The Costs of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing

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Introduction

Unions depend for most of their revenues on the dues and fees paid by the workers they represent.[1] Typically unions use these funds for such core workplace purposes as contract negotiation and grievance adjustment, maintenance of union property, staff salaries, publications to represented workers, and benefits not paid under the collective bargaining agreement.[2] Unions are also commonly authorized by their membership to spend dues on extra-workplace activities thought to enhance the union's strength internally and in the community. These activities may include union conventions and social events, lobbying for labor or social legislation, contributions to political candidates or ballot proposition campaigns, charitable contributions to community groups, scholarships or public education, and organizing nonunion employees. This Article examines the status of this last use of union dues—to "organize the unorganized."[3] A recent Supreme Court decision forbidding private sector

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1. Monthly dues in most unions are set at about twice the hourly wage rate. They are collected by the local union and allocated between local and national union treasuries, usually with half to each. Henkel & Wood, *Limitations on the Uses of Union Shop Funds After Ellis: What Activities Are "Germane" to Collective Bargaining?*, 35 LAB. L.J. 736, 743-44 (1984) (citing Hickman, *Labor Organizations' Fees and Dues*, 100 MONTHLY LAB. REV. No. 5, at 21-22 (1977)).

2. *See, e.g.*, Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61, 62 (1983) [hereinafter *Uses and Abuses*].

3. Union organizing is very expensive. In addition to the salary of the staff organizer and printing costs for the usual leaflets, the union may also need to pay for costly media messages to reach the employees and rent a meeting hall and office space near their workplace. Unions will also incur legal costs if there are unfair labor practice charges or legal challenges to the outcome of an election. It has been estimated that one-third of national union expenditures are made for organizing purposes. Henkel & Wood, *supra* note 1, at 744.

Organizing costs are increased by labor law decisions restricting union access to employees. Employers are not ordinarily required to grant non-employee union organizers access to

unions from funding organizing activities with objecting employees' dues[4] undermines national labor policy and is not justified by either the federal labor statutes or the First Amendment.

The currency of this question is dramatized by reports of shrinking union ranks:[5] as the labor community marked the fiftieth anniversary of the passage of the 1935 Wagner Act,[6] the unionized percentage of the workforce was declining to a figure approaching the level of the early 1930s.[7] Although there are a number of reasons for the decline, the surest way of arresting it is probably through new organizing efforts. At the same time, when unions undertake to organize,[8] they are met with an increasing level of employer resistance, both lawful and unlawful,[9] sub-

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plant premises to distribute literature, NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), nor to supply organizers with names or addresses of employees in the crucial beginning stages of a campaign, Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966). An employer may require all employees to attend a "captive audience" meeting to hear anti-union messages of the employer but is not generally obliged to give the union "equal time" to respond on plant premises, even when the employer's speech is coercive and unlawful. NLRB v. United Steelworkers (Nutone and Avondale), 357 U.S. 357 (1958); *see* United Steelworkers v. NLRB (Florida Steel Corp.), 646 F.2d 616 (D.C. Cir. 1981) (discussing when NLRB will order "union access" as a remedy for an unfair labor practice).

4. Last Term, the Supreme Court affirmed a Fourth Circuit decision that disallowed—among other challenged expenditures, mostly political ones—the use without employees' consent of private sector union dues for organizing. Communications Workers of Am. v. Beck, 776 F.2d 1187 (4th Cir. 1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd*, 108 S. Ct. 2641 (1988). The effect of this and similar cases on union treasuries is significant. The trial court in *Beck* ordered nearly 80% of the union's dues refunded to the plaintiffs. *Id.* at 2645-46.

5. *See infra* note 130 and accompanying text. The treatment of organizing expenses critiqued in this Article is a recent expansion of judge-made rules that restrict the use of union dues for political purposes. As applied to unions' political activities, these rules have provoked considerable scholarly comment. *See infra* note 20. Almost no attention has been given to the effect of these rules on union organizing. Brief references to the problem may be found in Henkel & Wood, *supra* note 1, and Shea, *Unions, Union Membership, and Union Security*, 11 SETON HALL LEGIS. J. 1, 63-64 (1987).

6. National Labor Relations (Wagner) Act, 49 Stat. 449 (1935), *amended by* 61 Stat. 136 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), 73 Stat. 541 (1959) (codified at 29 U.S.C. §§ 151-68 (1982)).

7. *See infra* p. 642.

8. Some figures show that union expenditures for organizing have been declining, rather than rising, to meet the challenge of membership losses. In 1953, unions spent $1.03 per nonunion member for organizing; in 1974, they spent $0.71, an overall decline of 30% (measured in constant dollars). R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 229 (1984). Whether or not the decrease in these particular expenditures is caused by restricting use of nonmembers' union dues, economic theory predicts that the decrease could at least be reinforced and accelerated by restrictions. *See infra* notes 112-118 and accompanying text.

9. Professor Weiler has documented an astronomic increase in the number of unfair labor practices by employers aimed at stopping union organizational drives. According to figures supplied by the National Labor Relations Board, the number of employees found entitled to reinstatement after being unlawfully fired for union activity increased 1000% between

stantially raising organization costs. Associated with the increase in employer opposition is a decrease in election successes for unions, and in the number of employees added to union ranks after the union wins an election.[10] This climate intensifies a need for reliable sources of funding for new organization at precisely the time when the Supreme Court is restricting the use of union dues for this purpose.

Part I of this Article describes the background and summarizes the problems of the Court's "fee speech" doctrine, which bans the use of objecting employees' union dues for purposes other than those connected with bargaining unit representation. Part II briefly examines the Supreme Court's statutory and first amendment justifications for the doctrine. Part III discusses whether the First Amendment compels the application of the doctrine to union organizing.[11] The Article concludes that the use of union dues for organizing efforts should not be restricted and suggests amending the federal labor laws to accomodate the legiti-

1957 and 1980. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1780 (1983) [hereinafter *Promises to Keep*]; *see also* Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

10. Professor Weiler reports a decline both in the union victory rate in certification elections (from 74% in 1950 to 48% in 1980) and in the percentage of voters included in union victories (from 85% in 1950 to 37% in 1980). Weiler, *Promises to Keep*, *supra* note 9, at 1776-77.

11. Three different questions might arise in a dispute over how union dues can be spent: whether the expenditure is authorized by the membership, whether it is authorized or prohibited by a statute, and, finally, whether it is prohibited by a constitutional command. This Article is concerned only with the last two questions.

Whether a particular expense is authorized by the membership remains important, however, even if no additional constraints are imposed by statute or constitution. A union officer who spends funds for purposes unauthorized or prohibited by the union's own constitution, by-laws, or rules is liable under federal law for return of the funds to the treasury. Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501 (1976). The LMRDA also enacted the "workers' bill of rights," guaranteeing members full political rights to vote, run for office, and exercise their rights to speak in regard to internal union affairs. LMRDA Title I §§ 101-105, PUB. L. No. 86-257, 73 STAT. 519 (1959) (codified at 29 U.S.C. § 401 et seq. (1976)). A membership bent on frugality or political inoffensiveness could use internal union democratic processes to limit the purposes to which all union dues, whether voluntary or involuntary, could be spent.

Plaintiffs in modern cases do not often invoke this "no authority" theory, doubtless because organizational and political expenditures are typically approved by union rules. Before the advent of rules based on the First Amendment or national labor legislation, however, the propriety of union expenditures was commonly tested only by whether the rules were properly authorized. *See, e.g.*, DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139, 187 P.2d 769 (1947) (rejecting argument that the First Amendment requires refund to dissenter of dues spent to defeat a right-to-work law, where assessment and expenditure were authorized by union membership). Authorized union expenditures for organizational campaigns would not violate the fiduciary duty of § 501, *see* McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1976) (a union's political expenditures not actionable under § 501 to the extent they are authorized

mate interests of individual employees and the institutional interests of the unions that represent them.[12]

I. Background and Summary of the Problem

Not all workers represented by unions pay dues and fees voluntarily; many are required to do so as a condition of keeping their jobs. Private sector unions operating outside the twenty-one "right-to-work" states[13] generally negotiate with the employer for some type of contractual union security device. A clause requiring union "membership" as a condition of continued employment is most common.[14] This requirement can be satisfied, at the worker's option, by subscribing as a full union member or

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by the union's constitution, by-laws, or resolutions), or federal civil rights statutes, *see* Lohr v. Association of Catholic Teachers, 416 F. Supp. 619 (E.D. Pa. 1976) (religious objection).

Thus, if no statutory or constitutional rule requires limits on organizational funding, such expenditures will ordinarily be governed by majority rule of the members.

12. The problem of agency preemption is not addressed in this Article. The Supreme Court's most recent "fee speech" opinion interprets the NLRA not to authorize the challenged expenditures, avoiding constitutional doubts. Communications Workers v. Beck, 108 S. Ct. 2641, 2657 (1988). So long as the doctrine is putatively statutory, alleged violations of the NLRA should be decided by the agency that Congress designated for this purpose—the National Labor Relations Board. In these controversial cases, though, plaintiffs are permitted direct access to federal court by suing the union for breach of its judicially implied "duty of fair representation," an exception to the traditionally exclusive jurisdiction of the Board. *Id.* at 2647. The Court in *Beck* found that the union failed to represent the interests of all workers fairly and without hostility—thus breaching the duty—when it made the challenged expenditures. *Id.* To reach this result, the Court interpreted the NLRA not to authorize this use of plaintiffs' fees, but it viewed this question as a "collateral issue" not committed to the NLRB's exclusive jurisdiction. *Id.*

13. Twenty-one states in the South, Midwest, and West have limited or banned union security agreements within their boundaries. W. GOULD, A PRIMER ON AMERICAN LABOR LAW 50-51 (2d ed. 1986). In these states, employees are privileged to withold payment of *all* union dues. Accordingly, the "fee speech" doctrine has significance only in the remaining 29 states.

14. The NLRA tolerates but does not compel collective bargaining agreements that require membership in the union as a condition of continued employment. When there is such an agreement, all workers in an elected union's designated "bargaining unit" must become members within thirty days of hire (seven days in the construction industry). *See* 29 U.S.C. §§ 158(a)(3), 158(f)(2) (1983). The resulting arrangement is called a "union shop." The terms of § 8(a)(3) of the NLRA permit the union to require contribution of an amount equal to regular dues from all bargaining unit members. Employees whose religious convictions are offended by union membership are allowed, under a 1980 amendment to the NLRA, to make a contribution equivalent to dues to a nonreligious, nonlabor, tax-exempt charity. Pub. L. No. 96-593, 94 Stat. 3452 (1980) (codified as amended at 29 U.S.C. § 169 (1982). The Railway Labor Act also authorizes union shop agreements. 45 U.S.C. § 152, Eleventh (1983).

A variation on the union shop common in the public sector is the "agency shop"; workers need not become members, but they must tender "agency fees" in lieu of dues to cover the costs of representation. In practice, the agency shop is indistinguishable from a union shop. *See* Clark, *A Guide to the Changing Court Rulings on Union Security in the Public Sector: A Management Perspective,* 14 J.L. & EDUC. 71, n.1 (1985) (listing 20 states that authorize the

simply by paying the equivalent of union dues as a "financial core" member.[15] Under these agreements, the employer, at the union's request, may discharge a covered worker who refuses to pay. Although these agreements compel a degree of unwanted association, they are generally held permissible under the First Amendment because of the governmental interest in assuring that all who benefit from them share the costs of representation.[16]

According to the Court, however, the First Amendment does limit the purposes for which even a private sector union may spend the dues and fees generated by union security agreements.[17] Employees frequently ask courts to prohibit unions from financing political campaigns, lobbying, and other "ideological" activities with their mandatory union dues or fees. Unions have lost most of these battles in the Supreme

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negotiation of agency shop or "fair share" agreements covering public employees); Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1726-34 (1984).

In addition, unions with union shop or agency shop contracts typically try to secure a "dues check-off" clause. This means that dues are deducted from employees' paychecks by the employer and remitted directly to the union. Union shop and check-off agreements are obviously crucial to the planning and administration of the union's budget; a check-off provision also spares the considerable costs of collecting dues from unwilling members. For these reasons, employers frequently resist such clauses on the ground that they are "not going to give aid and comfort to the enemy." *See, e.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99, 101 (1970).

The Bureau of Labor Statistics reports that 83% of private sector agreements outside the right-to-work states provide for some type of union security; a union shop provision, found in 72% of the agreements, is the most common device. 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).

15. *See generally* T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS (1977); Shea, *supra* note 5, at 6-10. Any worker covered by a contract that requires union "membership" can nevertheless refuse to become a full member. The Supreme Court interprets the union security portion of National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), to mean that a union can require nothing more from unwilling workers than the payment of dues and fees; it cannot compel the worker to take an oath of membership, sign a membership card, attend union meetings, or adhere to union disciplinary measures, which are all obligations of the full member. Radio Officers v. NLRB, 347 U.S. 17, 41 (1954); NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); Shea, *supra* note 5 at 4. These "financial core" members are often the plaintiffs in cases challenging union expenditures of their dues.

16. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956); Abood v. Detroit Board of Educ., 431 U.S. 209 (1977) (some infringement of first amendment interests justified in order to prevent "free riders" from obtaining union services without paying for them).

17. Ellis v. Bd. of Ry., Airline, and S.S. Clerks, 466 U.S. 435, 455 (1984). *Ellis* involved a dues suit under the Railway Labor Act. The Court has assumed that governmental action sufficient to trigger the first amendment is present in RLA cases. In the recent *Beck* opinion, the Court stated it "need not decide" whether the exercise of rights derived from the NLRA also involves governmental action. 108 S. Ct. at 2656. *See infra* notes 63-67.

Court[18] as the Court has gradually developed strict prohibitions on certain uses of "financial core" members' funds. These prohibitions apply in both the private and the public sectors. Although the private sector rule is formally cast as a construction of federal collective bargaining law, the doctrine in both private and public sectors really rests upon the theory that the use of members' money to promote causes with which they disagree offends notions of free speech and association.[19] Forced subsidiza-

18. The battles have been fought chiefly by the National Right to Work Committee and the AFL-CIO. Between 1969 and 1975, the National Right to Work Legal Defense and Education Foundation supplied counsel or financial support for more than 60 employees suing their unions. The Foundation has achieved a string of significant victories, participating in or supporting most of the landmark cases limiting use of compulsory dues, including Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. Bd of Ry., Airline, and S.S. Clerks, 466 U.S. 435 (1984) and Communications Workers of Am. v. Beck, 108 S. Ct. 2641 (1988).

The National Right to Work Committee, founded by a group of employers, now functions through its tax-exempt Foundation as a sort of legal aid society for employees who wish to sue their unions for return of dues. The Committee itself, a tax-exempt, non-profit organization, opposes "compulsory unionism" through education and support of "right-to-work" legislation. Although it now maintains that it is free from employer control, the Committee continues to receive most of its funding from employers. *See* UAW v. National Right to Work Legal Defense Found., Inc., 433 F. Supp. 474 (D.D.C. 1977), *rev'd sub nom.*, Internat'l Union, UAW v. Nat'l Right to Work Legal Defense and Educ. Found., Inc., 590 F.2d 1139, 1150, 1153 (D.C. Cir. 1979).

On the other side, unions defend these suits with their own counsel. Litigation costs are still lawfully paid out of dues, even over the objection of the right-to-work plaintiffs.

19. Before its recent *Beck* decision expanded the doctrine to all unions covered by the NLRA, the Supreme Court had announced its fee speech rules in two separate lines of cases, one involving transportation workers unions in the private sector, which are governed by the federal Railway Labor Act, and the other involving public employee unions. In the private sector, the rule was first inferred from § 2, Eleventh, of the Railway Labor Act, which permits an employer and union to enter into an agreement requiring union membership. *See* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). The Court held that Congress had implicitly forbidden the use of objecting employees' funds for political campaigns, which the Court found were "purposes unrelated to contract negotiation and enforcement." *Id.* at 744. In *Street*, the Court strongly suggested that even absent such a construction, enough governmental action was present in the Congressional authorization of such private contracts to require the same result under the First Amendment. *Id.* at 749; *see infra* notes 57-67 and accompanying text. In *Beck*, the Court shied away from this language in *Street*, stating that it "need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action." 108 S. Ct. at 2656. Thus, the NLRA rule is, like the RLA rule, cast as statutory interpretation. *Id.* at 2657.

A pure first amendment-based rule applies to public sector unions. In the leading case brought by public school teachers, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), Michigan's collective bargaining statute had been interpreted by the state court to permit authorized lobbying and political expenditures. The Court nevertheless relied on *Street* to find that the first amendment rights of dissenting employees required a refund of fees spent to advance political campaigns and other ideological activities that were not "germane" to collective bargaining. *Id.* at 236. *See infra* notes 71-81 and accompanying text.

The chief difference between the formulas is that proof of a first amendment violation requires a showing that the communication caused an ideological offense. The statutory formula requires only a showing that the expenditure was not necessary to represent the plain-

tion of union expression is said to be the equivalent of a government-compelled affirmation of belief, which has long been held to be a violation of the First Amendment.[20]

This fee speech doctrine was first applied to prohibit the use of dues to finance political candidates and causes that a worker opposed.[21] From this base, however, the doctrine expanded dramatically in scope. In its statutory version, the fee speech doctrine now forbids the compelled subsidy of almost any union expenditure not closely related to the rather narrow service categories of workplace contract negotiations, contract administration, or grievance adjustment. The current rule in the private sector is articulated in the interpretation of the implied limits of union security under the Railway Labor Act[22] announced in *Ellis*:

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tiff. *See infra* notes 20-23 and accompanying text. In a suit challenging payment for union social hours, Justice White alluded to this difference when he wrote, "[P]etitioners may feel their money is not being well spent, but that does not mean that they have a First Amendment complaint." *Ellis*, 466 U.S. at 456. The Supreme Court has rebuffed attempts by lower courts to eliminate the ideological element of *Abood's* constitutional test. *See* Hudson v. Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1986) (all expenditures that are not germane to collective bargaining process are impermissible, even if not political or ideological), *rev'd on other grounds*, 475 U.S.292, 303, n.13 (1986) (finding it unnecessary to reach issue of non-germane, non-ideological expenditures).

20. The doctrine has come under heavy fire from dissenting justices and from labor and constitutional scholars. The best and most cited scholarly criticism of the application of the government action doctrine to a private sector union is Wellington, *The Constitution, The Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961). On the division between conventional collective bargaining and political activity the scholarly criticism is both empirical and legal. Some commentators argue that lobbying and candidate support are not optional, but essential to effective representation in a government-regulated economy. *See, e.g.*, Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 44-46 (1983) [hereinafter *Forced Payments*]; Cantor, *Uses and Abuses, supra* note 2; Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981). Professor Hyde goes so far as to prophesy that ordinary collective bargaining in the private sector will inevitably be replaced by political advocacy, as employers become more dependent on government planning and regulation. *Id.* at 3-4.

21. International Ass'n of Machinists v. Street, 367 U.S. at 744 (1961).

22. The longstanding question whether the Court would transplant either constitutional or statutory limits on the use of dues to unions governed by the National Labor Relations Act (NLRA)—the vast majority of American labor organizations— was resolved against the union in Communications Workers of Am. v. Beck, 108 S. Ct. 2641 (1988). The Court took the statutory route, relying on precedents under the nearly identical Railway Labor Act, and expressly incorporating the *Ellis* formula into its intepretation of § 8(a)(3). *Id.* at 2657. The test for both statutes is now identical.

In *Beck* the Fourth Circuit had imposed upon the union a statutory duty, inferred from the NLRA, to refrain from spending any amount of the dues of objecting employees "beyond the requirements for purposes of collective bargaining, grievance adjustment or contract administration." 776 F.2d 1187, 1281 (4th Cir. 1985) (panel opinion) (*Beck I*). As applied, this formula excluded, among other categories, "political" expenses, lobbying expenses for labor legislation, strike support for sister unions, organizing expenses, and the cost of union publica-

> [T]he test must be whether the challenged expenditures are 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. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct cost of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees *in the bargaining unit.*[23]

The Court's focus has shifted from a concern with avoiding compelled association with political causes to a very different concern with ensuring economic fairness to the dues payor or service consumer. The protesting worker can constitutionally be charged for representation services that relate immediately to her economic well-being, even though she may have conscientious objections to being represented at all. She cannot be charged, however, for any activity, ideological or not, from which the Court believes she is not likely to receive a measurable gain in the workplace. Many majority-authorized union expenditures will be ineligible for mandatory funding under this test. Political activity of any kind will probably run afoul of the rule. Moreover, the Court in *Ellis* for the first time disapproved of expenses that are not conventionally political.[24]

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tions about such "ideological" activities. *Id.* at 1210-12. The opinion rendered en banc, after rehearing, reached the same result as the earlier panel opinion, and adopted much of its reasoning. 800 F.2d 1280 (4th Cir. 1986) (*Beck II*).

The circuits were divided on the substantive questions presented by *Beck*. The Ninth Circuit had extended the rationale of the *Street* and *Abood* cases to the NLRA. Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970) (cause of action stated under both duty of fair representation and First Amendment). The Second and Tenth Circuits had expressed the opposite view. *See* Price v. Auto Workers, 795 F.2d 1128 (2d Cir. 1986) (no cause of action under either First Amendment or duty of fair representation), *petition for cert. granted*, judgment vacated and remanded in light of Communications Workers of Am. v. Beck, 108 S. Ct. 2890 (1988); Reid v. McDonell Douglas Corp., 443 F.2d 408 (10th Cir. 1971) (no cause of action under First Amendment; duty of fair representation issue left open).

23. 466 U.S. at 448 (emphasis added). The "bargaining unit" is the group of employees the local union represents. All employees in the bargaining unit are eligible to vote for or against the union in the election. If the union receives a majority of the votes cast, it has both the power and the obligation to represent all employees in the unit, whether or not they are union supporters or members. *See* 29 U.S.C. § 159(a) (1982) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.").

24. The *Ellis* opinion disallowed the cost of organizing workers outside the established bargaining unit. The Court disallowed organizing expenses because they were spent on employees outside the union's bargaining unit; only "the most attenuated benefits" could flow to those already represented from increasing union strength. *Ellis*, 466 U.S. at 452. The opinion

The fee speech rule takes Thomas Jefferson almost at his word:[25] it prevents unions from compelling contributions of money for the propagation of at least some opinions that the dissenting worker disbelieves. For those who believe that freedom of speech or belief is impaired by the use of a dissenting worker's money, the fee speech doctrine has a positive effect. But favoring liberty interests also has its costs, most of which stem from reducing the union's financial resources. This is of practical import for the majority of employees who are willingly represented and charged: their unions will be less effective in achieving work-related benefits through political or organizational means.

For unions as institutions, the rule creates three problems. First, it saddles the union with what economists call a classical free rider problem: some workers do in fact benefit from political advocacy and other services for which they do not have to pay. Second, because the Court

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also disallowed the costs of litigation to protect the rights of airline employees generally, when such litigation had no close connection with the bargaining unit. *Id.* at 453.

After a long silent spell, the case law on "chargeability" is now developing. The cases generally hold that the following expenses are nonchargeable to the dues of the dissenting employee: litigation to advance workers' interests generally, lobbying for changes in labor laws, support of political candidates, loans to support affiliated unions, charitable contributions, and publications in regard to any activity not itself chargeable. *See Ellis*, 466 U.S. at 448; *Beck I*, 776 F.2d at 1210-12; Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1327 (W.D. Mich. 1986) (loan to support affiliated union's strike not chargeable to dissenters); Cumero v. Public Employment Relations Bd., 183 Cal. App. 3d 581, 213 Cal. Rptr. 326 (1985), *rev. granted* 701 P.2d 1170, 215 Cal. Rptr. 852 (1985) (organizing and recruitment costs and charitable contribution to Martin Luther King, Jr., scholarship fund not chargeable to dissenters). *Cf.* Associated Builders & Contractors v. Carpenters Vacation and Holiday Trust Fund, 700 F.2d 1269 (9th Cir. 1983) (organizing chargeable when directed at reducing nonunion competition for jobs); Price v. UAW, 795 F.2d 1128, 1135 (2d Cir. 1986) (organizing, scholarships, and strike support held to be normal and reasonable expenses of modern unions and thus chargeable to all represented employees). *Price* stood alone in its broad judgment of expenses chargeable by NLRA unions. It was vacated and remanded when the Court affirmed *Beck*. 108 S. Ct. 2890 (1988).

Expenses generally held chargeable include staff and overhead expenses allocated to contract negotiation and grievance handling, national union conventions, refreshments at union social events, and litigation to enforce a collective bargaining agreement covering the dissenting employees. *Ellis*, 466 U.S. at 448-53.

When a category of expenditures is deemed nonchargeable, the union is obliged to rebate to objecting employees their pro rata shares of the dues expended for the nonchargeable purpose, and to reduce any future dues by the same proportion. The union may not constitutionally adopt a pure rebate program, exacting full dues and refunding the objectionable portion later. A pure rebate system is inadequate because it permits the union to obtain an involuntary loan for purposes objectionable to the employee: "[T]he union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Id.* at 443-44.

25. Speaking of religious establishment, Jefferson wrote, "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948), *quoted in* Chicago Teacher's Union v. Hudson, 475 U.S. 292, 305, n.15 (1986).

does not apply a similar rule to corporations in behalf of dissenting shareholders or ratepayers, the union's chief adversary in the nonunion workplace and in the political marketplace has a competitive advantage.[26] Third, the rule may undercut democratic processes within the union by encouraging dissidents to resort to the courts instead of participating in union policy-making.

The fee speech rule's fiscal impact on unions also poses negative consequences for society at large. The redistributive, welfare-type laws that unions promote through political channels usually benefit groups of unrepresented, poor citizens who have no other equally effective voice in Congress.[27] Continuing decreases in the size of the union workforce,[28] due in great part to the failure of new organizing efforts, will also have ill effects on the American economy as consumer purchasing power declines and low-paid or unemployed workers increasingly rely on public assistance.[29] Finally, the restriction on free use of union dues for political activities may impair the free functioning of a democratic political system that relies on the pluralism of interest groups to inform and persuade legislators and other governmental policy makers.[30]

Despite powerful criticisms of the statutory and constitutional foundations for the fee speech rule and its broad social and economic effects, the Supreme Court remains committed to enforcing limits on the use of union shop dues. The rule has serious difficulties even as applied to most partisan political expenditures. This Article primarily argues, however, that the fee speech rule sweeps too broadly when it inhibits the funding of organizing the unorganized worker. The special policy considerations associated with union organizing activities and the weak rationale for

26. Free speech and other rules generally permit corporations to subsidize ideological messages out of funds contributed by unconsenting shareholders or ratepayers. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (striking down state law that prohibited monopoly utility from inserting messages promoting nuclear power into billing envelopes); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (corporate contributions to influence state ballot proposition campaign cannot constitutionally be prohibited despite speech and associational interests of objecting shareholders); *see also* Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. 1969) (closely held corporation will not be dissolved because of charitable contribution made over objection of minority shareholder).

The Court also has stated that it will not imply a private right of action for shareholders seeking to enforce Congress' ban on corporate contributions to federal office seekers, but might do so for similarly situated union members suing their union. *See* Cort v. Ash, 422 U.S. 66, 81-82 & n.13 (1975).

27. R. FREEMAN & J. MEDOFF, *supra* note 8, at 12-18.

28. *See supra* notes 6-10 and accompanying text.

29. R. FREEMAN & J. MEDOFF, *supra* note 8, at 248-50.

30. *See, e.g.*, Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 237 (1984) ("The decline of unions means trouble for the pluralist model.").

extending the fee speech doctrine to organizing expenditures warrants a separate analysis of this particular expenditure.

The legal premises for the fee speech doctrine are stretched to the breaking point when applied to organizational expenses. First, the rule is not compelled by any statute, even in the private sector. Nothing in the federal collective bargaining statutes, nor in their legislative history, addresses the purposes for which a union may use lawfully collected funds.[31] The Court's opinions, taken as a whole, essentially concede that the doctrine is sustainable only because necessary to accomodate first amendment-based doubts about compelling such financial subsidies. But if that is so, then the limiting construction of the statute must go no further than the Constitution requires—to do more fails to respect the will of Congress.

The fee speech doctrine arguably went beyond what the Constitution required when it evolved from a rights protective rule concerned with forced political association to a general dictate that union expenses must be "reasonably and necessarily incurred" for the demonstrable benefit of the protester or her bargaining unit. As applied, this statutory formula deems organizational expenditures unauthorized by Congress because the benefit to the payor is not immediate. But it is not clear that the constitution mandates this formula or its application to a collective goal such as increasing union strength. A constitutional analysis should begin instead with an inquiry whether either the manner or the ideological content of this particular union function significantly infringes first amendment interests of union shop members.

First, using compelled contributions for union organizing drives does not present the same evils that rules against government compelled speech are meant to prevent. The Court normally hesitates to recognize a right not to support others' speech when little possibility of public association of the message with the protester exists.[32] Organizing is inherently less public than politicking, and more likely to be perceived as an institutional priority pursued by the leadership rather than by the membership. Second, the ideological content of organizing distinguishes it from political activity. The First Amendment permits workers to be charged the costs of their union's collective bargaining activities, even if the workers morally disagree with these activities. Organizing promotes collective bargaining opportunities for employees who are not yet in the

31. *See infra* notes 34-45 and accompanying text.

32. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Wooley v. Maynard, 430 U.S. 705 (1977).

union; it is otherwise indistinguishable from the kind of communicative conduct that the rule holds *can* be charged to dissenting employees.

Third, it is unsatisfying to draw a constitutional distinction between collective bargaining activities that benefit the payor immediately and organizing activities that bring collective bargaining to the unorganized while benefitting the payor collaterally. Because increasing union strength does benefit workers already represented as a group, the Court's "free rider" rationale applies to organizing activities as well as to negotiations. Finally, even if the free rider rationale alone does not justify charging organizational costs, another governmental interest might do so. By focusing exclusively on one union role—providing services to the individual employee—the Court has overlooked a public interest in affording all workers an opportunity to choose representation.[33] This interest becomes more compelling as the percentage of organized workers declines, potentially resulting in a replication of the labor conditions that prompted the enactment of the NLRA. But even as the need for new organizing grows, the rules controlling use of union dues paid by "financial core" members inevitably will reduce the funds available for organizing activities. While the public interest in providing choice of representation might not justify compelled funding of unions when they act as political representatives, organizing new workplaces is squarely within the union's expected, traditional role. Unlike political advocacy, organizing cannot be performed by any other interest group.

II. Sources of the Doctrine—Statute or Constitution?

A. Federal Collective Bargaining Statutes

Congress might have chosen to regulate the various uses of dues. However, even a generous reading of the two major federal collective bargaining statutes and their legislative history does not justify the conclusion that Congress has done so.

The United States Code contains only one explicit limit on the use of dues, and it affects only donations to campaigns for federal office.[34] With

33. In passing the collective bargaining laws, Congress expressly intended to provide labor an opportunity to choose representation. *See* 29 U.S.C. § 157 (1982) and *infra* notes 126-27.

34. One of the Taft-Hartley amendments made it a crime for labor unions to contribute any portion of their regular dues (as opposed to separate voluntary contributions to political action committees) to finance a campaign for United States congressional or presidential office. Taft-Hartley Act, ch. 120, § 304, 61 Stat. 136, 159 (codified as amended at 18 U.S.C. § 610 (1970)). The law, which likewise prohibits similar contributions from the treasuries of for-profit corporations, was re-enacted by the Federal Election Campaign Act, and is now codified at 2 U.S.C. § 441(b) (1983). *Cf.* FEC v. Massachusetts Citizens for Life, 474 U.S. 1049 (1986) (law against treasury fund donations unconstitutional as applied to non-profit corporation cre-

this exception, Congress probably contemplated that dues spending would ordinarily be governed by majority rule of the represented employees. This non-regulation model was not noticeably disturbed when Congress debated the 1947 Taft-Hartley amendments to the NLRA,[35] nor when it added union security provisions to the RLA in 1951,[36] nor

ated to promote political ideas). The policy behind this statute was not exclusively or even especially to protect the integrity of dissenting employees, but to insulate candidates from undue influence. United States v. CIO, 335 U.S. 106, 113 (1948); United States v. Auto. Workers, 352 U.S. 567, 570-87 (1957).

Of course Congress could not enact similar prohibitions on contributions to state campaigns, whether for elective office or for ballot propositions, and such contributions remain within the bailiwick of state law, so long as contribution limits do not run afoul of the First Amendment. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981).

35. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136-162, amending National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

When Congress overrode President Truman's veto to enact the Taft-Hartley Act, the use of three provisions significantly weakened union security devices. First, the amendments banned the powerful closed shop and replaced it with the union shop. The closed shop had meant that the union could insist that only persons who were already members be hired, while the union shop requires membership only after hire.

Second, Congress, in an unusual departure from the goal of national uniformity exacted by most laws grounded on the Commerce Clause, gave states the option to pass laws that would ban even willing employers from agreeing to an otherwise lawful union shop. 29 U.S.C. § 164(b) (1982) ("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 or Territory in which such execution or application is prohibited by State or Territorial law."). Where such "right-to-work laws" are in place, *see supra* note 13, unions are rarely able to achieve 100% voluntary membership. Those who refuse to pay dues, while partaking of the benefits of union wages and representation, are called "free riders." W. GOULD, *supra* note 13, at 51. The percentage of free riders varies, but appears to be about 20% in southern right-to-work states. *See* Freeman & Medoff, *New Estimates of Private Sector Unionism in the United States*, 32 INDUS. & LAB. REL. REV. 143 (1979).

Third, the union shop amendments require unions to set "uniform" dues and to offer membership to all without discrimination. No employee can be dismissed for nonmembership if "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3) (1982). This proviso prevents the union from coercing employees into political orthodoxy by conditioning membership on conformity or personal support of the leadership. The amendment was bitterly opposed by unionists, who believed it to be an unwarranted intrusion into the local's right to decide the qualifications for membership in the organization.

36. The Railway Labor Act, which covers employees and employers in the railroad and airline industries, was amended in 1951 to copy the NLRA's new union security section. Act of Jan. 10, 1951, ch. 1220, 64 Stat. 1238 (codified at 45 U.S.C. § 152, Eleventh (1983)); *compare* 45 U.S.C. § 152, Eleventh (1983) *with* 29 U.S.C. § 158(a)(3) (1982). The debate on this Act indicates that § 2, Eleventh, was intended "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." *Beck I*, 776 F.2d 1187, 1197 (4th Cir. 1985) (quoting T. HAGGARD, COMPULSORY UNIONISM, THE NLRB AND THE COURTS 115 (1977)). Senator

when it enacted the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).[37]

Congress has refused to impose limits on either the amount of dues collected by private sector unions or the uses to which the dues may be put. Union security provisions under the NLRA do not address the uses of dues. Section 8(a)(3) of the NLRA makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[38] Section 8(b)(2) creates a corollary duty in the union not to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ."[39] Standing alone, these sections would outlaw the most common kind of union security agreement, which permits the union to insist that nonpaying employees be discharged. Section 8(a)(3)'s general condemnation of pro-union "discrimination" is, however, immediately followed by a specific exemption for union security agreements.[40] The statute permits employ-

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Taft, a co-author of § 8(a)(3), was explicit about the intent behind the virtual duplication of language. He declared that § 2, Eleventh "inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and railroads." *Id.* at 1197; Communications Workers of Am. v. Beck, 108 S. Ct. 2641, at 2651.

The only difference between the RLA and NLRA union security schemes is historical. Before the 1951 union shop amendments, no provision existed for any union security in the railway industry. In contrast, the union shop amendments replaced the closed shop in industries covered by the NLRA. *Id.* at 2653.

37. 73 Stat. 519 (1959) (Landrum-Griffin Act) (codified as amended at 29 U.S.C. §§ 401-531 (1983)). During the debates on the LMRDA in 1958, Congress voted down the proposed Potter Amendment, which would have allowed an employee to recover any portion of his dues spent for other than "collective bargaining purposes." 104 CONG. REC. 11330-43 (1958). *See* McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (legislative history of LMRDA indicates Congress specifically did not intend to limit political expenditures through § 501 fiduciary duty). *See also* Leslie, *Federal Courts and Union Fiduciaries*, 76 COLUM. L. REV. 1314, 1327 n.74 (1976) (summarizing legislative history).

38. 29 U.S.C. § 158(a)(3) (1982). *See supra* note 20.

39. *Id.* § 158(b)(2).

40. The exemption states:

> [N]othing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees [selected by the majority] as provided in section 159(a) of this title . . . .

29 U.S.C. § 158(a)(3) (1982). This language is followed by the Taft-Hartley proviso, which prevents a union with such an agreement from forcing the discharge of an employee for nonmembership if she has paid regular dues and initiation fees. *See supra* note 34.

Amended § 7 of the NLRA, 29 U.S.C. § 157 (1982), declares the right of employees to refrain from engaging in labor organizing activities. The right to refrain is also expressly qualified "to the extent that such right may be affected by" a union security agreement authorized by NRLA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982).

ers and unions to agree to require employees to pay uniform dues and initiation fees as a condition of their continued employment, without regard to how these funds are spent.

Moreover, no evidence of any Congressional intent contrary to the plain text appears in the legislative history. In fact, Congress rejected attempts to limit levels of dues and union political expenditures,[41] though members were well aware that unions did in fact use for political purposes the "periodic dues and initiation fees" that section 8(a)(3) would permit them to collect.[42] The Senate-House compromise that became the Taft-Hartley Act ultimately placed no restrictions on the uses of dues.[43]

41. In a strong dissenting opinion to Communications Workers of Am. v. Beck, Justices Blackmun, O'Connor, and Scalia agreed that according to the legislative history, "Congress affirmatively declined to place limitations on either the amount of dues a union could charge or the use to which it could put those dues." 108 S. Ct. at 2663 (Blackmun, J., dissenting). The legislative history of the Taft-Hartley debates on this issue is recounted in Cantor, *Uses and Abuses*, *supra* note 2, at 72-75. Professor Cantor concludes that "Congress did not intend to preclude union political expenditures from either union shop dues or agency shop fees." *Id.* at 72. In a related article, he writes that "[n]ot only *could* Congress conclude that unions should be able to collect agency fees for a full range of representational services, including lobbying, but Congress *did* so conclude." Cantor, *Forced Payments*, *supra* note 20, at 41.

The House was aware and reportedly disturbed that a worker could be "compelled to contribute to causes and candidates for public office to which he [is] opposed." H.R. REP. No. 245, 80th Cong., 1st Sess. 4 (1947), *reprinted in* 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 295 (1948) [hereinafter LEGISLATIVE HISTORY]. The House then approved a bill to free workers from "unreasonable and discriminatory financial demands," making it an unfair labor practice for a union to "impose any dues or general or special assessments that . . . are in excess of such *reasonable amounts* as the members thereof . . . shall authorize," or "to fine or discriminate against any member . . . on account of his having supported or failed to support any candidate for civil office . . . ." H.R. Doc. No. 3020, 80th Cong., 1st Sess. § 7(c) (1947) (emphasis added); 1 LEGISLATIVE HISTORY 179-80.

The Senate conferees refused to accept the House's proposals to regulate the reasonableness of dues. Senator Taft disclaimed any intent to intrude into union financial affairs, finding it "unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions . . . ." 93 CONG. REC. 6601 (1947); 2 LEGISLATIVE HISTORY 1540 (1948).

The Conference Committee's one concession to the House related to one-time initiation fees, not dues. Exorbitant initiation fees are a barrier to membership and, selectively applied, could allow a union to maintain a hiring monopoly of its friends. *Compare* 93 CONG. REC. 6659; 2 LEGISLATIVE HISTORY 1574 (Sen. Murray); 93 CONG. REC. 6673; 2 LEGISLATIVE HISTORY 1589-1590 (Sen. Pepper) *with* 93 CONG. REC. 7001; 2 LEGISLATIVE HISTORY 1623 (Sen. Taft).

42. Perhaps the best evidence of this is that during the debates several legislators complained that the dues-funded AFL and CIO were spending heavily to defeat the Taft-Hartley Act itself. *See* 2 LEGISLATIVE HISTORY, supra note 41, at 1424, 1549; Cantor, *Uses and Abuses*, *supra* note 2, at 74.

43. *See* Detroit Mailers Union No. 40, 192 N.L.R.B. 951, 951-52 (1971). It is important to recall that the unions lost considerable power through this compromise. Because Taft-Hartley outlawed the "closed shop" and substituted the union shop, unions could no longer insist that only union members be hired. Furthermore, amended § 8(a)(3) ensures that no

Finally, even the objections voiced in debate concerned only union politicking; the record apparently does not report any objection made to using dues for organizational drives.

The Railway Labor Act's union security provisions were modeled after the NLRA's, and the legislative history of section 8(a)(3) was expressly invoked by sponsors of the RLA amendment.[44] During deliberations, several witnesses complained that the bill set no limit on the scope or amount of fees and dues that could be exacted. Witnesses also informed Congress of the broad range of union activities beyond securing collective bargaining agreements that require the financial support of workers.[45] Yet Congress again failed to enact limits on dues spending.

The legislative history of the Taft-Hartley compromise and its 1951 replication in the union shop authorizations of the Railway Labor Act presented a serious obstacle to later arguments that Congress had nevertheless *implicitly* limited unions' discretion in respect to use of dues.[46] Perhaps for that reason, the Court began to invoke the First Amendment to justify inroads on union sovereignty over dues, even when it formally attributed the result to the intent of Congress. In 1956, the Supreme Court declined to find a union shop agreement by itself offensive to employees' first amendment freedoms of speech or association.[47] But the first time it heard a challenge to the use of union shop dues for political activities, the Court perceived constitutional questions of "the utmost gravity."[48] To avoid those questions, the Court construed the RLA to mean that employees could not be compelled to pay union dues to promote pro-labor candidates or other "ideological" causes, even if those causes were intended to produce workplace benefits for all employees.[49]

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employee can be fired for nonmembership as long as she pays dues. Thus, unions lost control over who would be employed and retained. They were left with only what they had always possessed: the right to negotiate for full payment of dues from all covered workers. The compromise, Congress noted, insulated workers' jobs from potentially oppressive union power but protected unions from the "free rider," who would benefit from representation without sharing in its cost. *See* 1 LEGISLATIVE HISTORY, *supra* note 41, 300, 871, 412-13; 2 LEGISLATIVE HISTORY at 952-53, 1010, 1170, 1199, 1417, 1419-20, 1422.

44. *See supra* note 36.

45. The legislative history is summarized in Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 445-46 (1984); *see* Communications Workers of Am. v. Beck, 108 S. Ct. at 2665 (Blackmun, J., dissenting). *See also* Shea, *supra* note 5, at 29-31.

46. Even the Court admitted, in *Ellis*, that a fair inference drawn from the RLA is that Congress did not intend to limit expenditures. 466 U.S. at 445-46.

47. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956); *see* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977) (similar "agency shop" agreement covering public sector employees does not offend first amendment).

48. International Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961).

49. *Id.* at 749, 763-64, 768-69. The opinion attributes to Congress an intent to authorize collection of union shop dues only insofar as necessary to avoid "free riding" by those who

As extended, this construction now compels refunds to the dissenting employee for any activity outside of core representational services, apparently without regard to whether the challenging employee actually has ideological disagreements with the challenged activity.[50] The first amendment-based inquiry into actual ideological affront has been abandoned. The net result is that first amendment concerns have propelled the Court beyond what the Constitution requires.[51]

Cases arising under the NLRA followed a parallel course in the lower federal courts culminating in the Supreme Court's recent opinion in *Communications Workers of America v. Beck*.[52] Under both statutes, limits on the union's authority to spend dues are said to arise implicitly from Congress' blanket authorization to contract to collect them. In *Beck*, a majority of the Supreme Court concluded that "[section] 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues'."[53]

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would recieve the benefit of union service without paying for them. The Court's concept of such "benefits" is narrow: "Section 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." *Id.* at 704. The union benefits Congress had in mind may well have included political or organizational services as well as negotiations. The division between collective bargaining and politics simply creates a new kind of free rider. *See infra* notes 113-119 and accompanying text. At best, Congress was silent about its intent in regard to the uses of union shop dues. *See supra* note 41.

50. In 1984 the Supreme Court iterated:

> [T]he test [for requiring a refund] must be whether the challenged expenditures are 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. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct cost of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Ellis, 466 U.S. at 448. *See* Communications Workers of Am. v. Beck, 108 S. Ct. 2641, 2651 (1988) (adopting same formula as construction of NLRA).

51. *See infra* notes 92-110 and accompanying text.

52. 108 S. Ct. 2641 (1988). *Street* happened to arise under the RLA's union shop provisions. The long stretch between invention of the fee speech doctrine under the RLA and its application to the NLRA might be explained by the practice of routinely settling individual claims, which are often for quite small amounts.

53. 108 S. Ct. at 2657 (quoting test from *Ellis*, *see supra* note 50). As applied by the trial court below, this formula excluded about 80% of the union's annual budget, including all politicking, lobbying for labor legislation, supporting sister unions, organizing, and publicity for such "ideological" activities. *Id.* at 1210-12. The union accountant who testified in *Beck I* compared the problem of making a proper allocation of staff worktime according to this formula to "making a frog fly." 776 F.2d 1187, 1212 (4th Cir. 1985).

There are limits to what a court can do in the name of statutory construction before it becomes reconstruction.[54] The Court's interpretation of the RLA and NLRA is extremely fragile.[55] The sparseness of statutory support for these outcomes demands a candid acknowledgement that the results are compelled, if at all, only by the Constitution and not by Congressional intent.[56] Treating the rule openly as constitutionally based would require the Court to inquire more closely into the precise justification for protecting workers from supporting particular expenditures. What the Constitution requires may be different for conventional political expenditures than for the funding of new organizing.[57]

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54. *See, e.g., Street*, 367 U.S. 740, 784-85 (Black, J., dissenting) (citing Clay v. Sun Ins. Office, 363 U.S. 207, 213 (1960)):

> I think the Court is once more 'carrying the doctine [sic] of avoiding constitutional questions to a wholly unjustifiable extreme.' In fact, I think the Court is actually rewriting § 2, Eleventh to make it mean exactly what Congress refused to make it mean. The very legislative history relied on by the Court appears to me to prove that its interpretation of § 2, Eleventh is without justification. For that history shows that Congress with its eyes wide open passed that section, knowing that its broad language would permit the use of union dues to advocate causes, doctrines, laws, candidates and parties, whether individual members objected or not.

Black would have found the statute unconstitutional because it permitted compelled support of ideas offensive to the payor.

Not surprisingly, a number of commentators do not find the Court's construction of the RLA and its history persuasive. *See, e.g.,* Cantor, *Uses and Abuses*, *supra* note 2, at 72 (Justice Brennan "tortured the legislative history"); Hyde, *supra* note 20, at 5 (statutory basis for exclusion of politics not made clear by cases); Shea, *supra* note 5, at 29-31 (legislative history was "twisted").

55. The troublesome statutory justification for the rule has provoked comment even from justices now on the Court. Justices Brennan, Marshall, Stevens and Rehnquist joined Justice Stewart's opinion for the Court in Abood v. Detroit Bd. of Educ., in which Stewart wrote, "*Street* embraced an interpretation of the Railway Labor Act not without its difficulties." 431 U.S. 207, 232 (1977) (citing Black, J. and Frankfurter, J., dissenting in *Street*, 367 U.S. 740, 784-86, 799-803).

56. Such an acknowledgement is important for the legislature as well as the adjudicative process. For example, any Congressional amendment that expressly authorized use of dues for political purposes would surely face a stiff first amendment challenge.

57. Another unanswered question is whether a regular, voluntary member of the union can invoke the constitutional rule. As a common sense matter, a full member's rights against the union might be governed only by contract law, in addition to whatever union rules the membership has approved. Thus, the fee speech rules are commonly assumed to apply only in favor of nonmembers or "financial core" members (*see supra* note 15). *See* TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4, at 805 n.5 (2d ed. 1988) ("Presumably, membership being voluntary, members were deemed to have consented to the expenditure."). Judicial solicitude may also seem more appropriate for this group, since they are unable to participate democratically in collective union decisions about the use of union funds (even though they do so by choice).

In fact, the Court does not always distinguish between the two groups' interests in how their contributions are spent. In *Ellis*, the plaintiff classes included *both* involuntary agency fee payors and regular members. The Court did not distinguish their rights in formulating or applying its test. *See Ellis*, 466 U.S. 435, 439 n.2. In *Abood*, the leading public sector case,

B. The First Amendment

1. Governmental Action

Exploring a possible constitutional genesis for the union's duty in spending dues paid by financial core members begins with a determination whether government action exists in union security agreements. There has never been a formal finding that sufficient governmental involvement exists in every private union shop agreement to make the First Amendment directly applicable to dues spending. Yet this seems a fair characterization of the view held by the current Court. *Abood v. Detroit Board of Education*[58] suggests that all private union shop agreements involve state action. Although *Abood* is often distinguished as a public sector case, the government's involvement as an employer and a party to the union's agency shop contract was incidental. The Court invoked related private sector precedents to find state action in Michigan's legislative *permission* to bargain for agency shops. The majority opinion stated:

> [W]hile the actions of public employers surely constitute "state action", the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in *Hanson*. The plaintiff's claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation [in agreeing to a union shop].[59]

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where the test took a pure constitutional form, plaintiffs included union members who were paying agency shop fees under protest, members who had joined the union and paid without protest, and others who had refused to pay or join. *Abood* described the protected class broadly as "government *employees* [not excluding voluntary members] who object" to political spending. More recently the Court stated that it is the *nonunion* employee whose first amendment rights are affected by political spending, Chicago Teachers Ass'n v. Hudson, 475 U.S. 292 (1986), but no full union members had joined that suit. Fourth Circuit Judge Murnaghan who, by concurring in *Beck II*, cast the necessary sixth vote to find union liability, carefully limited his rationale to the nonunion, involuntary fee payor, although the other five judges supporting the judgment were not clear on that point. 800 F.2d 1287 & n.10. Justice Brennan's opinion, affirming the Fourth Circuit, characterized the beneficiaries of the doctrine as "dues paying nonmember employees." *Beck*, 108 S. Ct. at 2045.

Of course, voluntary members could formally resign from the union to take advantage of the refunds made available by the rule. Economic theory predicts that a rational member might follow this course, even if she agreed that the union should spend dues to promote political causes. *See infra* notes 113-119 and accompanying text.

58. 431 U.S. 209 (1977).

59. *Id.* at 226-27. *Hanson* was an early decision in which the Court upheld the constitutionality of union shop contracts authorized by the Railway Labor Act. *Hanson* did not involve a claim by employees that their union was using their dues for political purposes. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956).

Logically, the public status of the employer does not make political expenditures by the public employees' union a government action. The employer is not involved in spending decisions. Its involvement is limited to agreeing that the union can collect mandatory dues or fees, and that act of agreement, according to *Hanson* and *Abood*, does not offend the First Amendment.

Although some justices had their doubts about applying the state action portion of *Abood* to the private sector,[60] *Ellis*, the leading private sector case after *Abood*, essentially does so. Justice White's majority opinion in *Ellis* begins by reaffirming the Court's belief that Congress did not intend to authorize the use of union shop dues for undertakings beyond providing direct representational services to the bargaining unit.[61] Union conventions, social activities, and nonpolitical publications are authorized by the RLA, while organizing and litigation not related to the collective bargaining agreement are not.[62] If the test were only statutory, that would have been the end of the matter. Justice White, however, devoted an additional section of his opinion to analyzing whether the First Amendment bars compelled financial support for the three activities allowed by the RLA. He introduced it with the flat assertion that

> [t]he First Amendment does limit the uses to which the union can put funds obtained from dissenting employees. . . . The issue is whether these expenses involved *additional* interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest.[63]

This language, coming so closely after the Supreme Court's major clarifications in 1982[64] of the reach of state action theory into the conduct of

60. In a concurring opinion, three justices expressed a concern that "[i]f collective-bargaining agreements were subjected to the same constitutional constraints as federal rules and regulations, it would be difficult to find any stopping place in the constitutionalization of private conduct. 431 U.S. at 252 (Powell, J., Rehnquist, J., and Blackmun, J., concurring). The concurring opinion quotes Professor Wellington, a long-time critic of extending the government action doctrine to private labor unions:

> Most private activity is infused with the governmental in much the way that the union shop is . . . . Enacted and decisional law everywhere conditions and shapes the nature of private arrangements in our society. This is true with the commercial contract—regulated as it is by comprehensive uniform statutes—no less than with the collective bargaining agreement . . . .

431 U.S. at 252 n.7, citing H. WELLINGTON, LABOR AND LEGAL PROCESS, 244-45 (1968).

61. 466 U.S. at 447-448.

62. *Id.* at 448-453.

63. *Id.* at 455, 457. Justice White cited *Abood*, 431 U.S. 209, for the proposition that the First Amendment applied to union expenditures, but without distinguishing *Abood* as a public sector case. His opinion concludes that requiring contributions to social hours, publications, and conventions is constitutional because these activities are justified by the governmental interest behind the union shop itself. *Id.* at 455-57. The employees' primary submission in the case was that "the use of their fees to finance the challenged activities violated the First Amendment." *Id.* at 444.

64. *See, e.g.*, Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840-42 (1982); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). If in the future the Court decided to retreat from *Ellis*, the 1982 cases would furnish powerful arguments against finding government action in the NLRA union shop. The Court's current approach attributes otherwise private conduct to the government only after a two-part inquiry is satisfied. First, "the deprivation must be caused by the exercise of a right or privilege created

private actors, indicates that no retrenchment was intended in the application of constitutional standards to these private contracts.[65] The Court prudently refused to reach the governmental action issue posed in *Communications Workers of America v. Beck* involving NLRA-governed unions,[66] but said nothing to cast doubt on earlier findings of governmental action in *Ellis* and other RLA cases.[67] The only event that would now force the Court to decide this issue would be a Congressional amendment to either NLRA or RLA authorizing dues expenditures for purposes (such as organizing) prohibited by the *Ellis/Beck* test. Assuming the Court would then find governmental action, as it did in *Ellis*, it would next have to apply a constitutional test to those expenditures.

2. *The First Amendment Test*

If judicially imposed limits on the use of union dues are sustainable only as a matter of constitutional law, the putatively statutory formula now applied in the private sector must capture precisely the sorts of union undertakings that trigger first amendment concerns. Though the

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by the State or by a rule of conduct imposed by the state." *Lugar*, 457 U.S. at 937. Only the first of these, the exercise of a right or privilege, is even arguably present when the union negotiates for a union shop, and it is not at all obvious that entering a contract can fairly be characterized as a "right or privilege created by the state."

Second, "the party charged . . . must be a person who may fairly be said to be a state actor . . . because [1] he is a state official, because [2] he . . . has obtained significant aid from state officials, or because [3] his conduct is otherwise chargeable to the State." *Id.* at 940. None of these characterizations easily fits the union, acting alone or with the private employer, to enforce a contract endorsed by federal legislation. The second choice—a private actor acting with state officials or with their aid—is most plausible. But unions are only permitted, not actively encouraged, to seek union security agreements. It is true that union security is a "mandatory subject of bargaining," meaning that the employer cannot refuse to discuss it at the table. NLRA § 8 (a)(5), 29 U.S.C. § 158 (a)(5) (1982). But neither employer nor union is obligated to *agree* to this or any other bargaining proposal. It is questionable whether the requirement to discuss a security proposal in good faith produces more union security agreements than would occur without the law. In this light, Congress' assistance does not appear significant.

65. Although the Supreme Court has not ruled on the question, several circuit courts have found in the NLRA's toleration of union shop agreements sufficient government action to invoke the federal constitution. *See* Linscott v. Miller Falls Co., 440 F.2d 14 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1971); Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970); *see generally* Reilly, *The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes*, 32 MERCER L. REV. 561, 563 (1981). These decisions predated the Court's major pronouncements on the state action doctrine in 1982. *See supra* note 64.

66. 108 S. Ct. 2641, 2656 (1988) (unnecessary to decide whether entering into union security contracts permitted, though not compelled, by § 8(a)(3) involves "state action").

The Court followed its past practice: it avoided the constitutional question by construing the NLRA to provide as much (or more) protection as the First Amendment would require.

67. *Id.*

Court interprets the RLA to mean that organizing is nonchargeable, it has never separately analyzed such expenditures under the First Amendment.

The *Ellis* formula,[68] if used as a proxy for constitutional analysis, would stand constitutional theory on its head. The statutory test inquires whether a particular expenditure was authorized by a policy, attributed to Congress, of requiring nonmember employee support only for specific collective bargaining services rendered on behalf of the payor or her unit. A constitutional analysis asks not whether a challenged expenditure is authorized, but whether it is prohibited. Moreover, the statutory test has abandoned the requirement of ideological offense, which is a prerequisite to a first amendment claim. Especially in light of the inhibiting effect of these legal restrictions on the *union's* free speech interests, charging the costs of organizing new workers to union shop dues should not be prohibited unless the constitution requires it.[69]

The best source for a pure statement of the Court's first amendment philosophy in regard to use of compelled union dues is still *Abood v. Detroit Board of Education*.[70] In *Abood*, Michigan law had already been interpreted by that state's highest court to permit a teachers' union to spend agency shop fees for lobbying and support of political candidates.[71] Therefore, the employees' first amendment issue was cleanly presented and decided.

Abood judged the agency shop contract between the school district and the teachers' union to be constitutional, even though the Court acknowledged that compelled support of *any* union function could offend an employee's sincere political and moral beliefs.[72] The Court held that interference with associational beliefs was justified by the government's judgment that requiring payment of fees to support the exclusive representative makes an important contribution to labor relations.[73] Exclusivity makes bargaining more efficient for the employer and maximizes

68. *See supra* note 50.

69. Union speech is also protected by the First Amendment, and the expenditure of funds to further an individual's expression is generally held to be a constitutional interest. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

70. 431 U.S. 209 (1977).

71. *Id.* at 230.

72. *Id.* at 222.

73. Under the principle of "exclusive representation," once a union is elected by a majority of the bargaining unit, that union has the exclusive power (and the duty) to represent all employees in the unit. Employees who voted against the union, or who oppose any union, are not free to decline representation or to seek separate representation. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). The union is obliged to represent all fairly. Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).

employee leverage by concentrating it in one agent. Agency shops ensure that all employees benefited by the union's representation will share equally in its costs, reducing resentment and divisiveness and increasing the stability of the exclusive agent. In sum, the government has an important interest[74] in preventing "free riding" even by conscientious objectors.

The union's political causes could not, however, constitutionally be funded from the dues of dissenting employees. These expenditures lost the shield of "government interest" because, in the Court's view, they were not "germane" to collective bargaining; political expenditures were not undertaken "to promote the cause which justified bringing the group together."[75] Building on constitutional principles that prohibit the government from compelling an individual to affirm any belief, the Court found that forced contribution to objectionable causes would violate freedom of speech.[76]

The Court thus found state action implicit in the contract and upheld the constitutionality of compelled dues in the public sector, but accepted plaintiffs' arguments that some uses of employee funds violate first amendment rules against government-compelled beliefs. As for the latter, plaintiffs specifically objected to the union spending dues to "contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."[77]

The Court's holding in *Abood* is limited to the proposition that plaintiffs allegations stated a cause of action. What constitutes a valid use of dues from nonmembers remains ambiguous. The majority drew

74. The Court did not, in *Abood*, require that the government interest be "compelling" or "overriding," a relaxation that prompted criticism from Justice Powell: "Before today it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests. . . The Court, for the first time in a First Amendment case, simply reverses this principle." 431 U.S. at 244, 263.

75. *Id.* at 223.

76. The Court relied on this famous passage from West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Compelling monetary contributions to underwrite objectionable beliefs is several steps removed from compelling the objector to express the belief, which was the situation of the West Virginia schoolchildren coerced into reciting the flag salute. The gap was partly filled by the Court's opinion in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), when it found that government *restrictions* on a candidate's campaign expenditures interfere with free expression. In the *Abood* Court's view, *forced* political spending similarly infringes freedom of speech. 431 U.S. at 234.

77. *Id.*

the line somewhere between a union's "collective bargaining, contract administration, and grievance-adjustment" activity, for which financial compulsion is clearly permitted,[78] and advancement of political views, political candidates, and other ideological causes "not germane to" or "unrelated to collective bargaining,"[79] for which compulsion is unconstitutional. The opinion did not attempt to identify what sorts of expenditures would be deemed "unrelated to collective bargaining." Expenditures for organizing were not an issue in *Abood,* and the Supreme Court has never held that such expenditures violate the First Amendment.[80]

3. *Some Objections to the Dichotomy*

The Court's reasoning in *Abood* has been criticized by constitutional scholars on two grounds. First, the rule equates compelled financial support with compelled speech or belief—a large extension of *West Virginia Board of Education v. Barnette.*[81] Second, the line dividing permissible

78. *Id.* at 232.

79. *Id.* at 235-36.

80. Two subsequent public sector cases relied on the First Amendment to disallow expenditures to promote union strength beyond the bargaining unit. Cumero v. PERB, 166 Cal. App. 3d 952, 213 Cal. Rptr. 326 (1985), *rev. granted,* 701 P.2d 1170, 215 Cal. Rptr. 852 (1985) (employee in disagreement with goals of union cannot be compelled to lend involuntary support to its growth); Lehnert v. Ferris Faculty Ass'n, 556 F. Supp. 309 (W.D. Mich. 1982) (loan to affiliated union to support its strike cannot be charged to dissenting nonmembers). In the private sector, use of dues to organize was held nonchargeable under the RLA, *see Ellis,* 466 U.S. at 435, and *Beck* affirmed the lower court's disallowance of organizing expenses under the NLRA without addressing organizing specifically in the opinion. 108 S. Ct. 2641 (1988), *aff'g* 800 F.2d 1280 (4th Cir. 1986). Some earlier NLRA cases were *contra. See* Associated Builders & Contractors v. Carpenters Vacation and Holiday Trust Fund, 700 F.2d 1269 (9th Cir. 1983) (money spent on organizing to eliminate competition from nonunion employers was germane to bargaining and therefore chargeable for purposes of first amendment analysis); Price v. UAW, 795 F.2d 1128, 1135 (2d Cir. 1986) (organizing was "normal and reasonable" union expense), *vacated and remanded,* 108 S. Ct. 2680 (1988).

Several courts have extended the rule of *Abood* to integrated bar associations that spend mandatory dues on political activities. *See, e.g.,* Gibson v. Florida Bar, 798 F.2d 1564 (11th Cir. 1986); Keller v. State Bar, 190 Cal. App. 3d 1196, 226 Cal. Rptr. 448 (1986), *rev. granted,* Aug. 28, 1986 (disallowing expenditures for lobbying, *amicus* briefs, bar conventions addressing political questions, and public education campaigns supporting retention of Supreme Court Justices); Arrow v. Dow, 544 F. Supp. 458 (D.N.M. 1982) (disallowing bar association's lobbying expenses on bills affecting continuing legal education, licensing requirements, criminal procedure rules, hourly rates for public defenders, Uniform Child Custody Act, and other bills relating to practice of law); Falk v. State Bar, 411 Mich. 63, 305 N.W.2d 201 (1981) (all lobbying by bar association infringes objecting members' first amendment rights).

81. 319 U.S. 624 (1943). Professor Shiffrin writes:

> The Court held [in *Abood*] that such compelled contributions unreasonably invade the individual's freedom "to believe as he will" and invoked *Barnette*'s "fixed star in our constitutional constellation." The link between compelled contributions and freedom of belief or expression, however, is tenuous. And the invalidation of com-

and impermissible financial compulsion is not logically justifiable.[82] Labor law commentators criticize the practical effect of distinguishing between collective bargaining and political activity. They assert that the rule does not take into account the union's need to resort to the political process to secure immediate, employment-related economic benefits.[83] The immediate benefit to represented workers is most plain when the AFL-CIO lobbies Congress or state legislatures for supplements to collective bargaining contracts, such as pension protection, workers' com-

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> pelled contributions is surely a long step from *Barnette*, where the state sought to compel individuals publicly to profess beliefs they did not share. . . . Requiring individuals to make contributions to a union, which in turn spends a portion for political purposes, does not compel them to believe anything or to express anything, nor does it prohibit them from believing or expressing anything. . . . It is true that because some of their income has been taken, fewer funds are available for political expression, but this could be said of any compelled financial contribution, from social security, to the income tax, to funds for the collective bargaining process itself.

Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 590-91 (1980) (footnotes omitted). *See supra* note 76.

82. *See* Shiffrin, *supra* note 81, at 591: "The Court's failure to justify a distinction between compelled contributions to the union's collective bargaining process and compelled contributions to the union's [political] election efforts fatally compromises its reasoning."

The criticism is a powerful one, but it is not the primary subject of this Article. The discussion which follows assumes generally a constitutionally based dichotomy between chargeable and nonchargeable expenses, but argues that it fails to account for disallowance of organizing expenses.

83. *E.g.*, Cantor, *Forced Payments*, *supra* note 20, at 40. Political advocacy of employee interests is especially important in subject areas where unions are relatively powerless, such as in plant shutdowns. Recent changes in NLRB rulings have severely limited unions' ability to contract for protection against sudden plant closures, leaving the unemployed and soon-to-be-unemployed only the hope of state and federal legislation. *See* Otis Elevator Co. (United Technologies), 269 N.L.R.B. 891 (1984); Milwaukee Spring Div. of Illinois Coil Spring Co., 268 N.L.R.B. 601 (1984), *enforced sub nom.* International Union, UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985); *see also* Barron, *The Causes and Impact of Plant Shutdowns and Relocations and Potential Non-NLRA Responses*, 58 TUL. L. REV. 1389, 1401 (1984) (describing proposed statutes providing for severance pay, government assistance, and advance notice to employees and communities).

Some courts, even after *Abood*, find lobbying by public sector unions to be a chargeable expense when it is directed to obtaining employment benefits. The reason often given is that many of the terms of employment bargained for bilaterally in the private sector are governed by law for public employees. *See, e.g.*, Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984). *Robinson* upheld a New Jersey statute that allowed public sector unions to charge against representation fees the "costs 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 public employer." N.J.S.A. 34:13A-5.5; *Robinson*, 741 F.2d at 609. When such matters as class size, licensing requirements, length of school year, and dismissal procedures for school teachers are legislated and thus removed from the union's power to negotiate them, lobbying is a logical adjunct to bargaining. *See* Cumero v. PERB, 166 Cal. App. 3d 952, 213 Cal. Rptr. 326 (1985), *rev. granted* July 11, 1985. State appropriations to local school districts, supplemented by local elections, also would involve the teachers' union in political efforts with direct economic consequences.

pensation, or occupational health and safety rules.[84] Contribution to a candidate is the most controversial type of union expense and the one most consistently disallowed by courts.[85] Yet few political events are more significant to labor's economic well-being than the election of a pro-labor governor or president.[86]

The Supreme Court has firmly rejected arguments that union political activities are germane to its representation function, despite the pleas of dissenting justices,[87] labor leaders,[88] and scholars[89] that political advocacy benefits workers. While it has not explicitly ruled that the Constitution requires organizational expenses to be treated in the same manner as

84. When unions attempt to obtain through legislation improvements in "wages, hours, and working conditions," which the union has the right to negotiate with the employer, 29 U.S.C. §§ 158(a)(5), 158(d) (1982), they seek benefits that they might have obtained at the bargaining table. The Court's position that freedom of belief is violated by compelled support for this type of speech cannot be explained by the subject matter of the speech. A possible explanation is that the Court believes the public *manner* of the speech, and its nonworker audience, create the infringement. When a union is engaged in the "pursuit of economic ends through political means," it must be the means, not the ends, that offend belief. *See* Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WIS. L. REV. 1, 32.

85. *See, e.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740, 744 (1961) (financing of campaigns for federal and state offices).

86. The Chief Executive is not only in a position to propose or to veto pro-worker legislation, but also wields a great deal of control over appointments to courts and labor boards. Consequently, labor organizations and employers attach great importance to electing sympathetic senators, whose advice and consent are necessary for an appointment to the NLRB. The members of the NLRB are appointed by the President, with the advice of the Senate, to serve for five-year terms. 29 U.S.C. § 153(a) (1982). Any member of the Board may be removed by the President for "neglect of duty or malfeasance in office, but for no other cause." *Id.*

Changes in union, employee, and employer rights that follow the shifting political makeup of the NLRB have been much publicized. Many scholars agreed, on the occasion of the law's 50th anniversary, that the Reagan Board has fundamentally reworked portions of the law to cut back on protections unions and workers had long enjoyed under previous boards. Others admit that the changes have been significant, but find them an improvement. *See Symposium: The National Labor Relations Act After 50 Years*, 38 STAN. L. REV. 937-1140 (1986).

87. Justice Frankfurter, dissenting in *Street*, stated:

> The notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment. And this Court accepts briefs as amici from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor.

367 U.S. at 814-15 (Frankfurter, J., dissenting) (footnotes omitted).

88. Joseph Rauh, a much-honored labor lawyer, argued in 1961:

> From the first, there has been no line of demarcation between the bargaining, education and political activities of unions. There is a tradition of over one hundred years of union political activity in this country. As the federal government has increasingly legislated in the field of union activity and on economic matters which are of the most immediate concern to laboring men as workers and as union members, the necessity for labor union political activity has correspondingly increased.

political ones, the Court rejected arguments that a larger and stronger union significantly benefits the already represented worker, when it disallowed organizing costs in *Ellis*.[90]

III. Which Side of the Constitutional Line for Organizing?

A. Distinguishing Organizing from Politicking

The ability freely to fund new organizing may be more crucial to unions than full funding of publications or lobbying. Other interest groups are likely to continue to support pro-worker laws even if labor's financial resources for lobbying and candidate contributions are limited by law. But the disallowance of expenses necessary for recruiting new members places in doubt the value and continued existence of the union movement. Without organizing, there is no labor movement.[91]

Rauh, *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152, 163 (1961).

Pockets of the labor movement were distinctly opposed to involvement with politics and political parties. The Industrial Workers of the World (nicknamed the Wobblies) believed that self-organization in places of production was the *only* way to advance the working class; until such collective power was a reality, politics would be divisive, untrustworthy and conservatizing. Vincent St. John exhorted his fellow Wobblies in about 1910 with the following remarks:

> [W]hile the workers are divided on the industrial field it is not possible to unite them on any other field to advance a working class program . . . . It is impossible for anyone to be a part of the capitalist state and to use the machinery of the state in the interest of the workers. . . . To those who think the workers will have to be united in a political party, we say dig in and do so, but do not try to use the economic organization to further the aims of the political party.

St. John, *Political Parties and the I.W.W.*, in THEORIES OF THE AMERICAN LABOR MOVEMENT 75 (S. Larson and B. Nissen, eds., 1987) [hereinafter LARSON & NISSEN]. The Wobblies, though they had many adherents in the mines, mills, and logging camps of the West before World War I, were never a mainstream movement. Their numbers were decimated by red-scare prosecutions, censorship, and violent attacks, including lynchings. They were not a serious force after the 1920s. COX, BOK, & GORMAN, LABOR LAW 11 (10th ed., 1986).

89. Archibald Cox, one of the most influential labor scholars of this century, wrote:

> It is difficult, if not impossible to separate the economic and political functions of labor unions. Right-to-work-laws affect union organization and collective bargaining. Legislation subjecting unions to the anti-trust laws or confining their scope to the employees of a single company would greatly weaken their bargaining, if it did not destroy them altogether. . . . The basic philosophy of a President and his party affects appointments to agencies like the National Labor Relations Board, which in turn exert tremendous influence upon the course of labor relations. Even the tariff impinges on labor negotiations. The bargaining power of the Hatters Union, for example, is affected by the competition of low-cost foreign goods.

A. COX, LAW AND THE NATIONAL LABOR POLICY 107 (1960). *See also* Woll, *Unions in Politics: A Study in Law and the Worker's Needs*, 34 CALIF. L. REV. 130, 142 (1961).

90. 466 U.S. at 452. *Cf.* Assorted Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund, 700 F.2d 1269 (9th Cir. 1983) (money spent on organizing to eliminate competition from nonunion employers was germane to bargaining and therefore not a "political" expenditure for purposes of first amendment analysis).

91. Henkel & Wood, *supra* note 1, at 744 (quoting from a speech given by an AFL-CIO official in 1977). Organizing is necessary for maintaining current union strength as well as

Constitutionally, the case against charging organizing expenses seems much weaker than the case against lobbying or candidate promotion. The degree of claimed infringement of speech or association rights[92] should first be measured against the reasons for the general rule prohibiting government compulsion of distasteful ideological expression. Foremost among these reasons is that an individual has a right not to be personally and publicly associated with an objectionable governmental message.[93] Forced expression results when a regulation requires an individual to assist in disseminating a message, under circumstances in which outsiders might wrongly attribute the belief to the individual.[94] Outside the labor context, these circumstances generally have required a *public* affirmation or association.[95]

Unconstitutional public affirmation was first found in forced public recitation of the government's quintessential political message, the flag salute.[96] Building upon the theme of public attribution, two modern cases have begun to describe the contours of the right to dissociate oneself from an ideological message.[97] *Wooley v. Maynard*[98] identified a first amendment right to avoid becoming a public "courier" for the state's ideological message, at least when less drastic means would achieve the state's countervailing interests.[99] On the other hand, *Pruneyard Shopping Center v. Robins*[100] rejected a similar argument against the forced use of private property, a shopping center, to support the expressive activity of others. First, the views expressed by members of the public

expanding it. Labor economists estimate that because of attrition and other factors, the union share of the work force in the United States tends to decline by three percent a year, in the absence of new organization through NLRB elections. R. FREEMAN & J. MEDOFF, *supra* note 8, at 222.

92. The degree of infringement is relevant to assessing the state's countervailing interest in regulation. *Cf.* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 310 (White, J., dissenting) (when an infringement is "slight and ephemeral," the state's interest justifying the regulation need not be as high).

93. *See generally* Barnette v. W. Va. State Bd. of Educ., 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977).

94. Wooley v. Maynard, 430 U.S. 705 (1977).

95. *Id.*

96. *Barnette*, 319 U.S. at 642.

97. Wooley, 430 U.S. 705 (1977) (sustaining the right); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (rejecting such a claim).

98. 430 U.S. 705 (1977).

99. *Id.* at 715, 716. In *Wooley*, the Court held that the state of New Hampshire could not require motorists, over their religious and political objections, to display the state motto "Live Free or Die" on their car license plates.

100. 447 U.S. 74 (1980).

would not likely be identified with the owner.[101] Second, unlike that in *Wooley*, the message in *Pruneyard* was not dictated by the state, and there was no danger of governmental discrimination against or for a particular message. The property owners could also dissociate themselves from any message by posting disclaimers. *Barnette* was dismissed as inapposite because there the speaker was compelled to communicate personally the government's message. These cases suggest that the Court should look to the degree of coercion and the danger of public attribution in measuring the degree of infringement posed by unconstitutional expenditures for organizing.

The situation of a worker's desiring to distance herself from her union's recruiting messages falls on the *Pruneyard*, rather than the *Wooley* side of the line. Unlike the coercion exerted when a child is required to salute the flag, as in *Barnette*, when a union representative speaks, no dissenting worker is asked to affirm or communicate publicly any belief. Unlike the slogan on the license plate in *Wooley*, a union message has not been prescribed by the government and required to be displayed on one's personal property. If there is a danger of public attribution of union views to dissenting workers, it is because the union might be perceived as a representative of individual views. But union organizational drives, which usually take place outside of the dues payor's workplace, are both more physically distant from the individual and less in the public eye than the license plate slogan at issue in *Wooley*. Additionally, when the medium used to disseminate the message is fungible and anonymous, as money is, rather than personal, as is one's car, there is less danger of a public presumption of individual endorsement. The promotion of unionism as an idea is unlikely to be associated by either the public or the unorganized worker with particular represented employees. Organizing is "what unions do"; it is thus more likely to be perceived as a self-promoting institutional message than as the ideology of workers whose dues pay its costs. In addition, union organizing drives are normally undertaken with the participation of unorganized workers, further diluting the connection to represented workers.

To the extent that *Abood* condemns funding politics out of the dues of objectors, it is arguably out of line with the teaching of *Wooley* and *Pruneyard* that only *public* association with a message works a constitu-

101. *Id.* at 87. In *Pruneyard*, a shopping center owner was obligated by California law to give members of the public access to the center in order to solicit signatures on a political petition. The center's owners argued that the state had required them to participate in the dissemination of an ideological message, contrary to *Wooley*. The Court disagreed, pointing out that in *Wooley* the government itself prescribed the message and required it to be displayed publicly as part of the car owner's daily life. 447 U.S. at 87.

tional injury.[102] Even so, it would make more sense for *Abood* to limit a union's political expenditures than to limit its organizing expenditures. Political advocacy, to be effective, *must* be public. Large campaign contributions are a matter of public record, as are media appeals, appearances at legislative hearings, and candidate endorsements. The individual worker in a union shop, whether or not a formal union member, is still an "auto worker" or a "retail clerk" in the eyes of the public and is not well situated to post disclaimers when the UAW or the Retail Clerks Union takes a public position on a political issue. Politicking also addresses the conduct of government, a subject of intense media and public interest. On the other hand, organizing primarily addresses the economic interests of workers in the workplace. While organizing is not conducted in secrecy, the differences in both the degree and the nature of the dissemination so attenuates the risk of public association as to merit a difference in treatment between fees used for organizing and fees used for politics.

An alternative view of the constitutional concerns behind *Abood* is that the first amendment injury occurs simply because the employee is compelled to "foster" a distasteful cause, even when there is no danger that the union's views will be attributed to the contributor.[103] Assum-

102. Professor Cantor makes this argument in connection with political expenditures. *Forced Payments, supra* note 20, at 19. *See* PG&E v. PUC, 475 U.S. 1 (1986) (invalidating agency rule that utility must allow its billing envelopes to be used to carry statements by groups opposing utility's political messages).

103. *Wooley*, though it involved forced public association, also alluded to a right not to foster objectionable ideas by being made an instrument for spreading them. 430 U.S. at 715. As commentators have noted, this species of moral affront has never been held to entitle taxpayers to withhold financial support from ideologically repugnant government programs, speech, or conduct. Cantor, *Forced Payments, supra* note 20, at 21; Shiffrin, *supra* note 81, at 593. Indeed, Justices Rehnquist and Blackmun, dissenting in *Wooley*, rejected this theory, pointing out that the Maynards could clearly have been forced to pay state taxes toward the cost of erecting "Live Free or Die" billboards. 430 U.S. at 721 (Rehnquist, J., dissenting). The fiscal chaos resulting from such a rule would render administration of government a nightmare. The taxpayer model provides a near analogy for arguing that union spending should be similarly treated. *See infra* note 147 and accompanying text. At least for union political expenditures, this view has not been accepted by the Supreme Court. Justice Powell's concurring opinion in *Abood* flatly rejects the analogy:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways which the taxpayer finds abhorrent. The reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people. The same cannot be said of a union, which is representative of only one segment of the population, with certain common interests.

431 U.S. at 259 n.13.

This language creates an impression of trying to have it both ways. The union is still called a "private association," but the Court held in *Abood* that the union engaged in "state

ing this view to be correct, there are still reasons to treat compelled funding of organizing as inoffensive—reasons that relate to the ideological content of organizing.

In contrast to campaign contributions, the union, by seeking new members, is not asking the dissenters to support any "ideology" that the union does not have the right to ask of them already. By hypothesis, they are lawfully bound by a union shop agreement to be union "members," at least financially. The most that a union can accomplish by way of promoting unionism by winning an election at another workplace is to negotiate another union shop agreement there. The union can *require* no more of new workers than it can of the dissenting represented workers, although its election propaganda will surely seek to promote the benefits of full membership as well. The cost of promoting unionism as an *ideology* through union propaganda aimed at achieving an election victory is incremental. The real promotional power lies in the ability to negotiate for a collective bargaining agreement. Therefore, an employee's contribution to organizing "does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union,"[104] a justification already accepted by the Court.[105]

The ideological content of lobbying and campaigning is different from that of organizing, even when the goal of the campaign is obtaining worker benefits. Neither the intended audience nor the ultimate beneficiaries of politicking can be confined to employees or their representatives. The election of a pro-labor candidate has ramifications for many issues unrelated to labor. For instance, welfare legislation confers benefits on the general public as well as on employees.[106] In contrast, the distinguishing characteristic of organizing speech is that it is speech *by* workers *to* workers and *for* workers. Both intuitively and analytically,

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action" when it collected and spent employee funds. If the union is equivalent to an arm of government so as to be bound by the Constitution, there should be a better explanation why it is not treated like the government in its collective taxing and spending policies. Part of the explanation may be the Court's belief that a union that elects to press workers' interests through the political system is acting beyond the traditional role deemed appropriate for a union, almost as if it were a local government that had "exceeded its powers." *See infra* text accompanying notes 121-25.

104. *Ellis*, 466 U.S. 456 (1984).

105. In its original context, Justice White used this language to reject a first amendment challenge to paying for union social hours. *Id.*

106. Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C. DAVIS L. REV. 591, 608 (1981). Professor Gaebler proposes a balancing test to decide whether political activity with both labor and nonlabor effects offends the First Amendment. *Id.* at 607-09. The problem with this approach is that, while judges and legislatures are conversant with balancing tests, union accountants are not. Balancing does not state a rule that regulated parties can easily administer.

organizing speech is far more "germane to collective bargaining"[107] than political advocacy.

The Court has consistently held that an employee can constitutionally be charged, even over her objection, for the cost of her union's activities that are "germane to collective bargaining." This is true despite the Court's concession that collective bargaining may be ideologically offensive to some, and thus may implicate speech or associational interests.[108] In ideological content, promotion of collective bargaining through recruitment of new members is not clearly distinguishable from promotion of collective bargaining "at home." Organizing the unorganized is not only germane to collective bargaining—it *is* collective bargaining, or at least a necessary prerequisite for it. Union organization is no more constitutionally objectionable a cause than collective bargaining, for which the Court has condoned union expenditures.

Thus, in contrast to political expenditures, the first amendment objection to the funding of election drives cannot be that the public will wrongly attribute a pro-union attitude to the employee, nor that the employee is privileged to withhold financial support because of the message's nonlabor content, audience, or beneficiaries. One last objection exists, however. The difference between new organizing and the in-house collective bargaining sanctioned by *Abood* is that organizing drives result in the spending of unit members' resources on *outsiders*. The question is whether this is necessarily a distinction of constitutional magnitude. The rule applied in *Ellis* suggests that the Court believes it is. In essence, *Ellis* tolerates infringements for which it judges the protesting employee will be "compensated" in the form of measurable benefits. The Court has stated that the promised benefits to the *individual* of increasing union strength are too remote to create a significant "free rider" problem.[109] It is at this point that the unduly narrow focus on the interests of the individual leads the Court to an error subordinating the collective interests of the group. Organizing does in fact benefit the already-represented *as a group*.[110]

107. *Hanson*, 351 U.S. at 238, quoted with approval in *Ellis*, 466 U.S. at 456.

108. *Abood*, 431 U.S. at 222.

109. In *Ellis* the Court observed, "Organizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues." 466 U.S. at 453.

110. Some fairly simple economic considerations indicate that a large union is more likely to achieve benefits for represented workers than a small one. *See generally* M. OLSON, THE LOGIC OF COLLECTIVE CHOICE 67-68 (1965).

First, a union is better off organizing an entire industry in order not to disadvantage the organized employer. When an industry is competitive, the isolated unionized employer is less able to pay his workers union scale wages and benefits and may even fail to survive competi-

To place upon the union the impossible burden of demonstrating a benefit to any particular individual at any particular moment in time misconceives the nature of the benefits which flow from a long-range, collective strategy of increasing union strength. A rule that permits individuals to opt out of financing the group effort here creates a free rider problem that is less obvious, but still real. In fact, economic theory predicts that the more remote and diffuse a collective benefit is, the less likely it will be achieved without a uniform contribution rule. This theory, which is taken up in the next section, is an elaboration of the free rider justification for the agency shop accepted in *Abood*. It suggests that, beyond dissenters, even persons who approve of their union's organizational efforts would rationally refuse to fund them in the absence of a uniform contribution rule.

B. Why Free Individuals Vote For Group Coercion

Unions enjoy first amendment rights to engage in most communicative activities: the fee speech doctrine does not prohibit them from organizing, lobbying or publishing on any subject—only from using

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tion by his nonunion rivals. Even Chief Justice Taft, remembered as a proponent of the hated labor injunction, acknowledged the economic necessity of organization:

> 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.

American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921). As an example, pressure to keep union wages low is common in the garment industry and in the construction trades, where the use of nonunion labor affects competitive bidding. *See, e.g.*, Associated Bldg. Contractors v. Carpenters Vacation & Holiday Trust Fund, 700 F.2d 1269 (9th Cir. 1983) (organizing to reduce competition chargeable to dissenters).

Second, a nonunion firm is a potential supplier of strike replacement workers, although this consideration is less important when the struck jobs are unskilled and unemployment is high. Third, organizational efforts among the general public might reduce the number of unemployed willing to serve as strike breakers, thus strengthening the leverage of the represented worker considering a strike. Fourth, a national union is advantageous to a mobile workforce, creating a sense of community as well as employment access in new locations. Finally, the political strength of a large union or a federated union movement can achieve work-related gains through legislation or sympathetic appointments to policy making positions. Some studies tend to show that the likelihood that a member of Congress will vote for a labor-endorsed bill increases in direct proportion to union density in the member's electoral district. For example, from 1947 to 1982 the figures suggest that the percentage of pro-union bills actually passed—58%—would have risen to 65% with a 5% increase in unionization. R. FREEMAN & J. MEDOFF, *supra* note 8, at 193-200. The statistics do not necessarily mean that increases in unionization would actually alter the success rates of bills proposed in Congress. Rather, Freeman and Medoff caution that the more likely scenario is that provisions of bills favored or opposed by the AFL-CIO would have been altered, with "pro-union" bills watered down when unionism is weaker and strengthened when it is stronger. *Id.* at 198.

nonmember employees' fees for those purposes.[111] The doctrine simply requires that most such activities be funded from voluntary contributions. Thus, it might be argued that application of the rule to organizing will not inevitably hinder expansion because union members who agree with the goals of the organizers will act in their rational self-interest to subsidize union growth voluntarily.

This common sense prediction of worker behavior may be incorrect. According to a theory of group behavior advanced by economist and professor Mancur Olson,[112] rational, self-interested members of large groups will not voluntarily act to achieve their common interest. According to Olson, rational individuals will act to further a group goal only when *there is coercion or some other special incentive* to make them act in their common interest, even when those individuals believe firmly that they would benefit from accomplishment of the group's goal.

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111. *See, e.g.*, Justice Stewart's majority opinion in *Abood*:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas.

431 U.S. at 235-236. Characterization of organizational speech as "economic" rather than political would not make it any less protected by the First Amendment: "Our cases have never suggested that expression about philosophical, social, artistic, economic, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Id.* at 231.

112. The following description of this theory, as it applies to large groups generally and mandatory union membership in particular, paraphrases M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). One objection to this theory is that attitudes in organizations are not determined solely by the hope of gain. An emotional, political, moral, or ideological motive can supply the incentive to promote a group goal, even when payment is not economically rational. Olson counters this objection by pointing out that nation-states find it impossible to function without coerced financial support in the form of taxes despite the obvious benefits of government to individual citizens and the powerful ideology of nationalism and patriotism, which should dictate voluntary support. The state cannot survive on voluntary payments, because the services provided by government are collective benefits, public goods that cannot feasibly be withheld from any member on the ground that she has not contributed to their cost. National defense is the most obvious example.

Olson concedes that the tendency to indulge in "free riding" is countered by social pressures when the group is small enough to permit face-to-face contact among the members. Social status and social acceptance are individual, noncollective goods, so it is predictable that they would serve as motivators even for economically irrational behavior. *Id.* at 61-62. Though it is not clear how small the group must be (in 1982, the average local union had 200 members, *id.* at 34), peer pressure could be a powerful incentive in some unionized groups. Its force would depend not only on the size of the group, but on the strength of union feeling in the group, the willingness to ostracize noncontributors, and the degree to which contributors cared.

This seeming paradox arises from the nature of organizations' goals. Groups are generally formed in order to pursue a good that is a collective benefit. If a benefit could be as easily and effectively achieved by individuals acting alone, the group would not be needed. Collective benefits, called "public goods," confer the same benefit on all members of the group without regard to individual contributions. Clean air and clean water, for example, are collective goods, as are public radio and public television. As Olson explains:

> Though all of the members of the groups therefore have a common interest in obtaining this collective benefit, they have no common interest in paying the cost of providing that collective good. Each would prefer that the others pay the entire cost, and ordinarily would get any benefit provided whether he had borne part of the cost or not.[113]

A rational group member will not make a financial sacrifice to further a group goal because her contribution will not perceptibly improve her opportunity to receive the hoped-for benefit. In fact, the individual who withholds payment increases her chances of receiving something for nothing. Thus, non-support is the most logical choice for each individual in a large group, even though the goal will not be achieved if all members withhold. Since all members will be tempted to act this way if possible, even democratic groups create rules that require (coerce) support from all members equally. Only the consequences of breaking the rule provide the incentive needed for the rational person to conform.

This theory explains why union members overwhelmingly vote to approve union security devices that compel union membership or financial support. Without some form of compulsion, nonmember employees would receive collective benefits without paying for them. Accordingly, although each individual would advance her self-interest by staying free, a group of such individuals will freely vote to bind themselves and each other to a scheme that coerces uniform financial obligations.[114] Olson concludes that, despite the obvious connection between ideology and organization, large national unions could not exist with real strength and durability without some type of compulsory membership.[115]

113. *Id.* at 21.

114. As Olson points out, NLRB supervised elections demonstrate that unionized workers support union security. He cites the example of the special union shop elections required by Congress after the Taft-Hartley Act. These elections required the affirmative vote of a majority of those *eligible to vote*, an unusually strict standard, to authorize union shop provisions. Contrary to the assumptions of the Act's sponsors, workers did not choose to escape from compulsory membership. After the unions won 97% of such elections in the Act's first four years, Congress deleted the requirement. *Id.* at 85.

115. *Id.* at 88.

Since increasing the percentage of the unionized workforce through organization is a collective benefit, the unconstrained, rational worker would refuse to contribute to that goal. Withholding dues support for any union activity within the embrace of the fee speech refund rule could not be interpreted as disagreement or disinterest, but action out of rational self-interest.[116] A refund rule for individuals would interfere with the preference of the majority of employees to bind *themselves*, as well as dissenting employees, to a uniform rule.[117]

The possibility that collective benefit does result from enforcing the majority's preference for a uniform rule is too strong to be ignored. A court must make a choice about when it is appropriate to honor the desires of individuals by overriding, or at least undermining, the collective desires of the group.[118] While this tension exists in all rules concerning union shop dues, it is presented most starkly in the context of

116. One important qualification should be noted. If an employee must allege or prove a sincere *ideological* objection to take advantage of the rule, the effect will be diminished because honest pro-union employees will not be able to act in their economic self-interest by escaping the obligation. Theoretically, ideological upset is a prerequisite to a constitutionally based claim. If, on the other hand, the rule were phrased, as it now is to disallow "unrelated" organizing expenses irrespective of ideological objection, the effect could be to induce even pro-union employees to withdraw dues support for these activities.

117. The effect of this phenomenon should not be exaggerated. Not all employees will choose to become free riders just because the option is there. Figures from litigation indicate that so far the numbers of employees seeking refunds is not high. Comment, *Mandatory Union Fees*, 18 U.C. DAVIS L. REV. 555, 570 n.58 (1985). Litigated cases, however, probably form a poor sample, and the Supreme Court only expanded the rule to NLRA governed unions—the overwhelming majority—in its 1988 *Beck* opinion. A low incidence of refund requests could be explained in a number of ways: (1) the available refund is small or zero because the union is complying with fee speech rules by reducing dues in advance; (2) the amounts are too small to outweigh ideological motives or social pressures to conform; (3) the amounts are too small to compensate for the time and trouble required by the refund process; (4) the fee speech decisions themselves are not well known and the unions are not publicizing them. On the other hand, the effect of the rule on future organizing efforts must be considered. A union's policy decision to respond to the loss of unionized workers by making major increases in funds allocated to recruitment could be inhibited by the fear that these allocations might provoke more refund requests.

The potential erosion of revenues would be diminished if full members could request refunds. Many union members value the right to vote in union elections on leadership, contract terms, and strikes, and would not resign to reduce their dues. Others might do so if the incentive were large enough. In *Beck I*, for example, the trial court ordered 79% of the defendant's regular dues refunded. 776 F.2d 1187, 1191-92, 1193, 1194 (4th Cir. 1985). Whether full members can demand such refunds has not finally been decided. *See supra* note 57.

118. The antagonism between the common law emphasis on individual liberty and the collective character of labor organization is a persistent theme in the history of American labor law, and surfaces in rules imposing on unions a duty of fair representation, as well as in the dues cases. Becker, Book Review, 100 HARV. L. REV. 672 (1987) (reviewing C. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985)).

organizational activities, which are so intimately related to the ongoing strength and health of the collective.

For the Supreme Court, the decision when to give primacy to individual rights appears to be guided in part by whether the Court believes the union is acting "in role" when it engages in the challenged activity. Treating politics as not "germane" to collective bargaining, irrespective of the benefits that politics confer, represents a policy judgment that political activism is simply too remote from the proper role of an agent certified for collective bargaining rather than political representation. The statutory version of the rule also implicitly provides a particular view of the normal and proper role of a labor union. A test that approves only union activities that are "normally and reasonably employed" to represent the employees in the unit disfavors activities that are aimed at altering the balance of power outside the immediate workplace. In other words, the Court seems to define the union's legitimate role by its minimum statutory duties (representation in labor relations with the immediate employer) rather than its maximum statutory power (all activities for "mutual aid and protection").[119]

The narrow definition of the union's role may reflect a common American theoretical view of the labor union as chiefly a provider of economic services to individuals rather than as a collective force for increasing the political power of workers.[120] Consistently with this view,

119. NLRA § 7, 29 U.S.C. § 157 (1982). Admittedly, the test is addressed to funding for union acts, rather than to curtailing legal protection for them. Still, it carries a strong symbolic message at the same time as it practically diminishes a union's ability to take advantage of the law's protection. That § 7 does protect involvement in political and other concerted action is conceded. *See, e.g.*, Eastex v. NLRB, 437 U.S. 556, 565 (1977):

> The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid and protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining'.

120. Since the 1920s, the dominant theory of the American labor movement has been the "job-conscious" theory of Selig Perlman and the Commons school. Perlman's theory, taking its inspiration from the conservative "business unionism" of Samuel Gompers and the AFL, instructs that the role of the trade union is simply to advance the immediate economic interests of workers in the workplace by persuading or coercing management to share the profits of the business. The union resembles a hired business agent more than a force for political or social liberation, transformation, or revolution. *See generally* Laslett, *The American Tradition of Labor Theory and its Relevance to the Contemporary Working Class*, in LARSEN & NISSEN, *supra* note 88, at 359, 367-70.

Stanley Aronowitz, a modern labor theoretician of the New Left, observes that this conservative conception of the role of the American labor movement survived even the militant industrial unionism of the CIO and the historic passage of the Wagner Act and other broad pro-worker political reforms of the 1930s:

some labor theorists and judges have treated union involvement in political advocacy as suspect.[121] The historical distrust of unions as *political* representatives could, by itself, explain the Supreme Court's unwillingness to find that political activism is germane to collective bargaining. But it is puzzling that the Court views efforts to organize with the same suspicion. Organizing is "what unions do"; it is a core activity, not a marginal activity. Recruiting new members is at the heart of the American labor tradition. While a philosophical preference for voluntarism and business unionism[122] could explain why the Court discourages mandatory funding for union politics, it does not offer a reason to withdraw support for organizing new workers. Organizational speech is, like union conventions that can be freely funded by dues, more "germane" to enhancing associational strength and, by its nature, unlikely to present a cognizable ideological affront.[123] Neither a role concern nor a rights concern justifies forcing the group to waive its uniform contribution rule.

C. The Government Interest in Facilitation of Organizing

The final reason for permitting free use of dues to fund union election drives departs from precedent. Economic arguments did not persuade the justices that disallowing organization expenses would create a significant free rider problem when the question was treated as one of statutory interpretation.[124] There might be little reason to expect the

> American unionism was never put into the theoretical and ideological context of social transformation because Gompers, the main theoretician of American labor, understood unions as institutions of *industrial citizenship*—labor's vehicle to achieve a greater share of an expanding capitalism rather than a means for opposing the system as [a] whole.

S. ARONOWITZ, WORKING CLASS HERO xv (1983) (emphasis in original).

121. Professor Alan Hyde, pointing to judicial condemnation of union politicking in a variety of contexts, has argued that political activity of any kind by unions arouses a deep seated anxiety in the Court and the NLRB. Hyde, *supra* note 20. This anxiety, he says, has been expressed by branding union political acts in connection with the workplace as abnormal and unprotected. Hyde points to an unnecessary and illogical tangle of cases that deal with punishing union distribution of ordinary candidate endorsement pamphlets at the factory, *see* Local 174, UAW v. NLRB, 645 F.2d 1151 (D.C. Cir. 1981); denying bargaining rights to employees of federally funded private programs like Headstart, because political factors make such bargaining "not feasible," *see* Lutheran Welfare Services v. NLRB, 607 F.2d 777 (7th Cir. 1979), denying enforcement to 236 N.L.R.B. 1018 (1978); and denying legal protection to strikes called as a protest, such as the Longshoremen's refusal to unload Soviet goods after the Afghanistan invasion, *see* International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982).

122. *See* Hyde, *supra* note 20, at 13 (separation of politics from collective bargaining in labor decisions results from "deeply principled sense" of the Board and courts and the unions themselves that "political unionism is a foreign influence to be kept from our shores").

123. *See supra* notes 92-108 and accompanying text.

124. *Ellis*, 466 U.S. at 453; *see supra* note 110 and accompanying text.

Court to reach a different result by direct application of the First Amendment, if eliminating free riders were the sole government interest acknowledged. But expenditures for organizing also promote a government interest in affording the unrepresented an opportunity to choose a labor association. This interest does not depend on proof that contributors will benefit from organizing efforts.

Congressional policy favors facilitation of free choice in the election of an agent for collective bargaining. Yet the potential impact on national labor policy of the Court's decisions regarding dues has received no attention in the opinions. That funding limitations might interfere with the goal of offering workers an opportunity to organize is a concern that should now be addressed by Congress.

When Congress passed the historic Wagner Act in 1935, its chief goal was to facilitate workers' free choice of union representation. Section 7, the centerpiece of the legislation, stated:

> Employees shall have 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 or other mutual aid or protection . . . .[125]

That Congress meant to encourage, as well as to protect, collective bargaining is made explicit in section 1 of the Act:

> The inequality of bargaining power between employees . . . and employers . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. . . . It is hereby declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[126]

Although the Act has seen major amendments in the last fifty years, its central justification has not changed. The Act has, however, been harshly criticized for failing its central mission. In 1984, the House Subcommittee on Education and Labor reported that "the evidence is clear that the law does not encourage collective bargaining. Rather, it has be-

125. 49 Stat. 449 (1935) (codified at 29 U.S.C. § 157 (1982). As noted earlier, the Taft-Hartley amendments added to § 7 a right to refrain from all of these activities, *except* to the extent such a right may be affected by a union shop agreement.

126. *Id.* § 151 (1982).

come an impediment."[127] The recent fiftieth anniversary of the Wagner Act's passage saw an outpouring of criticism for perceived weaknesses in the Act's terms and its administration by the NLRB. Most of the criticism is directed to the obstacles placed in the way of new organizing.[128]

The dramatic decline in union strength since the end of World War II fuels the skepticism of the critics. In 1930, before passage of the Act, union membership stood at 11.3 percent of non-agricultural employment. From a high of 35.3 percent in 1947, the proportion of union represented workers declined to 18 percent in 1985.[129] This pattern contrasts sharply with increases in unionism in most other Western countries, including Canada.[130] Labor economists estimate that because of attrition and other factors, the union share of the workforce in the United States tends to decline by 3 percent a year, *in the absence of new organization of workers through NLRB elections.*[131] With this rate of decline, they estimated in 1983 that unless current patterns changed, the union share would fall by the end of the century to barely 10 percent, below 1930 levels.[132] Some economists attribute most of the decline to broad structural changes in the American economy. Sectors of industry that were highly unionized have shrunk, while growth has occurred in occupations that have not historically been unionized.[133] Decreases in union organizing efforts in the face of these dislocations,[134] and large increases in lawful and unlawful management opposition to new organizing[135] constitute

127. Report by House Education and Labor Committee, Labor-Management Relation Subcommittee on "Failure of Labor Law—A Betrayal of American Workers," *reprinted in Daily Labor Report*, No. 193, October 4, 1983, D-5.

128. Weiler, *Promises To Keep*, *supra* note 9, at 1769.

129. S. LEVITAN, P. CARLSON, & I. SHAPIRO, PROTECTING AMERICAN WORKERS 145 (BNA 1986), citing statistics supplied by the United States Bureau of Labor Statistics.

130. R. FREEMAN & J. MEDOFF, *supra* note 8, at 222.

131. *Id.* at 241.

132. *Id.* at 242.

133. Freeman and Medoff estimate that 72% of the decline in private unionization, from over 40% to under 20% of the non-agricultural workforce, is due to structural changes in the economy. *Id.* at 225.

134. Correlating declining union expenditures for organization with the union's declining success rate in these elections indicates that "possibly as much as a third of the decline in union success through NLRB elections is linked to reduced organizing activity." *Id.* at 229.

135. The remainder of the responsibility for the decline is laid on sharply increased management resistance, both legal and illegal. *Id.* at 230-242. Resistance raises the financial cost of organizing considerably, requiring a heavier investment in legal and organizing staff while at the same time heavy election losses mean fewer new dues-paying members.

Freeman and Medoff estimate that from one-quarter to one-half of the decline in union electoral success can be attributed to illegal management opposition. *Id.* at 237. The risk to workers who exercise their rights under the NLRA to speak out in favor of a union is very high. Roughly one charge of illegal firing is sustained by the NLRB for every election, or about one worker in twenty who votes for the union. *Id.* at 233. Penalties for illegal firings for

two other major contributing factors to the decline. Whatever its causes, the precipitous decline in the unionized work force can only be countered with new organizational efforts.

Moreover, unlike political advocacy of workers' interests, unionizing can only be accomplished by unions themselves. Established unions with access to dues-supported treasuries bear the bulk of the job. It is, of course, legally possible for a group of employees to form an independent labor organization at their place of work without professional assistance,[136] but most call upon the expertise and support of organizers provided by an existing union.

These governmental interests that distinguish organizational spending from political spending may be summed up as follows: first, Congress believes that increasing employees' bargaining power is good for both workers and the economy; second, Congressional policy favors facilitation of workers' opportunities to exercise a choice about representation; and third, the present industrial climate makes the need for new organizing acute. Charging the unwilling minority of employees for organizing costs might not be justified if these government interests could be effectively accomplished without requiring their dues.[137] But organizing cannot be as effectively accomplished with voluntary contributions alone. The fee speech rule will inevitably undermine Congress' purpose in the collective bargaining laws, as resources for organizing diminish.[138]

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union activity are very slight. The Board does not award punitive or general damages; awards of back pay are reduced by any wages the discharged worker has earned between the firing and the Board's order. The benefits to the employer of avoiding a union contract are virtually certain to exceed any penalty from breaking the labor laws, resulting in incentives too powerful for some to resist. Professor Weiler maintains that the remedies administered by the NLRB do not and *cannot* stop these abuses. *See generally* Weiler, *Promises to Keep*, *supra* note 9, at 1774, 1778-90.

136. 29 U.S.C. § 157 (1982); 29 U.S.C. § 2(5) (1930) (defining labor organization broadly).

137. The Supreme Court has noted:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960); *see* Wooley v. Maynard, 430 U.S. 705, 717 (1976).

138. Even small dollar amounts could have measurable effects: roughly speaking, a ten percent increase in dollars spent per potential member raises the proportion voting pro-union by seven percent. Ultimately, whether fee speech rules actually inhibit unions from undertaking new organizing must be tested by empirical research. Analogous research has been reported on the effect on organizing caused by the more drastic "right-to-work" laws, which relieve workers of paying *any* amount of dues. *See* Ellwood and Fine, *The Impact of Right-to-Work Laws on Union Organizing*, 95 J. OF POL. ECON. 250 (1987). The authors conclude that passage of a right-to-work law reduces organizing by fifty percent in the first 5 five years after passage. *Id.* at 271; R. FREEMAN & J. MEDOFF, *supra* note 8, at 229.

D. The Effect of the Rule on the Balance of Power

The weakening of union strength also makes more difficult Congress' stated goal of "restoring equality of bargaining power between employers and employees."[139] This tendency is aggravated by the fact that corporate employers do not operate under similar restraints in opposing unions. For instance, a shareholder who conscientiously disagrees with a management "union-busting" drive, even an illegal one, has no first amendment right to a refund of any portion of company profits spent for that activity.[140]

By permitting individual interests to undermine union revenues, the fee speech rule inevitably enhances the bargaining power of corporations. As Kenneth Cloke writes:

> It is ludicrous to suggest that one may handicap the mouse without increasing the power of the cat, or that a "neutral" prohibition against biting, while permitting each animal to scratch, will not produce the same unequal effect. . . . In the guise of a neutral labor policy, the strengths of these combatants have been variously adjusted, leaving untouched the unequal distribution of wealth which continues as an "invisible" hand in politics. . . . Both by ignoring the reality of unequal wealth and by providing for a right of nonassociation which only affects union members, the courts are putting labor at a disadvantage, while corporate funds remain relatively untouched.[141]

Cloke's criticism is directed largely at disparities in employers' and workers' political voice. But the same objection could be made in regard to organizing expenses. Union elections are no different in this regard from other political contests; success at the ballot box is likely to be heavily influenced by the amount of money spent on the campaign. Fee speech rules operate as a campaign finance limit, one that affects the candidate, already disadvantaged by poor access to the voters,[142] and that often (but not always) has fewer financial resources than the opponent business.

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139. 29 U.S.C. § 151 (1982).

140. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788-95 (1978) (corporate contributions to influence state ballot proposition campaign cannot constitutionally be prohibited despite speech and associational interests of objecting shareholders); *see also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (striking down state law that prohibited monopoly utility from inserting messages promoting nuclear power into billing envelopes); Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. 1969) (closely held corporation will not be dissolved under state law because of charitable contribution made over objection of minority shareholder).

141. Cloke, *Mandatory Political Contributions and Union Democracy*, 4 IND. REL. L.J. 527, 567-68 (1981).

142. *See supra* note 3.

Neither the labor laws nor the Constitution guarantees equal resources to the combatants in a union electoral drive. But campaign funding rules which disadvantage *only* the union competitor make more difficult Congress' desire to promote "equality of bargaining power" through freely chosen union representantion.

The Court's treatment of organizing expenses as not chargeable to the dues of dissenting nonmember employees is not compelled by the First Amendment and is therefore vulnerable to Congressional amendment. First, exclusion of organizing expenses is not compelled by the Court's nonlabor precedents, *Barnette* and *Wooley*, which condemn forced, public affirmation of beliefs. Second, under the *Abood* test, uniform subsidization of organizing is justified by the same reasons as for funding other collective bargaining activity—namely, that organizing is an indivisible component of the collective bargaining process and results in concrete benefits to organized workers as a group. Finally, to the extent that the fee speech doctrine discourages the formation of new unions, it is also at odds with two express Congressional policies: to facilitate the workers' choice and to promote equality of bargaining power. The Court has swept organizational expenses into the nonchargeable category without even weighing the governmental interests that these Congressional policies advance.

IV. Recommendations

The Supreme Court has just decided that the NLRA does not authorize the private sector union freely to use its resources to increase union strength.[143] Since this result goes against the union on statutory grounds, advocates of collective bargaining will certainly urge Congress to amend the NLRA to clarify its intent with regard to permissible uses of union shop dues.

Reforms in the labor laws to remove impediments to new organization are overdue. Labor apologists are not alone in arguing that reforms are essential to the survival of unionization in the twentieth century. Some economists also deplore the decline of American union strength. Freeman and Medoff believe that both union and non-union shops are economically as well as socially necessary:

> We favor legal changes that will make it easier to unionize because we believe continued decline in unionization is bad not only for unions and their members but for the entire society. Because our research shows that unions do much social good, we believe the "union-free" economy desired by some business groups would be a

143. Communications Workers of Am. v. Beck, 108 S. Ct. 2641 (1988).

> disaster for the country. . . . In a well-functioning labor market, there should be a sufficient number of union and non-union firms to offer alternative work environments to workers, innovation in workplace rules and conditions, and competition in the market. Such competition will, on the one hand, limit union monopoly power and on the other, limit management's power over workers.[144]

If amendments to liberalize judge-made rules are proposed, Congress will need to debate the degree to which the First Amendment negates some uses of compelled support. Whatever the status of union politicking, permitting organizational expenses to be charged freely to dues is constitutionally sound. Any amendment to the RLA or the NLRA should designate this use of dues as one that a majority of the membership may authorize.

Congress should consider other adjustments to the balance of bargaining power. It should enact a new section making the union shop automatic (rather than simply negotiable) for elected unions, just as section 9(a) now automatically grants them exclusive representation rights.[145] At the same time, Congress should repeal the NLRA's permission for the states to adopt right-to-work laws. These two amendments would relieve the union of having to negotiate for the right to receive dues for its collective bargaining functions, and would ensure financial support from all who now enjoy these services. The net effect would be to distribute the costs of representation more justly among beneficiaries and to permit union energy now spent on institutional survival to be directed back to the collective bargaining for which the union was elected.

V. Conclusion

The result of the position advanced in this Article would be to leave the decision whether to allocate dues to organizing to majority rule of the employees. This would be democratic. Any democracy—whether a labor organization or a national government—inevitably calls for the subordination of some individual preferences. Another justification for majority rule is offered by legal process theory, as promoted by John Hart Ely, which would make the legitimacy of the outcome for dissenters depend upon a fair opportunity to participate in the process.[146] A union

144. R. FREEMAN & J. MEDOFF, *supra* note 8, at 250.

145. Congress could follow the example of Minnesota and Hawaii, whose public sector labor laws guarantee unions a level of "fair share" support from all represented workers. *See* MINN. STAT. ANN. § 179A.06, subdiv. 3 (1987) (fair share payment set at 85% of regular membership dues); HAW. REV. STAT. Title 7, § 89-4 (1986) (service fees required to cover the costs of negotiating and administering an agreement).

146. J. ELY, DEMOCRACY AND DISTRUST (1980).

shop permits two avenues for dissent: employees can opt out by changing jobs, or they can participate by becoming full members. In addition, because union officials must adhere to fiduciary standards in every expenditure of union funds under the Labor Management Disclosure and Reporting Act Section 501,[147] relegating union organizational expenditures to majority rule does not leave dissenters without legal protection.

The Supreme Court has taken a different view of the rights enjoyed by dissenters from union spending decisions. Its policy, whether squarely based upon the First Amendment or merely inspired by the First Amendment, permits individual employees to avoid the costs of achieving some of the group's goals, while retaining the benefits of group membership. It is questionable whether either the Constitution or the Labor Code requires such a policy for *any* particular union goal, including the goal of political influence. The Court's justifications for the fee speech rule are at their most vulnerable when the rule is applied to core union activities such as organizing the unorganized. The causal connection between increasing the degree of unionization and employee success at the bargaining table is undeniable. Organizing is demonstrably "germane" to collective bargaining, and should therefore be freely chargeable to union shop dues. The present Court disagrees with this conclusion, purporting, in its latest major opinion, *Communications Workers of America v. Beck*, to be guided by the intent of Congress. *Beck* should thus be treated by Congress as an open invitation to supply a needed correction.

147. 29 U.S.C. § 501 (1983).