1976

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Recommended Citation
Michael E. Merrill, Limitations upon the Use of Compulsory Union Dues, 42 J. Air L. & Com. 711 (1976)
https://scholar.smu.edu/jalc/vol42/iss4/3

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LIMITATIONS UPON THE USE OF
COMPULSORY UNION DUES

MICHAEL E. MERRILL*

I. INTRODUCTION—FACTORS OF CURRENT IMPORTANCE

In the early 1960's, two Supreme Court decisions1 were rendered which, because of constitutional infirmities, came close to invalidating the "union shop" provisions of the Railway Labor Act.2 This result was avoided only by the explication of a statutory interpretation which is at war with the literal terms of the Act. The effect of these decisions was to foreclose, over protest, unions from using dissenters' compulsory dues and fees for political purposes. This proscriptive condition is not expressed in the statute.

In the ensuing years, the import of Street and Allen has achieved immense consequence. Curiously, this has taken place in a near-vacuum of litigation and until very recently no other union action has responded to the rationale of those decisions. As stated by a self-described union devotee:3

Frankly, I have not been able to ascertain in precisely what manner any of the railroad unions have made an accommodation to the principle enunciated in the Street and Allen decisions. . . .4

The foregoing comment was written in 1969. Not until 1973 was further litigation begun against a railway union to enforce rights

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4 Id. at 296.
established by those earlier cases. In the interim, two other lawsuits were filed challenging compulsory unionism provisions of collective bargaining agreements negotiated pursuant to the National Labor Relations Act. Neither of those decisions ventured beyond the area of political spending, but it is now reasonably well settled that the authority of *Street* applies to compulsory unionism agreements authorized by the NLRA.

Measured against this unimpressive volume of litigation, one might superficially conclude that the consequences of the aforementioned cases are innocuous. Plainly, spokespersons for organized labor would vociferously disagree. One prominent union attorney responded to a recent trial court decision in the *Ellis* case with this emphatic statement: "[T]he ruling, if upheld, 'would in effect repeal the union shop.'" Such concerns are intensified by the fact that rival labor unions are joining the fray, scrapping for the privilege of extracting compulsory dues from each other's members. This occurrence is most visible in the intense competition between the National Education Association and the American Federation of Teachers, in which the victor generally seeks to obtain "union security" contractual language compelling the payment of equivalent dues and fees from its opponent's members, as well as from any unaffiliated teachers. This has in turn led to litigation challenging statutory procedures implementing such dues collections.

Disputes over union security provisions applicable to public employees augment the importance of the private sector cases dis-

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cussed above for yet another reason. Numerous public employee statutes purport to limit the costs that can be imposed upon dissenters to those of "negotiating and administering an agreement," to the "proportionate share of the costs of the collective bargaining process and contract administration," or the like. Thus the demarcation of that category of union activities which may be loosely termed "collective bargaining" activities poses a critical bearing upon the negotiation and enforcement of union security agreements both in public and private sector employment.

In general, this article will be limited to the authorities applicable to private sector employment. To the extent that those authorities are rendered in response to constitutional strictures, they apply with full force to the public sector. The converse may not be true; it has been seriously suggested that any compulsory union fees in public sector employment are unconstitutional, as they amount to forced political participation. Several actions are underway which assert the proposition that a public employee union is an inherently political organization, and that the First and Fifth Amendments to the United States Constitution foreclose compulsory payments to such an organization.

This article, then, will survey the major elements considered when weighing the legality of compulsory financial support of a labor union. As the definitive litigation has been framed in the context of the Railway Labor Act, primary attention will be devoted to that statute. The discussion, however, is fully applicable to controversies arising under the National Labor Relations Act.

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13 Wis. Stats. § 111.70(1)(h) (1973).
16 Seay I, 427 F.2d at 1003, comparing the "union shop" provisions of the two statutes: "Both the applicable provision of that Act [the RLA]—45 U.S.C. § 152, Eleventh—and the applicable provision of the [NLRA]—29 U.S.C. § 158(a)(3) are for all purposes here, the same." In its later decision in Seay II, 533 F.2d at 1128 n.3, the Ninth Circuit stated that:
While the holdings of Street and Allen turned on a construction of the provisions of section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, this court has held that the holdings of these cases are equally applicable to the National Labor Relations Act, 29 U.S.C. § 158(a)(3). Thus it is immaterial that the NLRA
II. THE NATURE OF THE OBLIGATION AUTHORIZED BY FEDERAL STATUTES

A. Misleading Statutory Terminology

The genesis of continuing confusion with regard to the nature and extent of compulsory unionism obligations authorized by the NLRA and the RLA lies in the deceptive terminology used in those statutes.

In section 7,17 the NLRA assures employees of the right to refrain from forming, joining, or assisting labor organizations. This assurance of independence is qualified by an authorization of collective bargaining agreement provisions requiring "membership" in the labor organization holding certification as the exclusive bargaining representative.18 A host of decisions19 has uniformly rebuffed union efforts to enforce the literal wording of the statute, thereby avoiding the certain constitutional difficulties that would afflict implementation of the common meaning of membership.20 The Supreme Court tersely limited the obligation contemplated by Congress to that of financial support:

Under the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core.21

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examples of the tests which should be, but have not been, applied to them.

Congressional action affecting employee "free riders" was premised upon its acceptance of the union benefit doctrine. Almost without exception, appellate courts have unquestioningly accepted this thesis, without subjecting it to rudimentary analysis. In its simple and widely accepted form, the thesis is as follows: the union is obligated to represent equally all employees in the unit in collective bargaining, and all employees benefit from the union's collective bargaining activities. Conducting these activities is costly, and it is only fair that the costs are shared equally by all beneficiaries—voluntary members and dissenters alike.

As a proposition of logic, this assertion of universal, equal "benefit" is unprovable. Its acceptance must therefore be premised upon observable, consistent factual demonstrations. But an infinite number of commonplace occurrences belie the possibility of sustaining the union benefit doctrine by reliance upon such facts. Even where consistency in collective bargaining results may be found, the consistency incorporates varying portions of economic benefit and economic detriment.

If the collective bargaining representative is negotiating a median wage, there is no doubt that compensation which would otherwise accrue to a superior worker will be diverted to the marginal employee. Plainly, employers cannot survive economically by paying all employees, including the least productive members of the labor force, at a wage level which can be economically justified for the most productive employees. If there is any "benefit" in this circumstance, it is derived by the marginal employee at the expense of the superior worker.

The notion that all unit employees benefit from union representation, and that they benefit equally, simply cannot stand up in the face of union admissions. Virtually every action taken by a union embodies a conflict of interest. The unfavorable connotations of

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30 For a thorough discussion of this point as it relates to the exclusive rep-
Comparably obscure wording is found in the Railway Labor Act. Language was inserted in section 2, Fourth\(^2\) in 1934\(^2\) making it unlawful “to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization,” or to withhold or collect union dues or fees from their wages. In 1951, section 2, Eleventh\(^4\) was added,\(^5\) authorizing collective bargaining agreements requiring that “all employees shall become members of the labor organization representing their craft or class . . . .” Again, the courts construed “membership” to mean the payment of dues and fees:

[T]he membership requirements of this contract and of the union shop statute are merely formal and fictional aside from the financial obligations.

The unwilling employee need assume no pledge of conformity nor promise of obedience, nor even make application for membership to retain employment under the union shop contract.\(^6\)

The pertinent question therefore becomes: to what extent may the “financial core” of initiation fees, dues and assessments\(^7\) be whittled down by the application of constitutional strictures or other inherent statutory limitations?

B. The “Free Rider” and “Union Benefit” Doctrines

Adequate treatment of the propositions inherent in the “free rider” and “union benefit” doctrines is impossible herein; this article undertakes a comprehensive survey of the vital factors affecting current litigation in the area of compulsory union financial support. Extensive economic, historical, sociological, and philosophic studies would be required. Nevertheless, it is possible to identify some of the central themes of those doctrines, and to pose

\(^3\) 48 Stat. 1185 (1934).
\(^5\) 64 Stat. 1238 (1951).
\(^6\) 7Sandsberry v. International Ass’n of Machinists, 295 S.W.2d 412, 415-16 (Tex. 1956), cert. denied, 353 U.S. 918 (1957); accord, Marden v. International Ass’n of Machinists, 91 L.R.R.M. 2841 (S.D. Fla. Mar. 13, 1976); Haggard, supra note 19.
\(^7\) Unlike the NLRA, the RLA permits charging dissenters for assessments because of the earlier practice of some railway unions of having nominal dues, and supporting operating expenses through regularly levied assessments. International Ass’n of Machinists v. Street, 367 U.S. 740, 766 (1961).
a fiduciary making such a compromise may be expunged by the implicit assent of one who voluntarily pledges himself as a union member, but the existence of the conflict is an ineradicable fact. The taint remains upon actions taken contrary to the interests of those who resist affiliation, but who, because of statutory powers granted the exclusive representative, are denied the power to negotiate their own employment terms and conditions.

Unions have conceded the perennial existence of significant conflicts of interest. In their brief to the Supreme Court in Street the appellants stated that:

There is at least as much interference with a man's freedom of association, freedom of thought, and freedom of speech in requiring him to pay dues to a union which strikes to secure a collective bargaining agreement for a 35 hour week or compulsory retirement at age 70 or strict seniority, as in the union activities considered below. (citations omitted). Compelling financial support of a union involves just as much if not more infringement on freedom in the sphere of supporting different policies in negotiating agreements and processing grievances as occurs in the legislative or political sphere; in the negotiating field the impact of the union's activities on the individual is direct and binding. Groups of employees within the same bargaining unit have opposing interests in seniority, hours of work, piece work as against straight hourly rates of pay, etc.\footnote{Brief for Appellants at 48-49 International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).}

Realistically, it may be said that collective bargaining activities often benefit some employees; generally at the expense of others. At times, unions have themselves advanced this proposition. The Deboles case presented a claim by a group of airline employees who charged their union and employer with discrimination in awarding seniority in such a way as to cause the plaintiffs to be prematurely furloughed. The employees alleged a breach of the union's duty of fair representation and the employer's complicity therein. The court observed that "the defendants correctly demonstrate that a collective bargaining agreement favoring a majority representation principle, see Schatzki, Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?, 123 U. Pa. L. Rev. 897 (1975).
of union members and disfavoring a minority is a frequent occurrence. . . .

The unforgiveable error in the theory of universal, equal benefit is that of treating individuals as fungible chattels. The injustice of this approach is apparent even when consideration is limited to purely economic factors. When the value of workers' intangible principles and beliefs is considered along with the economic factors, it is plain that non-analytical judicial acceptance of the union benefit theory in its simplistic form is a marked anomaly in a setting of growing judicial concern for numerous employee rights. The denial of an individual's right to speak for himself, to express nonconformist opinions, and to be free from forced association is of course accomplished in the name of democracy. In the eyes of those espousing the union benefit theory, the majoritarian principle has achieved absolute supremacy: as the majority of employees (through the union) are acting to benefit all within the unit, none may be heard to complain that the "benefit" sought, or obtained, is in fact a profound detriment.

Examination of judicial treatment of religious belief in two different contents—one in the field of labor relations, and one outside of it—demonstrates the incompatibility of the union benefit principle with firm constitutional authority, insofar as the former principle operates to grant supervening authority to a majority of union members.

In the highly respected Barnette decision, the Supreme Court acknowledged that a citizen's religious beliefs forbidding participation in a flag salute are not vulnerable to society's demand that such person participate in patriotic exercises, even in wartime:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.


34 Id., 319 U.S. at 638 (emphasis supplied).
The pre-eminent status of religious liberty recognized in *Bar-
nette* has not received even token consideration in labor relations
law, because of the overwhelming effect accorded the majoritarian
principle.

As an example of the subjugation of individual interests for the
supposed accomplishment of group harmony, one may review the
recent decision in *Burns v. Southern Pacific Transportation Co.* Plaintiff Burns, following his conversion to the Seventh-day Ad-
ventist faith, refused to continue paying union dues required by
the collective bargaining agreement. Burns' offer to pay equivalent
dues amounts to a non-religious and non-union affiliated charity
was declined, and the union sought and obtained his discharge.

The court made a specific finding that the union's collective
bargaining efforts had "resulted in substantial employment benefits
to the plaintiff in the form of high wages, job protection, security
and promotional opportunity, health care, safer working conditions,
retirement pay and other incidental employment benefits." Obviously Mr. Burns valued his religious beliefs more than those
employment conditions. Nevertheless, through the exercise of ma-
ajority rule, he was required to sacrifice one or the other. Under
those circumstances, it is difficult to ascertain the "benefit" brought
to him by his compulsory bargaining representative. The court did
not rest its analysis solely on the economic advantages accruing to
Burns. The court condemned the notion that Burns be allowed to
observe his religious faith, when that observance would presum-
ably be criticized by those of his fellow workers who were ardent
supporters of compulsory unionism:

The employee hostility, dissension, friction, and consequent loss
of operating efficiency and safety which would result if plaintiff
were to receive the benefits of collective bargaining without paying
his fair share of its costs would undoubtedly result in undue hard-
ship on Southern Pacific . . . . The testimony of both management
and union witnesses, based on experience, established that the hos-
tility generated by the 'no bill' or 'free riders' has a substantially
adverse impact on such safety and efficiency. Witness Carl Ball,
Vice-President of Operations for Southern Pacific, testified from an
experience of thirty-nine years in the field, that, in his opinion,

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56 *Id.* at 1444.
57 *Id.* at 1443.
the failure to require plaintiff to pay his fair share of the collective bargaining costs would cause significant employee hostility, dissen-
sion, and lack of communication, resulting in undue hardship to Southern Pacific in the form of reduced operational efficiency and safety . . . . Mr. Ball's opinion appears quite sound when con-
sideration is given to the fact that Burns' fellow workers could very well be expected to have difficulty accepting Burns' sincerity in be-
ing unable in conscience to pay union dues and assessments while he was able to accept the benefits he shares with his fellow work-
men, made possible by their payment of union dues and assess-
ments. 38

This exaltation of workplace attitudes presumably held by a major-
ity of employees over traditionally honored religious principles fairly illustrates the complexity and the unprovable nature of the union benefit thesis. In point of fact, the person most critically affected by the events—plaintiff Burns—obviously determined that the benefits he received from collective bargaining were of a lesser magnitude than his spiritual beliefs, as his adherence to the latter ultimately cost him his job. 39

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38 Id. at 1445.

39 Although Congress has not had occasion to reexamine the "union benefit" doctrine in practice, the impetus to make such an examination appears to be gathering momentum. Not surprisingly, the driving force is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq. In light of the congressional em-
phasis upon personal liberties emphasized by that Act, the courts have had to reexamine their accustomed mechanical application of the "union benefit" doc-
trine, which had uniformly resulted in individual preferences being subjected to a requirement of financial contribution to the collective representative.

The preeminence of religious principles over supposed worker harmony was recently presented as an issue for Supreme Court decision. In Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), the Sixth Circuit held that a worker's objection to working on Saturdays was a religious belief that required employer accommodation, absent an unreasonable burden caused by such accommodation. An equally divided Supreme Court affirmed that decision, Parker Seal Co. v. Cummins, 97 S. Ct. 342 (1976), providing little guidance with regard to the relative dominance of the respective interests being litigated. However, in an-
other recent case, issues within the scope of this article are resolved, if only tentatively. In Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976), the plaintif
f employees objected to the payment of agency shop fees because such payment conflicted with their religious tenets. Plaintiffs were Seventh Day Ad-
ventists, and the court accepted their claim of religious objection as genuine.

The court's decision, which was largely predicated upon Congress' 1972 amend-
ments to Title VII of the Civil Rights Act, departed from the earlier cases, which had swept aside religious objections to compulsory union payments in order to combat the supposed menace posed by alleged "free riders." In this decision the court recognized that in some instances religious principles forbidding payments to a labor union could be of such consequence as to supersede the agency shop
The point of this discussion is simply to engender the realization that union representation per se cannot benefit every employee; further, that the degrees of benefit and detriment flowing from such representation are assuredly not parcelled out in equal measure. Economic benefits received by an individual employee, as in Burns, may be offset by tangible or intangible detriments. An employee may find himself both tangibly and intangibly benefited by union representation, whereas another worker may find himself entirely disadvantaged by it.

The Second Circuit has refused to explore the difficult issues inherent in an analysis of the union benefit doctrine, although confronted by a record presenting relevant considerations in strikingly clear-cut form. The Buckley case was a challenge to the lawfulness of compulsory unionism provisions applied to news commentators whose employment duties unquestionably involve and depend upon the exercise of First Amendment freedoms.

The plaintiffs alleged that their constitutional liberties were infringed by forced union support and although the court found that these claims were not insubstantial or frivolous, it declined to resolve them. This result was predicated upon the overriding effect attributed to the congressional assumption that industrial strife is minimized by subordinating the exercise of such constitutional rights to a financial obligation imposed upon dissenters by agreement between union and employer representatives. I shall not dwell on the values ascribed by the court to these conflicting interests, as I have already commented upon the irrationality of excluding intangible factors from assessments of the union benefit doctrines.

The Buckley decision is of even greater interest because of the court's refusal to undertake any analysis of the economic facts before it. The trial court found that the plaintiffs derived no substantial benefit from union representation as each employee negotiated his own compensation which, in turn, exceeded the union scale wage. The only arguable tangible benefit available to the

provisions of the collective bargaining agreement. The case was remanded to the district court for evaluation of those respective interests.

Id. at 310.
plaintiffs was participation in a union pension plan, a benefit so meager that the court could not justify characterizing the plaintiffs as "free riders." The appellate court found this of no significance, holding that: "There is no rational basis for distinguishing between the degrees of benefit one enjoys as a result of a union's bargaining efforts on his behalf." If there is no basis on the Buckley facts of determining "degrees of benefit," there is no basis for determining the existence of benefit in the first instance. It is logically impossible to demonstrate that Buckley was favored by union representation, because that circumstance negated the opportunity of ascertaining what his economic rewards would have been in the absence of union representation.

If the "benefit" determination were reached solely by the application of common sense and the evidence before the court, the result reached by the Second Circuit would not find general acceptance. There is some indication that the court was sensitive to this observation, as it qualified its ruling by this statement: "Of course we do not decide whether employees who have derived no demonstrable benefit from a union's effort are 'free riders.'"

Despite the annual proliferation of union unfair labor practices, of massive court judgments for union-committed crimes and civil wrongs, and of egregious, ongoing union racial discrimination, the rote recitation of the union benefit doctrine continues. It can not be rationally and conclusively assumed that unions invariably benefit those for whom they bargain in the face of such occurrences.

If actual, not presumed, benefit is one of the criteria necessary for the imposition of costs upon dissenters, it will of course com-

40 496 F.2d at 311-12.
44 Id. at 312.
45 Id. at 312, n.2.
46 In fiscal year 1973, 9,022 charges were filed against unions, of which approximately one-third were found meritorious. BNA, LABOR RELATIONS Y.B. 238-41 (1974). In fiscal year 1974, charges against unions increased to 9,654; in 1975, the number increased again to 10,822. Of the latter number, 6,832 alleged illegal restraint and coercion of employees. The percentage of meritorious charges declined, however, to 26.4 percent. BNA, LABOR RELATIONS Y.B. (1975).
48 EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821 (2d Cir. 1976).
plicate the process of deciding cases in which this issue is raised. The quality of justice rendered by more incisive decisions will, however, be enormously improved.

III. STANDING TO CHALLENGE UNION EXPENDITURES

The issue of standing is complex and requires considerable analysis if one wishes to resolve it with regard to categories of employees as to whom no case authority exists. I have taken the space to explore this issue fully with the hope of stimulating development of a comprehensive and logically consistent approach.

A. Protest Must be Rendered

Agency fee payers' standing to assert claims for wrongful expenditures is unquestioned. One might think that the courts would take cognizance of the involuntary nature of their affiliation, and establish a presumption that such persons have a general objection to all expenditures made from their extracted fees.

To date, the courts have not indulged this presumption; specific protest against the unlawful use of compulsory fees has been required. Application of the latter rule, rather than a presumption of general objection, does not rest on any judicial intuition that workers forced to pay union fees really want to do so, or that they suffer the loss silently, feeling that it is their moral and ethical burden. The reason for requiring a specific protest turns simply upon application of the class action requirements of various rules of civil procedure.

The Georgia courts had certified the Street plaintiffs as representatives of a class of employees comprised of "all non-operating employees of the railroad defendants affected by, and opposed to, the hereinafter referred to union shop agreements" and who also opposed the use of dues and fees obtained therefrom for non-collective bargaining purposes. The union defendants argued with considerable force that ascertainment of the composition of this class was necessarily dependent upon a determination of the attitude of unnamed individuals. But the factor that made this argument

50 International Ass'n of Machinists v. Street, 367 U.S. at 774; Seay I, 427 F.2d at 1004.
forceful was the element of full union membership on the part of three of the named plaintiffs, including Mr. Street. If the lower court's class designation had been sustained, the union defendants would have been exposed to claims by other union members for unlimited retroactive reimbursement for political expenditures, predicated solely upon an undisclosed statement of opposition to such costs. It is fair to say that the Supreme Court considered that such a result would unwarrantedly jeopardize the union's treasuries. Accordingly, the rendition of specific notice was required.

The notice requirement is not illogical, as applied to union members (except in the instance of an unlawful compulsory membership agreement, as discussed below). It is submitted that the notice requirement does contradict common sense and experience when applied to agency fee payers.

The requirement of notice rests upon an implicit assumption that the compulsory contributor has no objection to the extraction of his wages. The converse proposition, that objection to such forced payments should be presumed, has some statistical support. In a recent survey conducted by the Opinion Research Corporation for the National Right to Work Committee, strong opposition was expressed to compulsory unionism:

[Seventy-nine] per cent opposed the practice of using compulsory union dues and fees to campaign for political candidates, while only 12 per cent felt the practice to be permissible.

Compulsory unionism was opposed by a margin of 68 per cent to 27 per cent, and 74 per cent favored retention of the section of the Taft-Hartley Act authorizing states to approve right to work laws, compared to 11 per cent who felt it should be repealed.

In arriving at these results, 2,173 adult men and women were interviewed, nearly 1,000 of whom were either members of unions or were from households of union members.

Persons interviewed were divided among manual laborers and service employes, farm workers, clerical and sales personnel, craftsmen and managerial people, with the largest number being 467 manual workers and service employes and the lowest number, 257, managerial employes.

The prevailing attitude reflected in that survey is even more striking

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when considered in conjunction with the other elements of inherent coercion associated with the exclusive representation principle. Those elements are discussed below, but preliminary attention is given to the notice requirement as affected by statutory interpretation.

In the Seay litigation, the plaintiffs contended that the Machinists' use of agency fees for politics constituted a breach of an implied condition of the collective bargaining agreement, and the Ninth Circuit found that this adequately stated a claim for relief.44

The "implied condition of contract" claim recognized by the Ninth Circuit in Seay raises an interesting question with regard to the necessity of specific notice as a prerequisite for perfection of a claim by dissenters. If the limitation on political spending is read into the contract, an expenditure of agency fees for such activities ipso facto constitutes a breach. To the extent that the political expenditures are derived from the funds of all agency fee payers within the bargaining unit, each is affected by this breach, and damaged thereby. Under such circumstances, presentation of a notice of objection is superfluous; the only relevant question in that regard is whether a portion of the dissenters' claims is barred by the statute of limitations.

It makes little sense to conclude that spending which exceeds and thereby breaches a contractual limitation does not give rise to a claim for relief until the breaching party (the union) is put on notice that dissenters intend to, or do, assert that breach in litigation. Such a conclusion is even more puzzling in the absence of recognized criteria for determining the sufficiency of a protest. Nothing in the cases militates against the adequacy of an informal oral protest to any union representative, even a shop steward.45

Where notice is required, a simple, sensible rule can be applied which respects human nature, comports with class action procedural rules, and fairly accommodates the respective interests of employees and unions. The rule should be that a general objection to the use of union dues or fees for non-collective bargaining activities is presumed on the part of agency fee payers and all persons

44 Seay I, 427 F.2d at 1000-01; Seay II, 533 F.2d at 1128.
45 As the statutes make no reference to such protests, it would seem uncomfortable for the courts to draw guidelines which would invalidate some such communications on the basis of informality or the official status of the recipient.
subject to an unlawful formal membership agreement; as to all other employees, specific notice is essential to perfect a claim against a union for non-collective bargaining expenditures. Application of this rule will have the further salutary effect of discouraging negotiations and enforcement of unlawful formal membership agreements.

B. Specificity of Protest

To forestall class action treatment and to multiply the difficulties of prosecuting cases such as *Street*, unions have asserted that dissentsers must identify specific candidates or legislative measures they oppose in order to be entitled to a proportional return of political expenditures. This is a particularly unappealing argument in light of the prevailing union practice of excluding agency fee payers from the receipt of union publications. Not surprisingly, this position was rejected by the Supreme Court, which stated:

It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to any political expenditures by the union.

General objections to other non-collective bargaining expenditures have been held sufficient.

C. Union Members' Standing to Avoid Contribution to Non-Collective Bargaining Activities

The course of the following discussion involves consideration of the legal status of various categories of employees: persons who become union members absent a union security requirement, persons who become union members pursuant to such a requirement and persons who become union members pursuant to an unlawful union security agreement. One common element can be traced throughout the discussion, and it applies in greater or lesser degree to each of the foregoing categories, depending upon a variety of specific facts, the nature of union operating practices, and the

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56 No notice is required, of course, with regard to union expenditures which are alleged to be violative of specific proscriptions established in federal or state statutes.

57 Allen, 373 U.S. at 118 (emphasis by the Court).

statute (RLA or NLRA) governing the pertinent employment relationship. The common element is the recognition that union participation—of whatever degree selected by the employee—is inherently coercive in an industrial relations system premised upon exclusive representation.

The inherent coercion to obtain union membership does not always accompany an inescapable financial obligation. Powerful pressures are exerted upon employees to become union members, even absent an enforceable obligation to pay union dues or fees. This situation is exemplified by the action of an employee who, in a “right to work” state, chooses union membership. More frequently, the considerations impelling union membership are joined with unavoidable, explicit financial requirements—union security provisions. In both of these situations there is a blend of powerful tangible (financial) and intangible forces affecting each employee, regardless of his membership status. It is this writer’s conclusion that a spending suit (i.e., a suit for non-collective bargaining expenditures) may be maintained by any person paying union dues or fees, no matter which of the foregoing membership categories apply to him, because the fact of membership is not necessarily reflective of a voluntary affiliation.

A combination of factors supports the conclusion that all union members have standing to protest non-collective bargaining expenditures. The pivotal factor is the union’s role as exclusive bargaining representative, a privilege which unions eagerly sought. Aside from obligating an employer to treat with the union as spokesman for all unit employees, this statutory privilege prohibits employers from dealing with individual employees with regard to their wages, hours, and working conditions. The next factor of major significance is the prevailing exclusion of non-members from all collective bargaining activities, such as contract negotiation, administration, and grievance handling. Agency fee payers are generally not even permitted to vote to ratify or reject the collective bargaining agreement negotiated in their behalf.

Union membership allows the member a part in choosing the very course of action to which he refuses to adhere, but he has of

59 Schatzki, supra note 30, at 918.
60 Medo Photo Supply v. NLRB, 321 U.S. 678 (1944).
course no role in employer conduct, and nonunion employees have no voice in the affairs of the union.\textsuperscript{42}

Numerous court decisions have recognized that employees are often coerced into union membership by an agency shop agreement charging nonmembers the equivalent of full union dues and fees.\textsuperscript{43} The operative principle of these cases is summarized in a recent attorney general's opinion:

\begin{quote}
[S]uch a clause in effect requires a nonunion employee to subsidize the union's institutional activities—activities from which he receives no benefit unless he joins the union. Thus, it places him in the position of either having to join the union in order to receive his 'money's worth' or staying out and allowing the union to be a 'free rider' to the extent of that subsidy. This, in turn, results in a compulsion to join the union. . . .\textsuperscript{64}
\end{quote}

The exclusion of agency fee payers from collective bargaining activities unquestionably increases the pressure to obtain union membership. Participation in collective bargaining activities has been held of such value that its wrongful denial constitutes irreparable injury entitling the victim to injunctive relief.\textsuperscript{65}

The pervasive disenfranchisement of agency fee payers exerts its maximum coercive effect in the context of airline employment, which is governed by the Railway Labor Act. Frequently unions negotiating agreements for airline employees reserve to the union the sole prerogative of determining whether or not the denial of an employee's grievance will be appealed. A grievant who feels that he has been wrongfully foreclosed from pursuing his grievance has only one remaining avenue of redress—litigation charging the union with the breach of its duty of fair representation.\textsuperscript{66} Unless he is able to establish employer collusion, suit will lie only against the union.\textsuperscript{67} Accordingly, even if the grievant-plaintiff prevails, he

\textsuperscript{64} Op. ATT'Y GEN. OF WASHINGTON, NO. 7 at 9 (1975).
\textsuperscript{65} Burns v. Local 1503, Painters, 90 L.R.R.M. 2824 (D. Conn. 1975).
cannot obtain adequate redress unless the subject of the grievance was a mere financial claim, as the court will have no power to rectify the employer's action which gave rise to the grievance in the first instance. Furthermore, the vast bulk of grievances are not of a magnitude rendering such litigation feasible. Indeed, even discharge from employment, which has been called "industrial capital punishment," often goes uncontested because of the unavailability of litigation resources.68

Although discriminatory and abusive treatment such as that described may be remedied in some instances by National Labor Relations Board, which investigates and prosecutes unfair labor practices, this relief is not available to railway and airline employees. *No union unfair labor practices are specified in the Railway Labor Act.* A railway union choosing to afflict bargaining unit employees with invidious treatment rests secure in the knowledge that the employee will have to surmount a staggering accumulation of obstacles in order to obtain redress (and bearing in mind, of course, that if the injury was non-financial in character, adequate redress may be impossible because of the employer's insulation from judicial relief).

Thus the employees must find an attorney who is either adequately trained in labor relations law or is willing to devote the time necessary to secure an adequate background for the circumstances of that case. The employee must also somehow conduct an investigation which will reflect a sufficient likelihood of success to justify the expenditure or commitment of the necessary resources for the inception of litigation. Finally, the time and financial resources necessary to conduct extensive discovery and prosecute the case, often through appeals, must be found.

It requires no imagination to perceive the invitation for the arbitrary exercise of power inherent in these circumstances. This perception is certainly not hidden from employees, who readily grasp that the fealty of union membership, with its attendant financial obligations, is "an offer [they] can't refuse."69

Judicial awareness of the pressures impelling employees to seek union membership can be seen in *Street.* During the progress of

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that litigation, three of the plaintiffs became full members of the Brotherhood of Railway Clerks (now BRAC). The union defendants argued that these plaintiffs had chosen membership, thereby waiving any claim for dues and fees paid pursuant to the union shop agreement.  

This argument fell upon deaf ears, and each of those "voluntary" union members later participated fully in the stipulated relief accorded nonmembers—the return of all dues and fees, and a release of any obligation to pay future amounts to the union as a condition of employment. While the stipulated result may have embodied a compromise of the unions' position in order to terminate burdensome litigation, it is critically significant that none of the appellate courts drew any distinction between the rights of dissenting union members and dissenting nonmembers.

Ironically, the basis for rejection of the unions' waiver argument was set forth in their own brief. In emphatic terms, they equated the quantum of coercion found in forced support of political activities with that involved in forced admission to the dictates of an exclusive representative in collective bargaining:

Compelling financial support of a union involves just as much if not more infringement on freedom in the sphere of supporting different policies in negotiating agreements and processing grievances as occurs in the legislative or political sphere; in the negotiating field the impact of the union's activities on the individual is direct and binding. . . . The compulsions which the court below accepts as constitutional when applied to the realm of negotiating contracts and processing grievances are not constitutionally less objectionable than the activities the court below finds unconstitutional.  

As the foregoing discussion demonstrates, the pressures to obtain union membership posed by (1) the broad-reaching power of the exclusive representative, and (2) the exclusion of non-members from their own bargaining affairs is often irresistible. These pressures are immensely powerful, and inherently coercive. The source of the former was union legislative influence, and the latter flows

89 Brief, supra note 31, at 99-100.
92 Brief, supra note 31, at 49.
93 Schatzki, supra note 30, at 914.
from union operational practices. Balanced against the coercion that each exerts, the presuasiveness of an argument that those who select union membership voluntarily endow their union with carte blanche authority to spend their money diminishes greatly. That argument is even less persuasive where a union security agreement exists, and the employee must still pay equivalent dues and fees, if he eschews union membership. The argument is untenable in the presence of an unlawful union security agreement compelling actual union membership.

Implementation of the foregoing analysis by permitting every union member to assert a spending protest will not result in unions being unfairly penalized if they forego the temptation to expend involuntary dues and fees upon activities beyond the purview of collective bargaining. The Supreme Court has ruled that dissenters must put the union on notice of their protest in order to perfect their claim. A union that maintains adequate accounting records and observes adequate practices ought therefore to be in a position to respond promptly to an employee’s protest. Unions could, of course, greatly minimize their exposure to any such claims by ensuring that the financial support of their non-collective bargaining activities is derived from contributions having a far greater indicium of voluntariness than that which may be asserted with regard to present membership dues.

How may this higher indicium be established? If unions were to refrain from charging nonmembers for non-collective bargaining activities, and abandon their exclusion of nonmembers from collective bargaining activities, the assertion that those who obtained membership did so voluntarily would have immensely greater credibility than does any such assertion premised upon existing practices. Unions that remain unbending in the exercise of their power over dissenters have little reason to complain of resulting “vexatious” litigation; the prerogative of forestalling such litigation rests almost entirely with the unions themselves.

IV. LEGAL BASES OF DISSENTERS’ CLAIMS

The discussion which follows with regard to constitutional claims, contractual claims, and those arising under the duty of fair rep-

Although that claim may be first asserted in the complaint, it will not be given retroactive effect. Street, 367 U.S. at 774.
representation applies with equal force to spending protests under the NLRA and the RLA, as the obligations owed by unions operating under those two statutes are coextensive on these points. The definitive spending cases have applied and interpreted the Railway Labor Act, and emphasis is placed upon the legislative history of that enactment. As the authorization for union security provisions contained in the RLA followed passage of the Taft-Hartley Act by four years, and was patterned upon the earlier legislation, there is no basis for varying a union's duty to dissenters depending upon the particular statute under which their employment is performed.

A. Constitutional Cause of Action

Preliminarily, it should be pointed out that no relief has as yet been granted any dissenters for a proven violation of constitutional rights. Nevertheless, plaintiffs continue to assail union use of compulsory dues for non-collective bargaining purposes, contending that such expenditures abridge constitutional freedoms. A Michigan appellate court has held that an agency shop clause applied to nonmember teachers "could violate plaintiffs' First and Fourteenth Amendment rights," but withheld relief on other grounds.

Although the decisions rendered thus far have delineated the scope of prohibited spending based upon statutory interpretation, it is important to consider the format of the constitutional arguments which have been advanced, as the statutory interpretation has been greatly influenced by the court's desire to avoid determination of those controversies on constitutional grounds. In decisions rendered thus far, the strictures of the First and Fifth Amendments have been emphasized by dissenters' counsel.


Abood v. Detroit Bd. of Educ., 60 Mich. App. 92, 230 N.W.2d 322 (1975), currently on appeal to the United States Supreme Court, No. 75-1153.

See Railway Employes' Dep't, AFL v. Hanson, 351 U.S. 225 (1956); Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970); Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963); Reid v. McDonnell Douglas Corp., 443 F.2d 408 (10th Cir. 1971).
COMPULSORY UNION DUES

1. The Presence of State Action

Unions have attempted to forestall constitutional scrutiny of their expenditures by urging that the indispensable element of state action is absent. The courts have not been receptive to this argument.  

2. Claims of First Amendment Violation

Aside from the cases in which union financial support has been opposed on the grounds of interference with religious belief, dissenters' claims of First Amendment infringement have focused upon forced membership in, and financial support of, unions as denials of free association and free speech. As noted, actual union membership has been proscribed as a mandatory condition of employment under the NLRA and the RLA on the basis of statutory interpretation. In a recent en banc decision largely premised upon the earlier challenges to the RLA, the Washington Supreme Court squarely held that forced membership in an organization is an unlawful derogation of First Amendment associational rights. Compulsory financial support is treated similarly, though with less emphasis. In Good, the plaintiffs challenged requirements that they become members of and contribute to a students' organization which "has consistently promoted a one-sided political viewpoint, both in its choice of speakers and in taking public positions on various controversial topics." The issues confronting the court were tersely described and forcefully resolved:

However, there remains plaintiff's assertion that their First Amendment rights have been violated by the requirement of mandatory membership in the ASUW and financial support thereof. The main thrust of plaintiffs' position is that they have a constitutionally protected right to not associate with any group, just as they enjoy

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31 See cases cited supra notes 19 & 26.

32 Good v. Associated Students of the Univ. of Wash., 86 Wash. 2d 94, 542 P.2d 762 (1975).

33 Id. at 96, 542 P.2d at 764.
a concomitant right to associate with any group of their choice. We agree.

Freedom to associate carries with it a corresponding right to not associate. 44

The Washington court then embarked upon a review of Hanson, Street, and Lathrop,45 the Supreme Court decisions which have most closely approached the question of associational infringement flowing from compulsory financial support of an organization.

Hanson is often cited by union attorneys as authority for the blanket proposition that union security provisions are compatible with the First Amendment. This argument runs counter to the express language in Hanson, and to its own author's subsequent interpretation. Mr. Justice Douglas, who wrote Hanson, later stated in his concurring opinion in Street that Hanson was confined to approval of the requirement that all who were benefited by collective bargaining activities could be compelled to contribute to the cost of those activities. 46 Both Douglas and Black (dissenting) believed that the First Amendment issues raised in Street were appropriate for decision, and they both set forth an unequivocal condemnation of the practice of using dissenters' dues and fees for political purposes. 47 The error of asserting Hanson as broad constitutional authority for all aspects of compulsory unionism is pointed out in Good: "The [Hanson] court expressly reserved the issue of First Amendment violations as not being presented by the record." 48

The very recent Knight49 decision makes it plain that there is room for disagreement as to the reach of constitutional questions decided in Hanson. The Eighth Circuit viewed Hanson as holding that the RLA authorization of union shop agreements, on its face, neither worked a denial of due process nor infringed upon dissenters' rights of free speech and association. For purposes of analyzing

44 Id. at 100, 542 P.2d at 766.
46 367 U.S. at 776.
47 Id. at 775-97.
48 86 Wash. 2d at 102, 542 P.2d at 767.
49 Knight v. Alsop, 535 F.2d 466 (8th Cir. 1976).
dissenters' rights litigable in a spending case, however, the Eighth Circuit's interpretation of Hanson is keyed to the conclusion that constitutional immunity exists only with regard to the payment of dues, fees and assessments utilized to defray the costs of collective bargaining.\footnote{Id. at 470.}

Lathrop, decided the same day as Street, upheld a state requirement of compulsory membership in an integrated bar, notwithstanding the existence of some unspecified legislative activities engaged in by the bar association. Although a majority of the Lathrop Court agreed that the First Amendment issues were present, no agreement could be reached on their resolution. As might be anticipated, nothing of clarity in constitutional doctrine emerged from that "curiously reasoned, rambling opinion."\footnote{Good v. Associated Students of the Univ. of Wash., 86 Wash. 2d 94, 542 P.2d 762 (1975).} In dissent, Mr. Justice Black vigorously castigated the plurality opinion: "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not."\footnote{Lathrop v. Donohue, 367 U.S. 820 (1961).}

Avoiding the "convolutions" of the foregoing Supreme Court decisions, the Washington court forthrightly addressed the Good plaintiffs' constitutional claims:

[W]e have no hesitancy in holding that the state, through the university, may not compel membership in an association, such as the ASUW, which purports to represent all the students at the university, including these plaintiffs. That association expends funds for political and economic causes to which the dissenters object and promotes and espouses political, social and economic philosophies which the dissenters find repugnant to their own views. There is no room in the First Amendment for such absolute compulsory support, advocation and representation.\footnote{86 Wash. 2d at 104, 542 P.2d at 768.}

The case was then remanded to the trial court for a determination of appropriate relief, which in turn will require evaluation of the various ASUW activities to see if they meet the standard of sufficiently presenting varying viewpoints to constitute a truly educational function.

The major principle to be derived from Good, for present purposes, is that compulsory financial participation in an organization
which promotes "one particular viewpoint, political, social, economic or religious," is contrary to the command of the First Amendment. The expression of this rule as a matter of constitutional adjudication, not statutory interpretation, lends strong support to dissenters' claims that union expenditures must be rigorously scrutinized and purged of funding from coerced sources. The Supreme Court has recently confirmed that financial contributions for political purposes have constitutional significance:

The [Federal Election Campaign] Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate.

Money is a neutral element not always associated with speech but a necessary and integral part of many, perhaps most, forms of communication.

Although the decisions in the spending cases have sought to avoid making constitutional determinations, the effort has not been wholly successful. In its first Seay decision, the Ninth Circuit observed that:

The diversion of the employees' money from use for the purposes for which it was exacted damages them doubly. Its utilization to support candidates and causes the plaintiffs oppose renders them captive to the ideas, associations and causes espoused by others. At the same time it depletes their own funds and resources to the extent of the expropriation and renders them unable by these amounts to express their own convictions and their own ideas and to support their own causes.

If the use of dissenters' funds for union political activities is at most a statutory violation, it is difficult to ascribe any import to the court's statement. The connotation of irreparable, or even accentuated, harm implicit within it lacks any force unless it is grounded upon the First Amendment's assurances of political freedom. Absent that foundation, there is no reason to draw a distinction between a union political contribution and a set of golf clubs for a retiring union officer, insofar as injury to dissenters is concerned.

84 Id.
86 427 F.2d at 1004.
3. Claims of Fifth Amendment Violations

As in the case of the First Amendment claims, consideration of the Fifth Amendment claims described below has undoubtedly led to the statutory interpretation confining the permissible use of dissenters' dues and fees to activities within the scope of collective bargaining.

If the Railway Labor Act were interpreted to grant an exclusive bargaining representative unfettered discretion to spend compulsory dues and fees for non-collective bargaining purposes, a claim would be sustainable for deprivation of property without due process of law, in violation of the Fifth Amendment to the United States Constitution. Assessment of this point will be of greatest assistance in passing upon union expenditures other than those of a political nature, as the latter were clearly disposed of in Street and Allen.

Section 2, Eleventh is an exercise of the power of Congress under the Commerce Clause, and acts of Congress under that power are subject to the due process limitations of the Fifth Amendment. To the extent that employees are forced to pay money to a union, they are, of course, deprived of property.

Congress has delegated to unions the quasi-governmental power to extract funds from the employees they represent and to spend those funds for collective bargaining and grievance handling. However, "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard" which, at a minimum, "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."

Here, however, if Congress intended that unions have discretion to spend compulsory dues and fees on anything other than collective bargaining and grievance handling, it provided neither stand-

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87 Railway Employees' Dep't, AFL v. Hanson, 351 U.S. 225, 238 (1956).
ards nor even broad guidelines to mark the field within which such spending is permissible. In the absence of limiting standards, the power conferred upon unions would therefore be the power to appropriate and spend the property of an unwilling minority for literally anything under the sun other than political activities.

This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of [the minority]. . . . [A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is . . . clearly arbitrary, and . . . clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment. . . .

Indeed, such "unbridled discretion" would violate the Fifth Amendment even if delegated to a government official.

The necessity of restrictive statutory interpretation is further evidenced by the fact that labor organizations certified as exclusive collective bargaining representatives under the RLA and NLRA are not confined to activities pertinent to that role. They are free to engage in a limitless range of lawful activities surpassing the boundaries of labor relations.

B. Dissenters' Statutory Claims for Relief

To a large extent, the foregoing materials outline the nature of the statutory claims which have been raised. Further detail is offered to assist in evaluating the Ellis decision, and to facilitate application of the emerging statutory standards to new litigation contexts.

In Street, the United States Supreme Court concluded that the purpose of Congress in enacting section 2, Eleventh was "the elimination of the 'free riders'—those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions." The Court conse-

105 367 U.S. at 761.
quently construed the statute as not allowing the unions unfettered discretion in the expenditure of coerced dues and fees. It held that political spending by unions of monies coerced from dissenting employees is a statutory violation because such spending "is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes."\(^{105}\)

In *Hanson*, the Supreme Court upheld section 2, Eleventh's "requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work"\(^{107}\) on the ground that "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining." The Court noted that "[I]f 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented."\(^{108}\) In *Street*, although the Court read the RLA as not allowing unions to expend coerced dues and fees on politics, it explicitly reserved judgment on other non-collective bargaining expenditures to which employees may object because that matter was not before them.\(^{109}\) The *Ellis* case\(^{110}\) raised the question reserved in *Street*: whether section 2, Eleventh denies unions the power to spend coerced dues and fees upon any and all activities other than collective bargaining and grievance handling.

Examining the legislative history of section 2, Eleventh, the Supreme Court first noted that in adopting that provision Congress modified its "firm legislative policy against compulsion . . . only as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act."\(^{111}\) The role of the unions under this statutory scheme was next described by the Court as "collective bargaining as the method of settling railway disputes, . . . the status of exclusive representatives in the negotiation and administration of collective agreements, . . . representation on the statutory board

\(^{105}\) Id. at 768. Accord, Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003-04 (9th Cir. 1970).
\(^{107}\) 351 U.S. at 238.
\(^{108}\) Id. at 235.
\(^{109}\) 367 U.S. at 768-70.
to adjudicate grievances, ... [and] the duty fairly and equitably to represent all employees of the craft or class, union and non-union.”

It was the costs of these functions, and these functions only, that Congress contemplated employees would be compelled to support by compulsory unionism arrangements:

The principal argument made by the unions in 1950 [urging adoption of § 2, Eleventh] was based on their role in this regulatory framework. They maintained that because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the costs to all employees who benefitted. They thus advanced as their purpose the elimination of the ‘free riders’

This argument was decisive with Congress.

The Supreme Court concluded its review of the legislative history of section 2, Eleventh by stating:

[I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the ‘free rider.’ . . . We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money.

The conclusion from the logic of the majority opinion in Street is that section 2, Eleventh restricts the power of unions to spend exacted money, over objection, to support any non-collective bargaining activity. Mr. Justice Whittaker, in his separate opinion in Street, understood the majority holding in which he concurred as:

[T]hat, in enacting § 2, Eleventh of the Railway Labor Act, Congress intended to, and impliedly did, limit the use that railway labor unions may make of dues, fees and assessments, collected from those of its members who were or are required to become or remain its members by force of union shop contracts negotiated as permitted by that section, only to defray the costs of negotiating and administering collective bargaining agreements—including the adjustment and settlement of disputes.

This interpretation was accepted by the Georgia Supreme Court.

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112 Id. at 760-61.
113 Id. at 761-62.
114 Id. at 767-68.
115 Id. at 779 (emphasis added).
on remand,"\textsuperscript{118} and in a later case by the Fifth Circuit: "[T]he expenditure of union funds for non-collective bargaining purposes was interdicted by the Court's statutory construction in Street."\textsuperscript{117} The Ninth Circuit agrees:

The Supreme Court has said as clearly as possible that agency fees exacted from employees under the terms of the bargaining agreement must be limited to use in sharing the costs with other dues of 'negotiating and administering collective agreements, and the costs of the adjudgment [sic] and settlement of disputes.' This limitation is read into the statute under the terms of which the collective bargaining agreement, with its agency fee provision, was entered into in this case.\textsuperscript{118}

This limiting construction was held equally applicable to expenditures of unions functioning under the aegis of the National Labor Relations Act.\textsuperscript{119}


Subsequent to Allen,\textsuperscript{120} dissenters broadened their claims of unlawfulness with regard to union expenditures, and asserted that expenditures for non-collective bargaining purposes created claims for relief based upon a breach of the union's duty of fair representation. Assertion of that theory has been approved by the courts,\textsuperscript{121} and in one instance, judgment was rendered on that ground alone.\textsuperscript{122}

The Ninth Circuit has held that there is an implied-in-law limitation in an agency shop agreement that fees generated therefrom will be limited to sharing collective bargaining costs. Accordingly,

\textsuperscript{118} International Ass'n of Machinists v. Street, 217 Ga. 351, 122 S.E.2d 220, 222 (1961).
\textsuperscript{117} Gray v. Gulf M. & O.R.R., 429 F.2d 1064, 1071 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971); see Linscott v. Millers Falls Co., 316 F. Supp. 1369, 1371 (D. Mass. 1970), aff'd, 440 F.2d 14 (1st Cir.), cert. denied, 404 U.S. 872 (1971), "The only purpose of the requirement is to supply funds to the union to compensate it for the performance of its functions as a federally-empowered agent, as contemplated by the NLR Act."
\textsuperscript{119} Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1000 (9th Cir. 1970).
\textsuperscript{120} See cases cited at note 8 supra.
\textsuperscript{123} Ellis v. BRAC, 91 L.R.R.M. 2339, 2343 (S.D. Cal. 1976).
expenditures of forced dues for other purposes establish a contractual claim for relief. 2

V. A CONCEPTUAL DEFINITION OF "COLLECTIVE BARGAINING"

The lawfulness of union expenditures will in each case be largely predicated upon the characterization of activities as "collective bargaining" or "non-collective bargaining," so it is well to arrive at a conceptual definition of that term. As the only instance of judicial application of "collective bargaining" criteria to a broad range of customary union activities (the Ellis case) omits detailed recitation of its definitional standards, I shall discuss that case in a later section. 124

The process of collective bargaining was congressionally authorized in the Railway Labor Act, 125 the National Industrial Recovery Act, 126 and its successor, the National Labor Relations Act. 127 The Taft-Hartley amendments to the National Labor Relations Act included a definition of collective bargaining:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . .128

The statutory definition reflects long-standing common usage, 129 and it accords with descriptions of academicians and practitioners

124 See discussion at notes 147 through 161 infra.
129 Statement of Samuel Gompers, AMERICAN FEDERATIONIST, (March 1920).
in the field of labor relations. Some commentators have noted the interrelationship between traditional collective bargaining and union legislative efforts, which "in a sense may be considered as an alternative to the collective bargaining process." Of course, union expenditures incurred in conjunction with such legislation do not thereby lose their "political" character.

The relatively precise sphere of union activities falling within the concept of collective bargaining has been reflected in judicial decisions. An inclusive definition was stated by the Fourth Circuit: "Collective bargaining, however, has the well-understood meaning in the law of settling disputes by negotiation between employer and the representative of the employees."

This emphasis upon the discussing of working conditions between the representatives of a particular group of employees and their employer is of considerable significance. Unions often represent diverse groups of employee vocational skills, in diverse industries and far-flung geographic areas.

Several courts have ventured into this definitional area with an exclusive approach—rendering decisions which categorize certain union functions and activities as being beyond the purview of collective bargaining. Most notable, of course, are Street and Allen which proscribe imposing the cost of political endeavors upon dissenters.

In one instance, the Supreme Court reviewed a union's brief,

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132 See the dissenting opinion of Frankfurter, J., strenuously arguing that railroad union legislative activities are inseparable from the conduct of collective bargaining in that industry. International Ass'n of Machinists v. Street, 367 U.S. 740, 811-16 (1961).


134 Supra note 1.
which described in some detail its varied interests. The brief stated that:

Rather typically, unions use their members’ dues to promote legislation which they regard as desirable and to defeat legislation which they regard as undesirable, to publish newspapers and magazines, to promote free labor institutions in other nations, to finance low cost housing, to aid victims of natural disaster, to support charities, to finance litigation, to provide scholarships, and to do those things which the members authorize the union to do in their interest and on their behalf.155

The Court responded:

We cannot take seriously petitioners’ unsupported suggestion at the oral argument that we must assume that the union spends all of its income on collective bargaining expenses. The record is entirely silent on this matter one way or the other and it would be unique indeed if the union expended no funds for noncollective bargaining purposes.

As indicated in the text, petitioners’ brief seems to concede as much and petitioners later appeared to modify or withdraw the suggestion at the oral argument.156

The discussion in Schermerhorn is interesting from the standpoint of establishing a demarcation between collective bargaining costs imposable by statute and those which the Court referred to as “institutional expenses.” The Court commented upon the unfairness to those dissidents who are compelled to pay the full rate contributed by voluntary union members and then proceeded to sever the statutorily approved collective bargaining costs from the general overhead incurred in operating a union:

If the union’s total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union’s budget is balanced. By paying a large share of collective bargaining costs the nonmember subsidizes the union’s institutional activities.157

155 Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963).
156 Id.
157 Id. at 754.
In its discussion of appropriate relief, the Court in *Street* pointed out that any remedy granted should safeguard dissenters from the subsidization of union political activities, and from payment of a disproportionate share of collective bargaining costs.\(^{128}\)

Only two administrative decisions touching upon the area of noncollective bargaining activities imposable upon dissenters have been rendered. The decisions are in conflict, and the later of the two, which purports to distinguish the first decision rather than overrule it, is of singularly poor quality.

The first case, *Teamsters Local 959*,\(^{130}\) involved a charge of unfair labor practices growing out of the union's imposition of a "working assessment" upon nonmembers. The assessment was made to finance a credit union and a building fund. The Board held that such amounts are not "periodic dues" and could not lawfully be required of nonmembers. The Board briefly reviewed the legislative history dealing with the "free rider" argument and went on to hold that:

> [I]t is manifest that dues that do not contribute, and that are not intended to contribute, to the cost of operation of a union in its capacity as a collective-bargaining agent cannot be justified as necessary for the elimination of "free riders."

Here neither the "dues" for the credit union nor those for the building fund were for the purpose of supporting the Respondent as a collective-bargaining agent, and they therefore do not fall within the proviso to Section 8(a)(3) of the Act.\(^{140}\)

The second decision was rendered in *Detroit Mailers Union No. 40*.\(^{141}\) The majority opinion found that no unfair labor practices proscribed by the National Labor Relations Act were wrought by the respondent union's use of compulsory fees for a mortuary fund, a pension fund, and a retirement home fund. This opinion was predicated upon the statutory history and the Supreme Court's decision in *Schermerhorn*.\(^{142}\) Although reliance was purportedly placed upon the statutory history, none was cited by the majority.

The second, and similarly erroneous premise of the majority

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\(^{128}\) 367 U.S. at 774-75.

\(^{130}\) 167 N.L.R.B. 1042 (1967).

\(^{140}\) Id. 1045.

\(^{141}\) 192 N.L.R.B. 951 (1971).

\(^{142}\) 373 U.S. 746.
opinion is its misreading of the Schermerhorn decision. Schermerhorn simply ruled that an agreement imposing collective bargaining costs upon all employees in a bargaining unit is a form of union security subject to state regulation pursuant to section 14(b) of the Taft-Hartley Act. In the course of that decision, the Court pointed out that union dues "may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining.'" This statement plainly did not place the imprimatur of approval upon this common practice; it simply pointed out that as a matter of fact, union dues are often expended upon non-collective bargaining activities. The propriety of such expenditures was not at issue in that case.

Aside from the questionable vitality of the Detroit Mailers decision in NLRB proceedings, it is not authoritative in any spending case raising substantial issues of constitutional and statutory violations. The Board majority explicitly recognized that the payment of dues cannot be compelled for purposes "inimical to public policy," and then stated that: "[N]obody contends here that the dues were other than periodic and uniformly required, or that their designated or actual use was inimical to public policy." In contradistinction, assertions that constitutional and statutory rights are violated by diversion of dissenters' compulsory dues and fees to noncollective bargaining activities raise public policy questions of the most sensitive nature.

In summary, a reasonably precise conceptual definition of "collective bargaining" has emerged premised upon the contributions of labor writers, academicians, congressional statements, and judicial decisions. Each of these sources focuses the rubric of "collective bargaining" upon indispensable parties, a specific process, and a specific subject area. The parties are employers and representatives of employees, i.e., unions. The process is negotiation between those parties. The subject is that of employment conditions. If union expenditures are made for activities other than the representation of employees vis a vis their employer, or for purposes or functions having no roots in the collective bargaining agreement,

144 373 U.S. at 753-54.
145 192 N.L.R.B. at 952.
146 Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1004 (9th Cir. 1970).
the application of definitional standards renders those expenditures unimposable upon dissenters.

VI. THE ELLIS CASE—A DEFINITIVE SURVEY OF NON-COLLECTIVE BARGAINING COSTS

The Ellis case had been in litigation for nearly three years when summary judgment in favor of the plaintiffs was rendered on the issue of liability. The plaintiffs and class members\(^{147}\) were employees of Western Airlines, represented under the RLA by the Brotherhood of Railway and Airline Clerks (BRAC).\(^{148}\) Through discovery, a massive record was accumulated, providing considerable detail as to the nature of many activities undertaken by BRAC, and in some instances, disclosing a portion of the associated costs.

In its order granting summary judgment,\(^{149}\) the court specifically listed a number of union activities whose costs were found to be nonchargeable against dissenters. Calculation of damages was deferred pending trial.

Two general observations should be borne in mind as one reviews the court's decision. First, the ruling that dissenters may not be compelled to financially support the listed activities in no way impairs unions from engaging in those activities. The sole limiting effect is that fiscal support for the listed union functions must be derived from amounts contributed by voluntary union members. Secondly, certain activities mentioned in the Ellis judgment may in some small measure relate to the conduct of collective bargaining on behalf of the plaintiffs; however, the bulk of costs associated with those activities reflects extensive involvement with other proscribed categories. For example, much of the convention proceedings and a large proportion of publication space concentrate upon union political activities or goals. Whether or not the overall costs can be accurately allocated between the chargeable and nonchargeable functions remains for determination in the damages phase of the trial.

\(^{147}\) Ellis includes two consolidated cases; the Ellis plaintiffs are agency fee payers, whereas the companion Fails plaintiffs and class members are union members.

\(^{148}\) This union was the principal defendant in Street and in Allen.

\(^{149}\) 91 L.R.R.M. 2339.
Those activities which the *Ellis* court held to be non-collective bargaining in nature are:

(1) Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.
(2) Operation of a death benefit program.
(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.
(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:
   (a) employees not employed by Western Airlines;
   (b) employees not employed in the air transportation industry;
   (c) employees not employed in other transportation industries.
(5) Publications in which substantial coverage is devoted to general news, recreational, and social activities, political and legislative matters, and cartoons.
(6) Contributions to charities and individuals.
(7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such program secured for its salaried officers and employees.
(8) Conducting and attending conventions of BRAC.
(9) Conducting and attending conventions of other organizations and/or labor unions.
(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC.
(11) Support for or opposition to proposed, pending, or existing legislative measures.
(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions.  

One should not infer that expenditures for activities other than those listed above were deemed imposable upon the plaintiffs. The court adopted the language quoted from the proposed findings of fact and conclusions of law submitted by plaintiffs' counsel with very few changes. This point can readily be illustrated by reference to the first item: "[R]ecreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines." That particular language was chosen for the very pragmatic reason that BRAC's International Secretary-Treasurer had admitted that not all social and recreational expenses

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[^150]: L.R.R.M. at 2342.
were considered part of collective bargaining, and he then offered the explanation that social functions not attended by management personnel fell into the non-collective bargaining area.\textsuperscript{131} The evidence indicated that the great bulk of the defendants' social and recreational expenses were related to this admittedly non-collective bargaining area, and it appeared unlikely that a reasonably accurate allocation could be made. Therefore, the proposed categorization of excludable activities was stated so as to maximize the advantage of this admission. Perhaps the court would have insulated the plaintiffs from payment for all social and recreational activities, but it was thought to be unnecessary to seek a determination of the broader category.

Union spokesmen urge that every union activity is inextricably interwoven with the collective bargaining function; that even such things as social functions increase the union's power at the bargaining table because they generate improved morale among union members. This argument is substantially undercut by the legislative history,\textsuperscript{132} and of course it cannot, even if accepted as factual, control the resolution of constitutionally sensitive issues.

At the time they were seeking congressional authorization for section 2, Eleventh, union spokesmen took pains to refute any inference that the purpose of their request was that of obtaining compulsory financing for programs that would augment union power in general. George M. Harrison, chief spokesman for the Railway Labor Executives Association,\textsuperscript{133} addressed Congress and "expressly disclaimed that the union shop was sought in order to strengthen the bargaining power of the unions."\textsuperscript{134}

Examination of the legislative history and consideration of specific union activities, insofar as their financing is affected by the application of constitutional standards, leads to the formulation


\textsuperscript{132} The emphasis on union collective bargaining activities is unmistakable. Leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost. S. Rep. No. 105, 80th Cong., 1st Sess., 5-7 (1947); International Ass'n of Machinists v. Street, 367 U.S. 740, 759-62 (1961).

\textsuperscript{133} International Ass'n of Machinists v. Street, 367 U.S. 740, 761 (1961). Harrison was simultaneously serving as Grand President of the Brotherhood of Railway Clerks.

\textsuperscript{134} Id.
of criteria with which to test the lawfulness of spreading particular costs to compulsory contributors. Exclusionary tests may be roughly categorized according to a constitutional predicate.

When utilizing Fifth Amendment standards to evaluate specific union activities to determine whether or not the associated costs may be imposed upon dissenters, one would ask the following types of questions:

1. Is the activity related to negotiations with the employer for wages, hours, and working conditions?
2. Is the activity rooted in the collective agreement or the collective bargaining relationship, such as contract interpretation or grievance handling?
3. Are the expenditures associated with the activity necessary to the union's performance of its collective bargaining functions?
4. Does the activity benefit the dissenters?

Even if the costs of a given activity qualify as collective bargaining costs according to the foregoing tests, First Amendment hurdles must be crossed. If compulsory financial participation in the activity would impose political or ideological conformity, or otherwise effect an infringement of associational freedoms, the dissenter must be protected from that participation. If the statute is not construed to provide this protection, the statute itself must fall. It is impossible to reach any other conclusion if the "compelling governmental interest" test is properly applied. As the statute does not even require collective bargaining, a fortiori, there is no public interest in forcing financial support of a collective bargaining agent which can override the uninhibited exercise of constitutional liberties.158

Many, if not most, union activities which are found to be extraneous to the statutorily authorized realm of collective bargaining functions run afoul of a combination of the foregoing exclusionary tests, as demonstrated by the following examples. Contributions to affiliates, charities and other organizations generally


159 But see Gray v. Gulf M. & O.R.R., 429 F.2d 1064, 1072 (5th Cir. 1970). Gray may be largely irrelevant, however, as the plaintiff therein refused to pay any fees to his union representative.
entail financial support of political activities, and associations with groups taking one-sided ideological or economic positions.\textsuperscript{187} The recipients of these funds almost invariably lack a bargaining relationship with the dissenter's employer. The result is not simply a forced association, but the deprivation of funds which dissenters could otherwise utilize for the support of groups or purposes of their own choosing.\textsuperscript{188} Entertainment expenses may be foreclosed from compulsory support simply because they are unnecessary for the conduct of collective bargaining. Compulsory payment to death benefit plans may be voided because of their lack of any relationship with the dissenter's employment context. Such plans are not negotiated with employers; their entire cost is paid by the union members and agency fee payers. Organizing expenses will almost certainly conflict with several exclusionary tests. Organizing costs within the dissenter's bargaining unit are virtually nonexistent, as the controversy would not arise in the absence of a provision compelling all unit employees to join the union or pay fees to it. Accordingly, solicitation of membership is unnecessary. Furthermore, union organizing activities are steeped in ideological commitment—a commitment which the dissenter, by the very nature of his status, opposes.

The Ellis defendants asserted that it is entirely proper to compel financial support for a great many of the activities interdicted by the summary judgment on the ground that those activities promote "solidarity and harmonious relationships" which redound to the general benefit of the bargaining unit. The lack of persuasiveness inherent in that contention is revealed by focusing upon a dissenter's constitutional rights to decide for himself what is to his benefit, and to exercise the prerogative to support positions or activities which may detrimentally affect him in some sense, but which nevertheless exert a superior claim upon his loyalties. An employee whose impending wage increase is blocked by a wage and price freeze may still approve of this action, based upon the conviction that such a measure serves the national economic health: "It is the essence of the First Amendment rights [of association], which the parties exercise that they may make their own contrary (and

\textsuperscript{187} Good v. Associated Students of the Univ. of Wash., 86 Wash. 2d 94, 542 P.2d 762 (1975).

\textsuperscript{188} Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1001 (9th Cir. 1970).
rational) judgments without interference from the courts."^{150}

In short, the pursuit of "solidarity and harmonious relationships" is not an objective dissenters share with those to whom they must pay union dues or fees. As to costs necessitated by union activities beyond the pale of collective bargaining, there is neither a statutory warrant nor a logical predicate for insisting that unions are entitled to a share of dissenters' wages in order to facilitate union pursuit of such private objectives.

The *Ellis* court appropriately separated chargeable costs from those of non-collective bargaining activities which lack statutory sanction. Confirmation of this assessment comes from an improbable source, the General Counsel of the United Auto Workers, who greeted the *Ellis* decision as follows:

*No union can exist on those terms. The decision has a tremendous effect on all unions and on the quality of life in the country because of the way it restricts the role unions can play in working for social change.*^{160}

Congress was never advised that unions sought payment from alleged "free riders" in order to secure the funds to underwrite sweeping programs aimed at "social change." The commitment inherent in financial support of the programs of political and social activism favored by union officers is precisely the sort of "ideological conformity" which unions are forbidden from imposing upon dissenters."^{161}

**VII. Scope of Unit As to Which Costs May Be Imposed**

Once the preliminary delineation of non-collective bargaining activities has been accomplished, another difficult question arises. Within what scope of the union organization are costs imposable upon a given group of dissenters? Neither the statutes (RLA and NLRA) nor the decisions interpreting them have attempted to circumscribe the function unit whose costs may be imposed upon dissenters.

The most feasible cost pool alternatives include the following:

(a) union-wide bargaining costs;

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^{161} Railway Employees' Dep't, AFL v. Hanson, 351 U.S. 225, 238 (1956).
(b) bargaining costs within the industry employing the plain-
tiff dissenters;
(c) all bargaining costs of the specific organization certified
to represent the dissenters;\textsuperscript{182}
(d) only those collective bargaining costs of the certified
representative that relates to the dissenters' employer; or
(e) costs of all union organizations which participate in bar-
gaining with the dissenters' employer, for the unit em-
ploying those dissenters.

As the perimeter of the cost pool widens, problems of accounting
and allocation become vastly more complex and burdensome.

Some guidance may be derived from the definition of "collective
bargaining" set forth in section 8(d) of the National Labor Rela-
tions Act, which emphasizes the relationship between a given
employer and the representatives of its employees:

\begin{quote}
[T]o bargain collectively is the performance of the mutual obliga-
tion of the employer and the representative of the employees to
meet at reasonable times and confer in good faith with respect to
wages, hours, and other terms and conditions of employment, or
the negotiation of an agreement, or any question arising there-
under, and the execution of a written contract incorporating any
agreement reached if requested by either party. . . .\textsuperscript{163}
\end{quote}

A limitation of cost pool boundaries encompassing only those
expenditures connected with bargaining with the dissenters' em-
ployer is compatible with the position taken by union spokesmen
in originally urging congressional approval of compulsory financial
support. Congress was importuned to permit the extraction of an
employee's wages to defray the costs of representing him in his
own employment. The principal argument asserted by unions in
pursuit of statutory authorization for the union shop was the exist-
ence of the duty of fair representation, which obligates an exclusive
bargaining representative to fairly and equally represent all persons

\textsuperscript{182} From an accounting standpoint, judicial selection of this alternative will
simplify accounting problems where the certified representative is a relatively
small local union. This is most often the case under the NLRA while it is com-
monplace for RLA certification to be granted to an international union. As to
the latter situation, serious legal and accounting problems will persist, as discussed
in the following text.

employed within the bargaining unit." It was the cost of that repre-
sentation which unions sought to spread among the bargaining
unit members, not the costs of providing similar services for em-
ployees in an unrelated industry, or those in a remote geographic
area, whose bargaining might be conducted by a local union orga-
nization having only remote affiliation through the separate vertical
ties to an international headquarters with the unit employing a
given group of alleged "free riders."

To illustrate the pertinent considerations, I refer to a hypo-
thetical example. Assume that dissenters A, B, and C are employed
by the Smith Company, a manufacturer of jewelry. A, B, and C,
are agency fee payers, contributing amounts under protest to
Local 3 of the Amalgamated Workers Union, a large union repre-
senting diverse employee skills throughout the country through a
large network of regional organizations and subordinate local
unions. Then assume that employees D, E, and F work for the
Jones Company, which is located in the same city as the Smith
Company, and that those employees are similarly represented by
Local 3. No union security provision, however, has been negotiated
with the Jones Company as prolonged and costly negotiations have
been unproductive. Somewhere across the country, Local 1000 of
the Amalgamated Workers Union represents a unit of gas station
employees, including G, H, and I. As in the case of the Jones
Company, Local 1000 has been unable to negotiate union security
provisions.

If union-wide collective bargaining costs are recoverable from
dissenters, A, B, and C will be required to defray a portion of
the bargaining expenses related to each of the other employee
groups. In terms of responding to the statutory objectives, manda-
tory payment of collective bargaining costs for employees D, E and
F is as grotesque a result as it is for the gas station workers. It
was never suggested to Congress that successful negotiation of an
agency shop agreement with a given employer would impose an
obligation upon his employees to defray union collective bargain-
ing expenditures for any other group of persons the union repre-

The irrational result that would follow from an obligation to

Compulsory Union Dues

Defray costs outside of the unit in which a given group of dissenters is employed can be most easily perceived by hypothesizing an extreme example. Expanding upon the facts set forth above, assume that the Amalgamated Workers Union represents 500,000 employees nationwide, but the very first agency shop agreement it has been able to obtain is that with the Smith Company. Further assume that the nationwide percentage of membership per bargaining unit is sixty percent, leaving 200,000 alleged "free riders" for whom collective bargaining costs are incurred. It is implausible to suggest that A, B and C, by virtue of the agreement between Local 3 and the Smith Company, are lawfully burdened with a share of the collective bargaining costs for the other 200,000 employees who reject union membership. It can scarcely be doubted that such a result would severely offend Fifth Amendment guarantees.

As I am concerned with the establishment of a principle of law, it matters not that these hypothetical facts are, at least in the latter instance, improbable; the nature of the dissenter's obligation is not governed by the infinite variation of considerations such as the amount of costs incurred by his union or its affiliates in negotiating for other groups of employees. The only rule of law that squares with the intent of Congress and with the arguments advanced by the unions in seeking the authority to financially obligate workers is that the costs subject to compulsory sharing are those directly related to bargaining with a dissenter's own employer.

The validity of the principle that dissenters may only be required to share costs of bargaining with their employer is demonstrated by a parallel analysis of the duty of fair representation. Plainly, that duty does not obligate a union to represent employees with any entity other than their own employer. Again, it was the cost of that representation which unions sought to spread among those to whom the duty was owed. Taking the unions' own arguments, it can readily be seen that the scope of the duty to represent and the scope of the duty to pay for that representation are congruent.

A formidable Fifth Amendment barrier impedes the imposition of union-wide bargaining costs of international unions. Many labor...
organizations have a substantial Canadian membership component. Such unions frequently hold exclusive representative status for Canadian bargaining units, which units may include some alleged "free riders," for whom bargaining costs are incurred. Imposing even a small portion of those costs upon American dissenters through compulsory dues or fees stretches the notion of minimizing labor strife into a shape that must be incompatible with the Constitution. Congress neither intended to, nor could, withdraw wages from employees in the United States to foster "labor stability" in foreign lands. On the contrary, the courts have taken some pains to insulate international commerce from the effects of labor relations policies promulgated by the NRLA:

The whole background of the Act is concerned with industrial strife between American employers and employees. . . . What was said [in Congress] inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.167

Ellis168 can certainly be constructed to contemplate the imposition of a cost obligation for union-wide activities meeting the court's functional criteria of collective bargaining. It is too early to make a definitive interpretation of the court's approach, however, as the basis of computing the plaintiffs' damages was not developed.

VIII. LIMITATIONS UPON COLLECTIVE BARGAINING EXPENDITURES

A. Excessive Costs

None of the cases has ruled upon the issue of a dissenter's liability for proportional payment of collective bargaining costs which are excessive. At least until such time as the categories of imposable costs have been further clarified, it is unlikely that significant challenges on this point will be raised. Neither the RLA nor the NLRA address this question directly, but it is probable that the

developing doctrine of fair representation will be expanded to encompass claims that a labor organization is afflicting dissenters with wasteful or extravagant expenditures.

The union's duty with regard to a dissenter's financial obligation is that of a fiduciary, and the application of rules of law which have long been accepted in other controversies involving fiduciaries seems probable. As the union's fiduciary duty requires it to represent nonmembers "in utmost good faith and fairness," it can scarcely be argued that excessive collective bargaining expenditures are made in good faith as to employees who have registered their protests against all compulsory contributions.

B. Exclusion of Compulsory Payers From Participation in Collective Bargaining Activities

The common union practice of excluding nonmembers from participating in collective bargaining activities affecting them gives rise to a provocative question: does that exclusion from collective bargaining activities negate or reduce the nonmember's financial obligation?

On only one occasion has this issue received direct attention. In a proceeding determining the amount of costs for union "services rendered in negotiating and administering an agreement" pursuant to the Hawaii statute governing teachers, the Chairman of the Hawaii Public Employment Relations Board remarked that he was deeply troubled by the exclusion of agency fee payers from negotiations concerning their own employment:

Further, union members have voting power which permits them some voice in policy determinations made by the union's leadership including those as to how their money is spent. Nonmembers have no voice in these matters. This is akin to taxation without representation. While the value of this participation in policy making has no tangible dollar value, I feel that it must be realized that it has some value, the recognition of which should result in dues being somewhat higher than service fees."

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170 Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1000 (9th Cir. 1970).

171 In re Hawaii State Teachers Ass'n, No. 36, at 12-13 (Hawaii Public Employment Relations Board 1973) (concurring opinion).
The rationale tentatively advanced by Chairman Hamada is readily configured into a claim of constitutional infringement; or at minimum, derogation of employees’ statutory rights. Further development and application of the Hamada rationale is probable, as the operative facts are present in nearly every context giving rise to a suit challenging compulsory union financial obligations.

IX. A CRITIQUE OF EXISTING REMEDIES

A. The Futility of Spending Litigation From the Employees’ Standpoint

A review of background information is helpful in preparing an analysis of existing remedies for union spending of dissenters’ dues and fees on non-collective bargaining activities. One might conclude that the problem posed by such spending is insubstantial if not innocuous, in light of the paucity of spending suits. But a realistic evaluation demands both longer-range and more detailed views.

Vast numbers of the American workforce have consistently rejected union representation, in the face of immense governmental pressure to submit to an exclusive collective bargaining agent. Despite this long-applied pressure, and the membership enticements flourished by today’s well-financed labor organizations, employees continue to reject union representation in droves.172

Why, then, haven’t the innumerable dissenters sought relief through litigation? One primary reason is the deceptive statutory terminology, often repeated in collective bargaining agreements, which not only authorizes a requirement of full equivalent dues payments to those opposed to a union, but further explicates the obligation as one of “membership.”173 Just how is an employee to acquire the perception that Congress meant “payment of fees” when it said “membership;” and that “the periodic dues and fees uniformly required as a condition of acquiring or retaining membership”174 really means only the payment of collective bargaining costs? In

172 In fiscal year 1975, union representation was rejected in 50% of the NLRB elections. This rebuff is even more apparent when one realizes that unions do not proceed through the election stage absent a significant expectation of victory. 90 LAB. REL. REP. (BNA) 383 (1975).
173 See discussion at notes 27 through 31, supra.
short, Congress misled American employees in at least these two vital respects, and the courts have been unwilling to say so. To avoid whatever sociological disasters it may have imagined would follow from recognition of pre-eminent constitutional rights, the Supreme Court has resorted to disingenuous statutory interpretation, coupled with severe restrictions upon traditional judicial remedies. The anticipated result has, of course, followed as unions continue to force employees into union membership, spend compulsory dues and fees unstintingly on politics, exert similar or greater coercion on other employees and on a vast range of institutional programs and activities having no criterion of public interest other than the favor of union officers.

Union hostility to potential and actual dissenters has been substantial, often subsiding only when some paramount union interest would be jeopardized by continuing adherence to that policy. A brief resume of the spending litigations illustrates this point, as well as that of the described judicial disinterest in rectifying invasions of employee rights.

The principal defendant in *Street*, the Brotherhood of Railway Clerks, litigated that case for eleven years. The same union was again the principal defendant in *Allen*, and litigated that case for eleven years. In each instance, when confronted with the prospect of having to make full disclosure with regard to the use of compulsory dues, the union responded by returning all funds paid by the plaintiffs, and relieving them of future obligations.  

177 Mr. Justice Black, dissenting in *Street*, 367 U.S. at 786, pungently observed that: "[N]o one has suggested that the Court's statutory construction of § 2, Eleventh could possibly be supported without the crutch of its fear of unconstitutionality."

178 The *Street* case was filed on June 5, 1953, and final judgment was not entered until December 29, 1964, *sub nom.* Looper v. Georgia S. & F. Ry., No. 16,537 (Ga. Super. Ct., Dec. 29, 1964). BRAC was one of the eight defendant unions party to the stipulation incorporated as part of the final judgment. As such, BRAC agreed to refund "all dues, fees and assessments" paid by the plaintiffs and intervening plaintiffs prior to final judgment and agreed that all plaintiffs who so elected would henceforth "not be required, as a condition of employment by a railroad defendant to acquire or maintain membership in any labor union defendant pursuant to any union shop agreement under the Railway Labor Act." *Id.* at 2-3. The *Allen* case was filed on June 8, 1953. Allen v. Southern Ry., 249 N.C. 491, 107 S.E.2d 125 (1959). BRAC was one of the two defendant unions against whom judgment was originally entered by the trial court, Allen v. Southern Ry., 42 L.R.R.M. 2175 (N.C. Super. Ct. 1958), and who appealed that judgment to the United States Supreme Court. 373 U.S. 113. The case was dismissed on remand on November 14, 1964, because the defendant
Reid was filed in 1967, and notwithstanding the valid claims asserted for political expenditures made over protest, the case terminated in 1973 without judgment having been entered against the defendant union, based on a union promise to analyze its political costs and voluntarily rebate them to dissenters. One searches in vain for any statutory or common law authority endowing a fiduciary who has admittedly misspent funds with the power to determine how much he has misspent, and if, how and when redress shall be accorded.

Seay was also filed in 1967. Although pending for nine years, it has not been tried; the second trial court reversal by the Ninth Circuit has just occurred. After six years of litigation, again with regard to unarguably valid claims for political expenditures, the Machinists "saw the handwriting on the wall" and followed the Reid tactic of announcing a rebate plan, in Circular 669. That circular was issued on June 28, 1973, and it provides that the union "shall" refund political expenditures; earlier protests were to be honored retroactively. No contingency is stated in Circular 669 which could hinder the promised refunds. Almost three years later a major IAM officer admitted that not one cent had been refunded as provided in the Circular.

Ellis has been in litigation for more than three years, during which time the litigation record and evidence have grown to fill approximately a dozen file drawers. In addition to the tremendous investment of attorney hours in the case, the services of several research personnel and two certified public accountants have been
indispensable. The costs of this litigation have been termed "staggering" by one union officer, with ample justification.\textsuperscript{183}

There are no shortcuts in spending cases. If voluminous evidence is not obtained, analyzed and presented, essential issues will go unanswered, as was the case in Hanson, Street and Allen. As the foregoing cases illustrate, the unions have engaged dissenters in a war of attrition; a war in which the odds are heavily weighted against the employee-plaintiffs. Not only is the union in control of its expenditure records, it is in a position to refrain from keeping descriptive records.\textsuperscript{184} Union resistance is financed from substantial treasuries; ironically, a significant part of those financial resources is obtained from other compulsory contributors and from these self-same plaintiffs whose claims are met with such unrelenting opposition.

Additional reasons deterring spending suits abound, but it is felt that the point is adequately established without further detail.\textsuperscript{185}

\textsuperscript{183}Mellon deposition dated Jan. 23, 1975 at Exhibit 10, filed in Ellis v. BRAC and Fails v. BRAC, Nos. 73-113-N and 73-118-N (S.D. Cal.).

\textsuperscript{184}Financial statements filed with the Secretary of Labor pursuant to the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 431 (1970), generally lack comprehensive descriptive information.

\textsuperscript{185}The fearsome cost of prosecuting a spending suit has a massive inhibitory effect upon would-be plaintiffs. Expenditures for attorneys' fees, accountants and other expert witnesses, research personnel, depositions, and the like run into the hundreds of thousands of dollars. Rank and file employees simply lack the wherewithal to undertake such litigation, unless supported by an outside source. At present, the sole institutional source of support for plaintiffs in spending cases is being provided by the National Right to Work Legal Defense Foundation, a non-profit private charitable corporation headquartered in Fairfax, Virginia.

Yet another serious hindrance to employees desirous of filing a spending suit is the relative unavailability of adequate counsel. The plaintiffs' attorney must be thoroughly trained in labor law, as a detailed knowledge of the following elements is essential: the various labor statutes and their underlying legislative histories, labor policy as administered by regulatory agencies such as the National Labor Relations Board, and operating practices of labor unions on a broad scale. A sensitivity to judicially formulated labor policy is indispensable. Attorneys possessing this background and experience are not found in many areas of the country. When they can be located, they are almost invariably engaged in representing union clients or management clients, and for various reasons are unwilling to embark upon such litigation. In the case of union attorneys, undertaking such litigation would be extremely harmful to the lawyer's standing with his regular clientele. Many management lawyers lack any genuine concern for the largely intangible rights of employees at issue in such cases, and they can rarely afford the massive time commitments that must be made in such cases.

Finally, there is the apathy barrier to consider. In the absence of an innovative, adequate remedy for the use of dissenters' dues for non-collective bargaining activities, such employees face the virtually certain prospect of litigating their rights
As the reader considers the following discussion of remedies, it is interesting to note the degree to which governmental action or inaction reinforces the union's antipathy to dissenters who seek redress for non-collective bargaining expenditures from their compulsory dues and fees.

B. Unfair Labor Practice Proceedings

1. NLRA Remedies—Questionable

Although Detroit Mailers imparts substantial doubt as to the availability of relief through NLRB proceedings, it is entirely possible that the current Board, if afforded the opportunity, would consign that decision to well-deserved obscurity. That opportunity may never arise, however, because consideration of such a case might be blocked by the General Counsel's refusal to issue a complaint.

In analogous circumstances, a finding of employer and union unfair labor practices has been judicially sustained. In a hiring hall case, "permit men" working through the hall were charged the exact equivalent of union members' dues. The charge of unlawful coercion was predicated upon diversion of a large part of the hiring hall fees to union institutional expenses. The union countered that permit men receive all benefits received by union members except the right to attend union meetings, and accordingly argued that the equivalent charges were legal. This argument met short shrift in the Second Circuit:

We think it is clear that charging permit men a fee for the use of the hiring hall which is equivalent to the dues paid by union members on the theory that permit men receive all the benefits of union membership will necessarily encourage union membership in vio-

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lition of the permit men's § 157 rights; likewise, it will encourage employers to discriminate against employees so as to encourage union membership.\textsuperscript{189}

The court went on to condemn the union's efforts to use the hiring hall to gain members, commenting that:

[C]ongress has provided unions with a specific means for meeting the problem of 'free riders' which Local 138 has here tried to meet through the exclusive hiring hall. If the union wants union security, it may bargain for it. It may not short-circuit the system Congress has established by attempting to gain union security through an exclusive hiring hall.\textsuperscript{199}

In essence, the court found that the union acted unlawfully in providing the permit men with unwanted "benefits" and demanding payment for those "benefits." The resulting encouragement of union membership found above is precisely the same encouragement that exists in an agency shop context, where nonmembers are generally excluded not only from the intangible benefit of participation in the process that governs their own employment conditions, but from participation in economic programs such as death benefits and strike benefits to which they contribute equally with union members.\textsuperscript{191}

Indeed, it is not necessary to show that an agency fee payer was excluded from participation in non-collective bargaining activities in order to establish the commission of an unfair labor practice:

The Supreme Court has said as clearly as possible that agency fees exacted from employees under the terms of the bargaining agreement must be limited to use in sharing the costs with other dues of 'negotiating and administering collective agreements, and the costs of the adjustment [sic] and settlement of disputes.'\textsuperscript{192}

If there is a statutory limitation upon the use of dissenters' contributions, any diversion of such funds to non-collective bargaining expenditures is necessarily an unlawful membership encouragement regardless of whether or not the payer is permitted to share in the activity being subsidized. If the payments are not made will-

\textsuperscript{189} Id. at 877 (footnote omitted).
\textsuperscript{190} Id.
\textsuperscript{191} See discussion at notes 63 through 69 supra.
\textsuperscript{192} Scay v. McDonnell Douglas Corp., 427 F.2d 996, 1000 (9th Cir. 1970) (footnote omitted).
ingly, and the activity is beyond the statutory perimeter of collective bargaining, the payer's section 7 rights are infringed.

2. RLA Remedies—Nonexistent

In contrast to potential meager relief available to a dissenter whose employment is governed by the NLRA, the railway and airline workers have been totally abandoned. The RLA is utterly silent as to proscriptions upon union conduct. Employers are forbidden to coerce union membership upon pain of stiff criminal sanctions, but only unions are statutorily empowered to seek those sanctions.°

3. Litigation Remedies

In *Street*, the Court seized upon the idea of a proportional reduction in dissenters' dues to prevent future violations. Injunctive relief was discouraged, on the wholly speculative premise that industrial stability would crumble if any controls were placed upon the flow of dissenters' funds to their unwanted union representatives.° The illusory nature of the proportional dues reduction remedy was keenly exposed in Mr. Justice Black's dissent:

> It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the voluminous and complex accounting records of the local, national and international unions involved. It seems to me, however, that while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated.'°

This prophetic comment squares nicely with the course of litigation described above,°° and with a union lawyer's statement some eight years later:

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°°° 45 U.S.C. § 152, Tenth (1970). In Cornell University, 183 N.L.R.B. 329, 333 (1970), the Board condemned state labor-management legislation as "inadequate" because "it contain[ed] no remedies for unfair labor practices which may be committed by unions."
°°° 367 U.S. at 795-96.
°°°° See discussion at notes 177 through 185 supra.
years later, reporting that the obligations imposed upon unions by Street and Allen had gone unobserved.¹⁸⁸

The accounting considerations adverted to by Mr. Justice Black are central to the conduct and result of a spending suit. Several random points must be recognized. Employees almost never have reliable information concerning the purposes upon which their dues are expended; local union officers frequently are in the same position. Claims are often retroactive to a much earlier protest, and chief union officers may be unable to recall pertinent information. Local union financial ledgers may be partially missing or in chaos and when they exist, little if any descriptive information is revealed. Finally, minutes of meetings, if retained, are frequently fragmentary.

In Ellis, plaintiffs’ counsel successfully obtained an order compelling disclosure of several years’ minutes of BRAC Executive Council meetings. In the minutes of March 10, 1972, International Secretary-Treasurer D. J. Sullivan presented a candid appraisal of the union’s financial condition and its accounting practices. He pointed out the misuse of United States government funds; lax practices on handling charitable contributions, supply purchasing and inventory control; diversion of earmarked funds for general operating expenses; and lack of accounting controls over expense accounts, use of union vehicles, and more. One week later, International President C. L. Dennis announced a new policy forbidding verbatim minutes or tape recordings at Executive Council meetings.¹⁹⁰ The result, of course, is that subsequent minutes mean practically nothing to anyone who was not present. Entries are terse and sensitive subjects are not even mentioned. It is impossible to follow the flow of dissenters’ funds in the face of such practices.

The Supreme Court had at least limited insight into the problems of evidentiary accumulation that would beset dissenters. The Court’s solution was to place the burden upon the union of proving the amount of political expenditures.²⁰⁰ One might be inclined to view that partial solution as a futile gesture, because it could well

¹⁸⁸ See Gromfine, supra note 3.
¹⁹⁰ Minutes of Executive Council Meetings of March 10, 1972, at 33-41, and March 17, 1972 at 1, filed in conjunction with affidavit of Susan R. Meisinger dated Aug. 21, 1972, in Ellis v. BRAC and Fails v. BRAC, Nos. 73-113-N and 73-118-N (S.D. Cal.).
operate in a fashion that appeared to reduce the plaintiffs' burden, but did not in fact do so. Thus, if the union presented a comprehensive analysis of its non-collective bargaining spending, the plaintiffs would have a Hobson's choice of accepting it at face value or engaging in thorough discovery that would establish the wrongfully spent amounts—in essence, bearing the burden which had ostensibly been placed upon the union. The only way that this result can be avoided is to attach consequences of severity to a union's erroneous computation of its non-collective bargaining expenditures. Plaintiffs will never under any circumstances be in a position to establish the amount of non-collective bargaining spending as accurately as can the union, but they can conduct sufficient discovery to test the union computations. If those computations are misleading, or incomplete, it ought not to be up to the plaintiffs to correct the proffered figures, or fill in the accounting gap—plaintiffs simply lack the ability to do so, regardless of the extent of discovery permitted. The only plausible solution is to penalize a union which presents inaccurate figures by requiring it to disgorge the entirety of dues paid by the dissenters involved in the litigation.

If a full dues disgorge remedy were granted, the plaintiffs involved in that case would at least have their direct financial losses occasioned by non-collective bargaining expenditures from their dues and fees redressed. For the sake of this analysis, it is assumed that some portion of dues and fees paid by those plaintiffs was expended properly upon collective bargaining in their behalf. Union disgorge of that portion would function as a penalty, as noted.

It is doubtful, however, that the penalty would be of sufficient consequence to function as a deterrent against similar union statutory violations. As discussed above, the number of spending suits is so small that unions can easily afford the financial consequences of a full disgorge remedy to the few employees involved. When one considers that a significant portion of the dues and fees must be returned for non-collective bargaining expenditures, it can readily be perceived that a disgorge remedy would not provide a strong incentive to comply with the dissenters' protests regarding the use of their compulsory dues and fees.
Two of the unions having closest involvement in spending suits have shown what may be typical recalcitrance in dealing with dissenters' claims. Thus the IAM has steadfastly refused to return members' money spent upon politics, notwithstanding its adoption in 1973 of a rebate scheme purporting to make annual refunds of such amounts. BRAC, the other prominent figure in spending suits, has disclosed its hostility to dissenters even more conspicuously. In 1974, BRAC enacted a political expenditure rebate scheme, and in reliance thereon, filed a motion for summary judgment in *Ellis*. That motion was denied, as the court found that the rebate scheme contained a "standard for refunds of dues and agency fees" which the court held to be "erroneous as a matter of law. . . ."

Subsequently, the BRAC rebate device, which had been issued as a presidential policy statement, was enacted as a constitutional amendment verbatim, notwithstanding its having been judicially condemned.

While there is no accurate way to predict whether or not such attitudes and actions are typical of labor unions, it is noted that in each instance litigation was pending against the IAM and BRAC concurrently with the described developments. Yet neither organization made even a superficial attempt to accommodate the dissenters' rights in issue.

Two other unions, the United Auto Workers and the American Federation of State, County and Municipal Employees, have adopted rebate schemes designed to refund at least a portion of the political expenditures made by those organizations. The UAW scheme met tentative judicial approval in *Reid II*, and the AFSCME plan has not drawn judicial comment, insofar as it purports to accommodate dissenters' claims for expenditures of their dues and fees on non-collective bargaining activities.

If there is any substance to the threat to "labor stability"

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imagined by the Supreme Court in *Street* and *Allen*, it cannot be denied that the penalty proposed would contribute to this undesirable result. Nevertheless, the Supreme Court's concern about "labor stability" being threatened by inhibiting the flow of coerced dues and fees was speculative; no facts were before the Court to establish that proposition. Worse yet, the judicial *speculation* rested solely upon a congressional *assumption* that "labor stability" could not be achieved without extracting compulsory contributions from dissenters. One will search the legislative history of the Railway Labor Act in vain for a cogent factual presentation supporting the "labor stability" proposition.

While purporting to burden unions with the obligation to account for misspent dues and fees, the *Allen* Court eased the painful effects by softening the requisite accounting standards: "Absolute precision in the calculation of such proportions [of political expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise."

There seems to be no alternative construction that can be placed upon the foregoing quotation other than that a dissenter whose wages are extracted by a union with the full intention of expending them upon political purposes he opposes has no claim for the return of the entirety of the misspent amounts; it is enough that some meaningful gesture at restitution is made. No legal predicate is asserted for this astounding proposition—it is simply Court-made policy that union actions are endowed with a conclusive presumption of societal worth transcending unequivocal injuries to employees. It is suggested that the untrammeled exercise of constitutional rights must be accorded greater weight than convenience for union accountants.

The post-*Street* history demonstrates that, unless unions are enjoined from the misuse of dissenters' dues and fees, such misspending will continue on a wholesale basis. The recoverability of actual damages, achieved only after exorbitantly expensive, exhausting litigation is a remedy in name only. It is difficult to conceive that the continued spending of dissenters' fees on non-collective bargaining purposes is anything other than bad faith action on the part of the union. The consequences of that bad faith dealing ought

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204 367 U.S. at 771; 373 U.S. at 120.
205 373 U.S. at 122.
to include exposure for punitive damages and the award of attorneys' fees to dissenters.

The reluctance to award punitive damages to a union breaching its fiduciary duty is one of the significant ironies of court-fashioned labor relations policy, particularly in view of the fact that the injury inflicted upon the employee by the compulsory representative may have serious consequences which entail only modest financial loss. Under such circumstances, an award of actual damages is an ineffectual remedy. One case has tentatively approached this issue, saying that: "Assuming arguendo, that there will be instances in which punitive damages are proper in a § 301 or unfair representation action. . . ." The facts of this case, however, were not found to be of the "outrageous or extraordinary" character requiring such extraordinary remedies.\(^{206}\)

In this writer's opinion, the persistent and pervasive practice of ignoring dissenters' complaints, and diverting their compulsory dues and fees to a variety of non-collective bargaining activities has, in the eyes of the law, an outrageous and extraordinary character. A potential award of exemplary damages would serve well as a deterrent to unions having no regard for the rights of those to whom a fiduciary obligation is owed. By the same token, union exposure to attorneys' fees for bad faith dealing would recognize the equities present in such conflicts.\(^{207}\)

Meaningful redress for dissenters' claims requires more than the recoverability of damages and attorneys' fees, however. If a union is free to continue the diversion of a plaintiffs' compulsory dues in the future to its non-collective bargaining activities, it is neither feasible nor desirable to require the institution of successive suits for damages. Truly effective relief must encompass the issuance of an injunction, just as is done with regard to recalcitrant employers who deprive their workers of wages required by the Fair Labor Standards Act (FLSA).\(^{208}\) In fact, it may readily be seen that the employee is injured more severely by the diversion

\(^{206}\) Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 454 (8th Cir. 1975).


of his wages through fees and dues to non-collective bargaining activities than he is by having his paycheck shortchanged by his employer, as the union is using at least a portion of his dues and fees for political and ideological purposes he opposes.

The appropriateness of granting injunctive relief is even clearer when one considers that FLSA violations are investigated and prosecuted by the government. The lack of litigation resources which dissenters encounter renders it that much more likely that violations of their rights will occur and persist, in contrast to the parallel situation of FLSA violations.300

Street and Allen did not rule out the grant of injunctive relief in spending litigation, although they made it plain that other methods were preferred. To the extent that they did contemplate injunctive relief, however, it was directed at prohibiting improper expenditures, not the collection of dues in the first instance.310 If the Court intended to thereby lay down a hard and fast rule prohibiting injunctions which would interdict the collection of compulsory dues and fees, it gave inadequate consideration to practicalities. It may fairly be stated that unions obtain full equivalent dues and fees from dissenters with the certain knowledge and intention that a portion of such funds will be utilized for non-collective bargaining purposes—purposes opposed by the payer. As unions have full control over their own accounting practices, they can readily and conveniently ensure that records accurately establishing the amount of non-collective bargaining expenditures are never created. If such unions are safeguarded from injunctive relief upon the collection of dues, they are necessarily granted the power to substantially defeat dissenters' claims with regard to dues misuse, as the records establishing that misuse simply will not exist, or they will at most reveal only gross approximations.

In an analogous political spending context, the Supreme Court has recently given clear indication that it recognizes the necessity of injunctive relief. In Cort v. Ash,311 stockholders complained of corporate political contributions having been made without their

300 When an employee recovers amounts wrongfully withheld from him in violation of the FLSA by a private suit, he is awarded a liquidated penalty as high as 100% of the actual damages, and his attorneys' fees. 29 U.S.C. § 216(b) (1970).
310 367 U.S. at 771; 373 U.S. at 119-20.
consent. During the course of its opinion, the Court devoted considerable attention to the restrictions upon union political spending set forth in the Federal Corrupt Practices Act,\(^1\) particularly as such spending relates to compulsory contributors:

We note that Congress did show concern, in permanently expanding § 610 to unions, with protecting union members from use of their funds for political purposes. (citation omitted). This difference in emphasis may reflect a recognition that, while a stockholder acquires his stock voluntarily, and is free to dispose of it, union membership and the payment of union dues, is often involuntary because of union security and check-off provisions.\(^2\)

Although recovery was denied in this instance because of the preemptive operation of state law, the Court specifically pointed out the injury suffered by one whose compulsory funds are utilized for political purposes he opposes:

Recovery of derivative damages by the corporation for violation of § 610 would not cure the influence which the use of corporate funds in the first instance may have had on a federal election. Rather, such a remedy would only permit directors in effect to 'borrow' corporate funds for a time; the latter compelled repayment might well not deter the initial violation, and would certainly not decrease the impact of the use of such funds upon an election already past.\(^3\)

The rationale of the foregoing quotation applies with full force to union political spending, and it clearly establishes the existence of irreparable harm which can be avoided only by the issuance of appropriate injunctive relief.

Another court has ventured somewhat closer to issuing an injunction foreclosing the collection of compulsory fees from public school teachers.\(^4\) After reiterating the precautionary statement in *Allen* that an injunction ought not to be granted dissenters "in the absence of special circumstances,"\(^5\) the court went on to rule that such special circumstances "would exist if either the amount

\(^{212}\) 421 U.S. at 81.
\(^{213}\) Id. at 82.
\(^{215}\) 373 U.S. at 120.
of the fee, or the circumstances surrounding its assessment, clearly indicate that the fee is invalid or unconscionable under the statutory provisions.\textsuperscript{117}

No further light was shed as to criteria of "invalidity" or "unconscionability," but it requires no strain to so characterize compulsory dues and fees which are extracted over an employee's protest and expend upon activities whose support from compulsory funds, over objection, has been unequivocally condemned by the Supreme Court.

C. Union Rebate Procedures

Confronted with exposure to costly litigation which, among other consequences, may entail the disclosure of a great deal of information they would prefer to keep to themselves, unions have attempted to persuade courts to relinquish jurisdiction of spending claims in favor of the forum and remedy provided by internal rebate plans. The specific doctrine urged in support of this disposition is that of exhaustion of internal union remedies. The results have been mixed: union success in \textit{Reid}, and defeat in \textit{Ellis} and \textit{Seay}.\textsuperscript{218}

Each union's rebate procedure is susceptible to criticism based upon the particular mechanical structure associated with it, as well as other factors affecting its implementation and computations of expenditures conducted pursuant to the procedure. Space does not permit discussion of these points, and in any event, they are of far less importance than the conceptual shortcomings of rebate plans.

As applied to union expenditures having significant First Amendment sensitivity, chiefly those associated with political activities or other highly ideological undertakings such as organizing efforts, the controversy as to whether rebate plans are a judicially cognizable remedy should be resolved with finality on one simple basis—the subsequent rebate of compulsory funds misspent on those activities cannot undo the constitutional infringement worked by the expenditure in the first instance.\textsuperscript{219} Political and ideological viewpoints once promulgated, and political influence once applied,

\textsuperscript{117} 239 N.W.2d at 444.
\textsuperscript{218} 91 L.R.R.M. 2339; 533 F.2d 1126.
\textsuperscript{219} Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1004 (9th Cir. 1970).
cannot be withdrawn from the marketplace of ideas, the legislative chamber, or the polling booth.

The impetus for the adoption of rebate plans may be traced to a suggestion in *Allen* that:

If a union agreed upon a formula for ascertaining the proportion of political expenditures in its budget, and made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them under the union-shop agreement, prolonged and expensive litigation might well be averted.\(^{220}\)

Promulgation of union rebate plans is compatible with neither the express language nor the Court’s intent. The extra-judicial resolution suggested by the Court depended upon unions ceasing to collect political monies from dissenters, not upon the establishment of a procedure whereby dissenters would be forced to submit their complaints of misspending to a union-established procedure yielding a controlled result.

The assertion that dissenters may be denied a judicial forum and compelled to participate in an internal union rebate plan runs directly against the grain of binding Supreme Court authority. In *Granite State*,\(^{221}\) it was made absolutely clear that unions have no power over nonmembers to bind them to internal union processes. The *Reid* decision,\(^{222}\) which consigned nonmembers to the exhaustion of an internal union rebate program, is flatly incompatible with the *Granite State* holding. *Reid* is further anomalous for its failure to recognize established federal labor policy. If a union member’s claim is met with the contention that exhaustion of internal remedies should be required, the court has discretion to compel that result; but pursuit of the internal union procedure may not be required for more than four months.\(^{223}\) This limitation on exhaustion requirements was, of course, mandated by Congress because implementation of the exhaustion doctrine had led to the following results: “[T]he only real assistance to the system from the intra-union remedies exhaustion requirement results from its

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\(^{220}\) 373 U.S. at 123.


\(^{222}\) 479 F.2d 517.

ability to wear down the employee and discourage him from further pursuit of his claim."\textsuperscript{224}

It is repugnant to common sense to suggest that an exhaustion requirement which Congress found too abusive to be inflicted upon persons choosing union membership could nevertheless be utilized to defeat or hinder the claims of those rejecting all ties with the union. Nevertheless, awareness of this anomaly has escaped some courts.

Any requirement that dissenters resort to internal union rebate procedures violates the burden of proof allocation established in Allen. As the union determines the extent of its political expenditures, any challenge to that determination necessarily transfers the burden of proof directly to the dissenter. An allusion to that point is made in the Seay \textit{II} decision, but the court avoided its resolution.\textsuperscript{225}

Tempestuous argument has been raised with regard to the propriety of allowing a union to make a determination of the spending grievances asserted against it by dissenters. The \textit{Reid} court indulged a presumption that the defendant union would fairly and regularly make the determination of political expenditures and rebate accurate amounts to dissenters. There is certainly no parallel authority in the common law presuming that a judge passing upon his own case could do so with legally cognizable effect. In fact, the notion that unions are empowered to resolve claims "of the utmost [constitutional] gravity"\textsuperscript{226} asserted against them by dissenters stands in solitary exception to hundreds of years of authorities invalidating the attempted exercise of judicial authority by one having personal involvement in the controversy.\textsuperscript{227}

Recent decisions have made some progress in undoing the mischief of the \textit{Reid} result. The Ninth Circuit, confronted by a trial court ruling in conformity with the \textit{Reid} decision, refused to follow the same path. Although it held that the case before it was "on all fours"\textsuperscript{228} with \textit{Reid}, the court found that exhaustion of the internal

\textsuperscript{225}533 F.2d at 1132.
\textsuperscript{228}Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1130 (9th Cir. 1976).
union procedure "imposes an intolerable burden on plaintiffs." The court left it up to the trial judge to determine whether or not the internal procedure was fair and adequate, but it is difficult to envision an affirmative answer to that inquiry, in the face of the remainder of the appellate decision.

Only one other spending suit has involved a determination of the legal effect to be attributed an internal union rebate plan. BRAC, the defendant in Ellis, had instituted a constitutional provision in 1967 providing for a reduction in dues of two cents per member per month upon request, which amount was to represent amounts ordinarily paid to the Grand Lodge Legislative Fund Account. Nevertheless, in the same constitution, it was provided that not less than fifteen cents per member per month be channeled to a State Legislative Committee. In 1971, the reduction was increased to three and one-third cents per month, and the State Legislative Committee payment increased to thirty cents. These are the provisions which the Ellis court found "were not good faith efforts to comply with [the union's] lawful obligations." Two subsequent internal rebate changes were made, increasing the scope of rebatable expenditures. On the strength of Reid and the trial court decision in Seay, termination of the litigation was unsuccessfully sought.

Immediately on the heels of the Ellis decision, it was reported that:

A recent union defeat in court prompts AFL-CIO political chiefs to advise unions to adopt rebate systems so members who dissent from union political stands can get back the portion of their dues spent on politics.

This recommendation may go unheeded. The adoption and announcement of rebate plans call attention to unions' political involvement, and the offer to return funds expended for politics may be felt to have unsavory connotations. At minimum, it obligates unions to process claims, and refund dues, to a large number

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228 Id. at 1130 note 6. Id. at n.6.
229 Exhibits F and H to Amendment to Complaint, Ellis v. BRAC, No. 73-113-N (S.D. Cal. filed Mar. 20, 1974).
230 91 L.R.R.M. at 2343.
231 Supra note 6.
of dissenters who would otherwise never resort to litigation. If the paramount purpose for the implementation of such plans is to secure an exit from such litigation, that objective has been substantially jeopardized by the *Seay II* decision. If a union must go through a full trial under any circumstances, the existence of an internal rebate procedure does little more than to portray the union's good intentions—a portrayal which may be inconsistent with other union actions, such as ignoring protests.

X. CONCLUSION

In 1958 legislation was proposed which would have permitted a compulsory contributor to file a petition with the Secretary of Labor requesting that his payments be expended only for collective bargaining. The Secretary was authorized to investigate and prosecute violations, and the amounts recovered were to be paid to the petitioning employee.\(^{234}\) This measure was rejected by a significant margin in the Senate\(^{235}\) and there is little reason to anticipate more cordial congressional treatment in the near future.

In the absence of meaningful statutory reform, rigorous litigation relief is an unavoidable necessity if the courts have a sincere interest in ensuring the exercise of dissenters' rights. Even if punitive damages and liberal attorneys' fees are awarded, few employees will be able to secure the financial resources and legal expertise essential to successful prosecution of a spending suit.

The infringement of workers' rights accomplished by misspending compulsory dues and fees is rooted directly in the exclusive representation device. If Congress were to carefully review the history and the effects of the present statutory schemes, it would be forced to conclude that releasing millions of employees from subordination to an unwanted union representative would largely resolve a tremendous range of societal conflicts that continually plague the courts without judicial intervention. A union obliged to represent only its adherents would not face a "free rider" problem.

Finally, it is entirely appropriate that Congress give American working people due credit for intelligence and common sense.

\(^{234}\) 104 CONG. REC. 11330 (1958).

\(^{235}\) Id. at 11347 (by a 51 to 31 vote).
If an employee needs or wants a union, he should be at liberty to join and be represented by whichever labor organization he selects. If he prefers to be a "rugged individualist," there is no factually supportable thesis for refusing him this alternative. This consequence may well follow in the absence of statutory revision. The Eighth Circuit has held that a challenge to the exclusive representation scheme, as applied to public employees, raises a "substantial federal constitutional question." Resolution of that question in favor of the plaintiff-employees will almost certainly exert a comparable effect upon private sector employment, as the hand of government has forcefully extended exclusive representation privileges to private sector unions.

236 Knight v. Alsop, 535 F.2d 466 (8th Cir. 1976).