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A Clearing in the Forest: Infusing the Labor Union Dues Dispute With First Amendment Values

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A CLEARING IN THE FOREST: INFUSING THE LABOR UNION DUES DISPUTE WITH FIRST AMENDMENT VALUES

Harry G. Hutchison*

ABSTRACT

This article deploys public choice theory and postmodern identity claims to develop a far-reaching understanding of the union dues dispute, which suggests that the burden of proof on the existence of and/or the possibility of an enduring union community should be placed on proponents of this view. While the postmodern project can be seen as an unsettled approach that is riven by coherency issues, not the least, its insistence on offering the good without the true, it supplies modest benefits by revealing the conceivably infinite varieties of human preferences in contemporary America. The absence of preference convergence, understood from the perspective of both public choice theory and postmodern identity construal, vitiates prevalent assertions that unions operate as a paradigm of voluntary cooperation characterized by solidarity. The conflict between putative solidarity and the actual presence of preference diversity might well be the genesis of this ongoing dispute.

Secondly, I both consider and differ with the Ninth Circuit's recent holding in *United Food and Commercial Workers v. NLRB*, which enforced an NLRB order requiring dues objectors to fund union organizing expenses despite a largely contrary holding by the Supreme Court in *Ellis v. Railway Clerks*. I expose the Ninth Circuit's opinion to a wide-ranging perspective on both First Amendment values and free-rider issues. Conventional analysis suggests that union organizing expenses, on their face, do not provide evidence of either a political or an ideological purpose, if, of course, ideologically grounded objections to collective bargaining are overlooked. Even so, a conventional analyst must concede that the legitimacy of the implication of First Amendment norms is both contingent and contextual. It is contingent on the actual purpose that organizing and consequent union revenue augmentation can be seen to serve. It is contextual in the sense that organizing can be linked to an ongoing effort to stem the degeneration in union economic power and the fear that the currently substantial political influence of unions will diminish in the future.

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This examination endangers the Ninth Circuit's conclusion that union expenditures aimed at organizing competing firms can be seen as germane within the meaning of the NLRA. I intend to show that union expenditures, such as organizing, that do not embrace an explicitly political purpose can nevertheless diminish the interest of workers in freedom of expression, freedom of association, and a variety of other interests that allow individual workers and subgroups of workers to define their own identities in what has become a pluralistic society. Lastly, I supply a number of proposals for clarifying judicial, NLRB, and scholarly analysis associated with the intensely fought debate over union dues. These proposals offer a clearing in a dense forest that has obscured the necessity of establishing a causal connection between contested union expenses, such as union organizing, and an actual, as opposed to an attenuated, collective bargaining purpose.

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INTRODUCTION

We find ourselves in a society that is waiting, but does not know what it is waiting for. "The feeling of being locked in implies the dream of liberation and implies, too, the suspicion of something hidden beyond the confines of daily life, however adequate daily life is claimed to be."¹

Americans live in a society in which individuals increasingly populate a variety of groups while waiting, ineffably, for something. Equally likely, people, individually and collectively, look for some form (among many possible forms) of liberation. In such a society, human choice (both individually and collectively) may be seen as a vehicle to find meaning in a life that seems to confront endless possibilities. If Chantal Delsol's bracing intuition is correct, it is probable that any contemporary evaluation of labor unions dues and union security agreements² as the primary costs of union membership, raises unavoidable questions about the nature of autonomy, individual as opposed to group motivation, and uncertainty about the goals that unions, like other groups, endeavor and ought to pursue. Inevitably, self-interest, preferences, the boundaries of consent, and the benefits and costs of collective action are arranged against the possibility that "a broad definition of unions' societal function . . . require[s] . . . limiting individual rights"³ and choices. Such issues unavoidably fuse politics, economics, and First Amendment norms. These issues become ever more poignant

¹ CHANTAL DELSOL, *ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD* xxvii (2003).

² Union security agreements are contracts between a union and an employer in which the employer requires all employees to undertake some specified level of support for the union as a condition of employment. Union security agreements are not unlawful on their face, nor does a union breach its duty of fair representation when it negotiates a union-security provision that tracks the language of section 8(a)(3) of the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. § 158(a)(3) (1935) (amended 1947) (2000), without explaining the Supreme Court's interpretation of the language in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). See, e.g., *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 36 (1998). Pursuant to the National Labor Relations Board's (NLRB) decisions in *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), and *United Paperworkers Int'l Union (Weyerhaeuser Paper Co.)*, 320 N.L.R.B. 349 (1995),

[a] union violate[s] its duty of fair representation by failing, when seeking to obligate employees to pay fees and dues under a union-security clause, to notify bargaining unit employees who were not union members that they had the right under *Beck* to limit payment of their union-security dues and initiation fees to moneys spent on activities germane to their union's role as a [section] 9(a) bargaining representative.

Teamsters Local 75 (Schreiber Foods), 329 N.L.R.B. 28, 29 (1999). The NLRB extended notification rights to union members as well as nonmember unit employees. See *United Paperworkers Int'l Union (Weyerhaeuser Paper Co.)*, 320 N.L.R.B. 349 (1995), *rev'd on other grounds sub nom.*, *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *vacated and remanded sub nom.* *United Paperworkers Int'l Union v. Buzenius*, 525 U.S. 979 (1998).

³ George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 193 (1994).

against a contemporary backdrop of emerging fissures within the union hierarchy itself⁴ as well as persistent declines in union density rates.⁵

It has been observed that politics and economics have been divided traditionally “by the types of questions they ask, the assumptions they make about individual motivation, and the methodologies they employ.”⁶ It is frequently assumed in political science “that political man pursues the public interest. Economics has assumed that all men pursue their private interests.”⁷ This dichotomy can no longer be seen as valid.⁸ Some commentators imply that human self-interest can be explained simply as avaricious greed or monetary self-interest.⁹ A fuller description of human rationality admits a wider array of explanations for the choices humans make than those supplied by theorists who concentrate on instrumental rationality in some strictly pecuniary sense.¹⁰ Because simple material gain supplies only “one of the many motives propelling economic [and other] activity,”¹¹ a richer appreciation of self-interest helps to explain human behavior in a contemporary world populated more and more by humans who see themselves as ever more autonomous individuals.

However self-interest is defined, a “large literature has grown up exploring the properties of social welfare”¹² within the context of social choice. These analyses concentrate on the difficulty “of aggregating individual preferences to *maximize* a social welfare function, or to satisfy some set of normative criteria.”¹³ These contentions carry with them ominous implications for the possibility of forging an enduring

⁴ See, e.g., Thomas B. Edsall, *Two Top Unions Split From AFL-CIO; Others Are Expected to Follow Teamsters*, WASH. POST, July 26, 2005, at A1. (“Two of the nation’s largest and most powerful unions resigned from the AFL-CIO . . . as the labor movement struggles to stem decades of decline and lost influence . . .”).

⁵ *Id.* (discussing the decline in membership over the last decade).

⁶ DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 1 (rev. ed. 1989).

⁷ *Id.*

⁸ See *id.*

⁹ Cf. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 7 (1991) (presenting an invitation to accept a limited version of public choice theory, suggesting that self-interest simply means avaricious greed in a simple monetary sense and thus implying that self-interest can be separated from ideological/nonmaterial considerations). That invitation is hereby declined.

¹⁰ See Jeffrey Friedman, *Introduction: Economic Approaches to Politics*, in *THE RATIONAL CHOICE CONTROVERSY: ECONOMIC MODELS OF POLITICS RECONSIDERED* 1, 20–21 (Jeffrey Friedman ed., 1996) (discussing instrumental rationality and its limits as well as alternative views on how human choice is formed); see also AMARTYA SEN, *ON ETHICS AND ECONOMICS* 10–28 (1987) (suggesting rationality can be variously viewed as consistency, as part of some self-interest determination, and as part of Adam Smith’s understanding of the term, which taken together under Sen’s analysis, implies that rationality must include more than narrow self-interest in some purely pecuniary sense).

¹¹ ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 12 (1975).

¹² MUELLER, *supra* note 6, at 3.

¹³ *Id.*

community shaped by shared interests. These implications have consequences for all individuals and all groups, not the least, labor unions, which operate under the protection of a compulsory dues collection scheme. Consequences attend whether or not unions can be seen as a form of majoritarian hegemony operating as statutorily privileged “mini-legislatures”¹⁴ or, alternatively, as a group “to which the individual has given her uncoerced express or tacit consent.”¹⁵ If individual assent cannot be established, then it is unlikely that the group functions consistently with customary explanations of the First Amendment’s freedom of association discourse.¹⁶ It is possible that “[n]otions about groups, organizations, community and the characteristics of human association . . . are tied directly to our ideas of the meaning of personhood,”¹⁷ especially if individuals can be seen as existing “prior to any sort of relation with others.”¹⁸ Because “any form of affiliation or association can impinge [on] . . . individual sovereignty,”¹⁹ human association may be viewed as “essentially artificial, instrumental and temporary in character,”²⁰ as well as an invasion of one’s liberty interest.

Undeniably, it is possible to maintain widely differing opinions about the individual autonomy/liberty assessments²¹ that infuse these sentiments. Equally probable, disagreements about First Amendment norms and doctrines simmer contemporaneously with the ongoing debate about what groups can legitimately demand of their membership. Disagreements intensify because it is unlikely that a majority of workers share the conviction that conventional unions are the best vehicles for the advancement

¹⁴ Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1342–44 (1997) (“Under this view, collective bargaining was conceived as a form of democratic self-government . . . complete with general legislative principles, including the principle of majority rule.”). Majoritarian hegemony may no longer be fully consistent with the NLRA because of the Taft-Hartley Amendments specifying that individuals have the right to refrain from engaging in concerted activity as part of their interest in autonomy. See Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149, 149–52.

¹⁵ Kohler, *supra* note 14, at 183 (opposing this view).

¹⁶ See *id.* at 182–86 (suggesting that “the language that informs our first amendment [*sic*] discourse has taught us to regard freedom” in individualistic terms).

¹⁷ *Id.* at 183.

¹⁸ *Id.*

¹⁹ *Id.* at 184.

²⁰ *Id.*

²¹ For at least one perspective on liberty, see, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (suggesting “matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”). But see J. BUDZISZEWSKI, *WHAT WE CAN’T NOT KNOW: A GUIDE* 6–7 (2003) (offering a cautionary explication on liberty and human autonomy with respect to moral choice).

of their interests.²² Without such a conviction, the prospect of a collectively rational outcome becomes difficult to imagine. Public choice and postmodernism have much to say about groups, members, and their interactions, and they offer two contrasting, yet complementary, viewpoints that may inform the labor union dues debate.

While public choice has always seen individual interest as distinct from group interest, a postmodern recognition has more recently emerged that confirms an "ill fit between the collective bargaining regime and [both] the identities of women and people of color" and some forms of expressive individualism.²³ This recognition "ha[s] led some to conclude that unions did not, and perhaps cannot, represent their interests."²⁴ The historical record of American unions underscores this conclusion. The record includes the exclusionary policies²⁵ of a number of labor unions, coupled

²² See Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 118 n.2 (1996).

By an overwhelming 86% to 9% margin, workers want an organization run jointly by employers and management, rather than an independent, employee-run organization. By a smaller, but still sizable margin of 52% to 34%, workers want an organization to be staffed and funded by the company, rather than independently through employee contributions.

Id. (quoting PRINCETON SURV. RESEARCH ASSOCS. WORKER REPRESENTATION AND PARTICIPATION SURVEY: REPORT ON THE FINDINGS 49 (1994)).

²³ McUsic & Selmi, *supra* note 14, at 1351.

²⁴ *Id.*

²⁵ Exclusionary policies have largely been effected towards members of minority ethnic, racial, and gender minority groups. On racial exclusion, see AUGUST MEIER & ELLIOTT RUDWICK, *BLACK DETROIT AND THE RISE OF THE UAW* 3 (1979) ("Since the turn of the century the mainstream of the labor movement — the AFL unions and the Railway Brotherhoods [have generally] excluded blacks or restricted them to jim crow units."). See also RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 166 (1995) (asserting that the evidence demonstrates that labor statutes mandating collective bargaining "made it particularly difficult for black workers to maintain their economic power in the face of white-dominated unions which represent them against their will"); W.H. HUTT, *THE THEORY OF COLLECTIVE BARGAINING: 1930–1975*, at 7 (1980) (relating that in practice, groups of workers can do little to raise wages "unless they have power to prevent outsiders from entering the trade"); David T. Beito, *Review of Only One Place of Redress by David Bernstein*, 10 GEO. MASON L. REV. 293, 295–96 (2001) (book review) (suggesting "that the railway union had barred blacks from most of the best jobs on the railroad;" that both "Booker T. Washington and W.E.B. Dubois spoke with almost a single voice in castigating organized labor as an enemy of the race;" and that "skilled and unionized workers, who happened to be mostly white, [tried] to shut out unskilled and nonunion workers who were often black."); David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 93–94, 99 (1993) (suggesting that the AFL deferred to the prejudice of its southern white membership and acquiesced in discriminatory wage levels and segregated facilities, and that the Railway Brotherhood regularly organized strikes aimed at forcing employers to pursue a white-only hiring policy). On gender exclusion, see Rosalie Nichols, *Are Feminist Businesses Capitalistic?*, in FREEDOM, FEMINISM, AND THE STATE: AN OVERVIEW OF INDIVIDUALISTIC FEMINISM 157, 161 (Wendy McElroy ed., 2d ed. 1991). See also Suzanne La Follette, *The Economic Position of Women*, in FREEDOM, FEMINISM,

with the likelihood that “[t]o the extent that unions are successful, they redistribute income toward their members, who are predominantly white, male, and well paid, at the expense of consumers as a whole, taxpayers, nonunion workers, the poor, and the unemployed.”²⁶ Accordingly, the hopeful claim that unions operate as one “community comprised of diverse groups is, for many, a concept that appears inherently coercive and infused with notions of domination.”²⁷ Perforce, arguments that call into question union claims premised on an alleged uniformity of worker interest seem compatible with arguments claiming freedom-of-association and freedom-of-speech violations. These arguments may be against either closed or union shops, and provide a useful perspective for enforcing Article 20 of the Universal Declaration of Human Rights, which states: “No one may be compelled to belong to an association.”²⁸ Collectively, these observations breathe life into Charles Baird’s contention “that forced bargaining is never justified.”²⁹ These observations also imply that compulsory union dues are, and ought to be, a source of controversy — especially given the size of union revenues.

According to the United States Department of Labor, labor unions receive upwards of \$17 billion a year in revenues.³⁰ Public and private sector unions and their respective revenues cannot be clearly separated because they are often both affiliate members of and contributors to the same national labor organization and share the same mission.³¹ Separating public sector from private sector bargaining units is also difficult because roughly one-half of a typical union’s financial activity tends to occur at the national level.³² Despite difficulties in coming up with accurate and complete data, private sector unions have, nonetheless, remained prosperous.³³ Since union

AND THE STATE: AN OVERVIEW OF INDIVIDUALISTIC FEMINISM, *supra*, at 163, 169 n.2 (stating that among the resolutions passed by the International Moulders’ Union was a resolution restricting and then eliminating employment of women in foundries).

²⁶ MORGAN O. REYNOLDS, MAKING AMERICA POORER: THE COST OF LABOR LAW 29 (1987).

²⁷ McUsic & Selmi, *supra* note 14, at 1351.

²⁸ Conor Cradden, The Free-Rider Problem, http://www.world-psi.org/Content/ContentGroups/English7/Focus2/Focus_articles/The_Free-Rider_Problem.htm (last visited Jan. 31, 2006) (quoting Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Part I, at 71, U.N. Doc A/810 (1948)).

²⁹ Charles W. Baird, *Henry Hazlitt on Unions*, FREEMAN: IDEAS ON LIBERTY, Nov. 2004, at 47, 47.

³⁰ See LINDA CHAVEZ & DANIEL GRAY, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS 12 (2004).

³¹ See, e.g., AFL-CIO/NEA Solidarity Partnership, <http://www.aflcio.org/aboutus/nea.cfm> (last visited Mar. 18, 2006); Unions of the AFL-CIO, <http://www.afl-cio.org/aboutus/unions> (last visited Mar. 18, 2006); see also CHAVEZ & GRAY, *supra* note 30, at 15–17.

³² See Marick F. Masters & Robert S. Atkin, *Financial and Political Resources of Nine Major Public Sector Unions in the 1980s*, 17 J. LAB. RES. 183, 186 (1996).

³³ See *id.* at 184. See also KENNETH R. WEINSTEIN & THOMAS M. WIELGUS, HERITAGE FOUND., HOW UNIONS DENY WORKERS’ RIGHTS (1996), available at <http://www.heritage.org/Research/GovernmentReform/bg1087.cfm> (stating that from the period from 1991 through

expenditures for political and related purposes continue to rise on a per member basis while membership declines,³⁴ multiple linear regression analysis is unlikely to be required in order to recognize that unions spend only a fraction — perhaps less than twenty percent — of their dues revenues “on collective bargaining and related activities.”³⁵ Compounding that predicament, accountability is compromised because unions refuse, as a matter of course, to provide even basic information to dues payers about how member union dues are spent.³⁶ This complements ongoing problems in negotiating labor contracts because “[o]n the employee side of the negotiations, [there] are [at least] two [distinct] groups: union leaders and the rank-and-file union members, who rely on their leaders for [relevant] information.”³⁷ Troublingly, given the racist and exclusionary history of labor unions, disputes persist because of a recurrent positive correlation between the expenditure of union funds involuntarily obtained from African American and Hispanic dues payers and union-led discrimination against African American and Hispanic employment applicants.³⁸ Moreover, since labor organizations are comprised of disparate individuals and, given that a large percentage, if not a majority, of unionists disagree with union leaders’ choices about

1995, total receipts by several of the major international unions that make up the AFL-CIO actually rose while membership fell).

³⁴ Rep. Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 350 (1998).

³⁵ CHAVEZ & GRAY, *supra* note 30, at 12. See also ROBERT P. HUNTER, PAUL S. KERSEY & SHAWN P. MILLER, MACKINAC CTR. FOR PUB. POLICY, THE MICHIGAN UNION ACCOUNTABILITY ACT: A STEP TOWARD ACCOUNTABILITY AND DEMOCRACY IN LABOR ORGANIZATIONS 4–15 (2001), available at <http://www.mackinac.org/archives/2001/s2001-02.pdf> (concluding that the United States Supreme Court apparently approved a detailed examination of union financial records that found no basis to disagree with the following: (1) in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), 79 percent of union dues were not chargeable to collective bargaining and related activities; and (2) in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), the union spent 90 percent of its dues revenue on non-representational activities).

³⁶ See, e.g., *Johnson Introduces Three Bills to Hold Union Leaders Accountable, Improve Accountability & Transparency on Behalf of Union Members*, STATES NEWS SERV., Mar. 3, 2005; see also Carl Horowitz, *Union Accountability: Ruling Strengthens Financial Reporting, But Concerns Remain on Pension Funds*, DETROIT FREE PRESS, June 6, 2005, at 9A (“In a 3–0 decision, the U.S. Court of Appeals, District of Columbia Circuit, upheld a new set of regulations issued by the Department of Labor that required unions to spell out in greater detail how they spend their money.”).

³⁷ RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 448 (8th ed. 2003) (emphasis omitted).

³⁸ See, e.g., Aaron Leo, *Bridgeport to Repay Dues from Nonunion Firefighters*, CONN. POST, Mar. 30, 2005 (relating that as part of the resolution of a conflict between the union and dues objectors who are members of a minority group, the union was required to repay dues used to discriminate against applicants of certain ethnic groups).

how labor unions should spend their funds,³⁹ disputes continue to boil as alternative ideological voices are excluded from the table.

A persistent source of conflict is rooted in the political and social ambitions of unions and their leaders. "Even staunch union supporters blanch over the autocracy, entrenchment, and corruption of some union leaders."⁴⁰ Other evidence suggests that "union elections provide members with little real control over leaders"⁴¹ and that unions are possibly, if not probably, "inherently undemocratic."⁴² It is unlikely that the political, social, and policy aspirations of union leaders accurately mirror the position of all workers within collective bargaining units. Despite that conclusion, the leaders of one of America's largest union organizations, the AFL-CIO, recently met with the chairman of the Democratic Party to plan political strategy amid "call[s] for a major shake-up" in labor union organizations and union organizing.⁴³ Although the AFL-CIO has maintained its political power even with a sharp decrease in its membership, few union or Democratic Party leaders believe that labor unions can maintain their political relevancy unless change is in the offing.⁴⁴ As a response to both disquiet within the union leadership and the fear of looming political irrelevance,⁴⁵ John Sweeney, president of the AFL-CIO, proclaimed that labor unions would tie their politics to union organizing.⁴⁶ This intertwining of organizing capacity

³⁹ See, e.g., CHAVEZ & GRAY, *supra* note 30, at 46 ("[A]fter voters in Washington State passed a paycheck-protection initiative in 1992, 85 percent of the state's teachers took advantage of their new freedom and refused to have their dues go toward politics.").

⁴⁰ Stewart J. Schwab, *Union Raids, Union Democracy, and the Market For Union Control*, 1992 U. ILL. L. REV. 367, 368 (footnotes omitted).

⁴¹ *Id.* at 369.

⁴² *Id.* at 370.

⁴³ Christina Almeida, *AFL-CIO Leaders, Howard Dean Plan Political Strategy in Las Vegas*, ASSOCIATED PRESS, Mar. 1, 2005, available at <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/36/9354>.

⁴⁴ Ron Fournier, *Unions' Grip on Political Relevance Slips*, ASSOCIATED PRESS, May 29, 2005, available at <http://www.detnews.com/2005/autosinsider/0505/29/e03-196519.htm>.

⁴⁵ See, e.g., *id.*

⁴⁶ See Almeida, *supra* note 43. Persistent reports suggest a possible pattern of under-reporting direct and indirect union political expenditures. Typically it is difficult to determine from a union's filings whether and to what extent it engages in prohibited political expenditures. See, e.g., *Beck Rights 2001: Are Workers Being Heard?: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce*, 107th Cong. 29-35 (2002) (statement of Raymond J. LaJeunesse, Jr., Vice President & Staff Attorney, National Right to Work Legal Defense Foundation, Inc.) (stating that "union dues and agency fees collected from workers under threat of loss of job" have been "used for registration and get out the vote drives, candidate support . . . , administration of union political action committees and issue advocacy [and] amount to between 300 [sic] to \$500 million in a presidential election year"); CHAVEZ & GRAY, *supra* note 30, at 13 ("[U]nions technically report that they spend no money on politics . . . [b]ecause any political contributions would be taxable." (emphasis in original)); Larry Margasak, *Labor Dept. Probes Teachers Union Reports*,

and political power⁴⁷ seems to operate consistently with Gary Becker's conclusion that "[p]olitical influence is not simply fixed by the political process, but can be expanded by expenditures of time and money on campaign contributions, political advertising, and in other ways that exert political pressure."⁴⁸ Groups, like individual human beings, are not animated simply by pecuniary gain. They are also animated by ideological and social objectives that provide both self-interested and nonexcludable⁴⁹ benefits. If union organizing expenditures can be fashioned as a form of politics, then such expenditures, funded by compulsory union dues payments, may flout Supreme Court precedents, implicate First Amendment values,⁵⁰ destabilize already debatable free-rider assumptions, and undermine the contestable social welfare calculus⁵¹ that tends to undergird the NLRA regime. Such expenditures may also marginalize workers' views and interests, in the middle⁵² of national debates about various social issues such as welfare-reform, drug-decriminalization, and the Boy Scouts that appear to be unrelated to collective bargaining.⁵³ Although collective bargaining objectives during the 1930s may have supplied intra-group esteem enhancements that diminished certain collective action problems,⁵⁴ as discussed below, the contemporary proliferation of union objectives outside of a collective bargaining

ASSOCIATED PRESS, Mar. 4, 2004, available at <http://washingtonpost.com/wp-dyn/articles/A30595-2004Mar4.html>.

⁴⁷ See Jill Lawrence, *Five Unions Form Coalition Apart from AFL-CIO*, USA TODAY, June 16, 2005, at 11A.

⁴⁸ Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. OF ECON. 371, 372 (1983).

⁴⁹ See *infra* Part II.A.

⁵⁰ See, e.g., Jennifer Friesen, *The Costs of "Fee Speech" — Restrictions on the Use of Union Dues to Fund New Organizing*, 15 HASTINGS CONST. L.Q. 603, 621–23 (1988) (positing that limitations on the use of union dues paid by dues objectors "begins with a determination whether government action exists in union security agreements" and that the *Beck* Court evidently confirms the reach of the First Amendment to private labor contracts).

⁵¹ See RICHARD VEDDER & LOWELL GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* 141 (1993) (reading data to show that government-sponsored "unionization was the more important cause of prolonged high unemployment" during the period immediately following the passage of the National Industrial Recovery Act and the NLRA, which includes the downturn in 1937–1938). If an increase in unemployment fails to constitute an increase in social welfare, then the assumed positive welfare benefits purportedly attributable to increased unionization are diminished potentially to zero or possibly less than zero.

⁵² My debt to Alan Wolfe should be obvious. See generally ALAN WOLFE, *MARGINALIZED IN THE MIDDLE* (1996).

⁵³ CHAVEZ & GRAY, *supra* note 30, at 18 (discussing the various causes that labor unions support).

⁵⁴ See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1083 (1995) (discussing how "[i]ntra-group esteem allocation permits groups to overcome certain collective action problems.").

context coupled with a crumbling of the presumed unity of worker attitudes may lessen the likelihood of finding a durable union community today. This proliferation of objectives and crumbling of unity may contribute to the impossibility of cohesive, representative, and justifiable group action.

I. PRELIMINARY OBSERVATIONS ON THE PROSPECT OF FINDING A DURABLE UNION COMMUNITY IN THE FOREST

The federal courts, including the Supreme Court, seem captivated with the possibility, even the likelihood, that unions operate cohesively — hence, the courts' focus on the free-rider presumption that seems to sustain analyses of union dues disputes. The free-rider presumption implies a form of community that may not exist. If community fails to exist, in the presence of compelled contributions to unions, First Amendment values may be adversely affected and therefore give rise to justifiable constitutional and other litigable claims⁵⁵ by union dissidents. Concurrently, the absence of community may be both a cause and an effect of the growth in the diversity of preferences from which humans can choose.

Supreme Court “[o]pinions often state that, when a law is challenged as unconstitutional, ‘this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty.’”⁵⁶ If state action can be discovered within government mandated dues collection schemes,⁵⁷ First Amendment claims can be

⁵⁵ See, e.g., *Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 740–42 (1988) (providing an example of another potential claim — the judicially constructed duty of fair representation).

⁵⁶ JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 110 (7th ed. 2004) (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984)).

⁵⁷ This is of course a debatable issue. See David H. Topol, Note, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135 (1992).

The Supreme Court has yet to articulate a clear standard for determining whether state action exists in union shop provisions and, therefore, whether a constitutional challenge can be brought against such provisions. Indeed, the Court has reached contradictory results when interpreting the virtually identical union shop provisions of the two major labor law statutes.

Id. at 1135. See, e.g., *Beck*, 487 U.S. at 761 (suggesting no state action exists in NLRA union shop agreements); *Price v. Int’l Union, United Auto. Aerospace & Agric. Implement Workers of Am.*, 795 F.2d 1128, 1133 (2d. Cir. 1986) (declining to find state action within the meaning of the NLRA; finding, instead that the union security clause was permissive and, hence, the result of the negotiations of private parties, and concluding that the federal government was not the source of authority for a union security clause); *Beck v. Commc’ns Workers of Am.*, 776 F.2d 1187, 1205 (4th Cir. 1985) (concluding “that there is governmental action sufficient to sustain jurisdiction” within the meaning of a union shop under the NLRA), *aff’d*, 487 U.S. 735 (1988); see also Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 70–71 (1990) (suggesting that the *Beck* Court’s dictum

tied credibly to the notion of coerced association and correlative free speech issues connected to union security provisions that most collective bargaining agreements require.⁵⁸ Both public sector and private sector cases, whether attached formally to the Constitution or to “a construction of federal collective bargaining law, . . . rests upon the theory that use of members’ money to promote causes with which they disagree offends notions of free speech and association.”⁵⁹ While there is a dispute as to whether union-organizing expenditures should be analyzed within the First Amendment or, alternatively, simply within a statutory test,⁶⁰ it seems clear that dues disputes are derived from contrasting emphases provided by the Wagner Act and the Taft-Hartley Amendments.⁶¹

One interpretation insists that the Wagner Act can be framed in terms that emphasize association and self-government and a diminution in freedom of association rights for workers. By contrast, both “first amendment doctrine . . . [and] the . . . Taft-Hartley provisions are framed in an individualistic language that views association,” particularly involuntary association, as suspect.⁶² Consistent with that view, workers evidently retain “the right to resign [a]s an unenumerated right, presumed to subside in the right to refrain from engaging in concerted activity pursuant to Section 7 of the Taft-Hartley Act.”⁶³ Significantly, “[t]he nature of resignation rights . . . [is] not purely economic[]” and presumably may “be influenced by liberty concerns, the doctrine of unconscionability, and the Thirteenth Amendment’s prohibitions against involuntary servitude.”⁶⁴

“would seem to defeat any arguments that a union’s actions in negotiating and observing a union security agreement are state actions”); John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 578–79 (2005) (discussing *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001)); stating “the [Supreme] Court found . . . state action in a private interscholastic athletic association’s rules governing its members”; and concluding that “[t]he conventional approach to state action” requires the Court to engage in fictional analysis, including the fiction “that some admittedly government conduct does not count as state action for purposes of constitutional law”).

⁵⁸ See generally Friesen, *supra* note 50, at 621–26.

⁵⁹ *Id.* at 608.

⁶⁰ *Cf. id.* at 623–26.

⁶¹ See Kohler, *supra* note 14, at 149–52. “The Wagner Act portion of the [NLRA] is framed in terms that emphasize the value of associations to self-government . . . [whereas] the Taft-Hartley portions . . . are framed in a highly individualistic language . . .” *Id.* at 151–52 (footnote omitted).

⁶² *Id.* at 186.

⁶³ See Heidi Marie Werntz, Comment, *Waiver of Beck Rights and Resignation Rights: Infusing the Union-Member Relationship With Individualized Commitment*, 43 CATH. U. L. REV. 159, 174 (1993) (discussing the roots of the right to resign from the union).

⁶⁴ *Id.* (focusing on the waivability of the right to resign from the union) (footnotes omitted).

Generally, “law and economics” has implied “that social organization is contractarian in nature.”⁶⁵ As such, community emerges from consent, with the social contract as the “connecting web.”⁶⁶ Self-interested and generally rational actors choose autonomously to join together based on their assessment “of the comparative advantages of limited forms of social cooperation. They come together and work together by choice and consent” to form a community.⁶⁷ Since unions, outside of right-to-work jurisdictions, are often made up of individuals with diverse views about the benefits of unionism who nevertheless are required to engage in some form of compelled association and expression, it is possible that neither a hypothetical nor an actual uniformity of worker interests exists. On the other hand, if dues payers could discover a consensual kinship with their fellow workers, unions might become their spokesperson, and union dues might become a vehicle to transform society, the workplace, and human life. In reality, the dearth of kinship may prove fatal to the prospect of finding a durable community within the framework of compulsory unionism while concurrently raising First Amendment concerns. Hence, the proper null hypothesis intimates that unions are unlikely to provide a fertile ground for an enduring community.

As one commentator noted:

The [United States Supreme] Court has consistently held that an employee can constitutionally be charged, even over her objection, for the cost of her union’s activities that are “germane to collective bargaining. This is true despite the Court’s concession that collective bargaining may be ideologically offensive to some, and thus may implicate speech or associational interests.”⁶⁸

Nevertheless, disputes concerning union expenditures continue to intensify because they involve the freedoms that are rooted in the fundamental values of democracy and autonomy that presumably underlie American First Amendment rights.⁶⁹ One observer illumines: “The great liberal freedoms — freedom of religion, association, and expression — are all deeply paradoxical because they rest on the notion of ‘epistemic abstinence’ — the idea that liberal government cannot impose its views of the Good on dissenters; that *qua* liberal government, it cannot know the Good.”⁷⁰

⁶⁵ ROBIN PAUL MALLOY, *LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS* 106 (2000).

⁶⁶ *Id.* at 107.

⁶⁷ *Id.*

⁶⁸ Friesen, *supra* note 50, at 634 (citation omitted).

⁶⁹ See Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure* 3 (Mar. 2001) (unpublished white paper, Brennan Center for Justice, New York University School of Law), available at <http://www.benkler.org/WhitePaper.pdf>.

⁷⁰ LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 147 (2005) (footnote omitted).

While complete government neutrality may be an impossibility,⁷¹ this much seems clear: because the NLRA empowers unions and their entrenched leadership to decide “the Good” via compulsory dues and compulsory association, there has been an “ever problematic relationship between the first amendment and the law structured by the National Labor Relations Act.”⁷² This specifies “[t]hat a fundamental tension exists between the first amendment and the statute . . . [leading to the possibility that] the Supreme Court’s repeated efforts to reconcile the Labor Act to the first amendment have trailed off into unintelligibility.”⁷³

Because agency shop schemes, like similar union shop arrangements, appear to constitute “a significant impingement on First Amendment rights,”⁷⁴ and because union dissent as a form of intra-group conflict survives in both public and private labor organizations, the federal courts, in a series of decisions culminating in *Communications Workers of America v. Beck*⁷⁵ have restricted the ability of unions to extract dues from dues objectors⁷⁶ within either a union or agency shop arrangement.⁷⁷ While the Court had considered and rejected the argument that collective bargaining itself constitutes an ideologically objectionable activity that warrants preclusion,⁷⁸ the *Beck* Court held that section 8(a)(3) of the NLRA obliges “union dissenters . . . to pay for their share of a union’s collective bargaining activities.”⁷⁹ As generally

⁷¹ *Id.* (noting “that liberalism as governmental nonpartisanship (neutrality) toward religions, associations, and expression is an impossibility”).

⁷² Kohler, *supra* 14, at 149 (footnotes omitted).

⁷³ *Id.*

⁷⁴ *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455 (1984).

⁷⁵ 487 U.S. 735 (1988).

⁷⁶ JULIUS G. GETMAN, BERTRAND B. POGREBIN & DAVID L. GREGORY, *LABOR MANAGEMENT RELATIONS AND THE LAW* 361 (2d. ed. 1999) (reporting that union dues are often collected through union security and dues checkoff provisions contained within the collective bargaining agreement). The statutory language legalizes any agreement between a labor organization and an employer that requires membership in the union as a condition of employment. *See* 29 U.S.C. § 158(a)(3) (1994).

⁷⁷ *See United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 764 (9th Cir. 2002) (en banc).

[E]mployees under a “union shop” arrangement who are required by contract to become union members, may be subjected to only one membership requirement — the payment of dues — and employees under an “agency shop” arrangement who are required by contract only to pay dues need not become union members even in form.

Id. *See also* *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46 (1998) (“[T]he statutory language [of § 8(a)(3)] incorporates an employee’s right not to ‘join’ the union (except by paying fees and dues) . . .”). Given these conclusions, “there is no realistic difference from a legal standpoint between a union shop and an agency shop, although under a union shop the union may, if it wishes, place an employee who only pays dues on its ‘membership’ rolls.” *United Food*, 307 F.3d at 765.

⁷⁸ *See Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

⁷⁹ DOUGLAS E. RAY, CALVIN WILLIAM SHARPE & ROBERT N. STRASSFELD, *UNDERSTANDING LABOR LAW* 427 (1999).

understood, collective bargaining encompasses negotiation, contract administration, and grievance adjustment.⁸⁰ The Court's opinion left open the question of what constitutes collective bargaining activity within the meaning of the NLRA.

On one account, this "decision was hardly remarkable because the NLRB balances the union majority's right to 'full freedom of association' for purposes of collective bargaining and other mutual aid and protection with the minority's right to refrain from such association."⁸¹ This process operates consistently with the 1947 Taft-Hartley Amendments⁸² and Congress's apparent intent to de-emphasize self-organization and group action.⁸³ The *Beck* decision stands at the epicenter of a controversy which, on one plane, promisingly confirms that: (A) "an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State";⁸⁴ and (B) as a general matter, "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights."⁸⁵ On another level, it is important to appreciate that, while the *Beck* decision (in effect, but not unequivocally) extends the reasoning of public sector and Railway Labor Act (RLA) sector cases to the NLRA, the decision is neither self-enforcing nor a model of clarity.

One source of haziness is the Supreme Court's inadequate understanding of the economics and logic of free riding. While the free-rider argument can undermine the claims of union dissidents, as I have argued elsewhere,⁸⁶ the *Beck* Court's unrefined free-rider computation is flawed because the Court fails to understand comprehensibly the nature of forced riding.⁸⁷ The Court also assumes unreflectively that

⁸⁰ *Beck*, 487 U.S. at 738.

⁸¹ Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 HASTINGS L.J. 1, 1 (1989) (footnotes omitted).

⁸² See 29 U.S.C. § 158(a)(3) (1994) (permitting an employer and a union to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment, regardless of whether the employees actually wish to become union members).

⁸³ Cf. James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1567 & n.20 (1996). In addition to intentionally de-emphasizing group action within the parameters of the Taft-Hartley Act, Congress apparently continued to emphasize individual rights in the form of workplace statutes that focused on individual interest. See *id.* at 1568.

⁸⁴ *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).

⁸⁵ *Id.* at 232.

⁸⁶ Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Post-modern Perspective in the Mirror of Public Choice Theory*, 33 U. MICH. J.L. REFORM 447, 493-94 (2000).

⁸⁷ See *id.* at 488. Members of certain postmodern subgroups are first required to resign to avoid dues payments for ideological expenditures but must, nonetheless, pay core dues for collective bargaining purposes. See *id.* This means that they lose union governance rights while paying core dues. See *id.* This leads to a consequent dues overpayment, which constitutes a form of forced riding since they are required to pay the same core fees as union

all dues collected presumably for collective bargaining purposes are essential to combat the elusive specter of free riding.⁸⁸ While strategic behavior within a labor union setting may create plausible opportunities that produce positive externalities wherein individuals obtain goods without bidding for them,⁸⁹ free riding produced by interest convergence may not necessarily exist⁹⁰ — since interest convergence itself may not

members who do not resign and, accordingly, enjoy full membership rights including the right to vote on strike and union contracts. *See id.* An additional source of forced riding results from the likelihood that a union may “inflate the amount of dues required to support core benefits” and underestimate the expenditures required to support noncore benefits. *Id.* at 488–89. To the extent that is correct, dues objectors become forced riders to the extent that unions engage in such activities. *See id.*; *see also* GEORGE C. LEEF, *FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT* 34 (2005).

As I have noted before:

[P]ublic choice theory suggests that collective action can give rise to both forced riders and free riders. A forced rider is a person or group compelled to subsidize benefits, which accrue primarily to others. A forced rider is the opposite of a free rider who receives benefits without fully paying for them.

Hutchison, *supra* note 86, at 461.

⁸⁸ *See* Hutchison, *supra* note 86, at 493–94. Deficiencies include: (1) the assumption “that all workers benefit *equally* from *core* collective bargaining activities”; (2) the failure “to take into account the possibility that non-object[ing unionists] may free ride at the expense of both ideological and core dues objectors” who then become forced riders in the absence of their ability to escape; and (3) the failure to understand that in light of “intimidating exit barriers” and union autocracy, union members who fail to object and resign may nonetheless “lack a commonality of interest with other union members and union officials.” *Id.* at 493. Additionally, workers who value their union governance rights, such as the right to vote on whether to accept or reject a collective bargaining agreement, but disagree with the union’s ideological expenditures must either resign and give up voting rights or retain membership and pay for detestable speech. *See id.* Given the varied diversity of viewpoints that exist in a pluralistic society, the Supreme Court’s deficiencies “reify[ing] hierarchy and subordination.” *Id.* at 494. In relying on the legislative history to understand the free-rider issue, the Supreme Court shares its deficiencies with Congress. *See, e.g., Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 748 n.5 (1988) (quoting 93 CONG. REC. 3558 (1947) (statement of Rep. Jenner) (supporting mandatory union dues and noting that “because members of the minority ‘would get the benefit of that [collective bargaining] contract made between the majority of their fellow workmen and the management . . . it is not unreasonable that they should go along and contribute dues like the others.’”)).

⁸⁹ *Cf. Avery Wiener Katz, Two Competing Economic Models of Law*, in *FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW* 42 (Avery Weiner Katz ed., 1998).

⁹⁰ Richard Posner asserts that the representation election, the principle of exclusive representation, and the union shop together are a “set of devices . . . for overcoming the free-rider problems that would otherwise plague the union [that operates] as a large-numbers cartel.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 354 (5th ed. 1998) [hereinafter POSNER, *ECONOMIC ANALYSIS*]. But for these devices, Posner asserts that the rational worker would “hang back from joining the union or devoting any resources to promoting it.” *Id.* In other words, he would enjoy the benefits without incurring the costs. Posner’s assumption that all

exist. In neoclassical economic and welfare terms, the disutility associated with mandatory union membership may outweigh the putative utility (if any exists at all) of such membership.

An additional flaw in the *Beck* Court's analysis is its refusal (unlike some lower courts hearing this case⁹¹) to tether its decision to the First Amendment⁹² — freedom of speech and freedom not to associate⁹³ — interest of union dues dissenters. This refusal is important because authority exists for the proposition that pure "collective bargaining" expenditures adversely affect the speech and associational interests of dues objectors.⁹⁴ Although Larry Alexander presents an elegant case that no universal right of freedom of expression and, perhaps, association can be found to exist at either the level of constitutional theory or the level of human rights,⁹⁵ the Supreme

rational workers necessarily enjoy benefits from unionization seems incomplete and unconvincing at best. *See, e.g.*, Hutchison, *supra* note 86, at 483–92 (explaining deficiencies in both the Supreme Court and Congress's free-rider analyses that apparently accept Posner's premises and claims).

⁹¹ *See Beck v. Commc'ns Workers of Am.*, 776 F.2d 1187, 1205–09 (4th Cir. 1985) (finding sufficient governmental action to sustain jurisdiction of the plaintiffs' First Amendment claim, but effectively deciding the case on grounds of the union's duty of fair representation, even though the labor union's practice of using agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration was unconstitutional); *Beck v. Commc'ns Workers of Am.*, 468 F. Supp. 93, 97 (D. Md. 1979) (issuing a declaratory judgment holding that amounts collected beyond allocable "collective bargaining, contract administration, and grievance adjustment" violate the First Amendment rights of dues objectors). *But see Beck v. Commc'ns Workers of Am.*, 800 F.2d 1280, 1280–82 (4th Cir. 1986) (en banc) (finding that federal jurisdiction rested on the union's duty of fair representation). Three of the five members of the en banc majority, however, "felt it unnecessary to consider whether jurisdiction also existed on constitutional grounds." *Id.* at 1282.

⁹² For a discussion of these issues, see generally Charles W. Baird, *The Permissible Use of Forced Union Dues: From Hanson to Beck* 38 (Cato Inst., Cato Policy Analysis No. 174, 1992) (on file with author) (discussing when sufficient state action exists to implicate the First Amendment rights of dissenters). A version of the file in html format can be found at <http://www.cato.org/pubs/pas/pa-174.html>.

In union dues situations, assuming state action requirements are met (typically in a situation where a union engages in the mandatory collection of dues from a public sector employee), the First Amendment applies in two ways. First, there is a free speech right not to be compelled to contribute to an organization whose expressive activities conflict with one's freedom of belief. Second, there is a right not to associate with an objectionable organization. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 56, 1162–63 & nn. 12–13; *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

⁹³ As part of an individual's freedom not to associate, if state action is found, she "may constitutionally prevent the union[]" from using her dues "to contribute to political candidates and to express political views unrelated to [the union's] duties as exclusive bargaining representative." NOWAK & ROTUNDA, *supra* note 56, at 1299–1300 (citing *Abood*, 431 U.S. at 209).

⁹⁴ *See, e.g., Abood*, 431 U.S. at 222; *see also Friesen, supra* note 50, at 634.

⁹⁵ ALEXANDER, *supra* note 70, at 185 (noting that one "searche[s] in vain for an argument that would support a human right of freedom of expression").

Court's failure to rely on the Constitution is troubling because the Court has found sufficient state action in earlier private sector cases to sustain constitutional jurisdiction.⁹⁶ While the *Abood* opinion conceded that the use of a union-security agreement to force a dues objector to pay "for causes and purposes to which the employee objected to some extent interfered with first amendment rights,"⁹⁷ its holding is grounded technically in the union's violation of its duty of fair representation.⁹⁸ A pure statutory focus by the courts might run afoul of the rule that the NLRB retains primary jurisdiction with respect to union security claims,⁹⁹ but judicial interpretation of the parameters of the statute may be collaterally necessary to resolve duty of fair representation claims that include a "'statutory obligation to serve the interests of all members without hostility or discrimination.'"¹⁰⁰ Although a concentration on the statutory analyses either related to duty of fair representation or alternatively based on possible union unfair labor practice might lead the courts to defend union security agreements, it can be argued that there has actually been a dramatic expansion of First Amendment-related rights within this arena.¹⁰¹ On this account, the courts "now forbid[] the compelled subsidy of almost any union expenditure not closely related to the rather narrow service categories of workplace contract negotiations, contract administration, or grievance adjustment."¹⁰² If true, then dues objectors might have reason to celebrate. Nevertheless, since statutory construction in the hands of either the NLRB or the appellate courts may be infinitely malleable, the judicially imposed

⁹⁶ The Supreme Court found sufficient state action in private employment cases under the Railway Labor Act. *See, e.g., Topol, supra* note 57, at 1135. Furthermore, the courts have determined that section 8(a)(3) of the NLRA that governs union security clauses is similar to the pertinent Railway Labor Act language for purposes of deciding union dues disputes. *See, e.g., Abood*, 431 U.S. at 226. As part of its string of decisions, the Supreme Court has suggested an adequate ground for First Amendment litigation by finding that "the actions of public employers surely constitute 'state action,' [and] the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in [the] *Hanson*" case. *Id. See also Beck v. Commc'ns Workers of Am.*, 776 F.2d at 1205.

⁹⁷ *GETMAN ET AL.*, *supra* note 76, at 361.

⁹⁸ *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 740–42.

⁹⁹ *See id.* at 742–43.

¹⁰⁰ *Id.* at 739 (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)). The judicially created duty of fair representation is grounded in section 9(a) of the NLRA, 29 U.S.C. § 159(a), and reflects the principle that a union's status as the exclusive representative of the employees' bargaining "unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177 (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)).

¹⁰¹ *See Friesen, supra* note 50, at 609–10 (arguing that First Amendment doctrine limits the purposes for which public and private sector union may expend funds and extends in its statutory version to preclude compulsory funding for activities that are not closely related to collective bargaining).

¹⁰² *Id.* at 609.

duty of fair representation¹⁰³ and unfair labor practice claims may constitute a fragile plinth on which to safeguard the growing interest diversity that characterizes unions and the workplace in the twenty-first century.¹⁰⁴ Statutory analysis, incorporated largely from the *Ellis* opinion, for instance, tends to focus on “whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”¹⁰⁵ The *Beck* Court’s adoption of this approach failed to supply a clear enforcement mechanism or clear principles.¹⁰⁶ Consequently, this has led to problems in exercising *Beck* rights.¹⁰⁷

Failure to provide clear principles creates a void that both the NLRB and the appellate courts may strive to occupy. The Ninth Circuit entered the fray recently by enforcing an NLRB order that requires dues objectors to pay for union organizing expenditures.¹⁰⁸ Union dues objectors filed unfair labor practice charges with the

¹⁰³ Evidently, “[t]he Supreme Court first announced the principle that a bargaining representative must represent fairly all employees within the bargaining unit — regardless of race and regardless of membership in the union — in *Steele v. Louisville & N.R.R.* (U.S.1944), a case arising under the Railway Labor Act.” ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 695 (1976).

¹⁰⁴ The evidence on this issue is mixed. The acceptance of postmodern norms, including identity norms associated with race, gender, and what can be called expressive individualism, all likely contribute to growing diversity. On the other hand, at least with respect to the employment of African Americans, this claim remains a matter of contention since African American labor-force participation and employment declined after the passage of the NLRA and the nonwhite-white unemployment differential widened. See VEDDER & GALLAWAY, *supra* note 51, at 272. Such empirical evidence may be consistent with less, not more, racial diversity.

¹⁰⁵ *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984).

¹⁰⁶ See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 752 (1988) (quoting *Ellis*, 466 U.S. at 447–48).

¹⁰⁷ As noted by one of the attorneys from *Beck*, “the [National Labor Relations] Board delayed for eight years before issuing its first post-*Beck* decision, *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995)]. . . . When the Board finally decides a *Beck* case, workers are likely to receive little protection or relief.” Raymond J. LaJeunesse, Jr., McCain-Feingold-Cochran’s So-Called “Codification” of *Beck*: In Reality, a Trojan Horse 2 (Nat’l Right to Work Found., Issue Briefing, 2001) (on file with author). See also *Tempers Flare at Hearing on Beck Rights to Not Pay for Nonrepresentational Activities*, 69 U.S. L. WK. 2712 (BNA) (2001) (reporting that at a House subcommittee hearing, “lawmakers and witnesses presented highly divergent, and sometimes angry, views on whether there is a significant problem” for workers trying to exercise *Beck* rights).

Moreover, because the *Beck* Court snubbed the opportunity to offer comprehensive legal principles for deciding when and if union dues expenditures can be truly connected to collective bargaining, and because the duty of fair representation nonetheless implicates statutory analyses, its decision may imply that interference with First Amendment rights of dissenting employees nonetheless can be found satisfactory so long as such expenditures reputedly maintain a frail, but not necessarily causal, link to the economic interest of workers. See *infra* Part III.

¹⁰⁸ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002) (en banc).

NLRB (as opposed to bringing a duty-of-fair-representation or First Amendment claim in federal district court) "contending that it was an unfair labor practice for the unions to use their dues to pay the costs of organizing."¹⁰⁹ On one account, union-organizing expenditures occupy a space between pure ideological and political expenditures and pure contract negotiation, ratification, and implementation.¹¹⁰ Whether this constitutes a genuine distinction or not,¹¹¹ the importance of this distinction will ride on whether union organizing is truly attached to an actual collective bargaining purpose or whether it operates in disguised form as a vehicle that has political fundraising as its objective.

The Ninth Circuit's decision is attached to the claim that workers "share a 'community of interests.'"¹¹² After dues objectors challenged the use of their dues, the court held, consistent with "§ 8(a)(3) of the NLRA, a union serving as a bargaining unit's exclusive bargaining representative is permitted to charge all employees, members and nonmembers [so-called core members] alike, the costs involved in organizing, at least when organizing employers within the same competitive market as the bargaining unit employer."¹¹³

This conclusion is based on the uncertain observation that the degree of unionization in the industry translates into union success in securing wage gains.¹¹⁴ If a positive correlation between the wages of represented workers and organizing competitor stores exists, and if that correlation is sufficient to establish a causal connection, dues objectors who fail to contribute might become free riders. Equally plausible, (A) newly organized workers, (B) individuals who have no direct connection to the already or newly organized workplace but who share the union's political objectives (outsiders), and (C) union leaders and union majorities may free ride (i.e., obtain uncompensated self-interested benefits) at the expense of dues objectors. Intriguingly, if the AFL-CIO president's statements linking organizing to politics are credible, then union organizing efforts are likely to be driven by ideological and political objectives. Union organizing expenditures, thus, come alive with First Amendment issues.

¹⁰⁹ *Id.* at 765–66.

¹¹⁰ *See* Friesen, *supra* note 50, at 625–26.

¹¹¹ *See, e.g.,* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 214–17 (1977) (considering union dues objectors' claim that an agency shop provision in the collective bargaining agreement implicates ideological and political expenditures); *Ry. Employees' Dep't. v. Hanson*, 351 U.S. 225, 233–35 (1956) (upholding a union shop provision because Congress was charged with identifying "[t]he ingredients of industrial peace and stabilized labor management relations" and could constitutionally determine that a union shop provision was necessary for peaceful labor relations).

¹¹² *United Food*, 307 F.3d at 764 n.3. This claim may be dubious. *See infra* Part II.

¹¹³ *Id.* at 766.

¹¹⁴ *See* Terry Ashley & Ethel B. Jones, *Unemployment, Union Density, and Wages*, 17 J. LAB. RES. 173, 173 (1996).

The Ninth Circuit found the complainants' specific First Amendment claims unconvincing.¹¹⁵ Instead, the court deferred to the NLRB.¹¹⁶ When the Board decides that a correlation exists between the challenged activity (organizing competitor firms) and the bargaining process,¹¹⁷ union expenditures are not impermissible expenditures.¹¹⁸ Persuaded by that syllogism, the court ignored an arguably contrary ruling by the United States Supreme Court construing the RLA.¹¹⁹ Accordingly, the Ninth Circuit's *United Food* decision-making, which draws a sharp distinction between the NLRA and the RLA, offers another opportunity to reconsider the essential parameters of the union dues dispute.

In Part II, I deploy public choice theory and postmodern identity claims, derived largely from Richard Rorty's analysis,¹²⁰ to develop a far-reaching understanding of the dues dispute. This analysis suggests that the burden of proof on the existence and/or the possibility of an enduring union community should be placed on proponents of this view.¹²¹ Public choice theory has sparked a rich debate about groups and the possibility of collective action. With its interest-group-oriented literature at the intersection of Arrow's Impossibility Theorem, public choice has been the source of "a wide variety of normative proposals for statutory interpretation" including, but not limited to "strictly honoring the terms of legislative bargains."¹²² It has also been used as a vehicle for "eschewing the notion of collective intent . . . [and] reading a public-regarding purpose into statutes to minimize the impact of special interest group influence."¹²³ Public choice, as used in this article, is less comprehensive and less rich in scope than the available literature suggests. This approach is tied largely to implications drawn from the field of economics with only limited intermediation by legal scholars. While the postmodern project can be seen justly as an unsettled approach that is riven by coherency issues, not least its insistence on offering the good without the true,¹²⁴ I believe it supplies modest benefits by revealing the conceivably

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *United Food*, 307 F.3d at 768.

¹¹⁸ *Id.* at 766.

¹¹⁹ See *Ellis v. Bhd. Ry., Airline & S.S. Clerks*, 466 U.S. 435, 452–53 (1984) (disallowing the collection of union dues from a dissenting worker when the funds are used for organizing purposes); see also Baird, *supra* note 92, at 23 ("The [*Ellis*] Court ruled that unions cannot charge dissenting workers for union attempts to organize hitherto unorganized employees of nonunion firms.").

¹²⁰ RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

¹²¹ See generally *id.*

¹²² Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1224–27 (1994).

¹²³ *Id.* at 1226–27.

¹²⁴ DELSOL, *supra* note 1, at 45–63 (discussing both the contemporary indifference to and the fear of the notion of truth, coupled with the question "where did the idea of the good without truth come from?"). For a limited discussion of the postmodern approach to truth, see *infra* Part II.

infinite variety of human preferences in contemporary America. The likely absence of preference convergence understood from the perspective of both public choice theory and postmodern identity construal inevitably vitiates prevalent assertions that unions operate as a paradigm of voluntary cooperation characterized by solidarity. The conflict between putative solidarity and the actual presence of preference diversity might well be the genesis of this ongoing dispute — whether worker preferences, judged from the perspective of the legislature, the courts, or the NLRB, are fully rational.¹²⁵ As discussed more fully below, the prospect of finding solidarity embedded within either a union security agreement or an agency shop agreement is negligible.

In Part III, I both consider and differ with the *United Food* holding by exposing the court's opinion to a wide-ranging perspective on both First Amendment values and free-rider issues. Undeniably, cautious conventional analysis suggests that union organizing expenses on their face do not provide evidence of either a political or ideological purpose, if, of course, ideologically grounded objections to collective bargaining are overlooked. Even so, a conventional analyst must concede that the legitimacy of the implication of First Amendment norms is both contingent and contextual. It is contingent on the actual purpose that organizing and consequent union revenue augmentation can be seen to serve. It is contextual in the sense that organizing can be linked currently to an ongoing effort to stem the degeneration in union economic power and the fear that the currently substantial political influence of unions will diminish in the future. Economic decline coupled with a collapse in political influence may have dire consequences for the political and social agenda of union leaders.

I provide neither new evidence about the actual composition nor actual proof of a lack of workers' interest uniformity and consequent absence of solidarity within the labor federation — the national and various union locals — associated with this case. Nonetheless, relying on both conventional and unconventional analyses, this examination of the *United Food* case: (A) defends the possibility of diverse human interest and preferences against labor union and labor movement proponents' claims that unions should act as hierarchs on behalf of the entire workforce; (B) devalues the court's social welfare determination that sustains union superordination, preserved by suppressing the defensible disquiet of dues objectors to group preferences; and (C) develops uncertainty about the empirical evidence and syllogisms on which the court relies by suggesting the probability that many self-interested benefits (whether accounted for or not by conventional analyses) flow to individuals and groups that operate outside of the bargaining unit frontier.

¹²⁵ For a discussion of rationality, see Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD L. REV. 85, 102 (2005) ("Much of our lives are built around the assumption that people behave rationally. . . . The difficulty with irrationality is that there are so many ways in which it can be expressed.").

Taken together, this examination endangers the Ninth Circuit's conclusion that union expenditures aimed at organizing competitor firms can be seen as germane within the meaning of the NLRA. I intend to show that union expenditures, such as organizing, that do not embrace an explicitly political purpose can, nevertheless, diminish the interest of workers in freedom of expression, freedom of association, and a variety of other interests that allow individual workers and subgroups of workers to define their own identity in what has become, rightly or wrongly, a pluralistic society.

Lastly, Part IV supplies a number of proposals for clarifying judicial, NLRB, and scholarly analysis associated with the intensely fought debate over union dues. These proposals offer a clearing in an increasingly dense forest that has obscured the necessity of establishing a causal connection between contested union expenses, such as union organizing, and an actual, as opposed to an attenuated, collective bargaining purpose.

II. SOLIDARITY CLAIMS AND THE ABSENCE OF PREFERENCE CONVERGENCE

James Madison determined that "[t]he diversity in the faculties" of humans constitutes an "obstacle to [finding] a uniformity of interests" among citizens — indeed, "a division of society into different interests and parties" has been predictable for some time.¹²⁶ Madison's insights have obvious implications for current disputes pertaining to labor union dues and the incompatibility in the interest of diverse union members.¹²⁷ Madisonian pessimism about the likelihood of interest uniformity has assumed renewed vitality since "[t]his move toward separation [and fragmentation] has found a [thunderous] voice in the context of the workforce," which had been envisaged traditionally as a venue for solidarity.¹²⁸ Madison's perspective finds contemporary echoes in postmodern/pragmatist assertions as well as in ongoing public choice analyses.

A. *Solidarity in the Mirror of Postmodernism*

"From the beginning or, to be more precise, from the time of Plato to that of Voltaire, human diversity was judged in the court of fixed values. Then came Herder, who turned things around. He had universal values condemned in the court of diversity."¹²⁹

¹²⁶ THE FEDERALIST No. 10, 78 (James Madison) (Clinton Rossiter ed., 1961).

¹²⁷ Viewpoint incompatibility evidently afflicts union leaders as part of an ongoing debate regarding union organizing expenditures takes center-stage within the labor movement. *See, e.g.,* Steven Greenhouse, *A.F.L.-C.I.O. Is Urged to Oust Its Leader*, N.Y. TIMES, May 12, 2005, at A12 (examining an emerging conflict over the future direction of the labor movement in which one group recommends a tripling of expenditures deployed for organizing purposes).

¹²⁸ McUsic & Selmi, *supra* note 14, at 1340.

¹²⁹ ALAIN FINKIELKRAUT, THE DEFEAT OF THE MIND 9 (Judith Friedlander trans., 1995).

The likely dearth of human and more specifically worker solidarity may well contribute to contemporary declines in union density¹³⁰ and union strength.¹³¹ Some of the reduction in labor union membership “coincide[s] with the steep drop in all community and civic activities starting in the 1960s” as Americans have become, by and large, content to go “bowling alone.”¹³² The decline in community and solidarity may be consistent with and contribute to “a loss of legitimacy for unions as the enablers of group action.”¹³³ What solidarity consists of, principally at the level of abstraction offered by one of America’s leading postmodern/pragmatist scholars, Richard Rorty, remains hazy¹³⁴ — even, if one concedes as ideal the boundary waters of his liberal utopia.¹³⁵ As a predicate to unveiling his own understanding of human solidarity, Rorty offers two contrasting viewpoints. On one account, the largely metaphysical and theological “attempt to fuse the public and the private lies behind both Plato’s attempt to answer the question ‘Why is it in one’s interest to be just?’ and Christianity’s claim that perfect self-realization can be attained through service to others.”¹³⁶ This provisional fusion — what Rorty calls “a striving for perfection with a sense of community — require[s] us to acknowledge a common human nature . . . [that implies] that what is most important to each of us is what we have in common with others.”¹³⁷ In essence, this perspective intimates that “the springs of private fulfillment and of human solidarity are the same.”¹³⁸

Rorty also supplies an alternative view. This view brims with skepticism about the possibility of attaining solidarity. For instance,

[s]keptics like Nietzsche have urged that metaphysics and theology are transparent attempts to make altruism look more reasonable than it is. Yet such skeptics typically have their own theories of human nature. They, too, claim that there is something common to all human beings — for example, the will to power, or libidinal impulses.¹³⁹

¹³⁰ Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1103 (1999) (suggesting that union density has fallen to less than 10 percent within the private sector).

¹³¹ Friesen, *supra* note 50, at 642 (asserting a “dramatic decline in union strength since the end of World War II”).

¹³² Fournier, *supra* note 44 (referencing ROBERT PUTNAM, *BOWLING ALONE* (2000)).

¹³³ Brudney, *supra* note 83, at 1564.

¹³⁴ RORTY, *supra* note 120, at xvi (“Solidarity is not discovered by reflection but created.”).

¹³⁵ *Id.*

¹³⁶ *Id.* at xiii.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

Properly understood, skeptics insist that human solidarity does not exist in any sense that matters; hence, when human solidarity is claimed to exist, it is merely an "artifact of human socialization."¹⁴⁰

Notwithstanding the Nietzschean possibility that the model definitions of words like solidarity and truth represent simply a "mobile army of metaphors,"¹⁴¹ and regardless of the contention that we should abandon "the whole idea of 'representing reality' by means of language" because that implies "a single context for all human lives,"¹⁴² Eric Posner argues rightly that the word "'[s]olidarity' denotes the ability of people to cooperate in the absence of legal sanctions."¹⁴³ Admittedly, "some . . . groups . . . serve the individual's interest by minimizing the transaction costs she incurs while acting to satisfy her preference for whatever interest or function the group facilitates."¹⁴⁴ Nevertheless, since humans can be seen as potential "egoistic, rational, utility maximizer[s],"¹⁴⁵ the prospect of finding a defensible and sustainable version of solidarity¹⁴⁶ in the form of voluntary, yet uniform, self-interest of workers¹⁴⁷ becomes unlikely in our present-day society.

Consider, for instance, George Feldman's argument for solidarity. This approach emphasizes "solidarity among workers, widely understood, rather than among employees of a particular employer (or even employees within a particular industry)."¹⁴⁸ This argument places emphasis on the contention that unions have both the power and the right to speak on behalf of the *entire* workforce as a class-based force for

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 27.

¹⁴² *Id.*

¹⁴³ Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 135 (1996).

¹⁴⁴ McAdams, *supra* note 54, at 1007.

¹⁴⁵ MUELLER, *supra* note 6, at 2.

¹⁴⁶ Chantal Delsol describes and critiques a contemporary kind of solidarity that seems both coercive and incoherent:

Simultaneously with the rejection of any idea of the objective good, a discourse of the *obligatory* good has developed. The idea of social solidarity, for example, will tolerate no opposition. It has become an objective reference that admits of no controversy. We feel that we must share. Similarly, we are under an obligation to protect the earth. No one can defend the destruction of the environment or manifest his indifference to such destruction. . . . The mandatory discourse about objective good, . . . seeks its justifications in vain, for why must we show solidarity with our contemporaries, or even, according to the environmentalist discourse, with future generations.

DELSOL, *supra* note 1, at 54 (emphasis in original).

¹⁴⁷ See McUsic & Selmi, *supra* note 14, at 1339 (noting that workers were commonly seen as united by a common struggle against management).

¹⁴⁸ Feldman, *supra* note 3, at 201.

societal solidarity and social change.¹⁴⁹ If this observation can somehow be seen as true, and if all union members/dues payers concur in the ordering of their preferences, this development leads inevitably to voluntary cooperation in attaining club goods¹⁵⁰ and other goods which might include “social justice” in some class warfare sense.

While it is doubtful that unions have sufficient legitimacy to speak on behalf of all workers, Rorty’s analysis (particularly its Nietzschean component) signifies an epistemic challenge to anyone who views solidarity as an indispensable component of, or even a possibility associated with, a group. Rorty’s perspective supplies a particular challenge to any group that seeks public goods (pure or otherwise), collective goals, interest group goods (providing generally nonexcludable benefits),¹⁵¹ special interest goods (providing concentrated benefits to the few)¹⁵² and individual gains that are funded or partially funded through compulsory union dues.¹⁵³

¹⁴⁹ *Id.* at 199–202.

¹⁵⁰ Club goods are created when and if public goods can be provided, and when those individuals who fail to contribute can be excluded from the consumption of these goods. The possibility of creating club goods can give rise to the possibility that individuals may “agree voluntarily to provide the public good only to themselves. . . . For a pure public good, the addition of one more member to the club never detracts from the enjoyment of the benefits of club membership to the other members.” MUELLER, *supra* note 6, at 150–51. If this analysis is correct, then unions may fail to genuinely qualify as a club, at least outside of right-to-work jurisdictions, because the necessary element of voluntariness is missing. It is probable that many of the goods sought by unions are best described as either quasi-public or collective goods because many of their goals and objectives provide non-excludable benefits even though unionists may disproportionately incur the costs of supplying these goods.

¹⁵¹ Club goods apparently can be distinguished from an interest group’s provision of collective goods in the sense that when the club provides a good, this provision is excludable and *only* available to paying members. Examples of club goods include licensing requirements (when only available to union members) that may raise wages — non-licensed participation may be excluded. An interest group’s provision may refer to the provision of non-excludable goods. An example of an interest group good occurs when a union seeks to decriminalize marijuana; decriminalization is generally available to all — including non-members or outsiders who do not pay any dues in order to consume this good. *See generally* P.A. McNUTT, *THE ECONOMICS OF PUBLIC CHOICE* 178–81 (1996).

¹⁵² Special interest goods may provide concentrated (largely private) benefits for the few. *Cf.* Jane S. Shaw, *Public Choice Theory*, in *THE FORTUNE ENCYCLOPEDIA OF ECONOMICS* 150–51 (David R. Henderson ed., 1993) (pointing out that because voters are often rationally ignorant, legislators may be captured by lobbying groups who provide campaign funds in exchange for support for legislation that may provide largely private benefits for the group). Examples of special interest goods may include the creation of a small national park with extremely limited access, which is designed to prevent development in the backyard of a wealthy neighborhood. This may provide highly concentrated benefits and large individual gains to the homeowners in this neighborhood.

¹⁵³ The public goods and collective goals to which labor union dues have been linked include: “forcing the Boy Scouts to admit homosexuals and atheists[,] promoting abortion[,] . . . opposing welfare reform[,] legalizing marijuana[,] . . . advocating statehood for the District

“[W]orkers increasingly enticed by an ‘expressive individualism’ which focuses on subjective self-realization, are less likely to find attractive any collective action that requires individual interests to yield to group interest and group solidarity.”¹⁵⁴ Such workers, rightly or wrongly, may embrace Isaiah Berlin’s claim that “the capacity for choice, and for a self-chosen form of life . . . [is] itself constitutive of human beings.”¹⁵⁵ They may be captivated by the opportunity “to invent for [themselves] through the exercise of the powers of choice a diversity of natures, embodied in irreducibly distinct forms of life containing goods (and evils) that are sometimes incommensurable and . . . rationally incomparable.”¹⁵⁶ Alternatively, some workers might be captivated by a nonvoluntary characteristic such as ethnicity, race, or gender, which creates for them a morally laudable interest in the lives of members of their own ethnic or gender subgroup. Consequently, they are likely to oppose the subversion of their dues to support policies that subordinate fellow subgroup members. Members of this subgroup may find that their preferences are driven by ascription.¹⁵⁷ Being predominately affective-oriented, their self-worth and their understanding of subgroup worth is enhanced or diminished by what happens to the subgroup and what happens to individual members of this subgroup.¹⁵⁸ Whether this analysis is

of Columbia[, and] supporting a freeze on nuclear weapons.” CHAVEZ & GRAY, *supra* note 30, at 18. Whatever one’s view on these issues may be, and even if one believes that these goods are under or over-produced, it may be difficult “to argue that the unions’ support for these causes improves union workers’ pay, benefits, or working conditions . . .” *Id.* Some of these goods fall into separate categories as public goods or club goods depending on whether or not they are non-excludable in terms of supply and nonrivalrous in terms of consumption. See Tyler Cowen, *Public Goods and Externalities*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 152, at 74, 74–75. When the good at issue provides benefits to individuals who are, generally speaking, not members of the group, that is, when nonmembers receive what can be called positive externalities, the good exhibits the quality of being nonexcludable. See *id.* at 74. Nonrivalry in consumption means that nonpayers (those who pay no fee) can enjoy the benefit of the good without diminishing the enjoyment of others or without increasing the cost associated with the production of the good. See *id.*

¹⁵⁴ Hutchison, *supra* note 86, at 453 (citing Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor’s Decline*, in EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING 41, 41–49 (Samuel Estreicher ed., 1998)).

¹⁵⁵ JOHN GRAY, ISAIAH BERLIN 14 (1996).

¹⁵⁶ *Id.* at 15.

¹⁵⁷ On one account, “[i]dentity is an ascriptive concept. . . . Ascription emphasizes the nonvoluntary mode of determining [group] membership. Membership is based on a mere quality [e.g., ethnicity, race, or gender] rather than some . . . voluntary share in association.” John D. Ely, *Community and the Politics of Identity: Toward the Genealogy of a Nation-State Concept*, 5.2 STAN. ELECTRONIC HUMAN. REV. (1997), <http://www.stanford.edu/group/SHR/5-2/elly.html>. Voluntariness can be supplied in the sense that individuals accept identity as a membership marker.

¹⁵⁸ See Vernon J. Dixon, *Some Thoughts on Teaching Predominately Affective-Orientated Groups*, in INTRODUCING RACE AND GENDER INTO ECONOMICS 177, 177–89 (Robin L. Bartlett ed., 1997); see also James McNair, *Ford Settles Employee Suit Alleging Bias in Testing*,

entirely persuasive or not,¹⁵⁹ it suggests that the preferences of many present-day individuals, when understood properly, are unlikely to be congruent with majoritarian preferences that infect union solidarity declarations.

Taken together then, all endeavors premised on a “universal” solidarity that are focused on “achiev[ing] the collective good run the risk of submerging the identity of subgroups and individuals to the service of others,” including others’ private interests.¹⁶⁰ Instead of discovering some commonality of interest favoring controversial values embedded in a cohesive version of solidarity, it is possible that these presumably universally held opinions are nothing more than “convenient intimations of shared meaning, as divined by prophetic or traditionalist avatars of the people [*i.e.*, workers].”¹⁶¹ Equally likely, these supposedly consensus views “are never checked against actual opinions, least of all those of the most disadvantaged . . . people [*i.e.*, union dues objectors].”¹⁶² When either a leader or a group majority becomes fascinated by some hierarchy of public goods/purposes such as democratic socialism¹⁶³ or indefensible racial or gender exclusion, and then seeks to employ mandatory, or even voluntary, union dues to promote such goals,

it is difficult [within the confines of a postmodern worldview] to conclude that such a purpose[, however desirable,] is derived or even derivable from some transcendental standpoint.

. . . .

. . . Postmodernism diminishes the viability of . . . cooperation [and enhances the value of independent action] insofar as it demonstrates that there may be no conclusive intersection between the union’s goals and the goals of various collective and individual identities [present within either a local or national union].¹⁶⁴

USA TODAY, June 6, 2005, at 6B (reporting that settlement of a racial bias claim was not about money but rather improving the opportunities provided to African American applicants).

¹⁵⁹ See generally Harry Hutchison, *From Bujumbura to Mogadishu: Ethnic Solidarity, African Reality, American Implications*, 31 GEO. WASH. J. INT’LL. & ECON. 141 (1997) (reviewing KEITH B. RICHBURG, *OUT OF AMERICA: A BLACK MAN CONFRONTS AFRICA* (1997), and offering a cautionary explication of postmodernism and appeals to identity).

¹⁶⁰ Hutchison, *supra* note 86, at 470.

¹⁶¹ Bernard Yack, *Liberalism Without Illusions: An Introduction to Judith Shklar’s Political Thought*, in *LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR* 1, 8 (Bernard Yack ed., 1996) (citation and internal quotation marks omitted).

¹⁶² *Id.*

¹⁶³ CHAVEZ & GRAY, *supra* note 30, at 19 (linking John Sweeney, president of the AFL-CIO, to the Democratic Socialists of America, a group that evidently “rejects any economic order sustained by private profit” (citation and internal quotation marks omitted)).

¹⁶⁴ Hutchison, *supra* note 86, at 471, 476.

Hence, if expressive individuals and various postmodern subgroups within the union are to be true to their own identity (whatever that may be), the extraction of their funds in support of this hierarchy of desire (solidarity) exposes these individuals to the real risk that their interests will remain subordinated to those of the dominant majority. Accordingly, independent action, such as the withdrawal of dues payments, premised on affective-group (race, class, gender) affiliation or, alternatively, one's own expressive individualism, will become more attractive as "the benefits of . . . (cross-class, cross-racial[, cross-gender]) [union] decline."¹⁶⁵

It may be true that in advanced capitalist systems like the United States, individuals try "to ward off alienation and anomie with . . . collective symbolism and ritual, complete with [some form of] group solidarity."¹⁶⁶ Yet it seems equally true in the postmodern world (A) that anyone can assume any of a myriad forms of authentic identities¹⁶⁷ that distinguish and separate individuals and subgroups of individuals from one's peers (whoever they may be), and (B) that everyone "should be repelled by the notion of making contact with something larger and more enduring than oneself."¹⁶⁸ If this portrait depicts contemporary America, solidarity can be seen as nothing more than "coercive consensus."¹⁶⁹ Thus, fragmentation at the level of society and the level of group is probable if not inevitable — nor is it permissible for society to rank permanently in order of importance any of these various identities, if one believes, as pragmatists like Rorty and Dewey believe, that there is no "legitimizing ground for a fixed and durable political hierarchy."¹⁷⁰

To be sure, Rorty, and possibly other postmodern observers, accept some conception of solidarity.¹⁷¹ Moreover, we need not be persuaded fully by his Nietzschean

¹⁶⁵ *Id. See also id.* ("Thus, the benefits of union solidarity will decline as the calculus of cooperation versus independence changes in favor of independence." (citation omitted)).

¹⁶⁶ TERRY EAGLETON, *THE IDEA OF CULTURE* 70 (2000).

¹⁶⁷ For a discussion of, and a disagreement with this development, see Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann ed., 1994) (arguing that the process proceeds as follows: self-knowledge as self-creation leads inevitably to the origination of self-identity).

¹⁶⁸ Hutchison, *supra* note 159, at 144.

¹⁶⁹ EAGLETON, *supra* note 166, at 72. This conclusion may be consistent with two views of the First Amendment. One narrative sees the First Amendment as an aspiration that implies the necessity "of securing an open environment in which all can equally experiment with how to think and speak[, disassociate] and where no one can determine for anyone else what is orthodox." Benkler, *supra* note 69, at 26. An alternative view rests on the premise that "government power rather than private power, is the main threat to free expression." *Id.* at 26–27 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 683–84 (1994)).

¹⁷⁰ RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 104 (2003) (discussing Dewey's views).

¹⁷¹ See RORTY, *supra* note 120, at xvi.

It is created by increasing our sensitivity to the particular details of the pain and humiliation of other, unfamiliar sorts of people. Such increased sensitivity makes it more difficult to marginalize people different from

understanding, nor accept fully postmodernism with “[i]ts demotic sympathies [that] spring more from a scepticism of hierarchies.”¹⁷² Rorty’s antifoundationalism may denote the contemporary manifestation of Sophism that appears to deny reality while resisting all metanarratives that can make sense out of life.¹⁷³ Worryingly, the complete acceptance of Rorty’s view reifies particularism and its suspicion of universalist claims,¹⁷⁴ thus severing the individual completely from society. To the extent that postmodern claims are grounded in mandatory and normative demands as opposed to optional and descriptive aspirations, it may lead government “to alter the terms of civil association in ways that will neither resolve the problems . . . nor bring . . . social harmony.”¹⁷⁵ Postmodernism may run the risk of “fall[ing] victim to the ‘fraternal conceit’: the fanciful notion that community and social solidarity can be secured” by a compulsory form of “political association.”¹⁷⁶ Equally clear, postmodern thought gives rise to other critical concerns that limit the viability, if not the coherence of postmodern discourse.¹⁷⁷ Nonetheless, Rorty’s postmodern/ pragmatist

ourselves by thinking, “They do not feel it as *we* would,” or “There must always be suffering, so why not let *them* suffer?”

Id. (emphasis in original). It is possible that contemporary liberal politics has been captured and captivated by the notion of minimizing cruelty particularly in some public form. Cf. Yack, *supra* note 161, at 3–5 (discussing cruelty as part of Judith Shklar’s liberal theory). For a discussion of the improbability of self-creation, see HANNAH ARENDT, *ON VIOLENCE* 13 (2d ed. 1970) (“[A]ll notions of man creating himself have in common a rebellion against the very factuality of the human condition — nothing is more obvious than that man, whether as a member of the species or as an individual, does *not* owe his existence to himself . . .”).

¹⁷² EAGLETON, *supra* note 166, at 77 (discussing postmodernism more generally).

¹⁷³ See BUDZISZEWSKI, *supra* note 21, at 167.

¹⁷⁴ See EAGLETON, *supra* note 166, at 76.

¹⁷⁵ CHANDRAN KUKATHAS, *THE FRATERNAL CONCEIT: INDIVIDUALIST VERSUS COLLECTIVIST IDEAS OF COMMUNITY* 2 (1991).

¹⁷⁶ *Id.*

¹⁷⁷ The analysis proceeds as follows. Postmoderns contend that there is no such thing as truth out there. See, e.g., RORTY, *supra* note 120, at 5. If correct, then contemporary man may be left “[w]ithout the means to identify the good, [and hence] . . . remains ignorant of just how the evil he is able to identify has come about . . . [despite the fact that] his intuition is telling him that what he sees is evil.” DELSOL, *supra* note 1, at 52. Then, if we in fact are able to identify absolute evil out there, we are forced “to believe that an order exists beyond our will, beyond our capacity as creators of order” — thus placing into question “the subjective morality of our times.” *Id.* at 53.

We cannot proclaim, “To each his own morality,” and at the same time decry racism and apartheid. There is a flaw in this reasoning that we will inevitably have to confront. We can remain faithful to subjectivism and accept everything, including the unacceptable, which then simply becomes unacceptable “for some,” or we can hold on to our absolute judgment about evil, and thus cast aside our subjectivism.

Id.

analysis can be seen as an imperfect philosophical complement¹⁷⁸ to a public choice inquiry wherein collective action problems and the impossibility of comprehensive interest convergence¹⁷⁹ among all members of the group undermine both the attractiveness and possibility of voluntary cooperation. These difficulties have been known for some time and precede the advent and recognition of postmodern claims that verify rising fragmentation.

B. The Public Choice View

John Gray's distinctive contribution to the proper understanding of modern mass democracies concludes that modern

states tend overwhelmingly [to fail] . . . to protect or promote the public interest. Contrary to the classical theory of the state as the provider of public good — goods, that is to say, which in virtue of their indivisibility and non-excludability must be provided to all or none — *modern states are above all suppliers of private goods*.¹⁸⁰

Rather than provide simply “the pure public good of civil peace,” it is increasingly likely that the mission of “the modern state [is] . . . to satisfy the private preferences of collusive interest groups,”¹⁸¹ whether or not the pursuit of such aims is cloaked

¹⁷⁸ In no sense should this be understood to imply that Rorty actually makes philosophical claims as traditionally understood. Instead, consistently with Paul J. Griffiths's critique, Rorty can best be understood as one who identifies “[a] whole vocabulary — that of truth, reality, objectivity, universality” — which is simply refused. Paul J. Griffiths, *Offer Declined*, 154 *FIRST THINGS* 38, 40 (2005) (reviewing RICHARD RORTY & GIANNI VATTIMO, *THE FUTURE OF RELIGION* (2006)).

Refusal is not denial. It is, instead, the abandonment of one lexicon and the deployment of another. Someone who turns from philosophy to jazz improvisation has not refuted or rebutted philosophy, but merely refused or abandoned it. To refute or rebut would still be to practice philosophy, and this Rorty . . . do[es] not wish to do.

Id.

¹⁷⁹ Among other things, “‘Arrow Impossibility Theorem,’ suggests that majority-rule determination of social preferences must be either chaotic or illusory.” JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 12 (1997). As is well-known, “[t]he Arrow Theorem generalizes an eighteenth-century proof called Condorcet's Paradox . . . [demonstrating] that no voting rule . . . allows voters to express their true preference.” *Id.* This leads inevitably to an indeterminate outcome. *See id.* at 13.

¹⁸⁰ JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 11 (1993) (emphasis in original).

¹⁸¹ *Id.* at 11–12. *See also* James M. Buchanan, *The Constitution of Economic Policy*, in *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* 103, 107–08 (James D. Gwartney & Richard

in language implying some pure public purpose or alternatively infused with the language of market failure.¹⁸² It may be possible, therefore, to achieve private aims and objectives through government processes more efficiently than by relying on market processes.¹⁸³ Hence, “[m]odern democratic states have themselves become weapons in the war of all against all, as rival interest groups compete with each other to capture government and use it to seize and redistribute resources among themselves.”¹⁸⁴ The “central tendency” of this political process may rightly imply that “many, perhaps most, statutes, if evaluated honestly and realistically, would be found to lack any true basis in the public interest.”¹⁸⁵

As Dennis Mueller illumines, “[i]nterest groups come in a wide variety of institutional forms and sizes. Some seek to further the objectives of their members as factors of production or producers.”¹⁸⁶ Examples of such interest groups include “labor unions, farmer associations, professional associations . . . , and industrial trade associations.”¹⁸⁷ Meanwhile, other groups “seek to influence public policy or public opinion with respect to particular public good — externality issues.”¹⁸⁸ Examples include “[p]eace groups, environmental groups and the National Rifle Association.”¹⁸⁹ Frequently, “a group is organized to pursue one objective, and then once organized turns to other forms of activity to benefit its members.”¹⁹⁰ Consistently with this conclusion, “[l]abor unions came into being to improve the bargaining power of workers vis-a-vis management. But once the large initial costs of organization had been overcome,” they turned their attention to other efforts that benefitted workers, union leaders, union majorities, or those who can be seen as outsiders.¹⁹¹ To be sure,

E. Wagner eds., 1988). *But see* FARBER & FRICKEY, *supra* note 9, at 7 (offering a limited version of public choice theory, suggesting that self-interest simply means avaricious greed in a simple monetary sense and thus implying that self-interest can be separated from ideological/nonmaterial considerations).

¹⁸² WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY* 1 (1994) (“The vision underlying this expansion [of regulation and bureaucracy] is that government succeeds where markets fail.”). It is possible that “welfare economists [have] dethroned markets” in western countries, and have “administered the coronation of government” premised on the claim of “undersupplied public goods, exorbitant and ubiquitous social costs of private actions . . . and [attached to the notion of] unfairly distributed wealth and income.” *Id.* at 3.

¹⁸³ *See id.* at 108.

¹⁸⁴ GRAY, *supra* note 180, at 4.

¹⁸⁵ RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 382 (1981) (describing but not necessarily “condemn[ing] as unconstitutional the most characteristic product of a democratic . . . system”).

¹⁸⁶ MUELLER, *supra* note 6, at 308.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

if the group is comprised of individuals who are part of a community of interest, there may be some incentive to free ride.¹⁹² On the other hand, the absence of a commonality of interest vitiates free-rider concerns and claims.

If one believes that "there are any moral rights at all, it follows that there is at least one natural right, the equal right of all" individuals to make choices free from coercion or restraint from others.¹⁹³ Hence the servicing of private interests by the government or by groups leads inevitably to inter-group and intra-group conflict. Correspondingly, the benefits that flow from either fraternal organizations or free, individually-focused action have been diminished relative to the benefits that are achievable if and when the government is captured by private interest. Hence, "[t]he transformation of the modern state" into a provider of private or quasi-private/quasi-public goods "has . . . weaken[ed] the vitality of autonomous institutions," as well as the vitality "of free individual activity."¹⁹⁴ When government, in the shape of a majoritarian democracy, "bestows favor upon a group" (Group A), often this group's activity is encouraged at the expense of other groups or subgroups (Groups B and C).¹⁹⁵ This is premised on the prediction that a specific form of government regulation promotes egalitarianism, the interests of the poor,¹⁹⁶ or the general interests. While this intuitively utilitarian calculation involves "the possibility of trading off the interests in the life or liberty of . . . [some] people against a [perceived] greater sum of the lesser interests of others,"¹⁹⁷ as a general matter, "[t]here is neither theoretical justification nor empirical evidence to support this [welfare enhancing] assumption."¹⁹⁸

While it is predictable that someone or some group benefits from government policy, the named beneficiaries may simply provide camouflage for the actual beneficiaries who lobby, litigate, engage in political fundraising, or otherwise invest in

¹⁹² *Id.*

¹⁹³ H.L.A. Hart, *Are There Any Natural Rights?*, in THEORIES OF RIGHTS 77, 77 (Jeremy Waldron ed., 1984). *But see* Margaret MacDonald, *Natural Rights*, in THEORIES OF RIGHTS *supra*, at 21 ("That men are entitled to make certain claims by virtue simply of their common humanity has been equally passionately defended and vehemently denied.").

¹⁹⁴ GRAY, *supra* note 180, at 12. *See also* DAVID T. BEITO, FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890–1967 (2000). During the period from 1890 through the 1920s, "more Americans belonged to fraternal societies than any other kind of voluntary association, with the possible exception of churches." *Id.* at 2. Ethnic social welfare organizations provided more assistance than other institutions, both public and private. *See id.* In contrast to government aid, which rested on hierarchy, "fraternal aid rested on an ethical principle of reciprocity." *Id.* at 3. Accordingly, "[t]here is reason to believe that . . . [there is an inverse correlation] between the emergence of the welfare state and the decline of fraternal services." *Id.* at 228.

¹⁹⁵ *See, e.g.*, Richard E. Wagner & James D. Gwartney, *Public Choice and Constitutional Order*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS, *supra* note 181, at 29, 51.

¹⁹⁶ *Id.* at 52.

¹⁹⁷ Jeremy Waldron, *Introduction* to THEORIES OF RIGHTS, *supra* note 193, at 1, 18–19.

¹⁹⁸ Wagner & Gwartney, *Public Choice and Constitutional Order*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS, *supra* note 181, at 29, 50.

the effort to maintain, expand, and ensure survival of the benefit (subsidy).¹⁹⁹ Similarly, it is possible that groups can be captured by the self-interests of subgroups, group majorities, or entrenched leaders.²⁰⁰ Those in power may then deploy general group revenues to finance special interest benefits as opposed to excludable club goods that might provide benefits solely to members. Claims that the true beneficiaries include all group members and that all group members benefit equally are used to defend special interest privileges that accrue to some (including those outside the group) but not all members. Such claims can best be described as subterfuge. Operating consistently with the prospect of group capture, special interest legislation²⁰¹ (such as expanded access to food stamps, national health insurance, or other non-excludable collective goods²⁰²) may be demanded by factions within a union or other group. This process leads inevitably to a difficult-to-justify redistribution of group revenues to provide largely private benefits (positive externalities) to outsiders as well as a limited yet influential cohort of insiders who favor such a result. In sum, the prospect for collective self-interest determination premised on goal uniformity derived from group solidarity may be grim unless evidence of preference and interests unanimity emerges.

C. Implications for Labor Unions

As a general proposition, the foregoing appraisal applies to labor market regulation in the form of the NLRA,²⁰³ the RLA,²⁰⁴ and similar statutes affecting state government employees.²⁰⁵ This appraisal implies that labor market regulation creating compulsory union fails to promote and preserve either the general or group interest. Instead, statutory protection tends to yield largely private benefits. Secondly, this appraisal predicts labor unions, just like any other group, can be captured to

¹⁹⁹ See generally *id.* at 51.

²⁰⁰ See Schwab, *supra* note 40, at 367–74, 380–83.

²⁰¹ For an exposition of the distinction that scholars and the courts make between special interest legislation and class legislation, see David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 11–31 (2003).

²⁰² See, e.g., Hugh L. Reilly, *The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes*, 32 MERCER L. REV. 561, 571 (1981) (listing some of the lobbying goals apparently funded by union dues in the *Communications Workers of America v. Beck* litigation).

²⁰³ 29 U.S.C. §§ 151–69 (2000).

²⁰⁴ 45 U.S.C. §§ 151–88.

²⁰⁵ Since “[t]he [NLRA] encourages union organizing efforts by forbidding the employer to fire or threaten union organizers and sympathizers,” and since “the Norris-LaGuardia Act forbids yellow dog contracts, which would enable the employer to exploit the workers’ incentives to free ride,” organizing campaigns have an advantage vis-a-vis employers. POSNER, *ECONOMIC ANALYSIS*, *supra* note 90, at 354.

benefit either the union majority and/or union leaders while failing to consider adequately the actual diversity of views and interests within the group. This analysis breathes life into two equally poignant probabilities: (A) Terry Eagleton's claim that during an earlier time, the international and largely Western labor movement spoke to the masses — today it speaks to the elites;²⁰⁶ and (B) if solidarity implies "the way of life of a particular people living together in one place,"²⁰⁷ as T.S. Eliot contends, union leaders may no longer inhabit the same place as rank and file union dues payers. Both of these possibilities operate coherently with the observation that "[m]odern thought is much more elitist than ancient thought, though it talks a less elitist line."²⁰⁸

Coextensively with these various contentions, it should be observed that we live in an epoch that has witnessed radically new perspectives on human liberty and autonomy. Evidently, the Supreme Court has confirmed the correctness of this possibility. On its account, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."²⁰⁹ Conversely, Professor Budziszewski counsels that the notion of radical autonomy, if taken too far, leads inevitably to the following conclusion:

If morality is created, not discovered, then surely different groups and individuals will create *different* moralities, for they will "care most" about different things. There will be no common standard by which to adjudicate the conflicts among these invented moralities. The clashes among them will be like clashes of clothing styles, with this strange difference — that the stakes are who lives and who dies.²¹⁰

If the Supreme Court is correct, it becomes doubtful that the liberty interest the Court seems determined to protect can coexist peacefully with the right of unions and union leaders to speak on behalf of the entire workforce in their search for the meaning of the universe or the mystery of human life. If Budziszewski's cautionary explication is correct, the descriptive component (but not the normative element) of his analysis echoes Rorty's claim that morality (solidarity) is simply a component of self-creation. That provokes a question: How can workers freely engage in this self-creation process when a union, ably assisted by statutory coercion, acts as an agent that aims

²⁰⁶ EAGLETON, *supra* note 166, at 77.

²⁰⁷ *Id.* at 112 (quoting T.S. ELIOT, NOTES TOWARDS THE DEFINITION OF CULTURE 120 (1948)).

²⁰⁸ BUDZISZEWSKI, *supra* note 21, at 164.

²⁰⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

²¹⁰ BUDZISZEWSKI, *supra* note 21, at 6–7.

to produce a radically opposite morality grounded in opposing preferences that are attached to some hierarchically determined and collectively imposed understanding of self-interest?

While few deaths have been reported in connection with union organizing, the stakes remain high. Labor unions, therefore, form the hub of an important debate about how to view human association — either within the parameters of government regulation or as part of a largely consensual group. Two options exist. On one hand, a collectivist conception attracted to government regulation “sees political society as a form of association that has value only insofar as it serves to unite men in a community in which the bonds of social solidarity are strong.”²¹¹ From this perspective, “human freedom will be attained only when civil association [commands] . . . that individuals act collectively in pursuit of their [hierarchically mandated] common ends.”²¹² This approach likely extends the bounds of a mandatory collectivity to unions as statutory instruments of the polity in the quest for presumptively common objectives. On the other hand, classical liberalism implies that a defensible form of association consists of consenting “individuals bound by rules of just conduct which, by specifying the terms of cooperation, regulate their behaviour and ensure peace: civil association has no purpose other than to preserve order so that the individual might pursue his own (private) ends, together with others or alone.”²¹³ Labor unions, under this approach, can only be legitimated when they act as purely voluntary associations that require consent before the obligations of membership attach.

The United States has opted for the former approach. Correctly scrutinized, “the regulation of labor markets has created a legal edifice of stunning complexity,”²¹⁴ augmented by the probability that most economic rents accrue to labor.²¹⁵ Despite statutory success, evidence continues to mount confirming a sharp decline in union density. Declining strength leads to the assertion that “private sector labor law . . .

²¹¹ KUKATHAS, *supra* note 175, at 2.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ EPSTEIN, *supra* note 25, at 151. *Accord* United Food & Commercial Workers Union, Local 1036 v. NLRB, 307 F.3d 760, 763 (9th Cir. 2002) (en banc) (“The NLRA . . . establishes an elaborate and complicated structure that governs labor relations in almost all of the industries within the nation’s private sector.” (footnote omitted)).

One source of complexity arises from the fact that “membership in a labor union allegedly constitutes a contract between the member and the union, the terms of which are governed by the constitution and by-laws of the union. . . . This contractual conception . . . widely prevails in this country.” *Int’l Ass’n of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958). Sometimes state law provides a remedy for breach of contract. *See, e.g., id.*

²¹⁵ Lawrence F. Katz & Lawrence H. Summers, *Industry Rents: Evidence and Implications*, in *BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS* 209, 210 (Martin Neil Bailey & Clifford Winston eds., 1989) (noting that “[c]apital owners in the American economy receive few monopoly rents,” and most rents, perhaps 80 to 85 percent, go to labor).

has shrunk in its reach and its significance, and is clearly ailing,”²¹⁶ thus, hampering “workers’ efforts to advance their own shared interests through self-organization and collective protest, pressure, negotiation, and agreement with employers.”²¹⁷ This contention suggests that there is a “‘gap’ between the desire for and the supply of collective representation in workplace governance”²¹⁸ — implying that this socially beneficial and market-correcting outcome is under-produced. Proving this claim²¹⁹ requires substantiation of interest convergence among workers. The postmodern

²¹⁶ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002). *But see* Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 WAYNE L. REV. 705, 721 (2003).

[O]rganized labor’s future within the United States must observe that union density in the private sector continues its downward spiral. In reality, current union penetration . . . fails to differ greatly from union density prior to the passage of the NLRA. . . . [T]his . . . return to the *status quo ante* [without more, fails to] constitute a principled ground for alarm.

Id. (footnotes omitted). Of some interest, the evidence may imply that unions have been too successful in certain industries in driving wages and benefits above the level that is sustainable. *See, e.g.*, Brett Clanton & Daniel Howes, *Suppliers Urge UAW to Aid GM, Ford*, DETROIT NEWS, May 9, 2005, at 1A.

²¹⁷ Estlund, *supra* note 216, at 1527.

²¹⁸ *Id.* at 1528 (footnote omitted). These views may reflect a dubious attachment to the purportedly blissful but actually spotty days of the labor movement during and after the New Deal. On one account, the passage of the Wagner Act represented “labor’s legal zenith.” GETMAN ET AL., *supra* note 76, at 5. *But see* VEDDER & GALLAWAY, *supra* note 51, at 141–46 (showing data supporting that government sponsored “unionization was the more important cause of prolonged high unemployment” during the period immediately following the passage of the National Industrial Recovery Act and the National Labor Relations Act, which includes the downturn in 1937–1938.). For a global view of unions, see JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* 358 (John Wilkinson trans., 1964) (“The worker through his unions is intensifying his own thralldom to techniques, augmenting their powers of organization, and completing his own integration into that very movement from which . . . unionism had originally hoped to free him.”).

²¹⁹ On the implausibility of government market correction and the probability of increasing imperfection, in the context of labor law, see Charles W. Baird, *Labor Law and Labor-Management Cooperation: Two Incompatible Views*, 6 CATO J. 933, 935 (1987) available at <http://www.cato.org/pubs/journal/cj6n3/cj6n3-13.pdf>. (“[T]wo sources of government failure [impede government regulation]: the knowledge problem and the political problem.”). *But see* Stearns, *supra* note 122, at 1242 (“Assuming participants legislate without knowing how the rules they devise will affect particular constituents in future transactions, all parties then have an interest in selecting efficient, utility-maximizing rules.”). This view does not advocate limiting legislative action to correcting market failures; rather, it argues that “the legislature . . . [may] have a comparative advantage relative to market participants” in correcting certain kinds of market failures but may lack that comparative advantage when engaging in certain kinds of distributive legislation. *Id.* at 1243. *See also id.* at 1242–43 nn.85–87 and accompanying text.

project, public choice theory, and a reasonable understanding of human autonomy flatten this possibility.

Indeed, just as difficulties exist in translating individual preferences into a social preference, difficulties persist in transmuting individual union members' preferences into some collective preference.²²⁰ Labor unions, protected by favorable legislative mandates that compel dues and fees in exchange for benefits that members presumably desire, may not represent a model of cooperation at all, and thus may accentuate collective action problems. Instead, unions may represent an involuntary collection of people who happen to share some (but not necessarily preference defining) characteristics.²²¹ This deduction implicates a tantalizing prospect: if collective bargaining and societal transformation are seen as a socially beneficial outcome (however that contention is arrived at), then government regulation is required, since it is unlikely that self-interested individuals will behave in such socially beneficial ways except under ideal circumstances.²²²

Unions and other groups, of course, exist. Explaining their existence (particularly large unions) may require "some other explanation than collective self-interest"²²³ since "worker solidarity . . . [may] not suffice"²²⁴ or, alternatively, may not exist. Nonetheless, Mancur Olson explains the existence of groups premised on the availability of "selective incentives that benefit group members such as . . . compulsory membership and picket lines."²²⁵ Evidently "[w]ithout such 'incentives,' the self-interest assumption of group theorists would generate a point prediction of zero collective action in large groups [such as unions], and would therefore be falsified in virtually every case."²²⁶ On the other hand, Olson concedes that groups may be comprised, at least partially, of "altruistic individuals" or, alternatively, "irrational individuals."²²⁷ At a minimum, this implies that selective incentives, such as union security agreements coupled with the right to terminate workers for nonpayment of dues, may not be necessary in every case.²²⁸ Nevertheless, collective action problems persist particularly "[w]here the benefits from collective action are not the same across all group members."²²⁹ In that case, "there is a systematic tendency for 'exploitation'

²²⁰ McNUTT, *supra* note 151, at 47. This difficulty will continue to persist unless some form of unanimous agreement can be discovered. *See id.*

²²¹ Cf. Posner, *supra* note 143, at 135.

²²² *See* Katz, *supra* note 89, at 41. If Katz is correct, the failure of workers to voluntarily cooperate in the formation of a union for collective bargaining purposes may constitute evidence of market failure, thus providing substantial scope for legal rules and institutions to promote an efficient exchange of wages for the use of human capital.

²²³ Friedman, *supra* note 10, at 20.

²²⁴ MUELLER, *supra* note 6, at 309.

²²⁵ Friedman, *supra* note 10, at 20 (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 71 (1965)).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *See id.*

²²⁹ MUELLER, *supra* note 6, at 309.

of the great by the small.”²³⁰ In sum, consistent with public choice theory and Terry Eagleton’s intuition,²³¹ union hierarchs tend to exploit labor organizations for their own private benefit while speaking to and on behalf of elites as opposed to all workers.

Since the inception of “protected status under . . . collective bargaining statute[s],”²³² attached to the Pigovian interpretation that government exists as “a corrector of market failure,”²³³ unions, workers, and employers have been parties to a plethora of rulings and counter-rulings from administrative agencies and (often incomplete) judicial decisions as part of the federal and various state governments’ attempt to locate, presumably, missing labor market efficiency or to resolve collective action disputes. The NLRA, through its enforcement mechanism, relies on court adjudication of increasingly technical and often repetitive arguments that are revisited in the form of additional litigation or ambiguous and often conflicting National Labor Relations Board (NLRB or Board) re-evaluations.²³⁴

Following the issuance of a Board decision, courts are then disposed to issue proclamations about the necessity of deferring to the omni-competence of administrative agencies, along with an explication of the interstices of the agency’s rule-making authority. This progression mirrors Justice Frankfurter’s observation about the hyper-technical “process of litigating elucidation.”²³⁵ Litigating elucidation has a cost in addition to evident increases in transaction costs: it may obscure and encumber rights that union dissenters should enjoy since it is doubtful all members (dues payers) share the same interests that union leaders or academic observers freely assert on their behalf. Another factor that obscures rights that dissenters may possess is simply the costs associated with delays in processing dues objector cases — delays that approach or exceed seven years.²³⁶ Since labor unions are unlikely to operate within the parameters of unanimous consent, public choice theory as revitalized by postmodern insights forecasts that the rights and interests of the minority (union

²³⁰ *Id.* (emphasis and citation omitted).

²³¹ See *supra* notes 166, 169 and accompanying text.

²³² EPSTEIN, *supra* note 25, at 151.

²³³ MCNUTT, *supra* note 151, at 2. Market failure occurs when the allocation of resources is inefficient. See John O. Ledyard, *Market Failure*, in ALLOCATION, INFORMATION, AND MARKETS 185, 185 (John Eatwell, Murray Milgate & Peter Newman eds., 1989). “Market failure is often the justification for political intervention in the marketplace,” premised on the conclusion that “everyone [or at least one person] can . . . be made better off” without making anyone worse consistent with Paretian claims. *Id.* To be clear, the Pigovian premise may not sustain a social welfare justification for collective bargaining statutes. Cf. Baird, *supra* note 219, at 933–37 (arguing that government impedes the development of effective forms of worker-management cooperation).

²³⁴ See, e.g., Harry G. Hutchison, *Toward a Robust Conception of “Independent Judgment”: Back to the Future?*, 36 U.S.F. L. REV. 335, 341 (2002) (discussing the evolution of the NLRA’s exclusion of “supervisors” from the collective bargaining unit).

²³⁵ Int’l Ass’n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

²³⁶ See, e.g., HUNTER, KERSEY & MILLER, *supra* note 35, at 8.

dues objectors) are likely to be subordinated to the tendency of modern mass democracies and groups to service private interests as opposed to the interests of either the group, identifiable subgroups, or individual members. The *United Food* opinion extends this possibility.

III. UNION ORGANIZING: GERMANE OR NONGERMANE? AN ANALYSIS OF THE *UNITED FOOD* CASE

The legitimacy of compulsory union dues turns on which activities are considered germane or non-germane, as well as a determination of whether activities implicate communicative speech adverse to the interests of dues objectors. Conclusions about whether certain union expenditures are germane (and therefore defensible under standard judicial and economic analyses) may depend on one's conception of the workplace, the persuasiveness of the empirical data available, and one's understanding of communicative content associated with a challenged activity, even if no ideological purpose is conceded by the labor union in question. Determining whether activities are representational or non-representational depends, in part, on rival economic claims and conclusions that implicate a cost-benefit calculus that either supports or opposes the presumed social welfare benefits of unionization. Before examining case-specific economic evidence concerning the effect that union organizing tends to have on wages, it may be useful to note that largely neoclassical "[e]conomic studies find that 'most, if not all, of the gains of union labor are made at the expense of non-unionized workers, and not at the expense of earnings on capital.'"²³⁷ Some studies find that union monopolies raise wages of union members in exchange for both market inefficiency and inequality; hence, a number of "economic studies implicitly or explicitly judge unions as having a negative impact on the economy"²³⁸ and on social welfare,²³⁹ including but not limited to a rise in unemployment rates.²⁴⁰ This

²³⁷ STEVEN E. RHOADS, *THE ECONOMIST'S VIEW OF THE WORLD: GOVERNMENT, MARKETS, AND PUBLIC POLICY* 256 n.55 (1985) (quoting Harry Johnson & Peter Mieszkowski, *The Effects of Unionization on the Distribution of Income: A General Equilibrium Approach*, 84 Q.J. ECON. 539, 560 (1970)). This observation becomes more important when we recognize that "[f]or most workers, all or almost all their income is derived from the sale of their labor." STEPHEN J. SPURR, *ECONOMIC FOUNDATIONS OF LAW* 18 (2006).

²³⁸ RHOADS, *supra* note 237, at 256 n.55.

²³⁹ EHRENBERG & SMITH, *supra* note 37, at 461–62 (noting that some evidence indicates that unionization, for a variety of reasons, contributes to social welfare losses). *But see id.* at 462–63 (discussing potential increases in social welfare derived from unionization).

²⁴⁰ *See supra* note 51. *But see* Peter Kuhn, *Unions and the Economy: What We Know; What We Should Know*, 31 CAN. J. ECON. 1033 (1998). While "standard microeconomic theory . . . predicts that . . . [labor's] factor-demand elasticities should be negative," suggesting that unions raise wages and reduce employment, Kuhn contends "that unions' effects on employment are theoretically ambiguous" within a North American context. *Id.* at 1040. Kuhn does concede the centrality of a negative union employment effect in much of the European macroeconomic literature. *See id.*

process may entail a two-fold response to a union's successful attempt to raise wages. First, higher wages may lead some employers to substitute away from labor and toward capital ("substitution effect"²⁴¹). Second, firms may respond by deciding that the cost increase associated with higher wages requires an increase in the price of its products, thus reducing the firm's sales and hence its demand for labor ("scale effect"²⁴²). While a number of defenders of the labor movement concede that "unions raise wages in ways that misallocate labor and reduce social output," unions also "change[] work relations in socially beneficial ways."²⁴³ These socially beneficial advantages are not only far from being fully quantifiable, but may also be highly suspect.²⁴⁴ These presumed advantages are linked to the conclusion "that the nation should [endeavor to] reverse the decline in union [strength]."²⁴⁵ On the other hand, the largely negative social welfare outcomes associated with unionization may produce skepticism about the asserted benefits associated with union organizing.

Returning to the question of the wage-effect of union organizing, a comparison of spillover effects with threat effects yields conflicting answers. Spillover analysis indicates that the achievement of higher wages for newly organized workers, like previously organized ones, means typically a union can only "succeed[] in raising the wages of its members who ke[ep] their jobs."²⁴⁶ Union organizing implies that unions

shift[] some of [their] members to lower-wage jobs in the non-union sector and, because of this spillover effect, . . . lower[] the wage rate paid to individuals initially employed in the nonunion sector. As a result, the observed union relative wage advantage . . . will tend to be greater than the true absolute effect of the union on its members' real wage.²⁴⁷

By contrast, the threat effects of unionization imply that "[n]onunion employers, fearing that a union would increase labor costs and place limits on managerial prerogatives, might seek to buy off their employees by offering them above-market wages."²⁴⁸ While the wage increase and resulting decline in employment in the union sector result in a shift in "the supply of labor to the nonunion sector,"²⁴⁹ employers

²⁴¹ I am indebted to Stephen Spurr for this observation. E-mail from Stephen Spurr, Professor of Economics, Wayne State University (Aug. 23, 2005, 16:06:34 EST) (on file with author).

²⁴² *Id.*

²⁴³ Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 143, 144 (Lawrence Mishel & Paula B. Voos eds., 1992) (footnote omitted).

²⁴⁴ *See id.* ("Unions and collective bargaining change work relations by lowering turnover and . . . increasing productivity . . .").

²⁴⁵ *Id.* at 145.

²⁴⁶ EHRENBURG & SMITH, *supra* note 37, at 453.

²⁴⁷ *Id.* (emphases omitted).

²⁴⁸ *Id.* at 454.

²⁴⁹ *Id.*

are not free to take advantage of this because they fear unionization, and hence, they attempt to buy off their employees with above-market wages.²⁵⁰ The threat of a union, therefore, results in a reduction in employment in the nonunion sector as the employers pay higher wages in lieu of unionization.²⁵¹ “[B]ecause the nonunion wage is now higher than the original wage, the observed union relative wage advantage is smaller than the absolute effect of unions on their members’ real wages.”²⁵² Taken as a whole, the evidence demonstrates in some cases that threat effects predominate,²⁵³ suggesting little benefit can be achieved by union organizing financed by already organized workers. This seems particularly true when the focus is on the wage effect received by already organized workers from a union organizing campaign aimed at unrepresented workers. In other cases, spillover effects predominate,²⁵⁴ implying that already organized workers may receive a positive wage benefits when unions organize unrepresented workers.

Some economic evidence, to be sure, exists in support of the possibility that workers “covered by union contracts earn wages that are, on average, 15 percent higher than observationally equivalent non-covered workers.”²⁵⁵ Conversely, it may also be the case “that workers who are observationally equivalent . . . [in an] analys[is] of standard social surveys are *not* equivalent to employers.”²⁵⁶ This conclusion diminishes the putative wage effects associated with union organizing. At least one major large-scale study concludes that little or no positive wage benefits can be derived from a successful organizing campaign.²⁵⁷ Such evidence serves to confirm Milton Friedman’s pessimistic assertion “that the ability of unions to raise wage rates . . . was somewhat exaggerated, because most unions could not overcome market forces that would tend to keep wages aligned with competitive rates.”²⁵⁸ Further, if and when high wages and benefits are achievable, it is far from clear that they will be an unmixed blessing for organized workers from a long-run perspective.²⁵⁹ Moreover,

²⁵⁰ *Id.* at 454–56.

²⁵¹ *See id.* at 454.

²⁵² *Id.*

²⁵³ *See id.* at 456–57.

²⁵⁴ *See id.* 457–58.

²⁵⁵ Kuhn, *supra* note 240, at 1036.

²⁵⁶ *Id.* at 1037 (emphasis in original).

²⁵⁷ John DiNardo & David S. Lee, *Economic Impacts of Unionization on Private Sector Employers: 1984–2001*, at 2–3 (Nat’l Bureau of Econ. Research, Working Paper No. 10598, 2004), available at <http://www.nber.org/papers/w10598> (using multiple establishment-level data sets representing establishments facing organizing drives in the United States during 1984–2001 and noting that “union wage impacts are small — centered around zero”).

²⁵⁸ *Id.* at 4.

²⁵⁹ *See, e.g.,* Daniel Howes, *Gettelfinger Didn’t Have Any Other Choice in the Visteon Deal*, DETROIT NEWS, May 25, 2005, available at <http://www.detroitnews.com/2005/insiders/0505/30/C01-192690.htm> (discussing the unemployment effects associated with collective bargaining success in the form of negotiations that lead to high wages and benefits); *see also*

when labor unions achieve a wage premium, the evidence suggests that such success has a negative effect on job growth because “[j]ob growth taking place in new workplaces is almost entirely nonunion, at least initially.”²⁶⁰ To the extent that vibrant competition exists within organized industries and among organized firms, the economic evidence suggesting fluctuating ambiguity may be consistent with F.A. von Hayek’s idea that competitive markets produce a “rivalrous flux” or “a kind of partially ordered chaos” as opposed to a stable equilibrium.²⁶¹ Taken as a whole, the economic evidence does not support the conclusion that already organized workers are likely to receive a causally connected wage benefit from extra-bargaining unit organizing efforts.

On the other hand, a contrary view — disconnected from the empirical evidence — emphasizes that such pessimistic claims “neglect[] the role unions play in giving workers a voice both at the workplace and in the political arena.”²⁶² Assuming the accuracy of this observation, it is possible to understand efforts aimed at depriving unions of dues that fuel organizing campaigns as an unnecessary constraint on unions’ political mission to transform society and an unnecessarily crabbed conception of the union movement. These observations underscore the conviction that what is germane to a labor union’s activity operates at the intersection of economic analysis and the union’s political, social, and ideological agenda in conflict with the diversity of member views on such issues.

A. *The United Food Case*

Despite the mixed economic data, the *United Food*²⁶³ case provided an opening for the NLRB to reconsider *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,²⁶⁴ *Lehnert v. Ferris Faculty Association*,²⁶⁵ and *California Saw & Knife*

Stan Greer, Nat’l Inst. for Labor Relations Research, *Is Forced Unionism Fueling the Health-Insurance Crisis?*, available at <http://www.nilrr.org/HealthCrisis.htm> (noting that “‘exclusive’ union bargaining has had a negative impact on the businesses’ rates of investment and accumulation of physical and innovative capital,” leading to a strong correlation between the presence of state right-to-work laws and the more rapid growth in the number of jobs offering medical benefits).

²⁶⁰ Barry T. Hirsch & Edward J. Schumacher, *Private Sector Union Density and the Wage Premium: Past, Present and Future*, 22 J. LAB. RES. 487, 492 (2001) (emphasis omitted).

²⁶¹ For a discussion of von Hayek and related issues, see MITCHELL & SIMMONS, *supra* note 182, at 198–201.

²⁶² RHOADS, *supra* note 237, at 256 n.55 (citation omitted).

²⁶³ *United Food & Commercial Workers Locals 951, 7 and 1036 (Meijer, Inc.)*, 329 N.L.R.B. 730 (1999), *enforced in part*, 307 F.3d 760 (9th Cir. 2002), *cert. denied*, 537 U.S. 1024 (2002).

²⁶⁴ 466 U.S. 435 (1984).

²⁶⁵ 500 U.S. 507 (1991).

Works.²⁶⁶ This reconsideration interacts with the Board's application of *Communications Workers of America v. Beck*²⁶⁷ to the pivotal issue — the chargeability to nonmembers of fees related to expenditures for organizing activities.²⁶⁸ "The consolidated complaint alleged . . . that Local 951 and Local 7 violated Section 8(b)(1)(A) of the Act by allocating expenditures for organizing as chargeable to objecting non-member employees and by expending dues and fees collected from them for such activities."²⁶⁹ The various complainants, subject to some exceptions, were governed by a union security clause although each had resigned from full membership in the union and had notified their respective union that they "objected to paying for non-representational activities."²⁷⁰ Local 951 acknowledged the resignations but continued to demand full payment of dues "to be placed in escrow pursuant to Local 951's service rebate procedure."²⁷¹ Local 7, in effect, acknowledged the resignations and indicated that the complaining employees would now be accorded "financial core member" status at reduced fees.²⁷²

1. The NLRB Opinion

The administrative law judge hearing the case "dismiss[ed] the complaint allegations that Locals 7 and 951 violated Section 8(b)(1)(A) by allocating expenditures for organizing as chargeable to nonmembers, . . . [and] rejected contrary precedent in Railway Labor Act and public sector employment cases."²⁷³ Instead, Judge William J. Pannier III "noted that the Board had concluded in *California Saw & Knife Works* that Railway Labor Act and public sector case precedent does not govern evaluation and allocation of union expenditures under the Act."²⁷⁴ Significantly, he "*did not make a ruling* on the expert testimony that was presented concerning . . . wages, benefits, and working conditions, . . . which [might] prevail in the industry or area [that became organized]. He found, however, that Congress *believed*" there was a positive correlation between organizing and wages.²⁷⁵ Whether Congress ever expressed this collective belief, or concurred in the judgment that organizing can serve to justify compulsory dues assessments against dissenters, may be dubious and difficult to prove. Instead of providing convincing evidence on these questions, the administrative law judge offered the simplistic but "commonly held belief that the

²⁶⁶ 320 N.L.R.B. 224 (1995).

²⁶⁷ 487 U.S. 735 (1988).

²⁶⁸ *United Food*, 329 N.L.R.B. at 730–31.

²⁶⁹ *Id.* at 730.

²⁷⁰ *Id.* (Local 951); *id.* at 731 (Local 7).

²⁷¹ *Id.*

²⁷² *Id.* at 731.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* (emphases added).

competitiveness of a unionized employer is adversely affected when that employer's competitors are not unionized, because those competitors possess greater latitude to reduce prices than does the unionized employer."²⁷⁶ While that claim may have some merit, the judge focused on the fact that "unionized employers object[] to unions' demands for increased wages and benefits."²⁷⁷ On the other hand, the judge failed to offer any evidence to suggest that nonunion employers endorse or encourage employee demands for increased wages and benefits. Hence, his proof, however exacting, appears unpersuasive from both an economic and legal standpoint.

But even accepting his analysis, it can be argued

that organizing . . . directed toward unrepresented employees . . . could be said to be unrelated to the union's performance of its duties to the employees whom it represents. Additionally, any effect on the union's bargaining strength derived from its organizing efforts is arguably too attenuated to support finding organizing expenses to be chargeable.²⁷⁸

Moreover, as the complainants pointed out, the Supreme Court in *Ellis* determined

that organizing expenses are nonchargeable to objecting nonmembers under the Railway Labor Act . . . and that the Supreme Court in *Beck* found the provisions of the Railway Labor Act and the National Labor Relations Act that authorize compulsory unionism to be identical in all material respects and that Congress "intended the same language to have the same meaning in both statutes."²⁷⁹

In sum, there are powerful arguments and some empirical evidence that imperil the conclusion that organizing expense ought to be charged to objecting nonmembers under the NLRA.

Dismissing such arguments and evidence, the Board found sufficient empirical evidence to connect organizing and wages rates.²⁸⁰ Hence, the Board concluded that "organizing is both germane to a union's role as a collective-bargaining representative and can benefit all employees in a unit already represented by a union."²⁸¹ The Board found higher wages provided a direct, positive benefit to all workers in a unit

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 732 (discussing the general counsel's objections to the administrative judge's findings).

²⁷⁹ *Id.* (quoting *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 747 (1988)).

²⁸⁰ *See id.* at 738.

²⁸¹ *Id.* at 736.

already represented by a union.²⁸² Consistently with free-rider fears, dues objectors must pay “their fair share of the union’s organizing expenses.”²⁸³ The Board came to this conclusion without requiring proof that such organizing activity actually results in higher wages or collective bargaining contracts for newly represented workers or even results in a favorable representation decision that affects targeted workers. Although representation and collective bargaining agreements are salient predicates to the Board’s holding, the NLRB observed questionably and explicitly that contrary precedents disallowing organizing expenses under the RLA or within the public sector are “not binding in the context of . . . NLRA [decision-making].”²⁸⁴

2. A Dissenting View

Member J. Robert Brame found the majority opinion of the Board unconvincing. Instead, he found that “the issue of organizing expenses [wa]s, without question, controlled by the Supreme Court’s decision in *Ellis v. Railway Clerks*.”²⁸⁵ Member Brame found three specific deficiencies in the NLRB’s decision making:

First, the Court found no basis in the legislative history for the notion that, in authorizing the union shop, Congress aimed to enhance union organizational efforts. Second, the Court recognized that, where a union shop provision is in place, the bargaining unit employees are already organized, so organizing expenses are necessarily spent on employees outside the unit, and the Court found that using dues to recruit members outside the unit “can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer.” Third, the Court reasoned that, as organizing “only in the most distant way works to the benefit of those already paying dues,” organizing was not the sort of benefit that Congress had in mind in authorizing union security to prevent “free riders” from enjoying benefits obtained by the union for which they had not paid.²⁸⁶

²⁸² See *id.* at 738 (finding “a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market”).

²⁸³ *Id.* at 736.

²⁸⁴ *Id.* (citing *California Saw & Knife Works*, 320 N.L.R.B. 224, 227 (1995)). The Board specifically found that “unlike the NLRA, the focus of the Railway Labor Act was not on organizing. . . . In contrast to the [RLA] . . . when the [NLRA] . . . was enacted, the industries that it covered were, in general, thinly organized, and one of the principal purposes of the [NLRA] . . . was to foster organization.” *Id.* at 737.

²⁸⁵ *Id.* at 744 (Brame, M., concurring in part, dissenting in part).

²⁸⁶ *Id.* (footnotes omitted).

Member Brame concluded that the foregoing “reasons apply with equal force to union security under the National Labor Relations Act.”²⁸⁷ The evidence shows that “the purpose of allowing union-security agreements under each statute was the same — to prevent ‘free riders,’ not to promote union organizing.”²⁸⁸ Free riding analysis becomes identical under either the RLA or the NLRA. Moreover, the legislative history offers “nothing to indicate that Congress’ purpose in permitting union-security agreements under either the National Labor Relations Act or the Railway Labor Act was to promote organizing.”²⁸⁹ This leads to the conclusion that organizing expenses are nonchargeable within the meaning of either the RLA or the NLRA.²⁹⁰ Additionally, because “unit employees are already organized, . . . organizing expenses are *necessarily* spent on employees outside the unit. Thus, . . . using dues to recruit members outside the unit ‘can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer’” whether the workers operate within either the RLA or NLRA framework.²⁹¹ It also supports the determination that workers within the already organized unit will become forced riders. They incur costs to ensure that outsiders (newly organized workers) enjoy one of the supposed principal economic benefits — higher wages.

The reasoning of the Supreme Court in *Beck* precludes any qualms about the persuasive appeal of *Ellis* and RLA precedents regarding union organizing expenses, and accordingly, it furthers Member Brame’s critique. “[T]he [*Beck*] Court found the provisions of the Railway Labor Act and those of the National Labor Relations Act . . . authoriz[ing] union security agreements [were] ‘in all material respects identical,’”²⁹² and thus, the statutes “have the same meaning.”²⁹³ Neither the language nor the legislative history of the two statutes warrants differing interpretations on the *chargeability* of union organizing expenses.²⁹⁴ Therefore, Member Brame found as a matter of law that labor union organizing expenses are nonchargeable.²⁹⁵

But assuming *arguendo* that is not so, the evidence offered in support of the NLRB’s conclusion “falls well short of demonstrating as a factual matter that organizing efforts afford anything more than ‘only the most attenuated benefits’ to collective

²⁸⁷ *Id.*

²⁸⁸ *Id.* See also Calvin Siemer, Comment, *Lehnert v. Ferris Faculty Association: Accounting to Financial Core Members: Much A-Dues About Nothing?*, 60 *FORDHAM L. REV.* 1057, 1062 (1992) (“The Taft-Hartley Act was . . . an attempt to balance the competing interests of employees who wished to work in a union shop without becoming union members with the union majority’s interest in avoiding ‘free riders.’”).

²⁸⁹ *United Food*, 329 N.L.R.B. at 744.

²⁹⁰ See *id.*

²⁹¹ *Id.* (emphasis added) (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 452 (1984)).

²⁹² *Id.* (quoting *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 742 (1938)).

²⁹³ *Id.* (quoting *Beck*, 487 U.S. at 747).

²⁹⁴ See *id.*

²⁹⁵ See *id.* at 746.

bargaining on behalf of employees who are already organized.”²⁹⁶ While conceivably “some [general] statistical correlation between the percentage of employees who are organized and wage levels of represented workers” may exist, the anecdotal evidence offered by the Respondents “fails to establish a cause and effect.”²⁹⁷ Put simply, the Board “majority assumes without supporting evidence a myriad of necessary steps in the asserted relationship between expenditures for organizing and the wages paid to already-represented employees.”²⁹⁸ Member Brame ramps up his critical appraisal of the majority’s opinion:

For example, they ignore the fact that not all organizing activities lead to voluntary recognition or elections and that, even when elections are held, unions win only about half. Additionally, as reported Board cases show, not all election wins result in contracts, and not all contracts provide for increased wages. Further, not all increased wages at a newly organized employer result in higher wages at its already-unionized competitor.²⁹⁹

Finding that the wage effect of an organizing campaign depends on several factors, including “the level of unemployment in the market, the size of the organized [workforce] . . . relative to the total labor market, . . . the elasticity of demand for the end products, [and the] availability and cost of labor saving devices,”³⁰⁰ as well as the terms and conditions of the new collective bargaining agreement, it is difficult to establish that more than the most attenuated benefits accrue to dues payers of the already organized facility. While it is probable that only those who are predisposed to find in favor of the various union units can ignore these claims, and notwithstanding the considerable logic, the empirical evidence, Member Brame’s careful reading of Supreme Court precedents³⁰¹ in *Ellis* and *Beck*, the legislative history, and the

²⁹⁶ *Id.* at 745 (quoting *Ellis*, 466 U.S. at 452).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* (footnotes omitted).

³⁰⁰ *Id.*

³⁰¹ Supreme Court precedents include: *Ellis*, 466 U.S. 435 (disallowing the exaction of union dues from dissenters for general organizing and litigation expenses that are unrelated to collective bargaining); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.

....

These principles prohibit a State from compelling any individual to affirm his belief in God or to associate with a political party . . . as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the [union] . . . from requiring . . .

pertinent statutory language, the Ninth Circuit Court, after initially agreeing with him,³⁰² was unimpressed.

3. The Ninth Circuit's *United Food* Opinion

As we have seen, the Supreme Court's *Beck*³⁰³ holding established predictably the right of union dissidents covered by the NLRA (and hence employed within the private sector workforce) to refrain, like similar dissidents covered by the RLA³⁰⁴ and like agency shop objectors in the public sector,³⁰⁵ "from paying their union dues if those dues were earmarked for [non-germane purposes]."³⁰⁶ *Beck* has triggered a firestorm that continues to reverberate within and outside the union movement,³⁰⁷ and has provoked the disputable claim that the policy, purpose, and accomplishments of the NLRA directed toward reducing bargaining power inequality³⁰⁸ have been

[any government employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.

Id. at 233, 235 (citations omitted). *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (entitling dissenting workers to recover for the pro rata share of union dues expended for political purposes).

³⁰² *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 249 F.3d 1115, 1117 (9th Cir. 2001) (holding that "organizational activity is not necessary for the union's performance of its duties as the exclusive representative of the employees" and that "requir[ing] non-member employees to fund such activity is not authorized by section 8(a)(3) of the [NLRA]").

³⁰³ *Comm'n Workers of Am. v. Beck*, 487 U.S. 735 (1988).

³⁰⁴ *See Ellis*, 466 U.S. at 452–53; *Int'l Ass'n of Machinists*, 367 U.S. at 775. Nonetheless, there are apparently significant limitations on the usefulness of analogies that can be drawn between the two labor statutes. *See, e.g., United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 773 (9th Cir. 2002).

³⁰⁵ *Aboud*, 431 U.S. at 233–35 (disallowing an attempt by a public sector union to compel payment in support of an ideological cause that the dues objectors opposed).

³⁰⁶ WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB — A MEMOIR* 73 (2000) (citing *Beck*, 487 U.S. 735).

³⁰⁷ Hutchison, *supra* note 86, at 456–57 (discussing this development).

³⁰⁸ Among other things, it has been argued that the Wagner Act "reflected the growing distrust of market solutions to social and economic problems." RAY, SHARPE & STRASSFELD, *supra* note 79, at 13. The Wagner Act also reflected dissatisfaction with the "inability of the courts to provide viable solutions to the problems presented by the labor movement" and hence, "[t]he industrial revolution, [with its] . . . combination[] of capital and of labor, . . . presented problems that called for broad legislative solutions." 1 *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 3–4 (Patrick Hardin ed., 3d ed. 1992) [hereinafter *THE DEVELOPING LABOR LAW*]. On one account the NLRA was seen not only as "a weapon against the disruption of industry by labor-management disputes," but also as "an 'affirmative vehicle' for economic and social progress." *Id.* at 27–28 (quoting Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 *GEO.*

thwarted by the Supreme Court.³⁰⁹ One narrative maintains that limiting the union majority's ability to charge compulsory dues imposes a constrained "view of the normal and proper role of a labor union" and impairs activities aimed at transforming "the balance of power outside the immediate workplace."³¹⁰ Allowing dues objectors to escape ideological and other nonrepresentational expenditures can be seen as neutral only if one also agrees that it is possible to "handicap the mouse without increasing the power of the cat."³¹¹ Hence, the Ninth Circuit, if it was so inclined, could rely on readily available ammunition to emasculate Supreme Court precedent.

a. The initial decision

Before reviewing the en banc holding of the Ninth Circuit, it is useful to consider briefly the initial decision of the court. The initial decision determined that Supreme Court reasoning in *Ellis*, *Lehnert*, and *Beck* required a decision in favor of union dues objectors.³¹² The Ninth Circuit panel determined that "[a]lthough the [Supreme] Court's decisions in this area 'prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees,' the Court has already established 'several guidelines to be followed in making such determinations.'"³¹³ The *Ellis* decision "held organizing expenses to be 'outside Congress' authorization' in section 2, Eleventh of the RLA."³¹⁴ *Lehnert* confirms that

WASH. L. REV. 199, 218 (1960)). Further, it has been asserted that the NLRA was seen as a mechanism to "lessen the inequality of bargaining power between labor and management." Bryan M. Churgin, Comment, *The Managerial Exclusion Under the National Labor Relations Act: Are Worker Participation Programs Next?*, 48 CATH. U. L. REV. 557, 557 (1999).

³⁰⁹ See, e.g., Friesen, *supra* note 50, at 603–04 (arguing that the Supreme Court's decision to preclude "unions from funding organizing activities . . . undermines national labor policy"). Still, another commentator dubiously observed that the *Beck* decision created a "politically volatile rule-making" quandary because the NLRB's rule-making efforts aimed at a balanced approach to the *Beck* holding have been thwarted by "the extraordinary and inordinate influence of the right-wing National Right to Work Committee, which [assertedly] had a veto over Board nominations and confirmations." GOULD, *supra* note 306, at 73. Hence, both the *Beck* decision and efforts to enforce limitations on the use of union dues might be characterized as unjustifiable government regulation of a purely private contractual relationship between employers and the employees' representatives if collective-bargaining contracts under the NLRA can be accurately seen as part of a private voluntary exchange relationship. *But cf.* Baird, *supra* note 92, at 2. ("[G]overnment coercion pervades the entire collective-bargaining process.").

³¹⁰ Friesen, *supra* note 50, at 639.

³¹¹ Kenneth Cloke, *Mandatory Political Contributions and Union Democracy*, 4 INDUS. REL. L.J. 527, 567 (1981).

³¹² *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 249 F.3d 1115, 1118–20 (9th Cir. 2001).

³¹³ *Id.* at 1119 (quoting *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991)).

³¹⁴ *Id.* (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 451 (1988)).

RLA cases, including *Ellis*, serve “to determine the scope of the chargeable activities under the NLRA § 8(a)(3).”³¹⁵ Subsequently, the *Beck* case found statutory equivalence between the NLRA and the RLA.³¹⁶ Therefore, union organizing expenditures cannot be authorized by the NLRA.³¹⁷ While this decision is clear, cogent, and persuasive, the Ninth Circuit court en banc disagreed.

b. The Ninth Circuit en banc: an invitation accepted

Despite the failure of the *Beck* Court to find state action³¹⁸ and to rest its decision expressly on the Constitution, that decision operates harmoniously with First Amendment values. Undeniably, “[t]he Supreme Court has firmly rejected arguments that union political activities are germane to its representation function, despite the pleas of . . . labor leaders[] and scholars that political advocacy benefits workers.”³¹⁹ Because organizing might be conceivably distinguished from politics, one issue lingers: Does “the Constitution require[] organizational expenses to be treated in the same manner as political ones[?]”³²⁰ A thoughtful assessment of the *United Food* opinion must both consider the reach of First Amendment norms and engage in statutory analysis that concentrates on whether a given activity is germane. Whether an activity is germane or not is linked to this question: Will union dissenters obtain self-interested benefits from the challenged activity?

Focusing on statutory issues, the Ninth Circuit’s en banc opinion concentrates initially and unremarkably on the rhetoric of free riding. Specifically, the court determined that “[t]he NLRA . . . permits the exclusive bargaining representative and the employer to require that all employees become dues paying [core] ‘members’ of the union” pursuant to NLRA § 8(a)(3).³²¹ This follows because the union “represent[s] all employees in a bargaining unit . . . when bargaining for wages, benefits, and working conditions, and when resolving grievances with the employer.”³²² Exclusive representation, from the court’s perspective, implies that all employees share a “community of interests.”³²³

³¹⁵ *Id.*

³¹⁶ *See id.* at 1120.

³¹⁷ *See id.* at 1117.

³¹⁸ *See Friesen, supra* note 50, at 623.

³¹⁹ *Id.* at 628 (footnotes omitted).

³²⁰ *Id.* at 628–29.

³²¹ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 764 (9th Cir. 2002) (en banc).

³²² *Id.*

³²³ *Id.* at 764 n.3 (citing Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 621–24 (2001)).

Despite disagreeing with the Supreme Court, the Ninth Circuit concedes that *Beck* and *Ellis* place limits on the ability of unions to charge nonmembers (dissenters).³²⁴ Hence, it is clear that “nonmembers need pay ‘only those fees and dues necessary to “performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”’”³²⁵ Still, under this fair share standard, objecting employees can be required to pay for more than “the direct costs of negotiating and administering a . . . contract.”³²⁶ They are also required to pay for expenses associated with “undertakings normally or reasonably employed to implement or effectuate the duties of the[ir] union” in its capacity as their collective bargaining representative.³²⁷

When the union resolves to fund duties that are unnecessary, principled free-rider scrutiny liberates dues objectors from any related dues payment obligation. Who decides *which* activities are necessary is obviously an important question. In partial answer to that question, the *United Food* court invokes precedent: “‘necessary duties’ [are] those functions that are ‘*germane* to collective bargaining, contract administration or grievance adjustment.’”³²⁸ Two interrelated questions frame the central issue: Does a union “violate[] the *Beck* rule by compelling nonmembers [dues objectors] to pay their share of the costs of organizing their employers’ competitors or conversely, . . . [are] unions . . . permitted under the NLRA to charge nonmembers for the costs of such organizing activities[?]”³²⁹ In answering these questions, the court, citing *Chevron*³³⁰ with approval, states that generally, it is “required to defer to the NLRB — statutory interpretation[s] . . . on questions of fact and policy.”³³¹ The *Chevron* rule requires judicial deference when the administrative agency’s “interpretation is rational and consistent with the statute.”³³² When the statute is cloudy, “*Chevron* dictates that ‘a court may not substitute its own construction of [the] statutory provision for a reasonable interpretation made by . . . an agency.’”³³³ Since the court concludes that section 8(a)(3) “does not describe what types of expenditures may or may not be made from . . . dues,”³³⁴ statutory ambiguity necessitates deference to the NLRB in order to sort out the specifics of the case.³³⁵

³²⁴ See *id.* at 765.

³²⁵ *Id.* (quoting *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 762–63 (1988) (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984)).

³²⁶ *Ellis*, 466 U.S. at 448.

³²⁷ *Id.*

³²⁸ *United Food*, 307 F.3d at 765 (emphasis in original) (quoting *Beck*, 487 U.S. at 745).

³²⁹ *Id.*

³³⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

³³¹ *United Food*, 307 F.3d at 766.

³³² *Id.*

³³³ *Id.* at 767 (alterations in original) (quoting *Chevron*, 467 U.S. at 844).

³³⁴ *Id.*

³³⁵ In *California Saw*, the NLRB determined that the legality of charging objectors for particular union expenses depends on “whether they are germane to the union’s role in collective bargaining, contract administration, and grievance adjustment.” *California Saw & Knife*

Dues objectors reached the opposite conclusion. They argued deference is unwarranted when a constitutional question is validly presented. They cited a prior Ninth Circuit opinion — *Seay v. McDonnell Douglas Corp.*³³⁶ — in support of this conviction. The dues objectors in *Seay* “asserted a substantial First Amendment claim: They contended that their dues ‘were used in substantial amounts for political and ideological purposes contrary to [their] wishes and in derogation of their constitutional rights under the First, Fifth and Ninth Amendments.’”³³⁷ Unfortunately for the objectors in *United Food*, the court determined that the case before it did “not involve any claim (let alone a substantial claim) regarding First Amendment rights, but rather the question of whether organizing an employer’s competitors [was] . . . germane to collective bargaining.”³³⁸ Hence, the *Seay* case, however viable, “in no way affect[ed the court’s] . . . obligation to defer to the Board.”³³⁹

The court also rejected the nonmembers’ contention that other cases establishing constitutional requirements for union collection of agency fees necessarily require an interpretation of the Constitution in order to discover what is germane for collective bargaining purposes.³⁴⁰ The rejection of the dues objectors’ claim resulted from the deduction that union organizing constitutes a non-political activity irrespective of whether it can be seen as germane to collective bargaining or not.³⁴¹ Once, that determination was reached, the pertinent question in any given case would turn on how closely related are collective bargaining and the contested activity.³⁴²

Persuaded that “[t]he Supreme Court has ‘not hesitated to defer to the Board’s interpretation of the Act in the context of issues’ that ‘implicate[] its expertise in labor relations,’”³⁴³ and rejecting any constitutional claims, the *United Food* court stakes the persuasive power of its analysis on the observation that the “germane versus non-germane issue requires an informed assessment of the practical relationship between the challenged activity and the bargaining process.”³⁴⁴ An informed approach

Works, 320 N.L.R.B. 224, 239 (1995). Additionally, the Board held that a union does not act unlawfully by charging objectors for representational expenses on other than a unit-by-unit basis. *Id.* at 237 & n.66. *Teamsters Local 75 (Schreiber Foods)*, 329 N.L.R.B. 28, 31 (1999) cites *California Saw*, 320 N.L.R.B. at 239, for the proposition that a union does not “act unlawfully ‘by charging . . . for litigation expenses as long as the expense is for “services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.””

³³⁶ 427 F.2d 996 (9th Cir. 1970).

³³⁷ *United Food*, 307 F.3d at 767 (alteration in original) (quoting *Seay*, 427 F.2d at 999).

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at 767–68 (citing *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 809 (9th Cir. 1991) (citing *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986))).

³⁴¹ *Id.* at 768.

³⁴² *Id.*

³⁴³ *Id.* (alteration in original) (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829–30 n.7 (1984)).

³⁴⁴ *Id.*

sanctions the exercise of the NLRB's expertise, and deference is therefore required.³⁴⁵ Consistent with this deduction, the court holds that dues objectors "fail substantially to contest the Board's actual factfinding in this case."³⁴⁶ While there is some evidence and much analysis that implies that the Board's factfinding was indeterminate or mistaken,³⁴⁷ the court concludes that "the Board's determinations are fully consistent with the realities of collective bargaining."³⁴⁸ In support of this comment, the court offers this analysis: "Because the union can only become the collective bargaining representative if enough employees agree, the initial recruitment and incorporation of new members into a nascent bargaining unit through organizing is crucial."³⁴⁹ Crucial for whom? Crucial for union leaders concerned about declining membership and political influence or, alternatively, crucial for purposes of establishing the existence of self-interested benefits obtainable by dues objectors? Further, the court's reliance on majority rule may be, in the end, misplaced. Simple democratic majoritarianism does not prove either a commonality of group interest or consent by all members in support of union defined goals, of increasing union strength and political clout. The court's analysis may reveal a misunderstanding of what is necessary to show that the already organized workers represent a unified as opposed to a heterogeneous group. Since the union local is unlikely to represent a cohesive community of interest, interrogation of the purposes that organizing serves ought to be obligatory before concluding that organizing activities are crucial to the economic success or political interest of dissenting workers.

The court does not engage in such an interrogation. Nonetheless, the court accepts the following conclusions: (1) organizing of competitor employees "'eliminat[es] competition of employers and employees based on labor condition regarded as sub-standard'",³⁵⁰ (2) nonunion employers will tend to "pay lower wages and provide lesser benefits",³⁵¹ (3) competition from nonunionized employers "significantly weakens the union's ability to bargain with the [already organized] employer and decreases the union's prospects of achieving the economic objectives of the members of the bargaining unit."³⁵² Moreover, the court was convinced "that extra-bargaining unit organizing is germane to collective bargaining and a proper use of nonmembers' dues."³⁵³ Equally true, the court asserted that its conclusion "was supported by extensive economic research and data on organizing and collective bargaining in general,

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ See *supra* note 299 and accompanying text.

³⁴⁸ *United Food*, 307 F.3d at 768.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 769 (alteration in original) (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940)).

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

as well as with respect to the retail food industry.”³⁵⁴ Dismissing *Ellis*, the court was prepared to accept the NLRB’s determination “that under the ‘necessary’ or ‘germane’ to collective bargaining standard of *Beck*, nonmembers may be compelled to bear their fair share of the costs of organizing.”³⁵⁵

Before considering what constitutes a germane expenditure more fully below, it is useful to examine the Ninth Circuit’s dismissal of *Ellis*. The *United Food* court distinguished the two cases by drawing an inference from the absence of an administrative agency under the RLA and the presence of one under the NLRA.³⁵⁶ Furthermore, the *United Food* court was persuaded that the Supreme Court had determined previously “that the only purpose organizing under the RLA could serve was to strengthen the union generally.”³⁵⁷ Because railroad/transportation unions were strong already (at least in the eyes of the court), and because organizing “provided only attenuated benefits to nonmembers within a [transportation industry] bargaining unit, the Court, [on the Ninth Circuit’s account,] held that under the RLA organizing costs could not be charged to such individuals.”³⁵⁸

In the *United Food* opinion, the court deals brusquely with the nonmembers’ contention that “the [Supreme] Court’s statements in *Beck* that the RLA provision at issue in *Ellis* and the NLRA provision at issue in *Beck* are ‘statutory equivalents,’ . . . and that ‘Congress intended the same language to have the same meaning in both statutes.’”³⁵⁹ Given the cogency of the Ninth Circuit’s initial finding, the en banc dismissal of the complainants’ argument is remarkable. On the *United Food* court’s account, the Supreme Court’s statements were simply aimed at confirming that the “two Acts were designed to afford employees the same protection: that Congress intended to protect employees covered under both Acts against the unions’ use of their dues for purposes not germane to collective bargaining,”³⁶⁰ as opposed to providing specific guidance on specific union dues expenditures. The Ninth Circuit determined that while union organizing conducted for the general purpose of strengthening

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 769–70. The court goes on to point out that “[t]he *Ellis* decision was made in the context of a statute designed to regulate the railroad industry[, which a]t the time the RLA was enacted . . . was [already] highly organized.” *Id.* at 770. In addition, the court relies on the claim that when the pertinent statutory provision of the RLA was enacted, “the president of a major railroad labor union . . . represented to Congress” that the creation of “the union shop would have no effect on the bargaining power of unions covered by the Act, . . . [but] would serve only to make those unions stronger.” *Id.* In addition, in *Ellis*, the facts supported the contention that the organizing at issue “was directed in part at employers that were not in the same branch of the transportation industry as the bargaining unit employer, and even at employers that were not in the transportation industry at all.” *Id.*

³⁵⁷ *Id.* at 770.

³⁵⁸ *Id.*

³⁵⁹ *Id.* (quoting *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 747 (1988)).

³⁶⁰ *Id.* at 770–71.

the union is not germane under the RLA, such extra-bargaining activity is not explicitly precluded by either the language of the NLRA or by the Supreme Court in *Beck*.³⁶¹ Perforce, such activities are permissible. If this analysis is accurate, the court's holding may turn *Beck*'s incorporation of *Ellis* on its head while leaving for another day the possibility that organizing aimed at strengthening unions generally can be charged to dues objectors — if and when the NLRB first sustains such claims.

Taken together then, there are two principal reasons why the court surmised that “the [Supreme] Court did not intend that ‘statutory equivalen[ce]’ be applied at the level of specificity”³⁶² necessary to decide this case. The reasons include “the fact that Congress established . . . different procedures for the interpretation of” the NLRA as opposed to the RLA.³⁶³ “Under the NLRA, primary jurisdiction over its interpretation lies with the NLRB, but under the RLA, exclusive jurisdiction lies, as with many statutes, with the courts.”³⁶⁴ The second reason is connected to the conclusion that the *Ellis* Court “explicitly based its decision upon its close review of the *legislative history* of the RLA.”³⁶⁵ Finding that “[t]he RLA establishes a highly detailed mandatory scheme for dispute resolution that has no parallel in the NLRA,”³⁶⁶ the Ninth Circuit concluded that “[t]he fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act.”³⁶⁷ Citing a limited number of scholarly opinions with approval,³⁶⁸ the *United Food* court determined that not only are the two statutes different, but that it was possible that *Beck*'s statutory explication failed to offer much guidance, if any, on the details of what is “germane” under the NLRA.³⁶⁹ Supplementing this claim, the court correctly stated that *Beck* did not specifically deal with which activities are precluded by the NLRA.³⁷⁰ *Beck* dealt with the general question of whether the NLRA, like the RLA, precludes nongermane expenditures from being assessed against dues objectors.³⁷¹ The *Beck* Court “left to the Court of Appeals the ultimate resolution of the question of which specific expenditures were germane and therefore chargeable to nonmembers.”³⁷² Whether *Beck* supplies an appellate court with adequate latitude to justify the *United Food* opinion is a question best left to the next subsection.

³⁶¹ See *id.* at 771.

³⁶² *Id.* at 771 (first alteration added). But see *Beck*, 487 U.S. at 756 (discussing Congress's intent to place industries governed by the RLA and the NLRA “on equal footing insofar as compulsory unionism was concerned”).

³⁶³ *United Food*, 307 F.3d at 771.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 772 (emphasis added).

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 773.

³⁶⁸ See *id.* at 772 n.17.

³⁶⁹ See *id.* at 774.

³⁷⁰ See *id.* at 771.

³⁷¹ *Id.*

³⁷² *Id.*

It is clear, however, that the Ninth Circuit is drawn to the following understanding of *Beck*: (1) because the Supreme Court left it to appellate courts to determine the explicit parameters of what activities are “germane,” circuit courts are entitled to defer to the NLRB; and (2) because the NLRB engaged in a process of “fact-finding and a searching examination of the statute,” neither the language of *Beck* nor the NLRA precludes the Board’s conclusion that union-organizing expenditures are germane to collective bargaining.³⁷³ Thus, the Ninth Circuit accepted an invitation proffered by union advocates to sustain organizing efforts aimed at stemming the decline in union workplace penetration.³⁷⁴

B. Analysis

Because of the specific facts of the case, because of the empirical record that was made available to the court, the NLRB, and the ALJ, and because all workers represented by the national union or local unit may share precisely the same interest, it is not impossible that the Ninth Circuit decision (en banc) enforcing the Board’s order could be correct. More likely, however, the decision is mistaken. This should not be surprising given the Ninth Circuit’s prior history, including the fact that one of its earlier decisions holding that a union was permitted to charge its organizing expenses to dues objectors, within the meaning of the RLA, was categorically reversed by the United States Supreme Court in *Ellis*.³⁷⁵

Ellis held that because “[o]rganizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues,”³⁷⁶ such expenditures are, therefore, “a far cry from the free-rider problem with which Congress was concerned.”³⁷⁷ Since “organizing expenses are spent [to benefit those] outside the . . . [already organized] unit,”³⁷⁸ it is doubtful, that any amount of legislative history can negate the logic of the *Ellis* Court. Moreover, the Court held impermissible a claim that the Ninth Circuit found persuasive: “organizing

³⁷³ *Id.* at 774.

³⁷⁴ *See, e.g.,* Friesen, *supra* note 50, at 613–14.

³⁷⁵ *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 457 (1984).

In [a case that preceded *Ellis*, *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961), the [Supreme] Court held that the [RLA] does not authorize a union to spend an objecting employee’s money to support political causes . . . [because such expenditures are] unrelated to Congress’ desire to eliminate “free riders” The [*Machinists*] Court did not express a view [as to the chargeability of] “expenditures for activities in the area between the costs which led directly to the complaint as to ‘free riders,’ and the expenditures to support union political activities.”

Id. at 438–39 (quoting *Street*, 367 U.S. at 769–70).

³⁷⁶ *Id.* at 453.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 452.

expenses could be charged to objecting employees because organizing efforts are aimed toward a stronger union, which in turn would be more successful at the bargaining table.”³⁷⁹ As more fully explained below, the Ninth Circuit’s decision, when analyzed simply as a limited holding, supplies evidence that organizing expenditures are too attenuated to be seen as germane even within the parameters of the NLRA. When analyzed as a general holding applying to all free-rider circumstances, the Ninth Circuit’s opinion eviscerates the *Ellis* opinion. Nevertheless, it may be conceivable that statutory differences between the NLRA and the RLA translate into different and diverse understandings of free riders within the meaning of the two statutes. The next section examines this possibility.

1. Statutory Equivalence or Statutory Ambiguity?

Although the Supreme Court abandoned the Ninth Circuit’s explication of the facts and the law in *Ellis*, the court once again proffered the same basic holding in *United Food*. The premise is different. Reasoning that statutory ambiguity associated with the NLRA provides scope for the NLRB to offer a result that differs from *Ellis*, the court enforced the NLRB holding. The court’s decision to enforce the Board’s order may have been made easier by virtue of the fact that the *United Food* court did not focus on the judicially created duty of fair representation.³⁸⁰ Concentrating primarily on the statutory claim associated with unfair labor practices provides grounds to argue that what constitutes a free rider under the RLA differs from the NLRA.

The contention that the RLA differs from the NLRA is necessitated by legal precedent which clearly states that union organizing expenses — which are of necessity aimed at employees outside the relevant bargaining unit — are nonrepresentational and hence nonchargeable as a matter of law within the meaning of *Beck* and *Ellis*.³⁸¹ Glenn M. Taubman’s brief in support of the charging parties exceptions adverts to a “record [that] shows that the UFCW unions — particularly Local 951 — have charged non-members and objectors for the vast majority of their ‘organizing’ expenses.”³⁸²

³⁷⁹ *Id.* at 451.

³⁸⁰ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 765 (9th Cir. 2002) (discussing petitioners’ contention that the challenged fees constituted an unfair labor practice).

³⁸¹ *See Commc’n’s Workers of Am. v. Beck*, 487 U.S. 735, 745–47 (1988) (holding that RLA cases are controlling for purpose of understanding free riders under the NLRA); *Ellis*, 466 U.S. at 452.

³⁸² Exceptions of Charging Parties Phillip Mulder, Charles Buck, Leon Gibbons and Glenn Hilton, including Brief in Support of Exceptions 2, *United Food & Commercial Workers Locals 951, 588, 7 and 1036*, No. 16-CB-3850 (2–6, 9–25, 27, 33, 35–36) (NLRB May 25, 2004) [hereinafter *Exceptions of Charging Parties*] (on file with author). *See also United Food*, 307 F.3d at 765–66 (finding that Local 7 nonmembers (dues objectors) also challenged the chargeability of union organizing expenditures).

In *Ellis*, the Supreme Court stated: "Congress' essential justification for authorizing the union shop was the desire to eliminate free riders — employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions"³⁸³ Obviously, Local 951 does not owe a statutory obligation to employees outside of those it represents. Union organizing, accordingly, cannot be directed toward them. Consistently with that intuition, *Ellis* stated: "[W]here a union shop provision is in place and enforced, all employees in the relevant unit are already organized. By definition, therefore, organizing expenses are spent on employees outside the collective-bargaining unit already represented."³⁸⁴

Evidently, a unanimous Supreme Court in *Ellis* "conclud[ed] that it would be perverse to" compel dues objectors "to finance the expansion of unionism to other bargaining units."³⁸⁵ Equally clear, the *Ellis* Court found that extra-bargaining unit organizing does not raise "the free rider [issue] Congress had in mind" because that issue, of necessity, only implicates employees that the union was required to represent.³⁸⁶ Thus, the petitioners argue that if Local 951 desires to operate

as an omnipotent, universal collective bargaining agent for all retail, wholesale and distribution employees in Michigan and elsewhere, without regard to the nature of its separate certifications and its limited statutory authorization to engage in collective bargaining for a specific bargaining unit . . . , [that desire] cannot change the rights which individual employees have under the NLRA.³⁸⁷

Furthermore, the Supreme Court stated that since section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA "are in all material respects identical,"³⁸⁸ RLA cases are "more than merely instructive," they are "controlling" for purposes of understanding the free-rider approach taken by Congress.³⁸⁹ In harmony with that conclusion, organizing has been litigated and found nonchargeable under the NLRA, the RLA, and a number of public sector bargaining statutes.³⁹⁰ Taken together, union

³⁸³ *Ellis*, 466 U.S. at 447.

³⁸⁴ *Id.* at 452.

³⁸⁵ Exceptions of Charging Parties, *supra* note 382, at 6 (quoting *Ellis*, 466 U.S. at 452 n.13).

³⁸⁶ *Ellis*, 466 U.S. at 452.

³⁸⁷ Exceptions of Charging Parties, *supra* note 382, at 6–7 (emphases omitted).

³⁸⁸ *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 745–47 (1988).

³⁸⁹ *Id.* at 745.

³⁹⁰ See, e.g., *Beck v. Comm'n Workers of Am.*, 776 F.2d 1187, 1211–12 (4th Cir. 1985) (declaring organizing to be non-chargeable under the NLRA); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1324 (W.D. Mich. 1986) (relying on *Ellis* and holding organizing non-chargeable in the public sector); *United Food & Commercial Workers, Local 1099 (Kroger, Inc.)*, 327 N.L.R.B. 1237, 1244 (1999) (relying on *Ellis* to hold that organizing was non-chargeable under the NLRA); see also Exceptions of Charging Parties, *supra* note 382, at 10–11.

organizing should be seen as nonrepresentational and hence nonchargeable as a matter of law, unless a court illuminated by an exceptional revelation can find a tenable basis to escape the preclusive effect of both *Ellis* and *Beck*.

The Ninth Circuit accepts this challenge. Much of the force of the Ninth Circuit's *United Food* opinion is connected to the argument that the RLA, as opposed to the NLRA, was not aimed at strengthening unions because labor union penetration within the RLA sector was already quite high,³⁹¹ whereas labor union penetration and labor union strength in the sectors covered by the NLRA have declined dramatically since World War II.³⁹² That assertion warrants examination because the decline in union density rates is traceable, at least in part, to the enactment of the Taft-Hartley Amendments to the NLRA.³⁹³ Because the American labor movement had been seen as "the most powerful, and the most aggressive that the world has ever seen,"³⁹⁴ Congress enacted the Taft-Hartley Act to constrain union power and enhance employee efforts to refrain from engaging in concerted activities.³⁹⁵ "Before 1947 it was possible to imagine a continuing expansion and vitalization of the New Deal impulse. After that date, however, labor and the left were forced into an increasingly defensive posture."³⁹⁶ Consequently, in order for the Ninth Circuit's opinion to be credible, the court must find evidence that Congress was trying to enhance union organizing efforts and to strengthen labor unions as part of its concern for free riders when it amended the NLRA in 1947.

In consideration of the depth of the Ninth Circuit's conviction that the RLA and the NLRA were meant to deal with different circumstances consider the following syllogism to explain how the court distinguishes free-rider jurisprudence under the RLA from the NLRA. High wages are evidence of union success; union success is evidenced by high union density rates; in the presence of high union density rates (union success), there can be no justification for charging dues objectors for extra-bargaining unit organizing expenses because railroad and transportation workers (RLA) already enjoy high wages; and therefore, they obtain no real self-interested benefits from expanding an already strong union presence within the industry. If this syllogism is correct, it implies two tentative conclusions: (1) the half-century long deterioration in union penetration rates (union failure) in the private sectors covered by the NLRA

³⁹¹ See *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 769–70, 772 (9th Cir. 2002) (en banc); see also *id.* at 772 n.17.

³⁹² *Id.* at 772 n.17.

³⁹³ The Taft-Hartley Act shifted the emphasis of federal labor law from a scheme designed to protect rights of employees to organize, to a more "balanced statutory scheme" that placed restrictions on unions while protecting the employees' right to refrain from engaging in concerted activities. THE DEVELOPING LABOR LAW, *supra* note 308, at 40.

³⁹⁴ *Id.* at 35.

³⁹⁵ See, e.g., STANLEY D. HENDERSON, LABOR LAW 35–36 (2d ed. 2005).

³⁹⁶ Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 765 (1998).

can justify ever increasing dues assessments to counteract this trend because the self-interested benefits obtained (by already unionized workers) derived from organizing become larger in the face of declining union strength; and (2) the current decline in union power and strength within the transportation industry (especially within the unionized subsector)³⁹⁷ provides a factual, yet speculative, basis for the Ninth Circuit to ponder the possibility of disregarding the Supreme Court's *Ellis* opinion affecting the railroad or airline industries.

Forsaking syllogisms for the moment, consider carefully the court's free-rider approach. The Ninth Circuit states: "Thus all persons in the bargaining unit receive the benefits and [must accordingly] share the economic costs of union representation."³⁹⁸ This conclusory statement, offered as proof of the union's claims, may not be fully convincing. To shore up its contention, the court offers a truism: "Were 'free riders' able to obtain the full benefits of the union's efforts without paying their share of the costs, union membership would likely be drastically reduced and the collective bargaining system seriously undermined."³⁹⁹ While it is clear that a persistent decline in union membership is a reality that existing union security agreements, so far, have been incapable of preventing, it is far from clear that repetition of a truism proves that dues objectors are free riders within the parameters of the NLRA when the same analysis disproves this contention within the boundaries of the RLA.

Though the court's analysis may mirror Supreme Court precedents that utilize the language of free riding to impose costs on dues objectors, it is not obvious that merely repeating the Court's free-rider claims is sufficient to support the argument that dues objectors must underwrite the extra-bargaining unit costs of organizing unrepresented workers at competing facilities. Underwriting may operate as a particular form of income redistribution or "[f]orced subsidization of union expression."⁴⁰⁰ In the absence of evidence that dues objectors obtain the self-interested benefits that have been attributable to them, subsidization operates in the shape of extra-unit organizing campaigns that may have a dual or a tripartite purpose.⁴⁰¹ As more fully explicated below, it is likely that the self-interested benefits (either pecuniary or non-pecuniary) derived from organizing efforts tend to be obtainable largely by individuals and groups who operate outside of the Ninth Circuit currently circumscribed field of vision. This development may be attached to the NLRB's and the Ninth Circuit's concentration on the possibility or, alternatively, the presupposition that

³⁹⁷ See, e.g., *Airline Workers Under Attack*, FIGHT BACK!, Mar./Apr. 2005, at <http://www.fightbacknews.org/2005/02/airline.htm> (highlighting union concessions within the airline industry).

³⁹⁸ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 764 (9th Cir. 2002) (en banc).

³⁹⁹ *Id.*

⁴⁰⁰ Friesen, *supra* note 50, at 608–09.

⁴⁰¹ The purposes associated with extra-unit bargaining may include (1) ideological and social purposes, (2) other nonrepresentational purposes, and (3) providing possible economic benefits to already represented workers. See *infra* Part III.

dues objectors obtain self-interested benefits while refusing to acknowledge that self-interest extends beyond the individuals represented by the union local.

In an effort to defend its approach from condemnation, the *United Food* court argued that its holding is limited and therefore distinguishable from both *Ellis* and *Beck* because the NLRB's decision is likewise limited. Judicial self-restraint, however commendable, may not be enough to carry the day. A decision currently limited to extra-bargaining organizing among competitor employers may not preclude the NLRB from accepting any number of extra-bargaining strategies in the future that are framed by concentrating on competition within the industry and among direct competitors or even, if the NLRB is so inclined, outside of the competitor framework. Before this case, it could be argued that the Supreme Court's decision in *Beck* constrained the Board. No longer hesitating along an uncertain path, consistent with the knowledge that the lower courts and the NLRB have limited authority to re-conceive the NLRA, both the NLRB and the Ninth Circuit have become captivated by the possibility that challenged expenditures may be linked to the objective of strengthening labor unions and expanding membership and thus a potent force for transformative unionism. Given the desirability of stemming the current degeneration in union density rates, any number of challenged activities are likely to withstand the Ninth Circuit's facile test of chargeability. On the Ninth Circuit's account, the on-going decline in union density rates supplies a plausible pivot point for transmuting the Supreme Court's free riding interpretation in *Ellis* while providing a keenly anticipated platform for reinterpreting *Beck* and the NLRA.⁴⁰²

For current purposes, *Beck* holds unambiguously that only *necessary* union duties can be charged to union dues objectors in order to prevent the problem of free riding. Still, as Henry Hazlitt illumines,⁴⁰³ even that admission does not necessarily prevent the Supreme Court's free-rider formulation from being perceived as deficient. Despite its deficiencies, it is clear that *Beck* allows only those functions that are germane to collective bargaining, contract administration, or grievance adjustment to be charged to dues objectors. The term "germane" can be defined as being closely or significantly

⁴⁰² See, e.g., Friesen, *supra* note 50, at 613–14 (arguing that organizing new workers is well within the union's expected traditional role, and that the necessity of the implementation of this role increases given the decline in union penetration).

⁴⁰³ See Charles W. Baird, *Henry Hazlitt on Unions: Part II*, FREEMAN: IDEAS ON LIBERTY, Mar. 2005, at 47, 47–48 (arguing that even the highest real wages received by members of strong unions were lower than such wages would have been in the absence of unions and historic policies related to compulsory unions). If this claim is correct, then it becomes doubtful that more members of labor unions can plausibly be seen as free riders because it is likely that they receive no real benefit from compulsory collective bargaining regimes. See also VEDDER & GALLAWAY, *supra* note 51, at 150–53 (noting that during the 1940s, a period of massive government budget deficits and massive increases in unionization, unemployment fell, but the era also reflected a decline in the real wage adjusted for productivity caused at least partially by wage and price controls). If this analysis is correct, high rates of unionization may not translate into high real wages.

related to the objective of the activity.⁴⁰⁴ Whatever the term means, the *United Food* court's application of *Beck* intimates that a collective bargaining purpose under the NLRA can be comprised of functions the Supreme Court has rejected when interpreting the RLA.

The motivation of the Ninth Circuit may require an explanation. It is possible that sympathy for the current plight and bleak prospects of labor unions provoked the court's approach.⁴⁰⁵ For quite some time, commentators have lamented the hard times experienced by unions⁴⁰⁶ and have sought to stem the degeneration of union power and influence in the workplace via a number of vehicles, including the use of union dues to reclaim labor union vitality.⁴⁰⁷ Intriguingly, the court cited one commentator whose sympathy for the labor movement remains unabashed.⁴⁰⁸ Professor Jennifer Friesen has argued that whatever their mission, "[u]nions depend for most of their revenues on the dues and fees paid by the workers they represent."⁴⁰⁹ She concedes, however, that unions expend "dues on extra-workplace activities . . . [that purportedly] enhance the union's strength internally and in the community," for political purposes and for purposes of "organizing nonunion employees."⁴¹⁰ While expanding union strength internally and within the community may be a laudable goal, and while strengthening the union's political posture may be a valid objective, it is doubtful that the Taft-Hartley Amendments to the NLRA were designed to enhance labor movement strength and power.⁴¹¹ Nevertheless, Professor Friesen argues

⁴⁰⁴ Cf. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 951 (2002).

⁴⁰⁵ See, e.g., *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 772 n.17 (9th Cir. 2002) (en banc) (discussing the historically low and now declining levels of organization within industries covered by the NLRA). It is doubtful that declining levels of unionization alone constitute justification for the judgment reached by the court.

⁴⁰⁶ See, e.g., Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1016–21 (1991).

⁴⁰⁷ See Werntz, *supra* note 63, at 193–207 (articulating the value of dues to the continued vitality of the labor movement).

⁴⁰⁸ *United Foods*, 307 F.3d at 772 n.17.

⁴⁰⁹ Friesen, *supra* note 50, at 603. Friesen argues that "unions [typically] use these funds for such core workplace purposes as contract negotiation and grievance adjustment, maintenance of union property, staff salaries, publications to represented workers, and benefits not paid under the collective bargaining agreement." *Id.* There is scant independent evidence that exists in support of these claims. Of note, one independent observer, the United States Supreme Court, evidently accepted a lower court's analysis after a detailed examination of union financial records, suggesting the following: (A) in *Communications Workers of America v. Beck*, the Court found that nearly 80 percent of union dues were not chargeable, practically the reverse of what unions and their supporters usually claim; and (B) in *Lehnert v. Ferris Faculty Ass'n*, the Court found that the union spent nearly 90 percent of its dues revenue on non-representational activity. See HUNTER, KERSEY & MILLER, *supra* note 35, at 15.

⁴¹⁰ Friesen, *supra* note 50, at 603.

⁴¹¹ Union advocates admit as much. See, e.g., Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616, 1620 (1995) (reviewing WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE*

that preventing "unions from funding organizing activities with objecting employees' dues undermines national labor policy and is not justified by either the federal labor statutes or the First Amendment."⁴¹² Although this conclusion is debatable, her forceful understanding of precedent suggests that unions are precluded from using union funds for any and all organizing activities.⁴¹³ Although the *Beck* Court has been criticized for failing to follow the canons of statutory construction,⁴¹⁴ Friesen's reasoning creates a paradox since the Ninth Circuit's rationale relies on her analytical powers. Her reasoning places in ruins the *United Food* court's claim that the absence of statutory equivalence is fatal to the dues objectors' claims. So convinced of the force of the *Beck* Court's holding, Professor Friesen proposes amending the NLRA to *permit* the chargeability of union organizing expenditure to dues objectors.⁴¹⁵ Since neither "the text [n]or the legislative history of the NLRA" contains evidence of a statutory goal directed toward "strengthening union power,"⁴¹⁶ the statute provides additional support for Friesen's conviction that *Beck* undermines what the Ninth Circuit is determined to allow. Indeed, the Supreme Court has stated that "[b]y its plain terms, . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers."⁴¹⁷ Furthermore, the *Lechmere* case fortifies the conclusion that unions

OF EMPLOYMENT RELATIONSHIPS AND THE LAW (1993), and arguing that the deterioration in union organizing power is related to the enactment of the Taft-Hartley Act); Lichtenstein, *supra* note 396, at 765 (noting that after the passage of the Taft-Hartley Act, "labor . . . [was] forced into an increasingly defensive posture.").

⁴¹² Friesen, *supra* note 50, at 604 (footnote omitted).

⁴¹³ *See id.* Among other things, Friesen bases her emphatic conclusion on the notion that political and/or other expenditures are authorized by labor union rules. Such reasoning may not apply to dues objectors for a variety of reasons including but not limited to the fact that an accurate understanding of their presumed preferences means that: (1) they must become forced riders if they are compelled to pay for politics; and (2) their disutility derived from forced association with detestable speech and detestable association violates their First Amendment values. Friesen's claim that "membership bent on frugality or political inoffensiveness could use internal union democratic processes to limit the purposes to which all union dues . . . could be spent" may overstate the amount of democracy that actually exists. *Id.* at 605 n.11. Friesen also fails to grapple with the historically verifiable problems of majoritarian governance systems. Friesen's approach allows the majority of unionists or the union leadership to oppress some for the benefit of others despite the defensible conclusion that "behavior that oppresses some for the benefit of others is pathological . . . [and] unconstrained majoritarian political process yields [such] outcomes." James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS*, *supra* note 181, at 25.

⁴¹⁴ *See, e.g.*, Dau-Schmidt, *supra* note 57, at 72–77 (contending that the Supreme Court in *Beck* did not follow the canons of statutory construction, failed to examine the NLRA's legislative history, and failed to correctly defer to congressional intent).

⁴¹⁵ *See* Friesen, *supra* note 50, at 605–06, 645–46.

⁴¹⁶ Exceptions of Charging Parties, *supra* note 382, at 8 (emphasis omitted).

⁴¹⁷ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis in original). This holding should serve to defeat the UFCW claim that union economies of scale (spreading collective-bargaining costs over a wider base of employees) constitute additional justification for the

do not have an unconstrained right to engage in organizing campaigns at the expense of dues objectors who do not share their expansionist goals.⁴¹⁸

The viability of the Ninth Circuit's decision rotates on the contention that the Supreme Court's holding in *Ellis*, which precludes the chargeability of organizing expenditures, brims with sufficient ambiguity to provide space for the NLRB to adequately distinguish *United Food* from Supreme Court precedent. Since the Supreme Court has determined that it is clear Congress has placed both the transportation industry and industries covered by the NLRA "on equal footing insofar as compulsory unionism . . . [is] concerned,"⁴¹⁹ the Ninth Circuit must traverse troubled waters in order to sustain its *Chevron* analysis. The court fails to do so.

Nevertheless, as developed more fully below, it may be constructive to temporarily accept the Ninth Circuit's contentions. But even assuming that the Ninth Circuit's reliance on *Chevron* is not provoked by unjustified sympathy or that its statutory equivalence analysis is spot on, the court concedes that deference to the NLRB is unwarranted if and when a valid constitutional question is presented. It is to this issue I now turn.

2. The Constitutional Question in the Mirror of Forced Riding

Although the Ninth Circuit's own precedents affirm the viability of First Amendment claims related to the NLRA,⁴²⁰ a brief exposition of the background of the NLRA, as well as the disputed purposes that collective bargaining can be seen to serve, may improve comprehension of the constitutional issues associated with the *United Food* opinion. For one of the drafters of the Wagner Act, statutorily protected unionism provides "freedom and dignity . . . [through] cooperation with others" for workers "caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise."⁴²¹ Absent from such equality of bargaining claims is an understanding that is at the heart of the union dues dispute: cooperation in the form of dues payments is grounded in statutory mandates that are coercive on their face.⁴²²

decision reached by the NLRB. Cf. *United Food & Commercial Workers Locals 951, 7 & 1036 (Meijer, Inc.)*, 329 N.L.R.B. 730, 731 (1999).

⁴¹⁸ See *Exceptions of Charging Parties*, *supra* note 382, at 8; see also *Lechmere*, 502 U.S. at 539–41; Harry G. Hutchison, *Through the Pruneyard Coherently: Resolving the Collision of Private Property Rights and Nonemployee Union Access Claims*, 78 MARQ. L. REV. 1, 10–12 (1994).

⁴¹⁹ *Comm'ns Workers of Am. v. Beck* 487 U.S. 735, 756 (1988).

⁴²⁰ See, e.g., *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 767 (9th Cir. 2002) (en banc) (citing *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970)).

⁴²¹ THE DEVELOPING LABOR LAW, *supra* note 308, at 28 (quoting 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner)).

⁴²² See, e.g., Charles W. Baird, *Toward Voluntary Unionism*, 17 J. PRIVATE ENTERPRISE, 77–96 (2001), available at <http://www.cbe.csueastbay.edu/~sbesc/volunion.html>.

In accord with that observation, the Taft-Hartley Amendments were designed to protect and promote the freedom of association of all workers by explicitly providing that workers had the right to refrain from engaging in concerted activity.⁴²³

Against this backdrop, the union dues dispute accentuates conflicting notions of unions. There are three possibilities. On one account, “workers oriented toward their own [presumed] common economic interest[s]” ought to “conceive [unions] as limited vehicles to . . . further self government,”⁴²⁴ or steadfast with the Taft-Hartley amendments, refrain from engaging in any concerted activity. That view intimates that some workers might be seen as free riders if they disguise their preference for union representation in an effort to escape financial contributions. In the absence of such disguised preferences, it is axiomatic that free-rider claims collapse. Attached inescapably to this guarded conception of unions is the following question: “[M]ay [a union], . . . consistent with [workers’ rights of] freedom of association [and speech], use . . . [union] dues . . . to advance causes [or interests] not favored by all of the [dues payers]?”⁴²⁵ If the answer is yes, and if the union can compel forced payments, does unjustifiable *forced* riding destructive of the dues objector’s interests occur?⁴²⁶

An alternative account of unions implies that they ought to “be conceived as the robust engine of collective insurgency against globalization, hierarchy, unwarranted management power, class-based injustice, and increasing disparities in income.”⁴²⁷

American trade unionism is based on coercion embodied in the National Labor Relations Act (NLRA). Its authors justified the coercion on the grounds that the interests of workers and employers are naturally in conflict, that individual workers have an inherent bargaining power disadvantage with respect to employers which unions can redress, and that unionization leads to peaceful labor relations. The principal instruments of coercion in the NLRA are exclusive representation (from which emerges union security), and mandatory good faith bargaining.

Id. at 77.

⁴²³ The Taft-Hartley Act amended section 7 of the NLRA to ensure that employees had “the right to refrain from joining a union.” RAY, SHARPE & STRASSFELD, *supra* note 79, at 426. “Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to ‘restrain or coerce . . . employees in the exercise of the rights guaranteed under section 7.’” *Id.* (alteration in original) (quoting 29 U.S.C. § 158(b)(1) (1994)). *See also* Kohler, *supra* note 14, at 186–87.

⁴²⁴ Hutchison, *supra* note 86, at 448.

⁴²⁵ NOWAK & ROTUNDA, *supra* note 56, at 1299. *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225–26 (1977) (holding that the state may require a public worker to pay dues or a service fee equal to dues “insofar as the [money] . . . is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment” but not for purposes of expressing political views); Int’l Ass’n of Machinists v. Street, 367 U.S. 740 (1961).

⁴²⁶ *Cf.* LEEF, *supra* note 87, at 32–35 (discussing and rejecting the free-rider justification for compulsory unionism).

⁴²⁷ Hutchison, *supra* note 86, at 448–49 (footnote omitted).

This view aims to alleviate the difficulties that unions are currently experiencing,⁴²⁸ and is enlarged by the necessity of rescuing “workplace democracy”⁴²⁹ as part of a movement toward the development of “radical class consciousness.”⁴³⁰ This plainly ideological approach is driven by a desire to find meaning in life through societal transformation despite an inability to articulate convincingly what that might look like. This dream of liberation “can be seen as part of a radical, inevitable, and historically driven movement [that] . . . leads to progressive human advancement in the form of egalitarianism and solidarity.”⁴³¹ This perspective may be consistent with the AFL-CIO’s objectives that include “mak[ing] the most of the solidarity and energy of the 2004 presidential election campaign” and by “helping workers form unions and building the most dynamic labor political program in . . . [its] history.”⁴³²

Taken together, this understanding of labor organizations implies that all workers must be enlisted in the conflict to transform society and the market as part of the quest for class-based justice.⁴³³ Workers, as thus described, operate as a prephilosophic *tabula rasa* that has yet to form sufficient moral intuition. Union hierarchs, by contrast, as members of the philosophic vanguard, act as forerunners of an inevitable and devoutly desired future destination that workers’ innate but still inchoate intellect guides them to. Coextensively, this *in loco parentis* perspective asserts that “[t]he core of American labor law has been essentially sealed off . . . both from democratic revision and renewal and from local experimentation and innovation,”⁴³⁴

⁴²⁸ See Weiler, *supra* note 406, at 1016–21; see also Hirsch & Schumacher, *supra* note 260, at 487 (“At the end of the century, the percentage of private wage and salary workers who were union members was less than 10 percent, not greatly different from union density prior to the [passage of the] NLRA.”). But see EPSTEIN, *supra* note 25, at 168 (noting that “[t]he declining role of unions in the labor force . . . is a direct and predictable response to the changes in the means of production that allow firms to escape the limitations of an inferior form of labor organization” — statutorily protected unions); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1407 (1983) (arguing that private sector unions “continue[] to lose ground” because they no longer “provide their membership with benefits that exceed their costs”).

⁴²⁹ For a description of workplace democracy, see Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 2 (1988).

⁴³⁰ For a description of the move toward radical class consciousness within the labor movement, see Hutchison, *supra* note 234, at 335–38, 353–58.

⁴³¹ *Id.* at 368 (critiquing this view) (footnote and internal quotation marks omitted).

⁴³² Strengthening Our Union Movement for the Future, <http://www.aflcio.org/aboutus/ourfuture> (last visited Jan. 27, 2006).

⁴³³ Cf. Feldman, *supra* note 3, at 193 (suggesting that the law fails to protect workers in their search for class-based justice).

⁴³⁴ Estlund, *supra* note 216, at 1530. Consistent with this claim, Professor Estlund also adverts to changes in the labor force, claiming that gender, “racial[,] and ethnic diversity has burgeoned” since the passage of the NLRA. *Id.* at 1535–36. This contention, at least with respect to the employment of African Americans and other members of nonwhite groups is dubious since African American labor-force participation and employment declined after the

thus imperiling “the collectivist premises of the New Deal labor law regime.”⁴³⁵ In other words, represented workers should become *justifiably* forced riders for the greater good, and accordingly, they should be denied the right to withdraw their financial support from the class-based benefits the union movement provides. On the other hand, even adherents to this view concede that the Taft-Hartley Act of 1947 refrains from forthrightly endorsing collective bargaining and instead reframed the NLRA “as favoring employee ‘free choice’ with respect to unionization and collective bargaining.”⁴³⁶ Nevertheless, empathy for the collectivist impulse impels some observers to claim that attempts to protect union dues objectors violate “the First Amendment rights of unions and union members . . . [by] threaten[ing] a union’s right to expressive association.”⁴³⁷

Despite the romance of this claim that overlooks union dissidents’ rights to expressive association, a third understanding of unionism maintains that unions are private organizations that have received an unconstitutionally coercive grant of power in the form of the right to exclusive representation of workers through majority-rule democracy.⁴³⁸ This point of view concludes that union dues objectors are motivated either by “genuine philosophical reservations” or fears that they will “suffer economically as a result of union action[s].”⁴³⁹ Because “[o]nly the individual can assess the subjective benefits of union membership,” compulsory unionism is unlikely to generate free riding among those who decline to support the union.⁴⁴⁰ This skeptical perspective discovers that state action exists and determines that compulsory union dues

passage of NLRA and the nonwhite-white unemployment differential widened. *See* VEDDER & GALLAWAY, *supra* note 51, at 272–80. Such empirical evidence may be consistent with less, not more, racial diversity.

⁴³⁵ Estlund, *supra* note 216, at 1530.

⁴³⁶ *Id.* at 1534.

⁴³⁷ Sean T. McLaughlin, *A Devil in Disguise: How Paycheck Protection Legislation Violates the First Amendment*, 27 SETON HALL LEGIS. J. 113, 137 (2002).

⁴³⁸ *See* Baird, *supra* note 92; *see also* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 208 (1944) (Murphy, J., concurring).

The constitutional problem inherent in [exclusive representation] is clear. Congress . . . has conferred upon the union selected by a majority . . . the power to represent [all members of a bargaining unit] . . . in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a [bargaining unit] . . . is derived solely from Congress.

Id. Apparently, “[i]n the same case the Court noted that, as an exclusive bargaining agent, a union ‘is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power’” Baird, *supra* (quoting Steele, 323 U.S. at 198). Baird states that it is doubtful that the United States Constitution granted Congress that “power to intervene in the formation [*sic*] and execution of private, voluntary exchange contracts. Congress has usurped that power, with the blessing of the U.S. Supreme Court, mainly on the basis of an illegitimate reading of the commerce clause of the U.S. Constitution.” *Id.*

⁴³⁹ LEEF, *supra* note 87, at 34.

⁴⁴⁰ *Id.*

payments implicate unjustified forced riding even when the dues are purportedly or actually collected to further a collective bargaining purpose or any other purpose.⁴⁴¹ Skepticism about collective bargaining imposed by statute appears to be consistent with the notion that legislation tends to favor a centralized decision-making process “with interest groups [and/or interest group leaders] trying to impose their will at the expense of more diffuse [and more diverse] groups” or subgroups.⁴⁴² Uncertainty, unease, and conflict may attach to hosts of putative collective bargaining related purposes. Some workers might favor high wages, others better benefits, and still others improved workplace safety. Even if one accepts the contention that unions operate as a “mini-legislatures,”⁴⁴³ it remains highly doubtful that collective bargaining-oriented decisions by this putative legislature will produce collectively rational decisions representing the views of the majority. Hence, a judgment by a union’s leader that a particular union objective and associated expenditures benefits the entire union membership does not by itself demonstrate that all or even a majority of unionists favor either the objective or the expenditure.⁴⁴⁴

a. Expanding boundaries: finding communicative content in union organizing

It is far from clear that the Ninth Circuit was disposed to consider impartially the constitutional claims of the dues objectors (nonmembers) because it held without analysis that “the claim made by nonmembers does not involve unions’ use of dues

⁴⁴¹ See *id.* at 32–34.

⁴⁴² A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 414 (1999). It is highly doubtful that “democracy [has the] ability to consistently produce collectively rational decisions representing the views of the majority. . . . [Hence,] a legislative judgment that certain individuals should enjoy entitlements at others’ expense *may* benefit society . . . does not by *itself* demonstrate that citizens favor the transfer or that the transfer benefits society.” *Id.* at 477 (emphases in original). Evidently, a number of “factors support this skepticism about majoritarian decisionmaking processes.” *Id.* at 478. According to Pritchard and Zywicki, these include: “(1) the influence of special interests on the political process; (2) the ‘lumpiness’ of political decisions,” meaning, among other things, that when the number of issues in any election vastly exceeds the number of candidates, it is unlikely that any candidate shares with even a single voter the same position on all issues; “(3) the ‘rational ignorance’ of voters” given that knowledge is scarce and hence costly; “(4) the ‘rational irrationality’ of voters caused by their individually trivial influence over election outcomes; (5) Arrow’s Theorem (the problem of aggregating individual preferences into coherent collective preferences); and (6) the problem of ‘stakeless voting,’” or in other words, the problem of majoritarian decision-making giving decision authority to many people with little or no personal stake in the matter. *Id.* at 478.

⁴⁴³ McUsic & Selmi, *supra* note 14, at 1343–44. (Noting that “unions . . . operate as mini-legislatures” with collective bargaining being viewed “as a form of democratic self-government . . . complete with . . . legislative principles, including the principle of majority rule” (footnote omitted)).

⁴⁴⁴ See Pritchard & Zywicki, *supra* note 442, at 477–83.

for political purposes.”⁴⁴⁵ In order to determine whether the *United Food* decision implicates First Amendment values, it is useful to analyze first the evidence upon which the court relied to justify its failure to consider fairly the charging parties’ First Amendment claims.

The court relied largely on economic claims. It suggested that if evidence could be found that demonstrated a positive relationship between extra unit organizing and wages, organizing-related expenditures could be seen as germane. Conversely, if such evidence was missing, that *lacunae* fortified the objections of union dissenters while exposing the political, social, or ideological purposes which lie beneath organizing expenditures. What *counts* as evidence is an obvious question.

On one account, a positive relationship between extra unit organizing and wages exists.⁴⁴⁶ Professor Voos, a union advocate who has asserted previously that “unions bring both protections for workers and an organized collective voice to the workplace,”⁴⁴⁷ was employed by the UFCW to provide evidence. Instead of evidence, she submitted a “Report” that seems to be unworthy of submission to “any professional ‘refereed’ journal.”⁴⁴⁸ Her survey of existing research “found [allegedly] that, out of some 20 studies by economists on the issue, all but two had found a significant positive relationship between the percent of employees organized and the level of union wages.”⁴⁴⁹ For Professor Voos, this leads to the conclusion “that there is overwhelming evidence of a positive relationship between union *coverage* and union wages.”⁴⁵⁰ Critically considered, her statement fails to demonstrate a provable connection between organizing and wages. While there may be a connection between union organizing and union coverage, it is equally clear that coverage as the independent variable that may operate to produce a positive wage benefit *is not* the same thing as an organizing effort that fails to result in coverage. Moreover, a “positive” relationship between union coverage and the dependent variable, the wages of already organized workers, fails to prove that there is a “significant” relationship. For instance “25% of the economics studies cited in her Report . . . indicate that the relationship between wages and union coverage is ‘insignificant’ (and in a few cases actually ‘negative’).”⁴⁵¹ Additionally, her report concentrated on the seventy-three

⁴⁴⁵ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 768 (9th Cir. 2002) (en banc).

⁴⁴⁶ Two putative experts testified on behalf of the UFCW, Professor Voos and Professor Craypo. Since Professor Voos’s report is primarily in issue, I focus on her work. See, e.g., *United Food & Commercial Workers Locals 951, 7 and 1036*, 329 N.L.R.B. 730, 732 (1999) (discussing the contentions surrounding Professor Voos’s report).

⁴⁴⁷ Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 173, 174 (Lawrence Mishel & Paula B. Voos eds., 1992).

⁴⁴⁸ *Exceptions of Charging Parties*, *supra* note 382, at 16–17 & n.17.

⁴⁴⁹ *United Food*, 329 N.L.R.B. at 734.

⁴⁵⁰ *Exceptions of Charging Parties*, *supra* note 382, at 17 (emphasis added).

⁴⁵¹ *Id.* at 17–18 (emphasis in original) (footnote omitted).

largest cities in the United States despite evidence that a number of the charging parties worked in largely rural areas.⁴⁵²

Although the *United Food* court was convinced that “[c]ase studies of specific retail food geographic markets also confirmed the [positive] results of the statistical studies,”⁴⁵³ there seems to be no analysis that distinguishes between spillover effects and threat effects. It is possible, therefore, that successful union organizing shifts union members in lower-wage jobs into the nonunion sector, and, accordingly, the wage rate paid in the nonunion sector falls. This development would, of course, correlate with an observed union relative wage advantage that tends to be greater than the true absolute effect of the union on its members’ real wage.⁴⁵⁴ Professor Voos’s report seems rife with omissions and verifiability issues. While the *United Food* court relies on her “Report,” the reliability of the report remains in doubt.⁴⁵⁵

Contrary evidence is available. In a study published in 2004, John DiNardo and David Lee, using multiple establishment-level data sets that represent establishments that faced organizing drives in the United States from 1984 to 1999, found that “union wage impacts are [very] small — centered around zero.”⁴⁵⁶ Given this data, and (1) the apparent absence of proof that Professor Voos separates threat effects and spillover effects, (2) her admission that “a union could spend virtually unlimited funds on organizing a new unit and still not actually recruit a single new member or sign a single new collective bargaining agreement,”⁴⁵⁷ (3) her concession that unions are unlikely to successfully negotiate contracts in more than 30 percent of successful organizing campaigns that result in an actual certification election,⁴⁵⁸ and (4) Professor Morgan Reynolds’s opinion that Professor Voos’s evidence consisted of “wishful thinking” and ignored the law of supply and demand for labor,⁴⁵⁹ it was predictable that the Board would formulate its conclusion in hypothetical terms. Missing is the language of causation. The hypothetical states: “[O]rganizing . . . *can* benefit all employees in a unit already represented by a union.”⁴⁶⁰ Even that hypothetical tends

⁴⁵² *United Food*, 329 N.L.R.B. at 732.

⁴⁵³ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 769 (9th Cir. 2002) (en banc).

⁴⁵⁴ Some evidence adduced before the administrative law judge shows “rising union wages” can operate consistently with “falling levels of unionization.” *Exceptions of Charging Parties*, *supra* note 382, at 18 n.12. (reporting on a study by labor economists Michael Wachter and Peter Linneman) (emphasis in original).

⁴⁵⁵ Among the issues are Professor Voos’s willingness to engage in unsupportable speculation about large increases in unionization (10 percent or more), and her failure to consider the positive effect of education on wages or the effect of race. *See id.* at 18–20.

⁴⁵⁶ DiNardo & Lee, *supra* note 257, at 3.

⁴⁵⁷ *Exceptions of Charging Parties*, *supra* note 382, at 20.

⁴⁵⁸ *Id.* at 21 (“[U]nions only win about 45% of certification elections, and then successfully negotiate contracts in only two-thirds of those units.”).

⁴⁵⁹ *Id.* at 28–29.

⁴⁶⁰ *United Food & Commercial Workers Union, Locals 951, 7 and 1036*, 329 N.L.R.B. 730, 736 (1999) (emphasis added).

to overstate benefits since an increase in wages in an already organized unit is unlikely to benefit workers who lose their jobs because of a wage increase.

Member Brame's critique underscores these various points by demonstrating that the NLRB fails to demonstrate a causal, as opposed to a coincidental, relationship between union wages gains and union extra-bargaining unit organizing. Indeed both the NLRB and Professor Voos fail to demonstrate that *any* wage gains are likely to be obtained from union organizing efforts. Further, if DiNardo and Lee's empirical investigation is correct, the contention that organizing yields more than attenuated benefits becomes untenable. Although further study may be warranted, Voos's claim that extra-bargaining unit organizing supplies economic benefits to already organized workers by forcing up wages at competitor facilities is pungent with salient implications that are adverse to union claims and contentions. Her claim cannot operate as *actual* proof that organizing supplies causally related economic benefits to newly organized workers to which the union has *no* representational obligation. Hence, her free-rider analysis may function as a perversity.⁴⁶¹

Taken as a whole, the Ninth Circuit opinion does not suffer from surplus empirical evidence in support of its holding. Suspicion is indispensable for a number of reasons. Recall the administrative law judge's refusal to make a ruling on the expert testimony presented.⁴⁶² Instead of relying on such evidence, he gave weight to a rather slender contention: Congress "believed" there was a positive correlation between organizing and wages.⁴⁶³ Even accepting the correctness of this narrative, we do not yet have proof that the individual closest to the evidence actually considered it. Still, given the unpersuasive evidence available, the focus on putative benefits accruing to already-organized workers may, in the end, be misplaced. For current purposes, it is time to accept an earlier suggestion: concede, for purposes of argument, the unreliable claim that organizing provides some collective bargaining benefits, but nonetheless challenge union dues expenditures on constitutional grounds. In order to provide an analytical framework, it is helpful to focus on two things: the purpose and the primary effect.

Following Professor Budziszewski, it is possible to state that "[a]n acorn is not *essentially* something small with a point at one end and a cap at the other; it is something aimed at being an oak."⁴⁶⁴ Likewise, extra-bargaining union organizing may not be essentially something that provides unions with an additional opportunity to expand economic "benefits" for already organized workers; it is something aimed at something greater — societal transformation. This probability assumes prominence

⁴⁶¹ See *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 452 n.13 (1984) (concluding that "it would be perverse to read it [the RLA] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them [unorganized workers] to become members.").

⁴⁶² See *United Food*, 329 N.L.R.B. at 731.

⁴⁶³ *Id.*

⁴⁶⁴ BUDZISZEWSKI, *supra* note 21, at 23.

given the evidence indicating that unions tend to consume up to 80 percent of union dues on what can be seen as indirect political, ideological, and other challengeable expenditures that are unlikely to have a representational purpose.⁴⁶⁵ Plainly, union dues payers may disagree with the union special interest message.⁴⁶⁶ Modern conflicts persist between different workers who are represented by a single bargaining agency.⁴⁶⁷ Predictably, different workers and different subgroups of workers find that their interests are at variance with others.⁴⁶⁸ “With standardized agreements, these individual variations in tastes and demands among workers are difficult to respect simultaneously.”⁴⁶⁹ It is questionable, therefore, that any worker who finds herself in disagreement within the union should be called upon to subsidize the contrary views, interests, or political preferences of the majority or entrenched union leaders, even if the purpose is masked by collective bargaining goals. This analysis appears particularly precise where “the state selects the ‘bargaining unit’ under the usual set of complex and indeterminate criteria, which always work against the interests of a political minority.”⁴⁷⁰

Since labor union “oligarchy . . . [may be] inevitable” and “‘elitist bargaining’ [may] now [be] the norm,”⁴⁷¹ concentration on economic benefits that are secured on behalf of unit dues payers tends to obscure the fact that the AFL-CIO, the formerly affiliated⁴⁷² United Food and Commercial Workers Union (UFCW), and UFCW’s various locals are structured to obtain far more than pure collective bargaining objectives. Evidently, the law has failed “to require, let alone enforce, democratic collective bargaining [and] has left union members subject to the manipulation of union leaders and negotiators with interests sharply different from theirs.”⁴⁷³ Fortifying this assertion, courts, commentators, and the NLRB refuse to focus on likely benefits (private or

⁴⁶⁵ See Edith Hakola & Rex Reed, *Labor Plays Politics With Its Members’ Dues*, WASH. POST, Sept. 1, 1996, at C4; see also *Compelled Political Speech: Hearings Before the S. Comm. On Rules & Admin.*, 106th Cong. (2000) (statement of Leo Troy, Professor of Economics, Rutgers University), available at http://rules.senate.gov/hearings/2000/041200_troy.htm.

⁴⁶⁶ Unions extract funds from their members to attain special interests benefits for the causes they favor within the context of American democracy, which, oddly enough, “favors concentrated interest groups at the expense of dispersed groups.” Pritchard & Zywicki, *supra* note 442, at 478–79. If true, this may favor entrenched union leadership at the expense of dispersed and diverse union members.

⁴⁶⁷ Cf. EPSTEIN, *supra* note 25, at 166 (“Since labor unions cannot function if they are required to have the unanimous consent of all workers within a unit, the legal system in the United States allows a bargaining representative chosen by a majority of workers within a firm to select the single representative for all workers within the business.”).

⁴⁶⁸ See *id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 167.

⁴⁷¹ Schwab, *supra* note 40, at 371.

⁴⁷² See *United Food and Commercial Workers Leave AFL-CIO*, USA Today.com, July 29, 2005, http://www.usatoday.com/money/workplace/2005-07-29-ufcw_x.htm.

⁴⁷³ Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 843 (1984).

public externalities) received by outsiders or disproportionately received by union leaders. Hence, the “fair share” language deployed to justify the chargeability of challenged activities to dues objectors remains suspect. It is likely that objectionable communicative content and spending are enshrouded by putatively economic crusades.

An inspection of recent AFL-CIO declarations substantiates the labor federation’s commitment, for example, to a “major global campaign to expose Wal-Mart.”⁴⁷⁴ Their goals include:

mobiliz[ing] federation-wide support for the UFCW’s drive to protect against the “Wal-Martization” of good jobs[,] develop[ing] and] implement[ing] global industry strategies to support organizing [and] bargaining[,] . . . building . . . community support [for] changing laws[,] . . . [ensuring that] organizing/growth and politics are linked[,] . . . [providing funds to] plac[e] full-time campaign directors in key states[,] . . . [and] developing new political relationships.⁴⁷⁵

Furthermore, an examination of publicly available documents reveals that the UFCW and its local affiliates have taken positions on a number of controversial issues including health care,⁴⁷⁶ defending the filibuster of judicial nominees,⁴⁷⁷ social security,⁴⁷⁸ minimum wages,⁴⁷⁹ and paid family medical leave.⁴⁸⁰

When labor union funds are spent to achieve interest group or special interest goods, it is doubtful that the union can credibly contend that *only* represented workers receive self-interested benefits. Instead, collective goods, such as enhanced child-support payments,⁴⁸¹ yield self-interested benefits largely to a select group of workers, leaders, or outsiders who happen to share this opinion. This activity, duly understood

⁴⁷⁴ AFL-CIO, A Comparison of “Winning for Working Families,” A Proposal by the AFL-CIO Officers with “Restoring the American Dream,” <http://www.aflcio.org/aboutus/ourfuture/upload/comparison2.pdf> (last visited Jan. 27, 2006).

⁴⁷⁵ *Id.*

⁴⁷⁶ See UFCW, Worker Political Agenda, Health Care, http://www.ufcw.org/worker_political_agenda/health_care/index.cfm (last visited Jan. 30, 2006).

⁴⁷⁷ See UFCW, Worker Political Agenda, Legislative & Political Action, http://www.ufcw.org/worker_political_agenda/2005_leg_and_po_action_mtg/index.cfm (last visited Jan. 30, 2006).

⁴⁷⁸ See UFCW, Worker Political Agenda, Social Security, http://www.ufcw.org/worker_political_agenda/social_security/index.cfm (last visited Jan. 30, 2006).

⁴⁷⁹ See UFCW, Worker Political Agenda, Minimum Wage, http://www.ufcw.org/worker_political_agenda/minimum_wage/index.cfm (last visited Jan. 30, 2006).

⁴⁸⁰ UCFW Local 1036, Political Affairs, California First State With Paid Family Medical Leave, <http://www.ufcw1036.com/political.htm> (follow “California First State with Paid Medical Leave” hyperlink) (last visited Jan. 30, 2006).

⁴⁸¹ See *id.*

as part of “Michel’s ‘Iron Law of Oligarchy,’”⁴⁸² operates simply as another version of group-specific “rent-seeking behavior.”⁴⁸³ Group resources are captured and transferred to favor goals and purposes idealized by group leaders and outsiders while the disfavored goals of the workers are left unattended.

Imagine the following possibilities connected to postmodern identity construal. Hispanic workers within the United States, driven by ascriptive concerns, may take an interest in ensuring an increase in immigration, legal or illegal, from Central and South America. They believe immigration improves the well-being of individuals who share their ethnicity. Union leaders may support the opposing view by allocating union funds to lobby either against liberalizing immigration or for tightening the rules. As this process proceeds, Hispanic workers may object to being associated with a policy that has the effect of diminishing the well-being of fellow Hispanics. They direct their opposition at the communicative element associated with compulsory funding of the union’s policy position.

Similarly, African American workers, knowledgeable about the historic role played by unions in sustaining subordinating strategies that limit opportunities for African American workers, may recognize minimum wage laws as an exclusionary device that has diminished economic opportunity for black workers in the United States and pre-Mandela South Africa.⁴⁸⁴ The future self-worth of African American workers is likely to be diminished by the enactment of minimum wage increases that have a disproportionately adverse effect on African American employment.⁴⁸⁵ African American workers may resist the communicative element connected to spending in support of this activity because wage floors operate to diminish the economic well-being and self-worth of individuals who share what has become, for them, a defining characteristic.

Figuratively, if the purpose of an acorn is to produce an oak,⁴⁸⁶ it is likely that union organizing operates purposely to produce collective goods that can be seen as hostile to the interests of Hispanic, African American, and other workers who fail to share a “community of interests”⁴⁸⁷ with the local union, national union, or union federation. The focus on presumed economic benefits received by already represented workers via extra-bargaining-unit organizing tends to operate as a sanctuary that shelters the primary purposes and resultant beneficiaries from view. Overall,

⁴⁸² Schwab, *supra* note 40, at 370.

⁴⁸³ Rent-seeking behavior has been crisply defined as conduct aimed at the transfer of wealth rather than its creation. *See, e.g.,* SPURR, *supra* note 237, at 26.

⁴⁸⁴ *See* Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 119–26 (1997) (reviewing unions’ historical motive for backing minimum wage laws).

⁴⁸⁵ *See generally id.*

⁴⁸⁶ *See supra* note 464 and accompanying text.

⁴⁸⁷ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 769 (9th Cir. 2002) (en banc).

this analysis serves to expand the boundaries of our understanding of expenditures that can neither be described accurately as germane nor be portrayed correctly as shorn of communicative content. Determining the legal sufficiency of a First Amendment claim requires courts to traverse an often fictional chasm between government conduct that counts as state action and government conduct that does not count as state action for purposes of constitutional law.⁴⁸⁸ As considered more fully below, the state action issue should not prove to be an insurmountable barrier. In addition, both the *Lehnert* and *Seay* cases provide examples pertaining to when union dues expenditures burden the freedom of expression of union dues objectors.

b. Burdening freedom of expression

When represented workers are given an actual choice to support the union's political and ideological mission, up to 85 percent of such workers refuse to allow their dues go to politics.⁴⁸⁹ While most private employees lack a similar choice, it is clear that "[t]he burden upon freedom of expression is particularly great [when] . . . compelled speech is in a public context."⁴⁹⁰ Consequently, the *Lehnert* Court's "hold[ing] that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation"⁴⁹¹ was a foreseeable boundary.

Before inspecting challenged expenses in considerable detail, the Supreme Court provided general principles to shape its deliberation. For instance, in *Lehnert*, "the challenged lobbying activities [did not] relate to the ratification or implementation of . . . [the] collective-bargaining agreement,"⁴⁹² and hence were nonchargeable. Analytically, this example indicates that challenged expenditures must have a connection with the presumed economic interest of the represented workers. Adverting to "the government's interest in promoting labor peace and avoiding the 'free-rider' problem that would otherwise accompany company union recognition,"⁴⁹³ the *Lehnert* Court found that "[n]either goal is served by charging objecting employees for lobbying, electoral, and other political activities that do not relate to their collective-bargaining agreement."⁴⁹⁴ Free-rider concerns are therefore inapt when "lobbying extends beyond the effectuation of a collective-bargaining agreement."⁴⁹⁵

Continuing to set forth general principles, the *Lehnert* Court declined to hold that dues objectors can "be charged only for those collective-bargaining activities

⁴⁸⁸ Fee, *supra* note 57, at 578–79.

⁴⁸⁹ See CHAVEZ & GRAY, *supra* note 30, at 46.

⁴⁹⁰ *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991).

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 520.

⁴⁹³ *Id.* at 520–21.

⁴⁹⁴ *Id.* at 521.

⁴⁹⁵ *Id.*

undertaken *directly* on behalf of their unit.”⁴⁹⁶ This apparently allows both the courts and the NLRB to conclude that a union does not act unlawfully by charging expenses that are “for services that *may* ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.”⁴⁹⁷ The Court’s failure to accept the complainants’ view may be mistaken because virtually any activity *may ultimately inure* to the benefit of members. The Court clarified. Since a local union’s affiliation relationship with the national unit may provide “considerable economic, political, and informational resources when the local is in need of them,” such expenditures are chargeable to dues objectors.⁴⁹⁸ But, invoking *Ellis*, the Court held that such expenses must be related to the union’s “statutory functions” and its “overall bargaining goals.”⁴⁹⁹ The Court stated that the chargeability of such expenses “does not . . . grant . . . [the] union *carte blanche*” to spend nonmembers’ dues however they wish.⁵⁰⁰ The *Lehnert* Court supplied familiar language, stating that the union does not have the right “to expend dissenters’ dollars for bargaining activities wholly unrelated to the employees in their unit.”⁵⁰¹ Expressly precluded, for instance, are “direct donation[s] or interest-free loan[s] to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally. . . . And, as always, the union bears the burden of proving the proportion of chargeable expense to total expenses.”⁵⁰² Placing the burden on the entity with the greatest access to information makes logical sense and is likely to be consistent with an accurate understanding of whom, as between the union and the dissenter, is the lowest cost information provider.

Justice Scalia would take this notion further. In the context of a public-sector union, he would hold “that any charge that does not relate to an activity expressly authorized by statute is *constitutionally* invalid, irrespective of its impact or lack thereof, on free expression.”⁵⁰³ The majority opinion criticizes “Justice Scalia’s rigid approach . . . [for] fail[ing] to acknowledge the practicalities of the complex inter-relationship between public employers, employees, unions, and the public.”⁵⁰⁴ Conversely, if union expenditures conceal spending objectives and purposes, then Justice Scalia’s approach may not only be allowable — it may be necessary to vindicate the First Amendment rights of union dissenters.

⁴⁹⁶ *Id.* at 522 (emphasis added).

⁴⁹⁷ *Id.* at 524 (emphasis added). *See also* Teamsters Local 75 (Schreiber Foods), 329 N.L.R.B. 28, 31 (1999) (citing *Lehnert*, 500 U.S. at 524).

⁴⁹⁸ *Lehnert*, 500 U.S. at 523.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at 524.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Id.* at 526 (emphasis in original) (discussing Justice Scalia’s opinion concurring in the judgment in part and dissenting in part).

⁵⁰⁴ *Id.*

The majority's premises and conclusions suggest that union organizing expenditures that exceed the level that is related provably to actual collective-bargaining purposes ought not to be chargeable to dues objectors. This conclusion should apply to all cases, whether arising within the public or private sector. Determining what must be proven for purposes of analyzing *United Food*, however, will require reliance on inferences drawn from specific examples.

For instance, the *Lehnert* Court disallowed the union's "Preserve Public Education (PPE) program designed to secure funds for public education," without considering the actual parameters of the program, because "none of the[] activities was shown to be oriented toward the ratification or implementation of . . . [the] collective-bargaining agreement."⁵⁰⁵ Here the Court adverts to the purpose of the challenged activity and implies that purpose can and should be dispositive.⁵⁰⁶ While dissenters are required to pay their share of general collective-bargaining costs of the state or national parent union, if and when such costs are germane to collective bargaining, extra-bargaining unit litigation expenses that provide hypothetical bargaining unit benefits are not chargeable to dissenters.⁵⁰⁷

Similarly, "[p]ublic relations expenditures designed to enhance the reputation of the teaching profession" might provide benefits by increasing the odds that the public might consent to pay higher taxes and increase the fund from which teachers are paid.⁵⁰⁸ Despite the collective-bargaining benefits of such activity, public relations remains an impermissible expenditure.⁵⁰⁹ Furthermore, the Court distinguished the permissibility of union social expenditures in *Ellis* from the public relations expenditures in *Lehnert* — disallowing "informational picketing, media exposure, signs, posters and buttons."⁵¹⁰ Public relations expenditures implicate a communicative content that is distinguishable from union social activities. When an activity becomes largely communicative in nature, it becomes suspect under *Lehnert*.

Before applying specific *Lehnert* examples to the *United Food* case, one should consider whether the state action rule precludes the application of the *Lehnert* rule to private sector cases. One commentator asserts that Supreme Court precedents in the affirmative action arena may serve "to defeat any arguments that a union's actions in negotiating and observing a union security agreement are state actions by virtue of the union's designation as the exclusive bargaining representative under section 9(a) of the NLRA."⁵¹¹ Oddly enough, the Ninth Circuit, in *Seay*, disagreed. The court considered a complaint brought by union dissenters covered by an agency shop agreement within the meaning of the NLRA.⁵¹² The complaint stated that compulsory fees

⁵⁰⁵ *Id.* at 527.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 528.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.* at 529 (citation omitted).

⁵¹¹ Dau-Schmidt, *supra* note 57, at 70–71.

⁵¹² *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 997 (9th Cir. 1970).

paid by union dissidents “were being used in ‘substantial amounts’ by the union to support the political campaigns of candidates for public office and were being employed ‘to propagate political and economic doctrines, concepts, ideologies, and legislative programs’” that they opposed.⁵¹³ The court held that such allegations were not “within the exclusive primary jurisdiction of the [NLRB].”⁵¹⁴ The Ninth Circuit’s *Seay* opinion states that “the pre-emption doctrine is not served by deferring to the Board where a constitutional question is validly presented.”⁵¹⁵ Although the Ninth Circuit now contends that most First Amendment claims “arise in the public sector context or under the RLA,”⁵¹⁶ the court concedes the obvious — its own precedents confirm that under the NLRA, First Amendment claims can be validly brought to the attention of the court without deferring to the NLRB.⁵¹⁷

In addition, the court found that the dissidents’ amended complaint states a duty of fair representation claim because it alleges that the union misused union funds.⁵¹⁸ Since the “[p]re-emption doctrine depends upon ‘the nature of the particular interest[]’” at issue, the *Seay* court found this misuse allegation to be outside the parameters of the NLRB because the duty of fair representation is *not* covered by statutory unfair labor practices.⁵¹⁹ *Seay* provides persuasive authority for the proposition that sufficient state action exists to ground union dues objectors’ First Amendment claims. It is also authority for the proposition that union dues cases arising under the NLRA support a separate claim for breach of a duty of fair representation. Hence, on the Ninth Circuit’s prior reading of the case law, the argument that state action rules bar First Amendment challenges is unlikely to bar union dues disputes brought before an impartial court.

Supplemental authority exists in support of these observations. It can be recalled usefully that the *Beck* dues objectors “sought relief on three separate federal claims: that the exaction of fees beyond those necessary to finance collective-bargaining activities violates Section 8(a)(3) [union security agreement rules]; that such exactions violate the judicially created duty of fair representation; and that such exactions violate the . . . [dues objectors’] First Amendment rights.”⁵²⁰ Emphasizing the discreteness of these claims, the *Beck* Court held that the NLRB “had primary jurisdiction over” issues related to the section 8(a)(3) claim⁵²¹ while stating that the court “need not

⁵¹³ *Id.* at 998.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* at 1002.

⁵¹⁶ *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 767 (9th Cir. 2002) (en banc).

⁵¹⁷ *Id.*

⁵¹⁸ *See Seay*, 427 F.2d at 1002.

⁵¹⁹ *Id.* The NLRB may have concurrent jurisdiction to decide duty of fair representation claims. *See, e.g., HENDERSON, supra* note 395, at 152–62.

⁵²⁰ *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 742 (1988).

⁵²¹ *Id.*

decide whether the exercise of rights permitted, though not compelled, by [section] 8(a)(3) involves state action."⁵²² Therefore, First Amendment challenges reinforced by duty of fair representation claims attached to First Amendment norms are still very much alive despite the unwillingness of the Court to ground its opinion in the First Amendment and to decide that sufficient state action exist. Moreover, sufficient state action has already been found in private sector cases within the meaning of the RLA.⁵²³

Returning to the application of specific *Lehnert* examples to *United Food*, I concentrate on three illustrations: (1) public education (PPE) expenditures, (2) extra-bargaining unit litigation expenses, and (3) public relations activities. First, securing additional public education funding via PPE spending may supply possible collective-bargaining related benefits for teachers. Still, the Supreme Court found that these types of expenditures were not sufficiently related to either the ratification or the implementation of a collective-bargaining agreement to be chargeable against dissenters.⁵²⁴ Fragrant with implications, however, PPE expenditures might be useful for purposes of *negotiating* a collective-bargaining agreement, because the availability of additional public revenues may be helpful in extracting larger wage increases from the employer. Economic benefits related to the PPE are dissimilar to the highly contestable and doubtfully reliable claims made in defense of extra-bargaining unit organizing in *United Food*. It is highly implausible that benefits associated with securing additional funds for public education can be seen as *more* attenuated than the economic benefits associated with extra-bargaining unit organizing. Reinforcing this conclusion is the determination that no benefits associated with extra-bargaining unit organizing are obtainable unless several predicate steps are accomplished. Moreover, since the *Lehnert* opinion implies that *purpose* can be dispositive, extra-bargaining organizing may be disallowable if a political purpose can be linked substantially to the organizing effort.

Secondly, *Lehnert* indicates that extra-bargaining unit litigation expenses, while potentially helpful to members of the unit, are unlikely to be helpful if the litigation does not concern or adversely concerns dissenting employees.⁵²⁵ Sending reports to the membership about such litigation is subject to the same conclusion. Here, the Court concentrates wisely on the improbability that union dissidents share in or are part of the same community of interests associated with the union's overall litigation strategy.⁵²⁶ The rejection of such expenditures vindicates the diversity of individual

⁵²² *Id.* at 761. *See also id.* at 763 (Blackmun, J., dissenting) ("I agree that the District Court and the Court of Appeals properly exercised jurisdiction over . . . [dues objectors'] duty-of-fair-representation and First Amendment claims . . .").

⁵²³ *See generally* Topol, *supra* note 57, at 1135 (discussing this development).

⁵²⁴ *See supra* notes 507–10 and accompanying text.

⁵²⁵ *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991).

⁵²⁶ *See id.*

and group interests that may comprise a union against the contrary claim that seems attached to the notion of solidarity. The Court states that “union litigation may cover a diverse range of areas . . . [which may be] unrelated to an objecting employee’s unit.”⁵²⁷ Accordingly, “[j]ust as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters’ fees for extraunit litigation, we hold that the Amendment proscribes such assessments in the public sector.”⁵²⁸

The *Lehnert* Court supplies several additional points. First, its understanding of the First Amendment proscribes extraunit litigation expenditures in both the private and public sector. Second, extraunit activity is unlikely to benefit workers within the unit. Third, because the *Ellis* Court’s free-rider and First Amendment analyses apply directly to private sector employment, the contention that such analyses cannot apply to private sector cases arising under the NLRA becomes fragile. Applying this analysis to *United Food* leads to several conclusions. The litigation expenses in *Lehnert* are potentially helpful when such expenses directly concern dissenters. It is equally likely that the organizing expenses in *United Food*, while potentially helpful if unions provide primary benefits to dissenters, are unlikely to be helpful when those expenses provide primary benefits to those outside the local union.

The third illustration drawn from *Lehnert* involves public relations expenditures. Unlike social activities, public relations expenditures — “informational picketing, media exposure, signs, posters and buttons” — have a plainly communicative element, which is likely to “increase the infringement of . . . [dissidents’] First Amendment rights.”⁵²⁹ In *United Food*, by contrast, it is not impossible but it is more difficult to prove that there is a communicative element associated with extra-unit organizing activities. Nevertheless, since *any* compelled contribution to a union may constitute a recognizable “infringement of his First Amendment rights,”⁵³⁰ a dues objector is likely to find compelled contributions for the purposes of organizing additional workers even more objectionable because of the message it sends to extra-unit workers and to the larger community. Such payments operate contrary to the union dissenter’s appreciation of the larger public interest. More particularly, if union organizing has a disguised purpose — additional funds directed toward the pursuit of political and ideological activities that have no real collective-bargaining purpose — the dues dispute becomes inextricably intertwined with First Amendment concerns. It may be possible that the United Food and Commercial Workers Union’s political and social objectives operate and are financed completely independently of the union’s collective bargaining initiatives. All that is necessary to disprove that possibility is complete access to union documents and accounts. Taken together, the *United Food*

⁵²⁷ *Id.*

⁵²⁸ *Id.* (citation omitted).

⁵²⁹ *Id.* at 529 (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 456 (1984)).

⁵³⁰ *Id.*

court's contention that all workers must pay for organizing because all represented workers receive uniformly robust benefits appears to be unsustainable. Compatible with that contention, the Fourth Circuit opinion in *Beck v. Communications Workers of America* following *Ellis*, unequivocally disallowed organizing expenses⁵³¹ and the subsequent *Beck* litigation failed to disavow this holding.⁵³²

In the analysis that follows, I contend that the *United Food* decision is in error. I concentrate largely on the possibility that self-interested benefits are likely to be obtained by a large number of individuals outside the *United Food* court's compass. The *United Food* court's explication suffers from two related strands of errors. The first strand is a function of the court's failure to appreciate that economic, as well as all other forms of self-interest, including ideological self-interest, brood whenever trade unions engage in virtually any activity. The possibility that organized workers will receive an economic advantage associated with extra bargaining unit organizing implicates free-riders concerns. If wages at Grocery Store A rise because a union's successful organizing effort leads to a collective-bargaining agreement that raises wages at competitor Store B, one might argue that workers in Store A have obtained economic benefits justifying compulsory dues as a device to preclude free riding *unless* the primary purpose and principal effect of the organizing campaign at Store B is to harvest self-interested benefits for those outside the local union. By overly concentrating on conjectural economic benefits that might be obtained hypothetically by represented workers at, for example, Grocery Store A, the court may abandon a more likely possibility: individuals (such as the union hierarchs or other outsiders) who neither work in Store A nor have a connection to the grocery store industry can obtain self-interested benefits from Store A's union members. Additionally, as previously noted, members of the newly organized workforce will obtain self-interested benefits if the union organizing campaign results in representation that ultimately leads to a collective-bargaining contract that results in higher wages for newly organized workers. Those benefits remain outside the court's eyesight.

A few illustrations may be helpful. The current leadership of the AFL-CIO opposes social security reform initiatives that include personal accounts.⁵³³ One need not take a position on the wisdom of President Bush's initiative to understand that if union dues are redeployed as part of a successful political campaign to block this proposal, the benefits of union involvement cannot be limited to workers at Store A. The benefits of the union's successful attempt to save social security are, in economic terms, nonexcludable. Equally probable, individuals who are neither members of the union nor members of the workforce may obtain possible economic benefits.

⁵³¹ *Beck v. Commc'ns Workers of Am.*, 776 F.2d 1187, 1199 (4th Cir. 1985).

⁵³² *See Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988) (apparently leaving to the appellate court to determine which particular expenditures are allowed); *Beck v. Commc'ns Workers of Am.*, 800 F.2d 1280 (4th Cir. 1986) (affirming federal jurisdiction).

⁵³³ Almeida, *supra* note 43.

Union and nonunion retirees are examples. Moreover, separating economic from all other forms of self-interested benefits is impossible. Saving social security may increase an individual's sense of security without necessarily providing some quantifiable pecuniary benefit. Similarly, monies spent on even incontestably direct political activities may provide some tangible economic benefits or other self-interested benefit to some, but not all, workers within a collective-bargaining unit consistent with the known proclivities of cartels to attempt to expand their monopoly power. Additionally, outsiders may become recipients of nonexcludable benefits derived from the union sponsored activity.

Similarly, when the union pursues collective goods such as abortion rights or marijuana decriminalization,⁵³⁴ these goods provide self-interested benefits consistent with the knowledge that the pursuit of special-interest goods supplies concentrated (largely private) benefits to the few.⁵³⁵ Framing this pursuit exclusively as a limited search for economic benefits obtainable by union dissenters may provide cover for the true beneficiaries' self-interest. Here, cover may take the form of an unpersuasive conception of free riding. Operationally, judicial cover is supplied by an inadequate search for *all* self-interested benefits attached to the challenged union activity. According to Professor Budziszewski, the following paradigm applies: "benefit incurs obligation, supreme benefit incurs supreme obligation."⁵³⁶ The exclusion of certain benefits results in a corresponding exclusion of certain obligations and certain obligors. Since the Ninth Circuit appears to exclude supreme beneficiaries, it must exclude, *a fortiori*, those who have incurred the supreme obligation. Conversely, the court's asymmetry allows it to place the primary burden on its pre-supposed, but not necessarily, supreme beneficiary — dues objectors.

The second strand of errors reinforces the errors associated with the first and is directly connected to First Amendment concerns. Subject to the usual caveat about causation, it is possible that union organizing efforts directed to workers at a competitor, Store B, yield economic benefits (higher wages) for already organized workers at Store A. Those benefits, however, may mask the true purpose and the primary effect of such organizing — increasing the number of workers represented by the local union which operates to expand total union dues revenue. Correlatively, additional dues revenues are then deployed principally to fuel the ideological and political mission of union leaders or union majorities that are, for example, aimed at transforming society via social disruption.⁵³⁷ This may require the election of a desired person to government office. For union hierarchs, this necessitates, among other things,

⁵³⁴ See, e.g., CHAVEZ & GRAY, *supra* note 30, at 18.

⁵³⁵ See Shaw, *supra* note 152, at 151.

⁵³⁶ BUDZISZEWSKI, *supra* note 21, at 31.

⁵³⁷ See, e.g., CHAVEZ & GRAY, *supra* note 30, at 52 (discussing the radical agenda of labor leader Dennis Rivera).

“spending a larger percentage of . . . dues on the political education of . . . members.”⁵³⁸ Given that the First Amendment can be seen as a key normative principle,⁵³⁹ and given that union members are likely to have diverse views concerning the benefits of social disruption, the court’s under-inclusive understanding of the political dimension of union dues conflict threatens the freedom not to associate and freedom of speech rights of union dissenters.

Risking repetition, I offer this summary. First, the court *overestimates* the self-interested benefits obtained by already organized workers at Store A, derived from the success of an organizing effort at Store B, by: (1) failing to require a causal connection between economic benefits and union organizing expenditures purportedly undertaken on their behalf, and (2) ignoring the self-interested benefits (private externalities) that actually flow from successful organizing, which accrue (perhaps disproportionately) to the hierarchy, union majorities, or outsiders.⁵⁴⁰ Second, the Ninth Circuit *under-inclusively defines* political expenditures by excluding from judicial scrutiny union spending on organizing efforts that have the primary purpose and effect of supporting political and ideological speech by expanding union strength in the form of greater union coverage of an industry. The union’s ideological and social missions are strengthened when a large percentage of additional union dues revenue, generated by compulsory dues paid by newly organized workers, migrates ultimately to support non-representational activity that takes the shape of politics. The court’s current approach fails to provide a principled basis to explain any Board decision concluding that a wide range of activities (political or otherwise) “*may ultimately inure*”⁵⁴¹ to the benefit of dues objectors. The NLRB has power, therefore, to authorize labor unions to charge dues to all members even where the collective-bargaining benefits, if any, remain attenuated.

Organizing can have at least two purposes: political and social transformation, on the one hand, and pecuniary gains, on the other. Establishing the former elevates First Amendment concerns. Diminishing the latter fortifies the former as well. Taken together, the court’s under-inclusiveness and overestimation may amount to a regressive form of wealth redistribution that is unlikely to favor all workers in an increasingly fragmented workplace while raising the probability that union dues objectors will become *forced riders*.

⁵³⁸ *Id.* (quoting Dennis Rivera, *Labor’s Role in the Political Arena, in A NEW LABOR MOVEMENT FOR THE NEW CENTURY* 241 (Gregory Mantsios ed., 1988)).

⁵³⁹ For a discussion that concentrates on freedom and expressly adopts the First Amendment as its guiding normative principle, see Benkler, *supra* note 69, at 26–28.

⁵⁴⁰ It is unlikely that even a modest understanding of free riding compels financial support of benefits that are provided to outsiders.

⁵⁴¹ This mistake can be linked to the Supreme Court’s language in *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991).

Conceivably, of course, “a benevolent guardian that bargains against management in the workers’ best interest” might be found to lead a union.⁵⁴² If this can possibly be true, and assuming that all “workers’ best interest” is uniformly the same, then free riding may resurface as a possibility. I remain skeptical however, that such a guardian can be found.⁵⁴³ Doubts are elevated both by virtue of the existence of dues objectors and by a comprehensive understanding of the human diversity embedded within the present-day workforce. It is neither likely that dues objectors have a disguised preference for the political goals, nor is it likely that the objectors in *United Food* obtained their fair share of the presumed economic benefits available. It is probable, therefore, that the *United Food* court has not accommodated adequately “first amendment-based doubts about compelling such financial subsidies.”⁵⁴⁴ On the contrary, the *United Food* holding reifies the probability that national and local unions will freeze out members with diverse preferences that operate within the parameters of a contemporary conception of human autonomy, grounded in the thin, *Lehnert*-derived argument that such activities will “ultimately inure to the benefit of” dues objectors.⁵⁴⁵

Since union dues objectors can be seen accurately as members of a distinct minority, judicial validation of challengeable union programs (such as organizing) that constitute (indirectly or directly) an encroachment of their First Amendment interests forecasts that courts may be better understood as serving the “veiled majoritarian function of promoting popular preferences at the expense of minority interests.”⁵⁴⁶ Contemporaneously, union leaders insist that “the only way to start winning [political] elections . . . [is] to organize.”⁵⁴⁷ Union leaders promote this symbiosis because they believe it supplies self-interested benefits to someone. The calculations of union hierarchs are unlikely to place minority interests (political or economic) at the top of the union’s agenda. On the contrary, union leaders will tend to fund political candidates who share their own preferences. Notably, labor unions occupy *seven* of the top ten spots on the latest lists of America’s leading contributors to political parties.⁵⁴⁸ Such evidence underscores the insight that

[t]he relevant difference between markets and politics does not lie in the kinds of values/interests that persons pursue, but in the conditions under which they pursue their various interests. Politics

⁵⁴² Schwab, *supra* note 40, at 373.

⁵⁴³ See *id.* (discussing the unlikelihood of this guardian’s existence).

⁵⁴⁴ Friesen, *supra* note 50, at 613 (describing “[the Supreme] Court’s opinions, [which] taken as a whole, . . . accommodate first amendment-based doubts.”).

⁵⁴⁵ *Lehnert*, 500 U.S. at 524.

⁵⁴⁶ Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1974 (1990) (focusing on racial minorities and judicial review).

⁵⁴⁷ Jill Lawrence, *Democrats Ponder Labor Split’s Political Effect*, USA TODAY, July 27, 2005, at 4A.

⁵⁴⁸ See *id.*

is a structure of complex exchange among individuals, a structure within which persons seek to secure collectively their own privately defined objectives that cannot be efficiently secured through simple market exchanges.⁵⁴⁹

Although "[u]nion autocrats [may] hunger for the 'solidarity' that comes from being able to compel all to join and pay, . . . if their services are as beneficial as they claim, they should be able to succeed without the use of compulsion."⁵⁵⁰ A labor movement led by hierarchs that subordinates the interest of the rank-and-file to the privately defined political and social preferences of the union hierarchy has no serious claim on workers' allegiance.

Allegorically, just as a chalkboard has predisposed itself to be receptive to certain kinds of writing instruments, so the *United Food* court believes that workers have predisposed themselves to be vehicles for societal transformation.⁵⁵¹ If societal transformation is the object, compulsory enlistment implies that workers are the means to achieve this end. Thus, one does not need to have a mind that is illuminated by special revelation or intoxicated by the Supreme Court's postmodern formulation of human autonomy⁵⁵² to recognize that objections to union dues are predictable and that a world without them would be odd. Still, the *United Food* case, appreciated dispassionately, provides a broad platform for expanding union efforts that constrain intentionally or coincidentally the First Amendment rights of dues objectors. Preventing similar efforts in the future will likely require reform of the NLRA.

IV. A CLEARING IN THE FOREST

The *United Food* opinion signifies that imaginative statutory interpretation conduces to extend the NLRA beyond its self-imposed limits. There is no reason why the Board, now liberated from *Beck* and, by extension, *Ellis* could not simply find a basis somewhere within the statute or within a flawed conception of free riding to extend *United Food*'s teaching to organizing cases involving some general desire to strengthen labor unions and the labor movement. The Ninth Circuit's opinion provides an opening for renewed efforts by union hierarchs to charge all represented workers, dues objectors and non-objectors alike, with higher dues in pursuit of *both* a stronger labor movement and greater political success. Activities seen previously and uncontroversially as unrelated to representational duties and therefore as non-chargeable expenses for dues objectors are likely to glide, deliberately or inadvertently, to the table.⁵⁵³ Nor is this claim simply idle speculation. In at least one case

⁵⁴⁹ Buchanan, *supra* note 181, at 107–08.

⁵⁵⁰ LEEF, *supra* note 87, at 34.

⁵⁵¹ I am indebted to J. Budziszewski for this observation.

⁵⁵² See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

⁵⁵³ Examples might include extra bargaining unit activities to preclude the "Wal-Martization" of the world, efforts aimed at raising the minimum wage, or sending extra bargaining unit

pending before the NLRB, a union has asserted its right to charge *private sector* employees for organizing efforts conducted within the *public sector*.⁵⁵⁴ It is possible that if and when a union successfully organizes crossing guards employed by the City of Green Bay, and if and when the crossing guards obtain a collective-bargaining contract that provides higher wages, such activities will ultimately inure to the benefit of Wisconsin area cheese and dairy industry workers.⁵⁵⁵ Conversely, most reasonable observers will decide that the contention that organizing crossings guards constitutes a closely-related and therefore chargeable ingredient that supplies economic benefits to dairy industry workers is unimaginably a bridge too far. Reforms that preserve dues objectors' First Amendment values and their finances from majoritarian assaults associated with these kinds of non-representational activities that can be seen to finance a union's political mission are overdue. The *United Food* opinion supplies a pedestal from which to pursue union objectives that place union dissenters' First Amendment interests at risk. I will, therefore, sketch a few proposals that may act to impede this probability.

A. Prevent Information Asymmetry

It seems clear that as between unions and dues objectors, unions tend to have access to the greatest amount of information. Equally probable, they have the greatest incentive to blur the ideological, social, and purely private purposes that may be embedded in compulsory union dues regimes. Nonetheless, "unions, set up to empower workers, provide far less financial information to their members — whose mandatory fees support them — than a publicly held corporation must . . . provide to its shareholders."⁵⁵⁶ Accordingly, "in spite of the expansive revenue and legal privileges unions possess,"⁵⁵⁷ unions generally face nominal financial disclosure requirements.⁵⁵⁸ Though unions are compelled to provide *Beck* objectors who resign from union membership with an independent audit, the NLRB has been far from convinced of this obligation.⁵⁵⁹ Typically, information provided to the rank-and-file does not

representatives out to organize non-competitor facilities or bring workers in from Bangladesh to speak to UAW about Southeast Asian labor conditions. See, e.g., Jennifer John, *Black Lake on 20-City Tour, Three Women Tell of Atrocities in Bangladesh*, UAW Frontlines, <http://www.uaw.org/solidarity/02/0102/front06.html> (last visited Jan. 31, 2006).

⁵⁵⁴ See *Teamsters Local 75 (Schreiber Foods)*, 329 N.L.R.B. 28 (1999). The case remanded for the development of further record on whether "organizing expenses are chargeable to dues objectors." *Id.* at 32 & n.14. Schreiber Foods, the employer, produces "cheese and related food products." *Id.* at 42 (Biblowitz, ALJ).

⁵⁵⁵ See *id.* at 48.

⁵⁵⁶ Ken Boehm, Foreword in HUNTER, KERSEY & MILLER, *supra* note 35, at 1.

⁵⁵⁷ HUNTER, KERSEY & MILLER, *supra* note 35, at 3.

⁵⁵⁸ *Id.*

⁵⁵⁹ See, e.g., *Penrod v. NLRB*, 203 F.3d 41, 45–46 (D.C. Cir. 2000) (overruling the NLRB's refusal to require a complete and thorough independent audit that provided the complainants with a breakdown of expenditures that were placed into nonrepresentational categories sufficient

have to meet an audit standard or a full disclosure standard,⁵⁶⁰ at least from the perspective of the NLRB.

Against this backdrop, a number of Supreme Court statements assume greater force. In *Brotherhood of Railway & Steamship Clerks v. Allen*, the Court held that “[s]ince the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden.”⁵⁶¹ Similarly in *Hudson*, the Court held that “[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee.”⁵⁶² The D.C. Circuit “expressly applie[d] *Hudson*’s requirements to new employees and financial core payors”⁵⁶³ covered by the NLRA. Burdening unions with the requirement to

to inform objectors of how much dues were to be reduced for new employees and financial core payors who exercised their *Beck* rights); *Ferriso v. NLRB*, 125 F.3d 865, 866 (D.C. Cir. 1997) (disagreeing with the NLRB and holding that if a union collects a compulsory agency fee, it is “required to provide [nonmembers] . . . with an independent audit . . . and that such audits must . . . conform to ordinary norms for audits of comparable entities”). NLRB resistance to the imposition of an independent audit requirement may be abetted by a recent Ninth Circuit decision disavowing the presumed necessity of providing audited financial statements in the context of a dues objector dispute within the public sector. *See Harik v. Cal. Teachers Ass’n*, 298 F.3d 863, 866 (9th Cir. 2002).

When information has been provided, some cases suggest that the union has engaged in a policy of defining core (germane) expenditures too broadly supplemented by its failure to fully inform workers of their right to object. *See Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998) (holding that “a union [does not] breach[] the duty of fair representation merely by negotiating a union security clause that uses the statutory language” contained in section 8(a)(3) but fails to inform workers of the *Beck* decision).

⁵⁶⁰ *See Penrod*, 203 F.3d at 43. (“The Board [has] held that unions have no obligation to tell employees . . . what percentage of dues are spent on nonrepresentational activities.”). The NLRB apparently holds “that the standard by which a union’s conduct is measured when it exacts funds from objecting nonmembers [dues objectors] under a union-security clause is the duty of fair representation.” *Teamsters Local 75 (Schreiber Foods)*, 329 N.L.R.B. 28, 30 (1999) (citing *California Saw & Knife Works*, 320 N.L.R.B. 224, 228–30 (1995)).

When nonmembers object to a union’s use of agency fees, the union must reduce the fee so that it reflects representational expenditures only.

The union also must apprise the objector of the percentage of fees being reduced, the basis for the calculation and the objectors’ right to challenge the figures.

Id.

⁵⁶¹ 373 U.S. 113, 122 (1963).

⁵⁶² *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986). *See also Abrams v. Commc’n Workers of Am.*, 59 F.3d 1373, 1379 n.7 (D.C. Cir. 1995) (applying *Hudson* to nonpublic unions).

⁵⁶³ *Penrod*, 203 F.3d at 47 (citing *Abrams*, 59 F.3d at 1379). Currently the NLRB concurs in the requirement that new workers be notified of their *General Motors* rights to refrain from joining a union while retaining the obligation to pay germane union dues and fees. *See, e.g., Teamsters Local 75 (Schreiber Foods)*, 329 N.L.R.B. at 29.

provide complete and thorough information regarding all union financial allocations (political or not) should be the right of all workers who are represented.⁵⁶⁴

Understanding the difficulties that union dissenters confront enhances the attractiveness of this approach. Difficulties include persistent union opposition to efforts by dues objectors to invoke their First Amendment rights,⁵⁶⁵ coupled with the requirement that dissenters must resign and lose their already limited union governance rights.⁵⁶⁶ This paradigm of limited financial disclosure may have been and may continue to be reinforced by the exploitation of campaign finance loopholes.⁵⁶⁷ Taken together, this comprehensive pattern seems to allow unions “to pretend they spend relatively little on politics, even while building tremendous political influence.”⁵⁶⁸

The provision of full, complete, and accurate financial information to all union members, including dues objectors, may be a step towards achieving actual, as opposed to aspirational, democracy.⁵⁶⁹ Without information, workers may have little incentive

⁵⁶⁴ It is clear that under *California Saw*, the NLRB requires the following:

[W]hen or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections.

California Saw, 320 N.L.R.B. at 233. First, I have not found authority that confirms that workers who elect to join the union have a right to receive the information specified in *California Saw* on a continuing basis. Second, the NLRB affords unions with “wide range of reasonableness . . . in satisfying its duty of fair representation.” *Id.* at 235.

⁵⁶⁵ See Knollenberg, *supra* note 34, at 364 (explaining that workers who “take on the union establishment [will] find the process . . . marked by threats of life and family, intimidation, insults, and coercion”); see also *Penrod*, 203 F.3d at 46 (noting that “Beck objectors . . . were given only general categories of expenditures.”).

⁵⁶⁶ Hutchison, *supra* note 86, at 486 (arguing that if a dues objector is compelled to resign and if her governance rights have value to her, her “resignation should serve to increase the amount of forced riding she incurs”).

⁵⁶⁷ See Hutchison, *supra* note 216, at 727.

⁵⁶⁸ *Id.* (footnote omitted).

⁵⁶⁹ Undeniably, any effort to reform the NLRA will encounter contrary arguments by commentators who “favor legal changes that will make it easier to unionize because . . . [they] believe [the] continued decline in unionization is bad not only for unions and their members but for the entire society.” RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 250 (1984). In an effort to defend labor unions, some commentators advert to the possibility that union democracy provides sufficient protection for union dissenters. Nonetheless, some observers admit the obvious: “[a]ny democracy — whether a labor organization or a national government — inevitably calls for the subordination of some individual preferences.” Friesen, *supra* note 50, at 646. While corroboration of the link between unions and inescapable subordination may be salutary news to union dissenters, democracy remains an unpromising

(a) to resign from the union (a predicate to becoming a dues objector), or (b) to enforce their *Beck* rights. A statutory enactment that requires unions to provide full and complete information is warranted.

In order to give full effect to this proposal, Congress must ensure that the NLRB and the courts demand proof that the challenged expenditures have more than a conjectural connection to a defensible collective bargaining purpose. Complemented by statutorily confirmed burden shifting⁵⁷⁰ that ensures the burden of proof with respect to the veracity of information is retained by the union, this rule would require unions to prove affirmatively the causal connection between the challenged activity and the stated collective bargaining benefit. This would give life to the ongoing incorporation of *Hudson* principles against private sector unions.⁵⁷¹ Furthermore, Congress should require that the quality and quantum of the evidence supplied by the union meet a high standard of evidentiary proof.

B. Ensure that Dues Objectors Have the Right, Coupled With Incentives, to Bring Their Claims in Federal District Court

Since most union dues disputes are connected (whether formally or not) to the duty of fair representation framework and First Amendment values, union dissenters should be encouraged by statutory enactment to bring their claim in federal district

source to safeguard workers' dissent for two reasons. First, unions do not operate generally as a democracy. *See, e.g.*, Schwab, *supra* note 40, at 368–70. Consistent with that observation, Andrew Stern, President of the Service Employees International Union (SEIU), wants to rebuild the union movement by “restor[ing] the labor bureaucracy’s social and political clout as a whole at the expense of small unions — and union democracy — to rebuild leverage in particular industries.” Lee Sustar, *AFL-CIO: The Limits of Partnership*, INT’L SOCIALIST REV., July/Aug. 2005, available at http://www.isreview.org/issues/42/labor_debate.shtml. Second, democracy, if it exists, falls prey to John Stuart Mill’s observation that democracy is insufficient to protect disfavored subgroups and individuals from the coercive power that can be exercised or authorized by a majority. *See* PHILLIP E. JOHNSON, *THE RIGHT QUESTIONS: TRUTH, MEANING & PUBLIC DEBATE* 149 (2002) (discussing John Stuart Mill). Consequently, democracy enhancement strategies are unlikely to preserve the diversity of preferences situated within contemporary unions.

⁵⁷⁰ Some federal appellate opinions already exist that move toward the placement of the burden on unions. *See, e.g.*, *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991) (“[A]s always, the union bears the burden of proving the proportion of chargeable expense to total expense.”).

⁵⁷¹ *See, e.g.*, *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000). Following *Hudson*, where “the union paid more than half its income to affiliated organizations, but informed nonmembers only that they were required to pay 95% of full dues,” the D.C. Circuit Court acknowledged that the Supreme Court ordered, “unless a union demonstrates that ‘none of [the amount paid to affiliates] was used to subsidize activities for which nonmembers may not be charged,’ then ‘an explanation of the share that was so used [is] surely required.’” *Id.* at 47 (alterations in original) (quoting *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 307 (1986)).

court rather than simply asserting an unfair labor practice or duty of fair representation claim before the NLRB. The right to bring suit in federal court should be toughened by sanctions that provide disincentives for unions to delay such proceedings and financial incentives to encourage dissenters to litigate the dispute in court. A statutory right would constitute a normative statement that society takes union dues objections seriously. In other words, society should see union dues objections in light of the *Communications Workers of America v. Beck*⁵⁷² case, which took more than nine years to prosecute fully.⁵⁷³ A statutory right to bring such lawsuits, coupled with a full panoply of sanctions that are enforceable against unions that flagrantly obstruct dues objectors' rights, should be given careful study. Sanctions, including punitive damages if necessary, may lead to a more expeditious review of dues objector cases. Overall, this approach is likely to provide an obstacle to elastic statutory interpretation and often delayed NLRB decision-making.⁵⁷⁴ Under this approach, judicial deference will continue to be warranted *only* with respect to NLRB unfair labor practice adjudication of complaints attached directly to statutory language such as section 8(a)(3). If judicial deference were to continue with respect to complaints implicating the union's duty of fair representation or an infringement of the workers' First Amendment rights, this would signify that society fails to take seriously the First Amendment issues at stake. Congress should consider amending the NLRA to give effect to this proposal.

C. Infuse the Union Dues Dispute With First Amendment Values

Lastly, when deciding First Amendment challenges, courts should adopt (or be required to adopt) an extraordinarily broad conception of First Amendment norms as an antidote to union attempts to camouflage the actual aim of union dues expenditures. Indeed, the courts should infuse the union dues dispute with a robust understanding of First Amendment values. While there is every reason to believe that unions, and more particularly union leaders, are unlikely to welcome proposals that tend to diminish their power and their "right" to speak on behalf of the entire workforce, it is, of course, the communicative content of such speech that prompts this initiative. First Amendment values are unlikely to be worth much if and when the free-rider presumption is maintained unjustifiably by either the courts, the NLRB, or unions that shelter expenditures having a primary or substantial effect of promoting offensive speech. Congress can breathe life into First Amendment values by reviewing and reworking its free-rider analyses to ensure that free-rider fears cannot

⁵⁷² 487 U.S. 735 (1988).

⁵⁷³ The employees filed their suit in federal district court in June 1976, and the Supreme Court issued its decision on June 29, 1988. See *id.* at 735, 739.

⁵⁷⁴ The first NLRB decision that took into account the *Beck* case was *California Saw & Knife Works*, 320 N.L.R.B. 224, 239 (1995).

trump First Amendment values. A minimal first step would be to disallow the legal sufficiency of any union claim that a program or activity is chargeable because it may “ultimately inure to the benefit” of workers. The enactment of this proposal will provide helpful guidance to the courts.

Taken together, these proposals offer a clearing in a dense forest that has obscured the necessity of establishing a causal connection between contested expenditures and collective bargaining. Left unattended, the leaves, the overgrown flora, and the debris cabined by this forest may conceal the true purpose associated with union organizing. This increasingly impenetrable forest has protected predictable free-rider presumptions grounded in the illusion that unions provide an enduring community. Failure to enact these proposals may allow the *United Food* decision to become a sturdy platform from which to expand union political strength at the expense of the growing diversity of interests present in America’s contemporary workforce and in derogation of First Amendment norms.

CONCLUSION

The union movement suffers from the belief in humanity’s capacity to control society in pursuit of an ideal — “collective self-determination”⁵⁷⁵ — that is not only desirable (for some) but also impossible. Both the NLRB and some courts have become receptive to the possibilities associated with this belief. Ultimately, this conviction in its compulsory form, as well as the *United Food* opinion itself, may be driven by the notion that conscious control or direction of social processes provides an avenue to a new, improved, and progressive social welfare future that seems implicit in some version of egalitarianism born of social disruption. Proponents of this form of social progress are likely to be “indifferent as between achieving equality through taking away from those who have and giving to those who have not.”⁵⁷⁶ The various goods that contemporary workers seek are irreducibly different and incommensurably complex. Vitiating individual autonomy and eviscerating individual preferences may be seen accordingly as acceptable casualties by labor unions that were formed to deal initially with the inequality of bargaining presumption, but which now have been transmuted into institutions that have another and larger purpose — obtaining the Good.

When labor leaders link organizing efforts with their politics, their conception of the Good, however self-interested, becomes more attainable. One of the Good’s indispensable fundamentals consists of imposed financial support. This process gives rise, unhappily, to the hypothesis that union hierarchs have become “acolytes enthralled” and captured⁵⁷⁷ by their attachment to talismanic rhetoric, who presume the

⁵⁷⁵ See KUKATHAS, *supra* note 175, at 18.

⁵⁷⁶ JOHN GRAY, *THE MORAL FOUNDATIONS OF MARKET INSTITUTIONS* 35 (1992).

⁵⁷⁷ MARVA J. DAWN, *POWERS, WEAKNESS, AND THE TABERNACLING OF GOD* 6 (2001).

coherence of a particular way of life⁵⁷⁸ and who seek to impose the benefits of this life on others⁵⁷⁹ who remain unwilling to capitulate to unions' centralizing impulse.

It is doubtful that even a majority of workers desire to share in this way of life that may yield, at best, attenuated benefits. Since unions spend or are likely to spend most of their dues revenues on nonrepresentational activities, society should reject the NLRA's failure to preclude compulsory payments for "any particular union goal including the goal of political influence."⁵⁸⁰ This contention should be required to surmount two obstacles: the union's duty of fair representation obligation and a principled, yet robust, understanding of First Amendment values. The conscription of funds, largely to achieve one's own private purposes, is unlikely to withstand any ethical examination grounded in a fair understanding of human autonomy and liberty.

This examination of the union dues dispute implies that labor unions can no longer be conceived of as true member-based organizations; nor can they be conceived of as part of what was once seen as "a proud mass movement that . . . [endeavored to] improve[] . . . the lives of its members in vital segments of the [then] manufacturing-based economy."⁵⁸¹ Instead, labor unions have become "special-interest adjunct[s]" to political allies while often failing to serve the actual interests of their members.⁵⁸² Urgent legislative action and principled judicial decision-making should be seen as important elements of any effort that aims to decouple politics from collective bargaining. Ultimately, such efforts may breathe life into Senator Dirksen's observation that "the Constitution [should serve] as a shield between the working man and the union officials who seek to force him to join a union or pay tribute . . . as the price of keeping his job,"⁵⁸³ and revitalize the Supreme Court's claim that "the right to work for a living in the common occupations of the community is . . . the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."⁵⁸⁴

⁵⁷⁸ Yack, *supra* note 161, at 3.

⁵⁷⁹ *Id.* at 8–9.

⁵⁸⁰ Friesen, *supra* note 50, at 647 (emphasis in original).

⁵⁸¹ Michael McMenamin, Labor Lost: Why the AFL-CIO's Cynical Survival Strategy Is Doomed, REASON, Nov. 2000, at 47, 48.

⁵⁸² *Id.* at 48.

⁵⁸³ Everett McKinley Dirksen, *Individual Freedom Versus Compulsory Unionism: A Constitutional Problem*, 15 DEPAUL L. REV. 259, 275 (1966).

⁵⁸⁴ *Truax v. Raich*, 239 U.S. 33, 41 (1915).