Congress intended to *foreclose* the use of union-shop dues on organizing. Brief for Respondents at 39, Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 104 S. Ct. 1883 (1984).

99 By focusing on the potential benefits to those employees at whom the organizing efforts are aimed, the Court ignored the benefits that organizing provides to those employees *already represented* by a union. In previous decisions, however, the Court itself has acknowledged that union members benefit economically when other employees are organized. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940); Texas & N.O.R. Co. v. Railway Clerks, 281 U.S. 548, 570 (1930). In American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921), Chief Justice Taft made this observation:

> To render [a labor union] at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.

Naturally, the Brotherhood contended that organizational efforts aimed at expanding its size and financial strength bore a direct relationship to its bargaining power. *See* Brief for Respondents at 36-39, *Ellis*, 104 S. Ct. 1883 (1984). To support this contention, the Brotherhood relied on the sworn testimony of a number of experts, including Willard Wirtz, former Secretary of Labor, and labor economist Lloyd Ulman.

The *Ellis* Court also prohibited the union from charging dissenting employees for the expenses of litigation unrelated to the negotiation or administration of the collective bargaining agreement or to the settlement of grievances and disputes arising in the bargaining unit.[100] More specifically, the Court stated that dissenting employees were not required to help defray the costs of general litigation involving the legality of the airline industry's mutual aid pact[101] and the protection of the rights of airline employees during bankruptcy proceedings. Nor did the Court require dissenting employees to share the costs of the union's defense in suits alleging that the union had violated the non-discrimination provisions of Title VII.

Although the Court in *Ellis* interpreted § 2, Eleventh to allow union shop contributions to finance the union's national convention, social events, and monthly magazine, the Court took the unusual step of analyzing the constitutionality of using the contributions for these three activities.[102] This analysis is superficial at best. The Court began by repeating the *Hanson* ruling that the union shop's interference with the first amendment interests of workers is justified by the government's desire to preserve industrial peace. Although the Court conceded that both the convention and the magazine "have direct communicative content and involve the expression of ideas,"[103] it asserted that there was no additional infringement of first amendment rights not already justified by the government's interest in the union shop itself.

It is not clear why the Court in *Ellis* chose to judge the constitutionality of the union leadership's use of union shop contributions to defray the costs of these activities. In *Ellis*, the Court

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[100] Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883, 1895 (1984).

[101] Under the airline industry's mutual aid pact, a struck carrier receives financial assistance from non-struck carriers. As the Court of Appeals noted, the purpose of the litigation challenging the legality of the pact "was to strengthen the union's ultimate collective bargaining weapon—the ability to engage in an effective strike, which is thwarted considerably if the struck carrier continues to receive substantial income from non-struck carriers." *Ellis*, 685 F.2d at 1073. For this reason, it is difficult to see why this litigation did not pass the test fashioned by the Supreme Court.

[102] *Ellis*, 104 S. Ct. at 1896. *See also* Darko & Knapp, *A Guide to the Changing Court Rulings on Union Security in the Public Sector: A Union Perspective*, 14 J.L. & EDUC. 68 (Jan. 1985) [hereinafter *Union Perspective*].

[103] *Ellis*, 104 S. Ct. at 1896.

had already followed *Street* and *Allen* by interpreting § 2, Eleventh in a way that it was not necessary to make a constitutional determination. Therefore, for the Court then to judge whether these activities implicate the first amendment seems unwarranted and departs from the Court's previous reluctance to adjudicate the constitutionality of union expenditures. The *Ellis* Court may have decided to confront the first amendment issue directly because it had concluded for the first time that § 2, Eleventh *affirmatively authorized* certain specific union expenditures. In *Street* and *Allen*, on the other hand, the Court had interpreted § 2, Eleventh as *prohibiting* the use of union shop contributions for political purposes over an employee's objection.

Another important issue before the *Ellis* Court was the adequacy of the union's rebate program.[104] Under this program, every dissenting employee was entitled to a rebate of his share of union expenditures for political or charitable causes. The Court concluded that the rebate program was a "statutory violation" of § 2, Eleventh, since the union was able to spend the agency fees prior to the determination of the amount of the rebate.[105] As the Court noted: "[b]y exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization."[106]

The Court conceded that it had previously suggested in *Street* that a rebate program would be adequate.[107] Nonetheless, the Court insisted that other alternatives were available to the unions. These alternatives included an advance reduction scheme, like the one recommended by the Court in *Allen*, and the placement of disputed union or agency shop funds in an interest-bearing escrow account.[108] According to the Court, resort to either alternative would be acceptable and would only slightly burden

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104 For a good discussion of how the *Ellis* Court and other courts have resolved this issue, see Clark, *supra* note 19, at 79-84.

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

106 *Id.*

107 *Id.* at 1889. In *Street*, the Court specifically suggested "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." International Ass'n of Machinists v. Street, 367 U.S. 740, 775 (1961).

108 Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883, 1889 (1984). *See also Union Perspective*, *supra* note 102, at 58.

the union's administrative apparatus.[109]

B. *The Mythical Legislative History of Section 2, Eleventh*

What is remarkable about *Street*, *Allen*, and *Ellis* is the Court's persistence in interpreting § 2, Eleventh as denying unions the power to spend money collected from a dissenting employee for political activities. The *Ellis* decision stretched this interpretation even further by extending the prohibition to certain non-political activities and by stating that a union rebate scheme was a "statutory violation." Although it is understandable why the Court wished to avoid passing judgment on the constitutional issues before it, an analysis of the legislative history of § 2, Eleventh suggests that the Court twisted this history to accommodate its own desire to avoid a constitutional decision. Three arguments support this view.

First, and most obviously, there is no explicit limit on union expenditures in the actual language of the statute. While § 2, Eleventh unequivocally states that unions organized under the RLA may enter into agreements permitting them to deduct dues, fees, and assessments from the wages of employees, it makes no attempt to outline the types of activities that these deductions may permissibly finance. Congress did make explicit, however, a single yet important limitation on the power of the union shop: a union cannot legally deny an employee membership in the union for any reason other than the employee's failure to pay the periodic dues, fees, and assessments uniformly required of all members.[110]

Second, the legislative history of neither § 2, Eleventh, nor the RLA, suggests that Congress considered a limit on union ex-

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[109] *Ellis*, 104 S. Ct. at 1889. In this respect, *Ellis* is consistent with the Court's summary affirmance in Threlkeld v. Robbinsdale Fed'n of Teachers, 459 U.S. 802 (1982). This case came before the Court of Appeals from a decision of the Minnesota Supreme Court rejecting a procedural due process challenge to Minnesota's proportionate share statute for public employees. The statute permitted state courts to "determine the validity and proper amount of the [proportionate] share fee" and to "enjoin the use of the disputed fee until the exclusive representative establishes to the satisfaction of the district court the validity and correctness of the fee. . . ." Threlkeld v. Robbinsdale Fed'n of Teachers, 307 Minn. 96, 239 N.W.2d 437 (1976), *vacated and remanded*, 429 U.S. 880, *reinstated on remand*, 316 N.W.2d 551 (1976), *appeal dismissed*, 459 U.S. 802 (1982).

[110] *See* 45 U.S.C. § 152, Eleventh (a)(1982).

penditures advisable.[111] In fact, there are a number of instances in the legislative history that confirm the observation made by the majority in *Street* that Congress "was . . . fully conversant with the long history of intensive involvement of the railroad unions in political activities."[112] This demonstrates that Congress realized that this involvement was likely to continue. For example, during both the Senate and House hearings, Daniel P. Loomis, Chairman of the Association of Western Railways, hoped to persuade Congress not to enact § 2, Eleventh with these comments:

> Without any limitation upon the right of the organizations to levy dues, fees, or assessments all employees could be made subject to unwarranted and unlimited deductions from their pay and would have no voice as to the kind or amount of such dues, fees or assessments. Such funds as were thus raised could be used indiscriminately by the organizations and in many cases solely at the discretion of the officers of the organizations. *We have seen recent instances where funds from one organization have been tendered to another organization for the alleged benefit of some general purpose or for political purposes. . . .* The proposed bill, while disguised as providing for permissible agreements, must be recognized in its true light as an act of Congress making it compulsory upon the railroads to deduct union dues, or fees, or assessments of any nature from the pay of the employee and this is nothing more than an assignment of a portion of his wages without giving an employee any voice as to whether or not he wishes to make such an assignment *or to have his money used for some undeclared purpose in which he has no voice.*[113]

Jacob Aronson, Vice President and General Counsel of the New York Central Railroad Company, echoed these comments when he testified that § 2, Eleventh "does not even limit the number, kind or amount of dues, fees, and assessments that may be required by the particular union."[114] But perhaps most demonstrative of Congress' awareness of the political expenditures commonly made by the rail-

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111 *See Hearings, supra* note 55. *See generally* Note, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 80, 234-35 (1961); Recent Development, *Union Shop Provision of the Railway Labor Act Held Not to Authorize Use of Union Dues for Political Purposes*, 61 COLUM. L. REV. 1513, 1517 (1961).

112 International Ass'n of Machinists v. Street, 367 U.S. 740, 767 (1961).

113 *See Hearings on H.R. 7789 Before the House Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 160 (1950); *see also Hearings, supra* note 55; *see also Street*, 367 U.S. at 767, 785 n.8 (1961).

114 *Hearings, supra* note 55.

road unions were the remarks of Congressman Hoffman of Michigan. Although he ultimately voted to enact § 2, Eleventh, Hoffman nonetheless felt compelled to offer this advice: "[The railroad unions] should quit levying political assessments for the benefit of some union officials and, through the use of this legislation now before us, force their members to meet those assessments—*especially those for political purposes*—as a condition of an opportunity to earn a livelihood."[115] This legislative history proves Congress passed § 2, Eleventh, even though both management groups and members of Congress knew that the statute placed virtually no limits on the scope of union expenditures.

Finally, it is difficult to understand why Congress in 1958 did not refer to § 2, Eleventh,[116] when it voted down a proposal[117] allowing an individual employee to recover any portion of his dues not expended for "collective bargaining purposes."[118] This propo-

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115 96 CONG. REC. 17049-50 (1951). Additional evidence that Congress was aware of the broad range of uses of union assessments is provided by this exchange between George M. Harrison, President of the Brotherhood of Railway and Steamship Clerks, and Senator Donnell:

> *Senator Donnell*: Is there any limit to the amount of the assessment that can be put on by the labor union under this bill?
>
> *Mr. Harrison*: There isn't in the bill, Senator, but all the unions have constitutions that have been in existence, some of them for as long as 100 years, and in my union it is 50 years old.
>
> *Senator Donnell*: So if a strike may be in progress there is nothing in the law that would restrict the assessments which the union could take out of a man's wages without his consent for the strike benefit?
>
> *Mr. Harrison*: Answering your question, Senator Donnell, there is nothing in the bill that in any way restricts what the union might do in the way of assessments, but all the unions have constitutions which control that.

Hearings, *supra* note 55.

116 During the Senate debate on the Potter Amendment, the impact of the *Hanson* decision was discussed. *See* 96 CONG. REC. 11343 (1950).

117 The proposal, in part, read as follows:

> Sec. 503(a). Any member of a labor organization whose employment is conditioned upon such membership may file a petition with the Secretary requesting that moneys paid as membership dues or fees to such labor organization be expended exclusively for collective bargaining purposes or purposes related thereto. Upon the filing of such petition the Secretary shall conduct an investigation to determine whether such moneys are being or have been expended by such labor organization for purposes other than collective bargaining or purposes related thereto. . . .

96 CONG. REC. 11330 (1950).

118 *Id.*

sal, introduced by Senator Potter of Michigan as an amendment to the then pending Labor-Management Reporting and Disclosure Act,[119] would have authorized the Secretary of Labor to bring civil actions on behalf of dissenting employees for the purpose of recovering the portion of their dues and fees spent by a union on activities unrelated to collective bargaining. As Justice Frankfurter suggested in his dissent in *Street*,[120] it is inconceivable that Congress would have considered this proposal if § 2, Eleventh had already attempted to remedy the problems the proposal sought to address.

Thus, it appears that the same legislative history invoked by the Court to support its interpretation of § 2, Eleventh, demonstrates that Congress was fully aware of union political expenditures, but chose neither to authorize nor prohibit them. Not surprisingly, four of the Justices in *Street* rejected the majority's statutory construction, describing it as a "disingenuous evasion"[121] and "without justification."[122]

C. *The Public Sector Decisions*

1. The Supreme Court

Despite these difficulties with the legislative history of § 2, Eleventh, the Court has readily transferred its analysis in the RLA decisions to the public sector. In *Abood v. Detroit Board of Education*,[123] the Court cited its previous judgments in *Hanson* and *Street* to uphold the constitutionality of an agency shop agreement made between the Detroit Federation of Teachers and a public employer, the Detroit Board of Education. This agreement was authorized by an amendment to Michigan's Public Em-

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119 29 U.S.C. § 402(e) (1978).

120 International Ass'n of Machinists v. Street, 367 U.S. 740, 816 (1961) (Frankfurter, J., dissenting).

121 *Id.* at 799.

122 *Id.* at 784. Not surprisingly, the Court has subsequently admitted that in *Street* it had "embraced an interpretation of the Railway Labor Act not without its difficulties." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977). In his dissent in *Street*, Justice Black also stated that he thought the majority had carried "the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme." *Street*, 367 U.S. at 784 (Black, J., dissenting) (quoting Clay v. Sun Insurance Office, 363 U.S. 207, 213 (Black, J., dissenting)). After analyzing the constitutional questions before him, Black concluded that § 2, Eleventh violated the freedom of speech guarantees of the first amendment. *Id.* at 791.

123 431 U.S. 209 (1977).

ployment Relations Act.[124] Although the Court acknowledged that compelling employees to financially support the Federation infringed upon their first amendment interests, it concluded that the same government interests recognized in *Hanson* and *Street* presumptively justified this infringement. To support this conclusion, the Court pointed out that "the desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller."[125] The Court also insisted that the existence of a single bargaining representative—one presumably capable of maintaining itself financially—allowed employees to negotiate collective bargaining agreements free from the conflicting demands of different employee groups.[126] Consequently, the Court applied the *Hanson-Street* rationale to justify the extension of union security agreements to the public sector.[127]

Although the Court in *Abood* upheld the constitutionality of union security agreements generally in the public sector, it also ruled that a state cannot compel public employees[128] to contrib-

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[124] Act of June 14, 1973, Pub. L. No. 25, 1973 Mich. Pub. Acts 60 (codified at *Mich. Comp. Laws Ann.* § 423.210(I) (West Supp. 1982). *See Abood*, 431 U.S. at 214.

[125] *Abood*, 431 U.S. at 224. The Court therefore rejected the contention advanced by the appellants in *Abood* that *Street* and *Allen* require the proscription of union security in the public sector, since public employee bargaining is inherently "political." *See* Brief for Appellants at 62ff; *but see* Brief for Appellees at 23-40; Brief *amicus curiae* for the National Educ. Ass'n at 50-57, *id.* Many commentators, however, have noted the inherently political nature of public sector collective bargaining. *See, e.g.*, Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); Clark, *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. CIN. L. REV. 680 (1975); *see also Union Security in the Public Sector*, *supra* note 52, at 138 (arguing that because of the inherently political nature of the public sector "all but the most obviously partisan political expenditures should fall within the permissible category of collective bargaining, contract administration, or grievance adjustment expenditures").

[126] *See Abood*, 431 U.S. at 222-24.

[127] For a good discussion of how the *Abood* Court embraced the government interests justifying union security agreements under the RLA, see Note, 27 CATH. U.L. REV. 132, 136-44 (1977). As it failed to do in *Hanson*, the Court in *Abood* never explicitly stated whether the agency shop was justified by a compelling state interest or whether its infringement of first amendment interests was justified by some lesser standard.

[128] Since the plaintiffs in *Abood* were nonmembers, the Court's decision could be narrowly construed as allowing only nonmembers a refund from union expenditures on political activities. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 589 n.5 (1978) (arguing that since the agency shop in *Abood* made union membership voluntary, actual members must have consented to the expenditures). Because there is practically no legal distinction between the obligations of a nonmember in an

ute to union political or ideological activities which they consider offensive *and* which are not germane to the union's role in collective bargaining.[129] In this way, the Court appeared to follow its previous decision in *Street*, which exempted dissenting employees organized under the RLA from financing political causes supported by their unions. The *Abood* Court, however, went beyond *Street* by ruling that any expenditure—political or non-political—unrelated to "collective bargaining, contract administration, and grievance adjustment" was unconstitutional if objected to by an employee.[130] It is not surprising, then, that the Court in *Ellis*, decided seven years after *Abood*, relied on *Abood* when it disallowed union expenditures for political activities and for any activity unrelated to the union's role as exclusive bargaining representative.[131]

To remedy the union's first amendment violation, the Court outlined a "practical decree" similar to the one it had suggested in *Allen*. According to this decree, each dissenting employee was entitled to a refund of a portion of his dues equalling the proportion of the union's objectionable expenditures to its total expenditures. The Court also suggested a reduction in the employee's future dues by this amount.[132] Echoing its remarks in *Allen*, the Court stated that dissenting employees were not required to specify each expenditure they opposed. Instead, the Court insisted that these employees may receive a rebate and a reduction in their future dues simply by informing the union of their opposition to any expenditures unrelated to collective

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agency shop and those of a "financial core" member in a union shop as a result of recent decisions by the Supreme Court, it is reasonable to assume that *Abood* applies to both the public sector "financial core" member and the nonmember.

129 *Abood*, 431 U.S. at 236. Consequently, the *Abood* Court "strongly suggested that expenditures for purposes which were political, but also related to collective bargaining, were not rebuttable." *Union Security in the Public Sector supra* note 52, at 141.

130 *Abood*, 431 U.S. at 225-26.

131 *See* Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883, 1892 (1984). In *Ellis*, the Court sought to define the line, left unclear by *Abood*, separating "expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Id* .

132 *Abood*, 431 U.S. at 238. In subsequent decisions, several lower courts have interpreted the remedies suggested in *Abood* differently. *Compare* White Cloud Educ. Ass'n v. Board of Educ., 300 N.W.2d 551 (Mich. Ct. App. 1980) *with* School Comm. of Greenfield v. Greenfield Educ. Ass'n, 431 N.E.2d 180 (Mass. 1980).

bargaining.[133]

In his concurring opinion in *Abood*, Justice Powell, however, was correct in faulting the majority for its reliance on *Hanson* and *Street* when it legalized union security agreements for government employees.[134] Although the *Hanson* Court concluded that union shop agreements under the RLA do not violate the first amendment, it offered virtually no analysis to support this conclusion.[135] In addition, since the *Street* decision rests on the Court's interpretation of the RLA and not on the Constitution, it does little to supply the reasoned constitutional analysis so lacking in *Hanson*.[136] Consequently, it was indeed strange for the *Abood* Court to declare that "[the *Hanson* and *Street* decisions] of the Court appear to require validation of the agency-shop agreement before us."[137]

In a recent but somewhat muddled decision, *Chicago Teachers Union v. Hudson*,[138] the Court went several steps beyond *Abood* by evaluating both the *remedy* developed by the union to protect the first amendment rights of dissenting nonmembers and the union's *procedure* for adjudicating a dissenter's claim that fair share fees were being used for impermissible purposes. Although the court failed to distinguish the remedial from the procedural aspects of the union's efforts, it is useful to make such a distinction for analytical purposes.

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133 *Abood*, 431 U.S. at 238. The Supreme Court recently affirmed this position in Chicago Teachers Union Local No. 1, AFT, AFL-CIO v. Hudson, 54 U.S.L.W. 4231, 4235 n.16 (March 4, 1986).

134 *Abood*, 431 U.S. at 245 (Powell, J., concurring).

135 *Id.* at 246-47. *See also The Supreme Court, 1976 Term*, 91 HARV. L. REV. 180, 190 n.17 (1977) (arguing that the *Hanson* Court's brief first amendment analysis clouds the issue of whether the Court upheld the union shop because it felt no first amendment interests were implicated, or because compelling government interests justified the infringement of these interests); Brief for Appellants at 190-97, *Abood*, 431 U.S. 209 (1977) (suggesting that the Court classify *Hanson* exclusively as a preemption case because of its sparse analysis of the first amendment).

136 *See Abood*, 431 U.S. at 247-48. Powell argued that "[t]he Court's reliance on *Hanson* and *Street* was ambivalent." *Id.* at 254 n.9. He suggested that the two decisions should be read narrowly to hold "that the Railway Labor Act's authorization of voluntary union shop agreements in the private sector does not violate the first amendment." *Id.* at 250 (Powell, J., concurring). Powell criticized the majority in *Abood* for rejecting the distinction made in *Hanson* and *Street* between union expenditures for political and nonpolitical purposes. *Id.* at 254 n.9 (Powell, J., concurring). It is not clear, however, that the *Abood* Court entirely abandoned this distinction.

137 *Id.* at 225-26.

138 *Hudson*, 54 U.S.L.W. 4231 (March 4, 1986).

In constructing an appropriate *remedy*, the Chicago Teachers Union (CTU) first estimated that ninety-five percent of its expenditures in the year immediately preceding the effective date of its agreement with the Chicago Board of Education had been made for activities related to collective bargaining and contract administration.[139] Accordingly, the CTU decided to provide an advance reduction in union dues of five percent for nonmembers, the amount of union dues spent on political, ideological, or charitable activities. If a nonmember objected to this "proportionate share" figure, and if this objection were sustained, the CTU would then provide as a remedy an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the particular dissenting employee.

Relying on *Ellis*, the Court rejected this remedy, insisting that "[a] forced exaction followed by a rebate equal to the amount improperly expended is . . . not a permissible response to the nonunion employees' objections."[140] Although during the litigation the CTU had placed 100% of the dues exacted from the dissenting employees in an escrow account, the Court stood firm in its conclusion that the union remedy was inadequate. Recognizing that the 100% escrow ensured that the dissenter's contributions would not be used for impermissible purposes,[141] the Court nonetheless faulted the CTU for failing to provide an adequate explanation for its advance reduction of dues at the outset. The Court insisted that such an explanation was constitutionally required.[142] The Court also concluded that the placement of some portion of the disputed union fees in an escrow account was a constitutional requirement.[143] Consequently, the Court se-

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[139] *Id.* at 4232. The union security clause in question became effective on September 1, 1982. The Chicago Teachers Union (CTU) arrived at the 95% estimate by analyzing its expenditures during the fiscal year that ended on June 30, 1982. The teachers union actually determined that 95.4% of its expenditures during this year were for activities related to collective bargaining. Nonetheless, the CTU decided to provide an advance reduction of 5% in order to allow a margin for miscalculation. *See* Brief for Petitioners and Respondents at 4, *Hudson*, 54 U.S.L.W. 4231 (March 4, 1986).

[140] *Hudson*, 54 U.S.L.W. at 4235.

[141] *Id.* at 4236.

[142] *Id.* The Court pointed out, for instance, that the CTU should have enlisted the help of a certified public accountant to verify the original breakdown of expenditures. *Id.*

[143] *Id.* The Court declined to hold, however, that a 100% escrow was constitu-

verely restricted the remedial options it had outlined in *Ellis* by declaring that an advance reduction scheme alone was constitutionally deficient.

The Court then evaluated the *procedure* adopted by the CTU for adjudicating a dissenter's claim. Although the Court had failed to resolve this procedural issue in *Ellis*, it had suggested in *Allen* and *Abood* that an internal union procedure might be appropriate.[144] In *Hudson*, however, the Court declared that the CTU's internal procedure was constitutionally inadequate.[145] According to this procedure, the CTU's Executive Committee first reviewed the dissenting employee's objection to the agency fee deduction. This reviewing period could not exceed thirty days. If the Committee rejected the employee's claim, the employee could appeal to the CTU's Executive Board and was entitled to a personal hearing. If this appeal proved unsuccessful, the employee could seek an arbitration before an arbitrator chosen by the CTU's president from a list of fifty arbitrators accredited by the Illinois Board of Education. The CTU also paid the arbitrator's fee.[146]

In holding this procedure unconstitutional, the Court confirmed the observation of the Seventh Circuit that "from start to finish [the procedure] is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees."[147] The Court specifically questioned the arbitrator's impartiality, since he was selected and compensated by the CTU. To remedy this procedural defect, the Court declared that the CTU was constitutionally required to provide dissenting employees with "a reasonably prompt decision by an impartial decisionmaker."[148]

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tionally required: "[o]n the record before us, there is no reason to believe that anything approaching a 100 percent 'cushion' to cover the possibility of mathematical errors would be constitutionally required." *Id.*

144 *See* Abood v. Detroit Bd. of Educ., 431 U.S. 238, 240 & n.41 (1977); Railway Clerks v. Allen, 373 U.S. at 122.

145 *Hudson*, 54 U.S.L.W. at 4235-36.

146 *See id.* at 4232.

147 *Id.* at 4235 (quoting Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1194-95 (1984)).

148 *Id.* The Court specifically rejected the stiffer procedural requirements of the Seventh Circuit. *Id.* at 4236 n.21. According to the Seventh Circuit, these requirements included: "fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the

A subtle, but nonetheless important, aspect of the Court's decision in *Hudson* is its rejection of the claim that non-union public employees have a fourteenth amendment *due process* right to assure that their agency fees support only those union activities related to collective bargaining.[149] The Seventh Circuit accepted this claim, although it had already acknowledged that the agency shop's interference with the first amendment interests of dissenting employees was justified.[150] Despite this acknowledgement, the Seventh Circuit mysteriously insisted that any interference with the first amendment interests of dissenting employees, although justified by a compelling government purpose, "is a deprivation of liberty that is forbidden to the states and their agencies without due process of law."[151]

By accepting this due process argument, the Seventh Circuit suggested that an interest cognizable under the first amendment but outweighed by some countervailing governmental interest nonetheless constitutes part of the "liberty" protected by the due

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usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decisions." *Hudson*, 743 F.2d at 1192-94.

149 *Hudson*, 54 U.S.L.W. at 4234 n.13.

150 The Seventh Circuit, for example, remarked that "[t]he Supreme Court in *Abood* had no occasion to decide whether an agency fee exacted by a public employer on the union's behalf from a dissenting employee deprives the employee of his liberty of association and therefore may not be exacted unless the dissenter is given due process of law." *Hudson*, 743 F.2d at 1193. It is difficult to know if the facts in *Hudson* are in any way distinguishable from those in *Abood*. In *Abood*, the Court suggested that the internal union procedure adopted by the Detroit Federation of Teachers may be sufficient to protect the constitutional rights of dissenting employees. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 240 n.41, 242 (1977). This procedure is very much like the one developed by the Chicago Teachers Union. Consequently, the *Abood* Court's implicit approval of the union procedure belies the Seventh Circuit's remark that the *Abood* Court did not have an opportunity to determine whether each dissenting employee was entitled to due process of law.

151 *Hudson*, 743 F.2d at 1194. When making this statement, the Seventh Circuit added that "[c]ontrary intimations in Railway Employees Dep't v. Hanson, 351 U.S. 225, 236-38 (1956), are no longer authoritative." *Id.* The very passage in *Hanson* that the Seventh Circuit no longer considered authoritative, however, was quoted in *Abood*. *See Abood*, 431 U.S. at 217-19. In *Ellis*, too, the Supreme Court reaffirmed *Hanson*, citing the passages the Seventh Circuit disparaged as establishing that a union security agreement "is justified by the governmental interest in industrial peace." *See* Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 104 S. Ct. 1883, 1896; *see generally* Brief for Petitioners and Respondents at 12 n.7, Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 54 U.S.L.W. 4231 (March 4, 1986).

process clause of the fourteenth amendment. More specifically, the court contended that the union's use of agency fees interferes with the first amendment "liberty" of employees and requires due process, even though it had already conceded that this interference was lawful. This reasoning rests on an expansive interpretation of the term "liberty" in the due process clause. Since such an interpretation "would effectively extend the protection afforded to constitutional *rights* to every inchoate constitutional interest that does *not* rise to the level of a right,"[152] the Supreme Court acted prudently in declining to evaluate the CTU's procedure through the prism of the fourteenth amendment.[153]

2. The Courts of Appeals

In a number of prominent cases decided before *Hudson*, the circuit courts applied the views articulated in *Ellis* to situations involving public sector unions and public employees. These cases center around the same issues addressed by the Supreme Court: (1) the activities for which a public sector union may constitutionally spend the dues and fees of dissenting employees; and (2) the procedures public sector unions must provide to dissenters who challenge these expenditures. When addressing these issues, the lower courts have sought to answer the questions left unresolved by *Abood*, *Ellis*, and the other RLA decisions.

In *Robinson v. New Jersey*,[154] for example, the Third Circuit recited the history of the RLA decisions to conclude that a public sector union may finance certain lobbying activities with representation fees:[155]

> [s]o long as the lobbying activities are pertinent to the duties

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152 Brief for Petitioners and Respondents at 17 n.11, *Hudson*, 54 U.S.L.W. 4231 (March 4, 1986).

153 The Supreme Court has also never decided whether union expenditures on activities unrelated to collective bargaining violate the fifth amendment. *See generally* City of New Orleans v. Dukes, 427 U.S. 297 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

154 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

155 Under § 5.5(c) of New Jersey's Employer-Employee Relations Act, a public sector union, like those involved in *Robinson*, were empowered to use representation fees for "the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the employer." N.J. STAT. ANN. § 34:13A-5.5(c) (West 1980).

> of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication than any other form of union activity that may be financed with representation fees. . . .[156]

In reaching this decision, the Third Circuit specifically relied on *Ellis*, interpreting the RLA to allow unions to compel dissenting employees to pay their share of "the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."[157] The Third Circuit carefully pointed out the inherently political nature of public sector collective bargaining, particularly in the state of New Jersey.[158] Since at least fifteen traditional subjects of bargaining are governed by New Jersey statutes, civil service rules, administrative regulations, or executive orders, the court concluded that a public employee union unable to lobby the state legislature "would be severely handicapped in performing its duties as a bargaining representative."[159] Citing the government's interest in industrial peace, the Third Circuit ruled that expenditures by public employee unions for lobbying activities *related to collective bargaining* did not impermissibly burden the first amendment rights of dissenting employees.[160]

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156 *Robinson*, 741 F.2d at 609.

157 Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. at 1883, 1892 (1984).

158 *See Robinson*, 741 F.2d at 606-09; *see also supra* note 125.

159 Robinson v. New Jersey, 741 F.2d 598, 609 (3d Cir. 1984). To support this conclusion, the Third Circuit referred to the Supreme Court's decision in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). In *Eastex*, the Court defined the "mutual aid or protection" clause of the NLRA's § 7 to include attempts by employees "to improve working conditions through resort to administrative and judicial forums" and through direct appeals to legislators. *Robinson*, 741 F.2d at 607 (quoting *Eastex*, 437 U.S. at 566). The Third Circuit therefore reasoned that a public employee union organized under a state statute should enjoy the same scope of bargaining powers as a private sector union organized under the NLRA. *Id.*

160 *Robinson*, 741 F.2d at 608. Consequently, the Third Circuit distinguished lobbying activities related to collective bargaining from lobbying activities in support of purely political positions, which a union may not finance with the representation fees of an objecting employee. In making this distinction, the Third Circuit relied upon the Supreme Court's decision in Minnesota State Bd. for Community Colleges v. Knight, — U.S. —, 104 S. Ct. 1058 (1984). In *Knight* the Supreme Court affirmed the reasoning of a three-judge district court, *see Knight*, 371 F. Supp. 1, 6 (D. Minn. 1982), which interpreted *Abood* as circumscribing union political activity unrelated to collective bargaining.

In *Champion v. California*,[161] the Ninth Circuit also upheld a public employee union's use of fair share fees for certain lobbying activities. Under California's State Employer-Employee Relations Act,[162] an employee is entitled to a refund of any portion of his fee spent on "activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. . . ."[163] The statute, nonetheless, further provides that this refund should not include the costs of union lobbying aimed at securing benefits in wages, hours, and other conditions of employment.[164] Although conceding that the Supreme Court did not consider the permissibility of lobbying expenditures in *Ellis*, the Ninth Circuit relied on *Ellis* to uphold the statute, noting that the "importance of legislation affecting public employment . . . requires that public employee representatives be given broad authority to protect their members' interests before the legislature."[165]

The circuit courts have also borrowed heavily from *Ellis* when evaluating the remedy developed by a union to protect the first amendment rights of those public employees who object to union expenditures. Despite the Supreme Court's caveat in *Ellis* that it was interpreting the RLA, the Third Circuit in *Robinson*, for example, insisted that *Ellis* had "approved as satisfying the first amendment either an advance reduction of dues or the placing of contested funds in an interest-bearing escrow account."[166] Applying this standard, the Third Circuit upheld the New Jersey public employee statute. Since the statute provided all representation fee payers with an automatic fifteen percent advance reduction from all dues charged to full union members[167] and since each of the unions

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161 738 F.2d 1082 (9th Cir. 1984).

162 CAL. GOV'T. CODE §§ 3515.7, 3515.8 (West 1982).

163 *Id.* § 3518.8. *See also Champion*, 738 F.2d at 1083.

164 CAL. GOV'T CODE § 3515.8 (West 1982).

165 *Champion*, 738 F.2d at 1086. To justify its conclusion, the Ninth Circuit listed the traditional subjects of bargaining in the private sector that are covered by the state statutes of California for public employees. These subjects include comparable worth, notice, and hearing procedures when an employee's salary is changed, and the employer's use of hourly day workers. *Id.*

166 Robinson v. New Jersey, 741 F.2d 598, 612 (3d Cir. 1984).

167 *Id.* Under the New Jersey Employer-Employee Relations Act, this 15% advance reduction is automatically given to those employees who are not members of the public employee union. No request by the employee is necessary. Consequently, there is a 15% difference between the fees paid by nonmembers and the union dues paid by full union members. *Id.* It has been estimated that the propor-

involved in the case had created an escrow system for a portion of the representation fee,[168] the court reasoned that both alternatives suggested in *Ellis* had been established.[169] Nonetheless, in light of *Hudson*'s rejection of a pure advance reduction scheme, it appears that *Robinson* is incorrect in hinting that such a scheme by itself is constitutionally sufficient.[170]

D. *The RLA Decisions, the Public Sector Decisions, and the Rights of Full Union Members*

In *Hanson*, *Street*, *Allen*, and the public sector decisions discussed above, the plaintiffs who challenged the union expenditures were nonmembers—those employees who chose not to become union members but who were nonetheless represented by the union as part of its bargaining unit. As the three previous sections demonstrate, the Supreme Court and the lower courts have acknowledged that a union may not spend the financial contributions of dissenting nonmembers on certain activities. In *Ellis*, the Court apparently applied this reasoning to the "financial core" member by declaring that, at least under the RLA, employees in a union shop cannot be compelled to pay dues to support certain union activities.[171] Although the union shop agreement in *Ellis* required employees to become members of the union within sixty days of the commencement of their employment,[172]

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tion of expenditures for political and ideological activities unrelated to collective bargaining made by unions generally amounts to less than 15% of their total expenditures. *See Union Perspective*, *supra* note 102, at 73.

168 In *Robinson*, three different unions were named as parties: the American Association of University Professors; the National Education Association and its New Jersey affiliates; and the Communications Workers of America, who served as bargaining representative for four units of state employees. *See Robinson*, 741 F.2d at 603. Each of these unions developed different policies regarding the amount of the agency fee that the union would place in escrow. *See id.* at 613-14.

169 *Id.* at 612. In fact, the *Robinson* court contended that all *Ellis* requires is an advance reduction. *Id.* at 612 n.12. It seems, therefore, that the court would have reached the same result even if the unions had not placed the contribution of dissenting employees into escrow accounts.

170 *Id.* at 612.

171 Although the agreement at issue in *Ellis* was a union shop, the Court confused matters by stating that the union shop required employees only to pay an *agency* fee. Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883 (1984). As a consequence, the Court never makes entirely clear whether the aggrieved employees were nonmembers or "financial core" members.

172 *Id.*

these employees had the option of either assuming the obligations of full membership or paying the equivalent of union dues. Since there is virtually no distinction between the obligations of a nonmember and a "financial core" member, the Court's decision in *Ellis* to circumscribe how a union may spend the dues of dissenting "financial core" members is entirely consistent with the constitutional and statutory protections it had previously offered to nonmembers.

Nonetheless, the courts have not confronted the issue of whether a union may permissibly spend the dues of dissenting full union members on activities unrelated to collective bargaining. Since full union membership is no longer a requirement of employment, it can be argued that an employee who chooses to become a full member cannot complain if the union spends his dues on activities that he opposes. Before assuming the obligations of full membership, the employee presumably would know that the union spends the dues of its members on an array of activities, including perhaps financial support of controversial political causes. If the employee, aware of the union's spending policies, still decides to become a full member, it seems that he should be foreclosed from demanding a refund of that portion of his dues spent on activities with which he disagrees.[173]

Of course, a full union member who objected to financing certain union expenditures with his dues could simply resign his membership in protest. The alternative of resignation may be particularly attractive, since a resigning employee need not fear union discipline or loss of employment.[174] As the Supreme Court recently pointed out in *Pattern Makers'*, "no employee can be discharged if he initially joins a union, and subsequently re-

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[173] In an *amicus curiae* brief submitted to the *Ellis* Court, the AFL-CIO made a similar argument: Under an agency shop, employees can choose full membership, "financial core" membership, or nonmembership. Consequently, employees have a choice either to accept or decline the opportunity to exercise a voice in union decisions. If the employee declines this opportunity, he does not have the constitutional right not to be bound by the decisions of the union majority. *See* Brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* for Respondents at 6-7, *Ellis*, 104 S. Ct. 1883. This analysis assumes, however, that contract principles are still relevant to defining the relationship between a union and the individual worker. The validity of this assumption is questionable. *See supra*, text accompanying notes 44-49.

[174] *See* Pattern Makers' League of N. Am., AFL-CIO v. NLRB, 105 S. Ct. 3064, 3071 (1985).

signs."[175] Although *Pattern Makers'* involved an interpretation of the NLRA, it is almost certain that the right to resign will be equally enforceable under the RLA and in the public sector.[176]

The Supreme Court, however, has never answered the question of whether an employee-nonmember, "financial core" member, or full member—may successfully object under the NLRA to the union's use of his dues for activities unrelated to collective bargaining. Consequently, if a full member of an NLRA union resigned his membership in protest against union spending policies, it is unclear whether that employee has the right to demand that the union discontinue the expenditure of his dues for certain objectionable activities. Since the lower courts are divided on the appropriate scope of union expenditures under the NLRA,[177] the Supreme Court is likely to decide this issue in order to resolve the confusion.

The Court may well conclude that a union organized under the NLRA may spend employee dues on any activities the union leadership considers appropriate. Such a conclusion, however, fails to recognize the legitimate limits of group action. It fails, in other words, to answer the question first posed by Justice Douglas in *Street*: why should an employee be compelled to pay for the union's promotion of such causes as birth control, taxes on cosmetics, and the "admission of Red China into the United Nations?"[178] If the Court acknowledged that there are certain activities that by any standard escape the free rider justification

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175 *Id.*

176 Private sector labor law has broad application in the public sector. In *Abood*, for example, the Court cited NLRA case law to support the proposition that individuals lacking traditional protections under federal law may seek redress for arbitrary union conduct by asserting the union's duty of fair representation. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221 n.15 (1977) (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976). *See* Levinson, *After Abood: Public Sector Union Security and the Protection of Individual Public Employee Rights*, 27 AM. U.L. REV. 1, 15-16 (1977).

177 *Compare* Beck v. Communications Workers of Am., 776 F.2d 1187 (4th Cir. 1985), *cert. granted*, 56 U.S. L.W. 3025 (1987) (ruling that § 8(a)(3) allows a union to charge nonmembers only for those expenditures related to the union's duties as exclusive bargaining representative) *with* Price v. International Union, United Automobile, Aerospace and Agric. Implement Workers of Am., 621 F. Supp. 1243 (D. Conn. 1985) (holding that unions organized under the NLRA can spend a portion of dissenting employees' dues and fees to support candidates for political office).

178 International Ass'n of Machinists v. Street, 367 U.S. 740, 777 (1961) (Douglas, J., concurring).

for union security, it must then construct an acceptable approach to protect the interests of the dissenting employee.[179]

Obviously, the two most prominent alternatives available to the Court are those developed in the RLA and public sector decisions. As one alternative, the Court could interpret section 8(a)(3) of the NLRA in the same way it has interpreted § 2, Eleventh of the RLA. Accordingly, the Court could declare that a union's use of the dues payments of dissenting employees on activities unrelated to collective bargaining violates section 8(a)(3). As a second alternative, the Court could adopt the approach of the courts in the public sector decisions by declaring that the enforcement of a union security clause pursuant to section 8(a)(3) constitutes "state action," and that a union's use of dues and fees for impermissible activities violates the first amendment rights of dissenting employees.

IV. The Erosion of "Financial Core" Membership Under the NLRA: Two Possible Alternatives

A. *Framing the Issue*

Although the Supreme Court has not yet eroded "financial core" membership under the NLRA, the D.C. Circuit's recent decision in *United Associations of Journeymen and Apprentices of the Pipefitting Industry v. NLRB*[180] signals that union membership under the NLRA may soon undergo a transformation in meaning similar to that of the public sector under the RLA. This transformation may hinge not only upon the Supreme Court's circumscription of union expenditures but also upon its interpretation of the scope of section 14(b).

In *Pipefitters*, the court confronted the question of whether Mississippi's right-to-work statute[181] could void a representation

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[179] In response to these concerns, Congress has recognized that union expenditures may affront the religious beliefs of a very narrow segment of employees. Section 19 of the NLRA, for example, provides that these employees may pay the equivalent of periodic dues and initiation fees to a nonreligious charity instead of to the union. Qualifying for this exemption, however, is a difficult task. *See* Buckley v. AFTRA, 496 F.2d 305 (2d Cir. 1974), *cert. denied*, 419 U.S. 1093 (1974).

[180] 675 F.2d 1257 (D.C. Cir. 1982).

[181] MISS. CONST. art. VII, § 198-A and MISS. CODE ANN. § 71-1-47 (1973) provide that "[n]o employer shall require any person, as a condition of employment or continuation of employment to pay any dues, fees or other charges of any kind to any labor union or labor organization."

fee provision in a collective bargaining agreement covering the employees of the International Paper Company's plant in Natchez, Mississippi. According to the provision, every non-union employee in the bargaining unit was required to pay a *pro rata* share of the costs incurred by the union for collective bargaining. The court admitted that the representation fee was a less stringent form of union security than the agency shop—since union dues often exceed a proration of representation costs[182]—but nevertheless concluded that the fee was prohibitable under section 14(b).[183] In reaching this conclusion, the court emphasized that the representation fee requirement was one manifestation of the "compulsory unionism" with which Congress was so concerned when it passed the Taft-Hartley Amendments.[184]

In a lengthy dissent, Judge Abner Mikva rejected the major-

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182 United Ass'n of Journeymen and Apprentices of the Pipefitting Industry, 675 F.2d at 1261-62.

183 *Id.* at 1262. To justify this conclusion, the *Pipefitters* majority relied upon the Supreme Court's decision in Retail Clerks Int'l Ass'n, AFL-CIO v. Schermerhorn, 373 U.S. 746 (1963). In *Schermerhorn*, the Court ruled that an agency shop clause was within the scope of § 14(b) and could be prohibited by a state right-to-work law. *Id.* at 751-52. Although the *Pipefitters* court conceded that the representation fee before it was a less stringent form of union security than the agency shop in *Schermerhorn*, it did not consider this difference important. For a discussion approving of the outcome in *Pipefitters*, see Note, *Section 14(b) Extended to Prohibit the Assessment of a Representation Fee Against Nonunion Employees in Right-to-Work States*, 57 TUL. L. REV. 1030, 1044 (1983) [hereinafter *Assessment*]; *see also* Brooks, *The Strengths and Weaknesses of Compulsory Unionism*, 11 N.Y.U. REV. L. & SOC. CHANGE 29, 30 (1982-1983) (claiming that the compulsion of the agency shop is more severe than that of the union shop, because it assumes no participation in union activities by the agency fee payer).

184 *Pipefitters*, 675 F.2d at 1262. *See* Comment, *Plumbers and Pipefitters: The Need to Reinterpret the Scope of Compulsory Unionism*, 33 AM. U.L. REV. 493, 530 (1984). On other occasions, the courts have concluded that certain union practices do not constitute "compulsory unionism" and are therefore outside the ambit of § 14(b). *See* Laborers Int'l Union of N.Am., Local 107 v. Kunco, Inc., 472 F.2d 456 (8th Cir. 1972) (non-discriminatory hiring hall); *see also* SeaPak v. Industrial, Technical and Professional Employees, 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971) (irrevocable dues checkoff authorization agreement). Union hiring halls and dues checkoff authorizations, however, "are concerned with the manner in which dues are paid not the obligation to pay dues" or fees in the first place. *See Assessment*, *supra* note 183, at 1047. The *Pipefitters* court attributed great significance to this distinction. *Pipefitters*, 675 F.2d at 1262. The Supreme Court has also limited the scope of § 14(b) by holding that Texas could not prohibit an agency shop covering seamen who perform most of their work outside the state. Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp., 426 U.S. 407 (1976).

ity opinion's interpretation of the legislative history surrounding section 14(b).[185] More importantly, he contended that under section 14(b) the states could not prohibit representation fee agreements, since the payment of representation fees falls short of the Supreme Court's description of "financial core" membership:[186] "[t]he 'financial core' of membership was defined as the 'payment of fees and dues.' As a matter of the Supreme Court's definition, then, payment of service fees in an amount less than fees and dues *cannot* constitute membership."[187] Since the representation fees did not finance the union's institutional activities but simply paid for the collective bargaining services rendered by the union,[188] Mikva insisted that non-union employees were not victims of the type of "compulsory unionism" which Congress sought to alleviate through the Taft-Hartley Amendments.[189]

Mikva's reasoning would distort the law if the disgruntled employees in *Pipefitters* were represented by a union organized under the RLA or under a state public employee statute. For in the public sector and under the RLA, the Supreme Court has whittled membership beyond its financial core by allowing employees—both members and nonmembers—to finance only those union activities related to collective bargaining. Consequently, the union or agency shop agreement made pursuant to either § 2, Eleventh or an equivalent public sector statute requires only a representation fee, or a fee for the collective bargaining services rendered by the union.

If the Supreme Court exempts those employees organized under the NLRA from financing union activities unrelated to collective bargaining, then Mikva's reasoning would fail again. Since Mikva rests his conclusion on the Supreme Court's narrow definition of union membership as the payment of dues and fees, any further narrowing of the membership obligation by the Court would undermine this conclusion. In other words, if the

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185 Judge Mikva, for example, insisted that "[a]t no time, in the committee reports or during the debates, was it intimated that 'compulsory unionism' meant anything more than the closed shop, union shop, and conceivably contracts requiring maintenance of membership or preferential hiring of union members." *Pipefitters*, 675 F.2d at 1274 (Mikva, J., dissenting).

186 *Id.* at 1279 (Mikva, J., dissenting).

187 *Id.* at 1276 (Mikva, J., dissenting).

188 *Id.* at 1279 (Mikva, J., dissenting).

189 *See id.* at 1275-76 (Mikva, J., dissenting).

Court followed the pattern of its RLA and public sector decisions, then Mikva himself must agree that a state right-to-work law could permissibly prohibit a representation fee agreement made pursuant to section 8(a)(3). The following two sections will explore *how* the Supreme Court may go about this task.

B. *Alternative One: Interpreting Section 8(a)(3) of the NLRA*

In order to avoid adjudicating the constitutionality of section 8(a)(3), the Supreme Court may decide to interpret section 8(a)(3) as prohibiting unions organized under the NLRA from spending the dues payments of dissenting employees on activities unrelated to collective bargaining. As demonstrated earlier, the Court adopted this strategy in *Street*, *Allen*, and *Ellis* as a way of sidestepping the issue of § 2, Eleventh's constitutionality. Accordingly, the Court in these cases looked to the legislative purpose of § 2, Eleventh, to conclude that § 2, Eleventh was primarily the product of Congress' desire to inhibit the free-riding employee and union expenditures unrelated to collective bargaining did not promote the satisfaction of this desire.[190]

It is likely that the Supreme Court may attempt to graft its prior interpretation of the legislative history of § 2, Eleventh onto the legislative history of section 8(a)(3). The Court may also decide after an independent analysis of the legislative history of the NLRA that section 8(a)(3) itself prohibits the compelled financing of union activities unrelated to collective bargaining. In a recent decision, *Beck v. Communications Workers of America*,[191] the Fourth Circuit adopted both approaches to conclude that the Communications Workers of America (CWA)[192] could not permissibly charge nonmembers for a variety of union expenses. These expenses included: (1) the CWA's political expenditures; (2) expenditures on lobbying activities not directly related to the

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[190] In Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 104 S. Ct. 1883 (1984), for example, the Supreme Court cited *Street* when it declared that the RLA "does not authorize a union to spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked." *Id.* at 1887.

[191] 776 F.2d 1187 (4th Cir. 1985).

[192] *Id.* at 1189. The employees sued both the national union and four of its locals. According to the special master appointed by the district court, 40% of the fees collected under the agency shop agreement were allocated to the national union and 60% to the local unions. *Id.* at 1210.

work conditions of employees; (3) community services expenditures; (4) union organizing expenditures; (5) foreign affairs expenditures; (6) expenditures on publicity; and (7) expenditures in support of another union's strike.[193]

To support its conclusion, the *Beck* court suggested that the Supreme Court's interpretation of § 2, Eleventh applies equally to section 8(a)(3).[194] Although recognizing the minor differences in the language of the two statutory provisions,[195] the Fourth Circuit insisted that the similarity in their language was not coincidental, and that "Congress [in phrasing § 2, Eleventh] simply tracked the language of Section 8(a)(3) of the Taft-Hartley Act."[196] Because of the nearly identical nature of the statutory language, the Court in *Beck* concluded that "it is inconceivable that two such statutes would be construed differently,"[197] and that the Supreme Court's construction of § 2, Eleventh in *Street, Allen*, and *Ellis* should be equally valid when interpreting section 8(a)(3). The Fourth Circuit also insisted that the legislative histories of § 2, Eleventh and section 8(a)(3) demonstrated that Congress was motivated by the same considerations when it enacted both statutory provisions. According to the Fourth Circuit, for

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193 *Id.* at 1210-12. Surprisingly, the CWA objected only to the special master's disallowance of expenditures for organizing. *Id.* at 1211. In upholding the disallowance, the Fourth Circuit also intimated that the *Robinson* decision was irreconcilable with *Abood* since it sustained the lobbying expenditures of a public employee union. *Id.* at 1211 n.31. Under a broad reading of *Abood*, however, it seems that certain types of lobbying expenditures are permissible. In fact, Justice Stewart in *Abood* offered some examples of permissible lobbying efforts: lobbying a legislative body for ratification of a public sector labor contract or lobbying for government funding sufficient to meet contractual obligations. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

194 Beck, 776 F.2d 1187, 1196-1201 (4th Cir. 1983). *See also* Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003-04 (9th Cir. 1970); Lykins v. Aluminum Workers Int'l Union, 510 F. Supp. 21, 27 (E.D. Pa. 1980). Several commentators have agreed with this suggestion. *See* Henkel & Wood, *supra* note 97, at 743 (arguing that the "policies behind the *Ellis* standard are just as applicable under the NLRA"); *see also* Eissinger, *supra* note 60, at 590-91 (arguing that it is reasonable to apply the *Street* decision to unions under the jurisdiction of the NLRA); Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 194 (1975) (predicting that the Supreme Court will interpret § 8(a)(3) of the NLRA in the same way that it interpreted § 2, Eleventh of the RLA).

195 *Beck*, 776 F.2d at 1202-03 (4th Cir. 1985). Section 2, Eleventh, for example, allows a union to charge "periodic dues, initiation fees and assessments"; § 8(a)(3) uses the simpler language "periodic dues and the initiation fees."

196 *Id.* at 1197 (quoting HAGGARD, *supra* note 12, at 115).

197 *Beck*, 776 F.2d at 1197-98.

example, the legislative history of the RLA shows that Congress enacted § 2, Eleventh " 'merely to extend to employees and employers subject to the Railway Labor Act rights now possessed by employees and employers under the Taft-Hartley Act in industry generally.' "[198]

The Fourth Circuit's grafting of § 2, Eleventh onto section 8(a)(3), however, is seriously flawed. Since the Supreme Court has distorted the legislative history of § 2, Eleventh, the Fourth Circuit's interpretation of section 8(a)(3) rests on an unsound foundation. Furthermore, the legislative histories of the two provisions are not compatible. Congress enacted § 2, Eleventh after a period of seventeen years during which the RLA had prohibited the union shop in the railroad industry.[199] This prohibition—incorporated in the 1934 amendments to the RLA—came at the urging of the railroad unions which opposed union security primarily for economic reasons.[200] The NLRA, on the other hand, never embraced the policy of the 1934 amendments since it has always authorized the adoption of security provisions. In addition, when Congress finally enacted the Taft-Hartley Amendments in 1947, it sought to eliminate the peculiar evils of the closed shop and not to guarantee to employees the "complete freedom of choice . . . to join or not to join a union."[201] However, it was this "freedom of choice" that the *Street* Court claimed was at the heart of the 1934 amendments. Consequently, one should heed the words of Jacob Aronson, who, during the Senate hearings on § 2, Eleventh, unequivocally declared that "[§ 2,

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198 *Id.* at 1197 (quoting 96 CONG. REC. 15, 737 (1950) statement of Sen. Hill). To justify the grafting of § 2, Eleventh onto § 8(a)(3), the Fourth Circuit emphasized that since the *Abood* Court had relied on *Street*, *Allen*, and *Ellis* when construing Michigan's Public Employment Relations Act, these decisions should be even more relevant to its interpretation of a similarly phrased federal statutes. *Beck*, 776 F.2d at 1200. *See also* Lykins v. Aluminum Workers Int'l Union, 510 F. Supp. 21, 27 (E.D. Pa. 1980) (insisting that the Supreme Court's reasoning in *Abood* applies to unions organized under the NLRA). The dissent in *Beck*, however, correctly points out that the *Street* decision fails to look to the NLRA for guidance. *Beck*, 776 F.2d at 1220 (Winter, C.J., dissenting). This failure is particularly striking since the majority opinion claims that the legislative purposes behind the two statutes are identical.

199 For a good survey of the history of the RLA, see *Hearings*, *supra* note 55, at 166-71.

200 Through the 1934 amendments to the RLA, the railroad unions sought specifically to rid the industry of the many company unions that were then operating under closed-shop conditions.

201 International Ass'n of Machinists v. Street, 367 U.S. 740, 750 (1961).

Eleventh] . . . does not pattern itself after the union-shop provision of the Taft-Hartley law."[202]

The Fourth Circuit also claimed that the legislative history of section 8(a)(3), when surveyed alone, convincingly demonstrated Congress' intent to prohibit unions from spending the fees and dues of dissenting employees on certain activities.[203] Unfortunately, the court produced little evidence to support its claim,[204] simply asserting that the legislative history of section 8(a)(3) evinced Congress' desire to ensure that the costs of union representation were spread among all employees within a particular bargaining unit. This legislative history, however, shows that Congress intended to be very cautious in supervising the use of union shop dues and fees under the NLRA. Contrary to the bold assertions of the Fourth Circuit, scrutiny of the legislative history discloses that Congress intended neither to ban all union political expenditures nor to provide a detailed list of the activities on which a union may and may not spend union shop dues.[205]

During the Congressional hearings on the Taft-Hartley Amendments, the spending practices of unions were amply considered.[206] In the initial House Report on the Amendments, a number of proposals were submitted to enable Congress to supervise these practices. For example, the Report proposed to exempt union members from any *unreasonable financial demand* of this union.[207] It also proposed a twenty-five dollar cap on initiation fees.[208] The Senate Conference Committee, however, rejected

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202 *Hearings*, *supra* note 55, at 182. The legislative history of § 2, Eleventh contains a number of instances highlighting the differences between the RLA and the NLRA. *See id.* at 173.

203 *See* Beck v. Communications Workers of Am., 776 F.2d 1187, 1197 (4th Cir. 1985), *cert. granted*, 50 U.S.L.W. 3025 (1987).

204 The *Beck* court made just two references to the legislative history of § 8(a)(3): S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947) and 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 413, 1422 (1948) (statements of Sen. Taft).

205 Professor Norman Cantor has written a good summary of the legislative history of the Taft-Hartley Amendments. *See* Cantor, *supra* note 34, at 72-75. According to Cantor, Congress placed few restrictions on the permissible scope of union expenditures.

206 *See, e.g.*, *Hearings on S.55 and S.J. Res. 22 Before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess. 801, 897 (1947).

207 *See* H.R. 3020, 80th Cong., 1st Sess. § 7(b) (1947).

208 *See id.* § 8(c)(2).

these proposals.[209] According to this committee, the "language [in section 8(a)(3)] which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees" adequately safeguarded the rights of union members.[210]

As a result, the final version of the Amendments watered down much of what had been originally proposed in the House Report.[211] Although one surviving provision, section 8(b)(5),[212] made it an unfair labor practice for a union to charge an excessive or discriminatory initiation fee, its restrictions are far less severe than the original House proposal prohibiting unions from making any unreasonable financial demand. Similarly, section 304, as an amendment to the Federal Corrupt Practices Act, only intended to prohibit union contributions to federal political campaigns and not union expenditures on all political activities.[213] In fact, when Congress defined the permissible scope of union security as an amount equal to union dues, it was well aware of the labor movement's traditional use of political avenues to secure workers' benefits. Several Congressmen, for example, pointed out during the Taft-Hartley debates that the AFL-CIO was spending a considerable amount of money in an effort to defeat the legislation.[214]

Finally, the Senate's rejection in 1958 of the Potter Amendment, which would have explicitly limited the use of dues col-

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209 *See* Beck v. Communications Workers of Am., 776 F.2d 1187, 1217 (4th Cir. 1985), *cert. granted*, 56 U.S.L.W. 3025 (1987).

210 *See* 93 CONG. REC. 6662 (1947) (statement of Sen. Taft).

211 For example, the House passed a provision making it an unfair labor practice for a union to discipline a worker for having supported a political candidate or referendum issue in violation of union instructions. *See* H.R. 3020, 80th Cong., 1st Sess. § 8(c)(5) (1947). The provision was prompted by the testimony of movie director, Cecil B. DeMille, who had been expelled from a union for his refusal to pay a union assessment levied to gather funds to oppose a state referendum on a right-to-work law. *See Hearings*, *supra* note 55, at 796-808 (1947) (statement of Cecil B. DeMille). The provision, however, did not survive a joint House-Senate conference committee. *See* Cantor, *supra* note 34, at 74.

212 29 U.S.C. § 158(b)(5) (1982).

213 *See* H.R. 3020, 80th Cong., 1st Sess. § 304 (1947). Congress repealed § 304 in 1976 and replaced it with the Federal Election Campaign Act, 2 U.S.C. § 441(b), which also prohibits unions from spending dues payments on federal elections. 2 U.S.C. § 441(b)(3) (1982).

214 *See* 2 NLRB, LEGISLATIVE HISTORY THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1424, 1529 (1948).

lected under a union security agreement to defray the expenses of collective bargaining,[215] undermines the assertions of the Fourth Circuit. By rejecting the amendment, the Senate seems implicitly to have indicated its belief that Taft-Hartley, in its original form, did not place such restrictions upon the use of dues money.[216]

In light of these considerations, the Supreme Court should not delimit the types of activities on which a union organized under the NLRA may or may not spend the dues payments of dissenting employees by grafting its dubious interpretation of § 2, Eleventh onto section 8(a)(3). Nor should the Court distort the legislative history of section 8(a)(3) by claiming that section 8(a)(3) itself prohibits certain union expenditures. To adopt either approach would make the cure worse than the disease. The following section will examine another potential cure: constitutionalizing security clauses adopted under section 8(a)(3).

C. *Alternative Two: Union Action as State Action*

The Constitution protects individual rights only from the actions of either state governments or the federal government. Consequently, when a litigant claims that his rights have been constitutionally violated, he must first prove that his injury results from governmental or state action. Since "the Supreme Court has not succeeded in developing a body of state action 'doctrine,' "[217] there is no clear-cut test of state action that the courts can readily apply to determine whether the government is responsible for an alleged constitutional violation. Instead, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State be attributed its true significance."[218]

In their efforts to outline the permissible scope of union expenditures under the NLRA, several lower courts have conducted this kind of factual inquiry and have found the presence of state action in a union's adoption and enforcement of a secur-

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215 *See supra* text accompanying notes 116-120.

216 *See* Note, *The National Labor Relations Board's Role in Examining the Use of Union Dues Collected Pursuant to a Union Security Agreement*, 67 MICH. L. REV. 152, 159 (1968).

217 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1148-49 (1978).

218 Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

ity agreement under section 8(a)(3).[219] Accordingly, the courts have ruled that expenditures on a number of activities not related to collective bargaining violate the first amendment rights of dissenting employees.[220] To justify their finding of a constitutional violation, these courts have proffered two main arguments: (1) since both *Hanson* and *Abood* determined that state action was present in the operation of security clauses, state action must be similarly present when a union adopts and enforces a security clause pursuant to section 8(a)(3); and (2) according to the Supreme Court decisions outlining the various components of the state action "doctrine," there is a sufficient nexus between Congress' authorization of union security clauses in section 8(a)(3) and their adoption by private employers and private sector unions. Each of these arguments will be analyzed separately below.

1. The Unpersuasive Logic of Hanson and Abood

Several courts have relied on the Supreme Court's ruling in *Hanson* to conclude that union security agreements authorized by the NLRA are infused with state action.[221] In these decisions, the courts seem eager to disclaim responsibility for their conclusions by insisting that they must follow Supreme Court precedent. As the Fourth Circuit in *Beck* remarked: "[i]f we assumed that Section 2, Eleventh, and Section 8(a)(3) are to be given the same interpretation, then it necessarily follows under *Hanson* that there is governmental action here sufficient to satisfy the requirements for governmental action."[222]

In finding state action, the courts have specifically rejected the contention that the degree of government action under the

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[219] *See* Beck v. Communications Workers of Am., 776 F.2d 1187 (4th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3025 (1987); *see also* Havas v. Communications Workers of Am., 509 F. Supp. 144 (N.D.N.Y. 1981); Lykins v. Aluminum Workers Int'l Union, 510 F. Supp. 21 (E.D. Pa. 1980); Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971) (ruling that an employee's dismissal for failing to pay the fees and dues required by a union shop under § 8(a)(3) constituted state action).

[220] *See Beck*, 776 F.2d at 1208; *Havas*, 509 F. Supp. at 149; *Lykins*, 510 F. Supp. at 25.

[221] *See Beck*, 776 F.2d at 1205; *Havas*, 509 F. Supp. at 149; *Lykins*, 510 F. Supp. at 25; *Linscott*, 440 F.2d at 16.

[222] *Beck*, 776 F.2d at 1205.

NLRA is less than that under the RLA.[223] This contention rests on the fact that the RLA preempts state "right-to-work" laws while the NLRA in § 14(b) explicitly defers to state law on the issue of union security. The First Circuit in *Linscott v. Millers Fall Co.*,[224] for example, denied that this distinction was of any importance. After concluding that state action was present in an employer's discharge of an employee who, as a matter of religious conscience, refused to make any financial contribution to her union representative, the First Circuit made this observation:

> [w]e can attach no weight in this context to the circumstance that [§ 2, Eleventh] of the Railway Labor Act affirmatively authorizes the union shop, while section 14(b) of the [NLRA] is cast in terms of empowering the state to outlaw it, by a so-called "right to work" law, a difference noted, without comment, in n.5 of the *Hanson* opinion. 351 U.S. at 232, 76 S. Ct. 714. By section 14(b)'s necessary implication, federal approval, and hence federal enforcement, will exist in those states that do not enact such a law. . . . We know of no principle that measures governmental action by the frequency or infrequency of its exercise. In the case at bar the union's demand that the plaintiff be discharged is as federally supported as was the similar demand in *Hanson*.[225]

Although the First Circuit in *Linscott* acknowledged that the union shop interfered with the First Amendment interests of the disgruntled employee, it nonetheless concluded that the same government interests recognized in *Hanson* outweighed this interference.[226]

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223 *See id.* at 1206; *Linscott*, 440 F.2d at 16; *Havas*, 509 F. Supp. at 148; *Lykins*, 510 F. Supp. at 25; Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003 (9th Cir. 1970); *but see* Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410 (10th Cir. 1971) ("the policy with respect to union security agreements expressed in the NLRA is more neutral and permissive than the policy of the RLA").

224 440 F.2d 14 (1st Cir. 1971).

225 *Id.* at 17.

226 *Id.* The First Circuit distinguished the Supreme Court's decision in Sherbert v. Verner, 374 U.S. 398 (1963). In *Sherbert*, a Seventh-day Adventist was discharged from employment because she refused to work on Saturdays as a matter of religious principle. When she applied for unemployment compensation, the state denied her application, claiming that she was not unemployed involuntarily. The Supreme Court ruled, however, that the state interest in saving money was insufficient to justify this interference with the employee's exercise of her religious beliefs. The First Circuit, on the other hand, insisted that the government interests in *Linscott* were more important than those at stake in *Sherbert*: "In the present case the interests are not merely that of the plaintiff versus the cost to the fisc; opposed to plaintiff's interest are both the public and private interests in collective bargaining and

When the Supreme Court addresses the issue of whether the conduct of a union organized under the NLRA constitutes state action, it too should attribute no significance to the apparent "permissiveness" of the NLRA and the mandatory character of the RLA's preemption of contrary state right-to-work laws. Although the courts have downplayed this difference between the two statutes, they have done so in order to justify their conclusions that the adoption of union security agreements under section 8(a)(3) is state action, their analysis actually cuts against a finding of state action. In fact, their analysis unintentionally highlights the foolishness of the Court's initial finding of state action in *Hanson*.

If the dispute in *Hanson*, for example, had occurred in a state that tolerated the union shop, then under *Hanson*'s own terms no constitutional guarantee would have been implicated.[227] In such a state, § 2, Eleventh would not supersede a contrary right-to-work statute and a union shop agreement made in the state would therefore not enjoy the "imprimatur of federal law."[228] Consequently, the *Hanson* reasoning contravenes the major justification for preemption: uniform rules governing labor-management relations that are applicable throughout the nation.[229] If state action exists in those jurisdictions with right-to-work statutes but not in those jurisdictions without such statutes, then first amendment protections would only be enforced in a patchwork fashion. In addition, if the *Hanson* Court is correct in noting that state action automatically arises when a congressional statute nullifies an existing state law, then it appears that "all private action taken under the authority of federal legislation that occupies a field by that token alone becomes governmental action."[230] Such reasoning unnecessarily broadens the doctrine of state action as it has been developed by the Supreme

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industrial peace." *Linscott*, 440 F.2d at 18. The First Circuit also remarked that the burden to the *Linscott* plaintiff as a result of her discharge from employment was not as severe as the burden on Sherbert, who faced the possibility of "absolute destitution." The plaintiff could simply seek employment with an unorganized employer. *Id.*

227 In fact, prior to the Court's decision in *Hanson*, several lower courts found no state action in litigation arising in states without right-to-work laws. *See, e.g.*, Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir. 1956), *cert. denied*, 351 U.S. 946 (1956); *see also* Gaebler, *supra* note 81, 598 n.31.

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

229 *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); *see generally Governmental Action*, *supra* note 79, at 356.

230 *Governmental Action*, *supra* note 79, at 357.

Court. For these reasons, therefore, the circuit courts were mistaken in partially basing their finding of state action on *Hanson*. The fact that the Supreme Court quickly retreated from this finding in *Street*, *Allen*, and *Ellis* suggests that the Court itself was uncomfortable with its conclusions in *Hanson*.

The circuit courts have also relied on *Abood* when concluding that the expenditures of private sector unions should be subject to constitutional scrutiny.[231] Citing *Abood*'s observation that "differences in public- and private-sector bargaining simply do not translate into differences in First Amendment rights,"[232] they have reasoned that government action is present in disputes concerning security agreements under section 8(a)(3).

Once again, this reasoning is misguided. In *Abood*, it is indisputable that government action was present, since the State of Michigan not only authorized the agency shop agreement but also negotiated and adopted the agreement itself. The state, acting through the Detroit Board of Education, then *required* its employees to contribute funds to the Detroit Federation of Teachers.[233] The NLRA, on the other hand, though permitting unions and private employers to adopt security provisions, obviously does not contemplate public agencies as parties to collective bargaining agreements. The level of state involvement under the NLRA, therefore, is far less conspicuous and far more remote than that commonly found in the public sector where the state acts as both legislator and employer.

2. State Action as a Matter of Supreme Court Precedent

The most difficult state action questions require the Supreme Court to determine whether government acquiescence in private action amounts to ratification and is thus subject to

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231 *See, e.g.*, Beck v. Communications Workers of Am., 776 F.2d 1187, 1206-07 (4th Cir. 1985), *cert. granted*, 56 U.S.L.W. 3025 (1987); *but see* Kolinske v. Lubbers, 712 F.2d 471, 476-80 (D.C. Cir. 1983); Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410-11 (10th Cir. 1971); Havas v. Communications Workers of Am., 509 F. Supp. 144, 148 (N.D. N.Y. 1987); *see also* Choper, *The Supreme Court and Individual Rights*, 83 MICH. L. REV. 1, 178 (1984) (arguing that the decisions of those federal courts of appeals which have declined to extend *Abood* to the NLRA are based more "on the Burger Court's conservatism in respect to the 'state action' concept than on the logic of the Justices' earlier reasoning").

232 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977).

233 *Id.* at 253.

constitutional challenge.[234] The question of whether a union's adoption and enforcement of a security agreement under section 8(a)(3) clearly falls into this category.

The fear that the Supreme Court may constitutionalize union security agreements under section 8(a)(3), however, may be somewhat exaggerated. In a number of recent state action decisions, the Supreme Court has shown a definite reluctance to find government involvement in conduct predominantly private in character. In *Blum v. Yaretsky*,[235] for example, the Court discovered no state action in a nursing home's decision to discharge a Medicaid patient and to transfer the patient to a lower grade of health care. The Court reached this conclusion even though the State of New York extensively regulated the services offered by the nursing home and required that the patient's physician certify the medical necessity of certain services before New York would pay for them. To support its conclusion, the Court insisted that New York did not coerce or even "significantly encourage" the nursing home's decision to transfer the patient.[236]

Similarly, in *Rendell-Baker v. Kohn*,[237] the Court found no government involvement in a private school's decision to discharge a teacher, even though the State of Massachusetts funded ninety-percent of the school's operating budget and the school had to comply with a number of complicated state regulations to receive this funding. State officials accepted the school's decision to discharge the teacher, a decision apparently based on the teacher's criticism of the school administration's policies. The Court acknowledged the state's acquiescence in the school's decision but still maintained that the decision was the act of a private party and therefore immune to a first amendment attack.[238]

The Court's reasoning in *Blum* and *Rendell-Baker* is relevant to situations involving union security agreements authorized by the NLRA. In both of these decisions, the Court placed great

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234 *See* L. TRIBE, AMERICAN CONSTITUTION LAW 1150 (1978).

235 457 U.S. 991 (1982).

236 *Id.* at 1003-05. The words of the Court are instructive here: "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Id.* at 1004-05.

237 *Blum*, 457 U.S. 830 (1982).

238 *Id.* at 839-43.

emphasis on "the interposition of the independent judgment of a private party between the act that allegedly resulted in a constitutional deprivation and the decision of the state to accept the decision and continue funding the private activities."[239] When a private employer and a union enter into a section 8(a)(3) security agreement, they too exercise their independent judgments. Since both the NLRA and the RLA are neutral with respect to the contents of particular agreements,[240] they allow for the exercise of this judgment by simply authorizing but not compelling the adoption of security provisions. Consequently, the decision to include a security clause in a private sector collective bargaining agreement is purely a private one. In light of both *Blum* and *Rendell-Baker*, it appears that the Supreme Court would be unwilling to transform the adoption of security agreements under section 8(a)(3) into governmental acts.[241] The Supreme Court's refusal on other occasions to find state action in similar union rules governed by the NLRA supports the accuracy of this prediction.[242]

3. Some Prudential Considerations

Just as the Supreme Court has appropriately rejected the

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239 Kolinske v. Lubbers, 712 F.2d 471, 480 (D.C. Cir. 1983).

240 *See* 29 U.S.C. § 158(d) (1982); Local 24, International Bhd. of Teamsters v. Oliver, 358 U.S. 283, 294-95 (1959).

241 This paper does not intend to provide an exhaustive treatment of the Supreme Court's development of the state action doctrine. For a good discussion of the state action issues surrounding union security clauses, see *Kolinske*, 712 F.2d at 474-80. It should be noted, however, that the Supreme Court has previously imputed state action to private parties who perform what are traditionally characterized as exclusively public functions, *see* Terry v. Adams, 345 U.S. 461 (1953), Marsh v. Alabama, 326 U.S. 501 (1946), or functions that are "inherently governmental," *see* Evans v. Newton, 382 U.S. 296 (1966). In Jackson v. Metropolitan Edison, 419 U.S. 345 (1974), on the other hand, the Supreme Court held that the acts of a highly regulated public utility enjoying a government-granted monopoly franchise did not constitute state action. Although the NLRA grants unions a similar monopoly power through the principle of exclusive representation, it would be reasonable for the Court to follow *Jackson* in declining to find government involvement in the adoption of a security clause.

242 *See* United Steelworkers v. Sadlowski, 457 U.S. 102, 121 n.16 (1982); *see also* United Steelworkers v. Weber, 443 U.S. 193 (1979); American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950); Hovan v. United Bhd. of Carpenters and Joiners, 704 F.2d 641 (1st Cir. 1983) (ruling that a union's oath requirement was not state action and therefore was beyond the pale of the first and fourteenth amendments).

idea that constitutional guarantees should be applied across the board to unions,[243] particularly when statutory protections are already available to aggrieved union members,[244] the Court should not repeat the mistake it committed in *Hanson* by constitutionalizing union security clauses authorized by section 8(a)(3). If the Court were to reject this, however, one must then ask what other types of union action would be similarly exposed to the exacting eye of the Constitution.

It is appropriate to view such a "slippery slope" argument with a degree of skepticism, but the implications of attaching government involvement to union security under the NLRA are undeniably profound. A number of important questions would immediately arise as a result. Would the Court, for example, find it necessary to place constitutional restrictions on the right of unions to prescribe their own internal rules under section 8(b)(1)(A)? Or would unions violate some constitutional guarantee if they excluded from full membership those employees who favored right-to-work laws or who advocated the union's decertification? Perhaps most importantly, would private sector unions then be required to carry out the entire host of special obligations that accompany due process? And if the Court constitutionalizes union actions, why should it not subject the activities of corporations, an equally powerful private group, to most, if not all, of the provisions of the Constitution?[245]

A finding of state action might also require the Court to constitutionalize many of the statutory provisions of the Labor-Management Reporting and Disclosure Act, particularly those

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243 Dean Harry Wellington has constructed the best argument against subjecting unions to the full scrutiny of the Constitution. *See generally Governmental Action*, *supra* note 79. Professor Archibald Cox has advanced a similar argument. *See* Cox, *supra* note 6, at 620. For a fair rebuttal of the Wellington-Cox rationale, *see* Note, *Individual Rights in Industrial Self-Government—A "State Action" Analysis*, 63 NW. U. L. REV. 4 (1968) (suggests that constitutionalizing individual rights in labor relations supplements the remedies available to an aggrieved employee under the union's duty of fair representation).

244 *See, e.g.*, The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1982).

245 Some commentators, however, have argued that corporate actions should be evaluated against the provisions of the Constitution. *See* Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874 (1957); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952).

contained in its "bill of rights."[246] Such a finding would significantly broaden the rights guaranteed by the statute. As the Supreme Court itself pointed out in *United States v. Sadlowski*,[247] the protections offered by the Labor-Management Reporting and Disclosure Act partially incorporate but do not coincide with the protections provided by the Constitution.[248] Any broadening of the scope of the statute would therefore appreciably alter the clear intent of Congress.

Finally, it is fair to say that Congress, and not the courts, is better equipped institutionally to supervise union expenditures. While the judicial branch with its arsenal of constitutional weapons is capable of protecting minorities in the larger communities from congressional malfeasance, Congress can more fairly balance the needs of unions generally against the often compelling interests of those employees who object to particular union expenditures. In fact, perhaps the most important lesson from the *Ellis* Court's misguided decision to circumscribe expenditures on union organizing is that the Court should not engage in the gamesmanship of picking and choosing the types of activities that a union may permissibly finance. Congress should assume this responsibility instead.

V. Conclusion—Union Expenditures Under the NLRA: Time for An Amendment

Ever since the Court in *Street* entangled itself into legislating about collective bargaining, it has periodically attempted, though unsuccessfully, to develop some way of distinguishing permissible union expenditures from impermissible expenditures. The tests fashioned by the Court for this purpose show that these distinctions are simply not susceptible to judicial elaboration. Phrases such as "germane to collective bargaining" or "related to the union's duty as exclusive bargaining agent" may sound

246 *See* Hovan v. United Bhd. of Carpenters & Joiners, 704 F.2d 641, 643 (1st Cir. 1983).

247 457 U.S. 102 (1982).

248 More specifically, the Court concluded that the protections of the "freedom of speech and assembly" provisions of the Labor-Management Reporting and Disclosure Act were narrower than those of the first amendment. *Id. But see* Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 711 (1985) (suggests that the associational rights protected by the NLRA are the same rights protected by the first amendment).

useful at first but their ambiguity gives judges a free hand to impose their own views on what types of expenditures a union may or may not make. Permitting this kind of judicial legislating to continue under the NLRA could lead to intolerable results. Accordingly, Congress should intervene and develop some guidelines as to the types of activities a union organized under the NLRA may finance with union shop contributions. As Dean Harry Wellington has pointed out, it is the "give and take" of the legislative process that can most appropriately separate permissible union expenditures from those that should not be funded with the contributions of dissenting employees.[249]

In more general terms, the Court's commitment to treating unions exclusively as service organizations should not go unsupervised. As Parts Two and Three of this Article have demonstrated, this commitment has resulted in two related phenomena under the RLA and in the public sector: the erosion of "financial core" membership and the transformation of union and agency shop agreements into service fee agreements. If the Supreme Court carries this commitment in its full force over to the NLRA—a very real possibility in light of some of the Court's recent decisions[250]—then the meaning of both union membership and union security will have undergone a complete transformation. For if the Court conceives of unions simply as service organizations, then it must necessarily view the union member as the service's consumer, and union security as nothing more than a way of ensuring that the consumer pays for the services the union provides.

In light of this conception of unions and union membership, it is understandable why the Court would resort to excoriating the evils of the free-riding employee in order to justify union security. Sharing the costs of union activities among all those who consume and thereby benefit from them is consistent with our notions of fairness. Not surprisingly, the Court's adoption of a free rider approach to evaluate the permissibility of union expenditures has an equally compelling logic, a logic whose clearest articulation was in the *Ellis* decision.

But the free rider approach, even with its cloak of fairness, is

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249 *See* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 264-65 (1968).

250 *See supra* notes 4-5.

susceptible to an alarming degree of judicial manipulation. *Ellis* is instructive here, not because of its flawless legal reasoning but because it shows how the Court can apply an apparently neutral test to achieve a result that is objectionable. For in *Ellis*, the Court hid behind the free rider rationale when prohibiting unions from charging dissenting employees for the expense of union organizing.

It is difficult to comprehend the Court's reasoning that a union can use dues payments to defray the costs of a union convention but cannot apply these payments to the costs of organizing other workers. This reasoning is particularly strange since there is a direct relationship between a union's organizing efforts and its power at the bargaining table. As one AFL-CIO official explained: "[o]rganizing is the most important part of the labor movement. Nothing happens until organizing takes place."[251]

It is through organizing, for example, that unions increase their memberships. A recent study has shown that a ten percent increase in the amount of money spent on each potential union member increases by seven percent the proportion of those workers for whom the union ultimately wins representation rights.[252] According to the study, however, organizing expenditures per non-union worker have actually decreased by thirty percent from 1953 to 1974.[253] Other evidence suggests that organizing expenditures as a percentage of total union expenditures has also dropped since 1953.[254] Professors Richard Free-

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251 O'Malley, "The Science of Organization," speech at the 61st Trade Union Program, Harvard University, February 15, 1977 (cited in Henkel & Wood, *supra* note 97, at 744).

252 Voos, *Labor Organizing Programs 1954-1977* (Ph. D. diss., Harvard University, May 1982). I have borrowed from the summary of the results of this study which are contained in FREEMAN & MEDOFF, WHAT DO UNIONS DO? 229 (1984) [hereinafter FREEMAN & MEDOFF].

253 FREEMAN & MEDOFF, *supra* note 252. The author of this study, however, has subsequently disputed the interpretation of her data by Freeman and Medoff. The author specifically objected to the use by Freeman and Medoff of a wage-deflated measure rather than a CPI-deflated measure when calculating union organizing expenditures. After deflating organizing expenditures by the CPI, the author concluded that there was no evidence of a reduction in union organizing activity that would explain the decline in the percentage of workers unionized in the private sector. *See* Voos, *Trends in Union Organizing Expenditures, 1953-1977*, 38 IND. LAB. REL. REV. 52, 57-60 (1984).

254 Voos has estimated that from 1953 to 1974 organizing expenditures as a percentage of total union expenditures had dropped from 21.6% to 19%. *See* Voos,

man and James Medoff have estimated that as much as a third of the decline in union success in NLRB elections is related to this reduction in organizing expenditures.[255] In fact, one labor economist has theorized that a prominent reason for the drop in the unionized segment of the private sector workforce is that unions have not placed a high enough priority on organizing, primarily because of the demands of union members that a larger proportion of union resources be allocated to representation and administration.[256] Under *Ellis*, however, unions are now handicapped if they decide to allot a greater percentage of their budgets to organizing in an effort to improve their performance in NLRB elections and hence increase the rate of unionization. This handicap is especially severe since national unions use about fifteen percent of their dues payments on organizing,[257] an activity that dissenting employees under the RLA no longer have to finance.

Furthermore, organizing enables unions to equalize wage rates among organized and non-union firms in a particular industry. Organizing non-union firms enhances the competitiveness of the industry's organized segment. Without organizing efforts, the non-union firms which enjoy cheaper labor costs could undersell the higher-paying union firms, thereby endangering the very existence of these firms and, of course, the jobs of union members.[258]

Therefore, before the Supreme Court has an opportunity to examine the expenditures of unions organized under the NLRA and to limit union expenditures on organizing, Congress should

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Trends in Union Organizing Expenditures, 1953-1977, 38 IND. LAB. REL. REV. 52, 56 (table I) (1984).

255 FREEMAN & MEDOFF, *supra* note 252 at 229.

256 *See* Block, *Union Organizing and the Allocation of Union Resources*, 34 IND. LAB. REL. REV. 101 (1980). In an interesting argument, Block suggests that as unions increase the extent of their organization in their primary jurisdictions, the need of the membership for organizing services declines relative to their need for representation services.

257 *See* Hickman, *Labor Organizations' Fees and Dues*, 100 MONTHLY LAB. REV. 19, 19-24 (1977).

258 Of course, this is only half the story. Current studies have shown, for instance, that unionism raises the wages of workers in large nonunion firms by as much as ten to twenty percent. See FREEMAN & MEDOFF, *supra* note 252, at 153. The spillover gains for nonunion workers created by union organizing drives may be equally significant. *See id.* at 154-56.

amend the NLRA's section 8(b)(2). Such an amendment should incorporate the *unobjectionable* aspects of the RLA decisions, including the prohibitions placed on union expenditures for certain political, charitable, or ideological purposes. More specifically, it could incorporate the *Ellis* ban on union expenditures designed to cover the cost of litigation that is not incidental to collective bargaining. To limit any interpretive confusion, the amendment should also affirmatively authorize the use of dues payments for certain types of activities. These activities should include union conventions, publications, social events, the disposition of strike benefits, and most importantly, the union's efforts at organizing nonmembers. Finally, the amendment should contain a clause disclaiming Congress' intent to provide a comprehensive list of all permissible union expenditures. Such a clause would foreclose the argument that Congress intended to prohibit any expenditure it did not explicitly authorize.

Of course, this list of considerations is not exhaustive. The main aim of encouraging Congress to focus on them, however, is to ensure that Congress, and not the Supreme Court, determines through the legislative process the types of union activities a dissenting employee must finance. The Potter Amendment to the Labor-Management Reporting and Disclosure Act,[259] which was rejected by the Senate more than twenty-five years ago, was a good first step in this direction, and it probably would have deterred the Court from hearing the RLA cases. But much like the tests subsequently fashioned by the Court, the amendment provided little guidance as to the types of activities a dissenter need finance. Instead, it simply substituted the judgment of the Secretary of Labor for that of the Court, granting the Secretary the authority to recoup dues payments spent on activities that he characterized as unrelated to collective bargaining.[260] While the Secretary of Labor may be a more informed observer than the nine Justices of the Supreme Court, Congress is best equipped to make the tough decisions surrounding this issue.[261]

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259 *See supra* notes 116-20 and accompanying text.

260 *See supra* note 117.

261 In *Hanson*, Justice Brandeis supported this view:

> Congress, acting within its constitutional powers, has the final say in policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure

If Congress did amend section 8(b)(2), or if it overruled the Court by amending § 2, Eleventh, there would be little uncertainty left about Congressional intent. By authorizing or prohibiting the use of dissenters' dues payments for specific union activities, Congress would be doing what the Court in the RLA decisions claimed as its goal: the fulfillment of the intent of Congress. If Congress, for instance, explicitly allowed the use of these payments to help defray the costs of organizing, then it is self-evident that union organizing expenditures would fall within Congress' authorization, not outside this authorization as the *Ellis* Court claimed. Nor is it likely that the Court would strike down the authorization as unconstitutional. The Court's behavior in *Street, Allen*, and *Ellis* highlights its reluctance to constitutionalize union security. Furthermore, union organizing efforts clearly do not share with union publications and conventions the same "direct communicative content." Yet union expenditures on those two activities were upheld in *Ellis* after the Court's admittedly bare-boned First Amendment analysis.[262]

It is in this confrontation between the individual rights of dissenting employees and the institutional needs of unions that Congress is presented with the opportunity to assert itself in federal labor policy. The Supreme Court's own attempt at reaching a balance has resulted in an unnecessarily restrictive approach to union expenditures. This approach, however, is but one outgrowth of the Court's evolving conception of unions and union membership. Whether this conception is good, true, or at all appropriate is a question that the Court should not answer alone.

> adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary.

351 U.S. at 234 (footnote omitted) *quoted in* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225 n.20 (1977).

262 *See* Ellis v. Brotherhood of Ry. Airline & S.S. Clerks, 104 S. Ct. 1883, 1986-97 (1984).