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Beck Executive Order Signing 4/13/92 [OA 7571]

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THE WHITE HOUSE

WASHINGTON

April 13, 1992

MEMORANDUM FOR DAVID DEMAREST
DAN MCGROARTY
SPEECHWRITERS
RESEARCHERS

FROM: BOB SIMON *PS*
SUBJECT: BECK EXECUTIVE ORDER SIGNING

XI. THOU SHALT NOT BE FORCED TO CONTRIBUTE AGAINST THY WILL.

And the Earth shook and the mountains trembled. And when Moses came down from the mountain with the new commandment, there was a great tumult in the land, for in his absence, the unions had constructed a golden political action committee, and adorned and worshipped it.

Moses declared, "Those who will not live by the law, must die by the law." And with that, the Earth opened up and swallowed those who would not follow the new executive order.

* * *

In case any of you are totally lost, Charlton Heston was in the Rose Garden today as the President signed the Beck enforcement executive order which informs workers of their right to not have their union dues support political causes. After the President joked that Heston parted the Red Sea again on TV last night, Heston was out at the stakeout taking credit for the good weather.

The President's delivery was strong and clear. The hand-picked audience interrupted him twice with applause for saying the magical words: "enforce workers' Beck rights." All in all, a good event.

Jennifer
Memorandum for Speechwriting Staff

From: Dan McGroarty

Regarding: *BECK*

Please return your comments to Room
122 by:

11 AM

APR 9 1992

Today's Date: _____

(Duggan/Simon)
April 9, 1992
Draft Two
Beck

2 APR 9 P4:03

PRESIDENTIAL REMARKS: BECK EXECUTIVE ORDER SIGNING
ROSE GARDEN
MONDAY, APRIL 13, 1992
11:00 A.M.

[Acknowledgments]

It is a pleasure to welcome all of you to the White House. This happens to be a very special anniversary. Two hundred forty-nine years ago today, Thomas Jefferson was born. It is therefore a fitting occasion for putting into effect new reforms that will protect Americans' constitutional rights against political abuse by special interest groups.

For brilliance, for courage, for passion in the cause of freedom and democracy, no one has ever surpassed Thomas Jefferson. Jefferson showed his characteristic intensity in [year] when he declared: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

It is this Jeffersonian insight that we reaffirm today with reforms to strengthen the political rights of American workers. In the Executive Order I will sign in a few moments, I am directing the Secretary of Labor to require all companies that perform federal contract work to inform their employees in the clearest possible terms of their constitutional rights as affirmed in the Supreme Court's landmark Beck decision. While this order will directly affect xx million American workers, I want to note that the rights affirmed by the Beck decision apply

to all Americans and are enforceable by the National Labor Relations Board.

The Beck decision affirmed that no worker may be compelled against his will to pay union or agency dues in excess of what is actually used for collective bargaining purposes. Enforcing that decision will guarantee that no American will have his job or livelihood threatened for refusing to contribute to political activities against his will. Our enforcement actions will make it easier for workers to understand and protect their specific political rights. [For example, I have asked the Secretary of Labor to establish a toll-free hotline providing callers information on workers' political rights.]

The Secretary of Labor also will issue a new rule clarifying and bringing up to date requirements for labor organizations to account for how workers' dues are spent. The trial court in the Beck case found, for instance, that in plaintiff Harry Beck's workplace, 79 percent of the compulsory dues collected went to purposes unrelated to collective bargaining. Our new rule will make sure that workers have a chance to know clearly how their dues are being spent.

One of America's most intrepid fighters for individual rights is the distinguished actor, Charlton Heston. He has been a member of four different labor organizations, and like Ronald Reagan before him, a former president of the Screen Actors Guild. He has given much of himself to put collective bargaining rights into practice. And he has been equally committed to seeing that

*(John had
banning off
of Jerry Brown's
1-800?)*

*Heston is a
magnificent
speaker. How about
a guest from
one of
his speeches.*

*His
office:
(213) 459-
7359*

*310-459-4017 Fox
859-~~1134~~ phone Heston
1134
310-859-8095 Fox*

no company or organization may infringe on a worker's individual freedom of conscience. Chuck, we're honored that you have travelled across the country to be with us today. \\

Our new actions to protect individual liberties are important efforts in a larger crusade I am waging to reform our system of politics and government. I would like to ask you to join me, for instance, in turning up the heat on Congress to enact a sweeping reform of campaign financing. I'm fighting to eliminate the special interest PACs, and to stop the millions of dollars in administrative subsidies that corporations and labor organizations now are allowed to channel into their own PACs.

Time and again over our constitutional history, protecting universal rights has demanded the lonely courage of individuals citizens standing up against powerful organized interests. And I am especially honored that we have here today such an individual. It took this man 12 years of patient effort to carry his case to vindication in the highest court of the land. And it is his crusade that brings us together today. Harry Beck, won't you please come up and stand with me as I sign the Executive Order.

\\ {Signs order.}

Thank you, and may God bless the United States of America.

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TO POTUS

(Duggan/Simon)
April 10, 1992
Draft Four
Beck

PRESIDENTIAL REMARKS: BECK EXECUTIVE ORDER SIGNING
ROSE GARDEN
MONDAY, APRIL 13, 1992
11:00 A.M.

[Acknowledgments] *Tom DeLay* *Bob Walker*

It is a pleasure to welcome all of you to the White House. This happens to be a very special anniversary. Two hundred forty-nine years ago today, Thomas Jefferson was born. And there is a renewed spirit of Jeffersonian reform sweeping through this nation today. It is therefore a fitting occasion for putting into effect new reforms that will protect Americans' fundamental rights against political abuse by special interest groups.

For brilliance, for courage, for passion in the cause of freedom and democracy, no one has ever surpassed Thomas Jefferson. Jefferson eloquently stated a principle of fundamental fairness in 1779 when he declared: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."

Not long ago in Philadelphia, I spoke of the wisdom of the Founders on the subject of government reform. It is this Jeffersonian insight that we reaffirm today with reforms to strengthen the political rights of American workers. In the Executive Order I will sign in a few moments, I am directing that companies performing federal contract work must inform their employees in the clearest possible terms of their legal rights as affirmed in the Supreme Court's landmark Beck decision. The

large placard displayed here presents the exact words of the notice that will be placed in workplaces around the nation. While this order will directly affect American workers employed by federal contractors, I want to emphasize that the principles affirmed by the Beck decision are precious to all Americans.

The Beck decision is one of a series of cases protecting American workers from being compelled against their will to pay union or agency dues in excess of what is actually used for collective bargaining purposes and contract administration. Full implementation of this principle will guarantee that no American will have his job or livelihood threatened for refusing to contribute to political activities against his will. The Executive Order I sign today will make it easier for employees of federal contractors to understand and exercise their political rights.

The Secretary of Labor is separately proposing a rule clarifying and bringing up to date requirements for labor organizations to account for how workers' dues are spent. This rule aims to foster union democracy, and it also will have the effect of helping employees protect their Beck rights. The trial court in the Beck case found, for instance, that in plaintiff Harry Beck's workplace, 79 percent of the compulsory dues collected went to purposes unrelated to collective bargaining and contract administration. Our new rule will assist union members in discovering how their dues are being spent. And perhaps most important of all, I expect the National Labor Relations Board to

carry out its responsibility to enforce the principles of the Beck decision.

One of America's most intrepid fighters for individual rights is the distinguished actor, Charlton Heston. He has been a member of four different labor organizations, and like Ronald Reagan before him, a president of the Screen Actors Guild. He has given much of himself to put collective bargaining rights into practice. And he has been equally committed to seeing that no company or organization may infringe a worker's individual freedom of conscience. Chuck, we're honored that you have travelled across the country to be with us today. \\

Our new actions to protect individual liberties are important efforts in a larger crusade I am waging to reform our system of politics and government. Institutions of public life -- whether the government, corporations, or unions -- should be accountable to their constituents to produce results and to respond to their needs. Working Americans should have the right to decide whether contributing to political parties or candidates at odds with their beliefs fulfill that principle and represent the institutional responsibility we rightfully expect. In pursuit of the very same principles -- accountability and responsibility -- I am asking Congress to enact a sweeping reform of campaign financing. I'm fighting to eliminate the special interest PACs, which will stop the millions of dollars in administrative subsidies that corporations and labor organizations now are allowed to channel into their own PACs.

Time and again over our constitutional history, protecting universal rights has demanded the lonely courage of individuals~~s~~ citizens standing up against powerful organized interests. And I am especially honored that we have here today such an individual. It took this man 12 years of patient effort to carry his case to vindication in the highest court of the land. And it is his crusade that brings us together today. Harry Beck, thank you for all you've done. I'm proud to have you [and other plaintiffs -- names still to be provided] stand with me as I sign the Executive Order. \\ {Signs order.}

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(Duggan/Simon)
April 10, 1992
Draft Three
Beck

PRESIDENTIAL REMARKS: BECK EXECUTIVE ORDER SIGNING
ROSE GARDEN
MONDAY, APRIL 13, 1992
11:00 A.M.

[Acknowledgments]

It is a pleasure to welcome all of you to the White House.

*world
Almanac
1992
p. 429*
This happens to be a very special anniversary. Two hundred
forty-nine years ago today, Thomas Jefferson was born. It is
therefore a fitting occasion for putting into effect new reforms
that will protect Americans' fundamental rights against political
abuse by special interest groups.

*see
bill
from a
Bill
introduced
in Va.
Legislature*
For brilliance, for courage, for passion in the cause of
freedom and democracy, no one has ever surpassed Thomas
Jefferson. Jefferson showed his characteristic intensity in 1779
when he declared: "To compel a man to furnish contributions of
money for the propagation of opinions which he disbelieves and
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It is this Jeffersonian insight that we reaffirm today with
reforms to strengthen the political rights of American workers.
In the Executive Order I will sign in a few moments, I am
directing that companies performing federal contract work must
inform their employees in the clearest possible terms of their
legal rights as affirmed in the Supreme Court's landmark Beck
decision. While this order will directly affect American
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to all Americans.

The Beck decision is one of a series of cases protecting American workers from being compelled against their will to pay union or agency dues in excess of what is actually used for collective bargaining purposes. Full implementation of this principle will guarantee that no American will have his job or livelihood threatened for refusing to contribute to political activities against his will. The Executive Order I sign today will make it easier for employees of federal contractors to understand and protect their political rights.

The Secretary of Labor is also proposing a rule clarifying and bringing up to date requirements for labor organizations to account for how workers' dues are spent. The trial court in the Beck case found, for instance, that in plaintiff Harry Beck's workplace, 79 percent of the compulsory dues collected went to purposes unrelated to collective bargaining. Our new rule will assist union members in discovering how their dues are being spent. Perhaps most important of all, I expect the National Labor Relations Board to carry out its responsibility to enforce the principles of the Beck decision.

One of America's most intrepid fighters for individual rights is the distinguished actor, Charlton Heston. He has been a member of four different labor organizations, and like Ronald Reagan before him, a president of the Screen Actors Guild. He has given much of himself to put collective bargaining rights into practice. And he has been equally committed to seeing that

see
file
for
court
opinion
by W.
Brennan

no company or organization may infringe a worker's individual freedom of conscience. Chuck, we're honored that you have travelled across the country to be with us today. \\

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see court opinion It took this man 12 years of patient effort to carry his case to vindication in the highest court of the land. And it is his crusade that brings us together today. Harry Beck, won't you please come up and stand with me as I sign the Executive Order.

\\ {Signs order.}

Thank you, and may God bless the United States of America.

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(Duggan/Simon)
April 9, 1992
Draft Two
Beck

PRESIDENTIAL REMARKS: BECK EXECUTIVE ORDER SIGNING
ROSE GARDEN
MONDAY, APRIL 13, 1992
11:00 A.M.

[Acknowledgments]

It is a pleasure to welcome all of you to the White House. This happens to be a very special anniversary. Two hundred forty-nine years ago today, Thomas Jefferson was born. It is therefore a fitting occasion for putting into effect new reforms that will protect Americans' constitutional rights against political abuse by special interest groups.

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It is this Jeffersonian insight that we reaffirm today with reforms to strengthen the political rights of American workers. In the Executive Order I will sign in a few moments, I am directing the Secretary of Labor to require all companies that perform federal contract work to inform their employees in the clearest possible terms of their constitutional rights as affirmed in the Supreme Court's landmark Beck decision. While this order will directly affect xx million American workers, I want to note that the rights affirmed by the Beck decision apply

to all Americans and are enforceable by the National Labor Relations Board.

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The Secretary of Labor also will issue a new rule clarifying and bringing up to date requirements for labor organizations to account for how workers' dues are spent. The trial court in the Beck case found, for instance, that in plaintiff Harry Beck's workplace, 79 percent of the compulsory dues collected went to purposes unrelated to collective bargaining. Our new rule will make sure that workers have a chance to know clearly how their dues are being spent.

One of America's most intrepid fighters for individual rights is the distinguished actor, Charlton Heston. He has been a member of four different labor organizations, and like Ronald Reagan before him, a former president of the Screen Actors Guild. He has given much of himself to put collective bargaining rights into practice. And he has been equally committed to seeing that

no company or organization may infringe on a worker's individual freedom of conscience. Chuck, we're honored that you have travelled across the country to be with us today. \\

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\\ {Signs order.}

Thank you, and may God bless the United States of America.

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(Duggan/Simon)
April 9, 1992
Draft One - 14
Beck

PRESIDENTIAL REMARKS: BECK EXECUTIVE ORDER SIGNING
ROSE GARDEN
MONDAY, APRIL 13, 1992
11:00 A.M.

[Acknowledgments]

It is a pleasure to welcome all of you to the White House. This happens to be a very special anniversary. Two hundred forty-nine years ago today, Thomas Jefferson was born. And I've invited you to mark that occasion with me as I put into effect new reforms that will protect Americans' constitutional rights against political abuse by special interests groups.

For brilliance, for courage, for passion in the cause of freedom and democracy, no one has ever surpassed Thomas Jefferson. Jefferson showed his characteristic intensity in

1779 ~~year~~ when he declared: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

It is this Jeffersonian moral insight that we reaffirm today with reforms to strengthen the political rights of American workers. In an Executive Order I will sign in a few moments, I am directing the Secretary of Labor to require all companies that perform federal contract work to inform their employees in the clearest possible terms of their constitutional rights as affirmed in the Supreme Court's landmark Beck decision. While this order will directly affect xx million American workers, I want to note that the constitutional rights affirmed by the Beck

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One of America's most intrepid crusaders for individual rights is the distinguished actor of the stage and screen, Charlton Heston. \ And, Chuck, we're honored that you have travelled across the country to be with us today. \\\ Charlton Heston has been a member of four different labor organizations representing the entertainment professions. Like Ronald Reagan

before him, his fellow film actors showed their respect for his leadership by electing him national president of the Screen Actors Guild. He has given much of himself to put collective bargaining rights into practice. And he has poured every bit as much of his fervor and talent into assuring that no company or organization may infringe on a worker's individual freedom of conscience. Chuck Heston has been one of the most vigorous proponents of the reforms we are now putting into effect.

Our new actions to protect individual liberties are important efforts in a larger crusade I am waging to reform our system of politics and government. I would like to ask you to join me, for instance, in turning up the heat on Congress to enact a sweeping reform of campaign financing. I'm fighting to eliminate the special interest PACs, and to stop the millions of dollars in administrative subsidies that corporations and labor organizations now are allowed to channel into their own PACs.

Time and again over our constitutional history, protecting universal rights often has demanded the lonely courage of individuals citizens standing up against powerful organized interests. And I am especially honored that we have here today such an individual. It took this man 12 years of patient effort to carry his constitutional case to vindication in the United States Supreme Court. And it is his crusade that brings us together today. Harry Beck, won't you please come up and stand with me as I sign the Executive Order. \\ {Signs order.}

Thank you, and may God bless the United States of America.

#

AFL-CIO NEWS UNIONS YES

DEPARTMENT OF INFORMATION 202-637-5010

FOR IMMEDIATE RELEASE
March 23, 1992

CONTACT: Rex Hardesty
or Candice Johnson
202/637-5010

THE FOLLOWING IS A STATEMENT BY AFL-CIO PRESIDENT LANE KIRKLAND ON PRESIDENT BUSH'S COMMENTS ON THE BECK DECISION:

In his press conference comments on the Beck case last Friday, the President reached new depths in hypocrisy. He demonstrated again his willingness to pander to the far right in his party as he desperately seeks support for his re-election effort.

In amplifying the President's remarks, the White House announced its intention to issue an Executive Order requiring federal contractors to notify their employees of the rights of agency fee payers regarding the funding of such union activities as "test case" litigation, lobbying and political activities. The President has also directed the Department of Labor to require unions to report expenditures by functional category.

This is nothing but a scheme to vastly complicate the current financial reporting done by unions and to impose duplicative paperwork requirements on unions because of a minuscule number of workers who pay an agency fee to their union representative.

It is laughable for the President -- after vetoing unemployment insurance improvements and failing to show the slightest concern for the millions of jobless in the longest recession since the 1930s -- now to pretend that he's the friend of workers.

The point of the program he announced on Friday is to deny the vast majority of union members their rights to take political action. The method to that end is to hamstring unions in every way he can -- to the advantage of the union-bashing, right-wing extremists of his party.

The President professes to be a believer in the constitutional system of separation of powers, in limited government and in private enterprise. Yet he has taken it upon himself, without any statutory authority whatsoever, to legislate a broad new regulatory authority over communications between private employers who are government contractors and their employees.

This is the last Presidential protection American workers need. The level of union dues is determined by the union's members themselves through their own democratic process. With the fewest exceptions, unionized workers

2

are highly satisfied with their unions and are quite willing to pay the costs of union representation. They know there is no free lunch and they have no desire to be free riders.

We doubt that there is any area of the labor law where voluntary compliance is higher and where workers are more fully informed. For more than 30 years, unions have filed financial reports with the government showing all items of income and expenses. Unions presently inform workers covered by agency fee agreements of their objection rights, provide accountings of their expenditures and make appropriate dues reductions for objectors. Unions, in other words, respect the rights of workers who have valid objections to funding union political activity as declared by the courts.

The same President who has placed moratoriums on all forms of regulations, has stifled job safety and health enforcement and has sought to remove all manner of regulation in the name of "competitiveness" and "paperwork reduction," has finally found paperwork and regulation that he can wholeheartedly embrace.

The same President who has opposed government intervention in private sector labor relations each time workers have sought his aid to protect their benefits and living standards has finally found a cause worthy of aggressive government intervention in the workplace: the "cause" of weakening workers' unions. We are certain that the Administration's raw use of government power toward this end will be no more successful than its prior tactic of "benign neglect".

What all this adds up to is further proof -- if any be needed -- that the President will pander to the most extreme elements of his party in order to boost his political fortunes.

If the President wants to become serious about an executive order informing workers of their rights, we would suggest he require employers to tell their employees of their full rights under the nation's labor laws and labor standards -- their right to form and join unions, their right to a safe and healthy workplace and their right to prevailing rates of pay and conditions. We stand ready to assist in the drafting of such an executive order.

###

News

United States
Department
of Labor



Office of Information

Washington, D.C. 20210

CONTACT: Steve Hofman
OFFICE: (202) 523-9711

USDL: 92-161
FOR RELEASE: Immediate
Mon., March 23, 1992

**STATEMENT BY SECRETARY OF LABOR LYNN MARTIN
FRIDAY, MARCH 20, 1992**

As Secretary of Labor, workplace democracy is one of the values I hold most dear.

To help ensure workplace democracy for America's workers, the Administration is moving to protect the rights of workers recognized by the Supreme Court in the Beck decision. The Department of Labor will implement shortly the President's Executive Order to ensure that nonunion dues-paying employees working on federal contracts are informed of their rights under Beck not to be charged for union activities unrelated to collective bargaining. We will also issue a proposed rule on the financial reporting requirements for unions that will enable union members to monitor how their dues are spent. This information will enhance the democratic process in labor unions by enabling members to know more about the activities of their organization.

These changes are long overdue. Without them, too many Americans will continue to view their union dues as the 1990s version of taxation without representation.

###

'Sinful and Tyrannical'

When we think of coercion, we usually think of government as the culprit. Sometimes the government can be the solution, as when the Supreme Court justices last week repeated their admonition that groups with mandatory membership may not force members to fund political activities they oppose.

This time the offenders were, ironically, lawyers. The defendant was the state bar of California, which all lawyers in the state must join and fund through dues. Dissident lawyers brought *Keller v. State Bar of California* because they objected to politicking by the state bar funded with their compulsory dues. The California bar has actively supported gun control, nuclear-freeze ballot initiatives and an unlimited right to sue anyone who causes air pollution. This kind of ideological lobbying has nothing to do with the purpose of the bar, the "regulation of the profession and improvement to the administration of justice."

A unanimous Supreme Court cited Thomas Jefferson. "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves," barrister Jefferson wrote, "is sinful and tyrannical." It also violates the First Amendment free-speech rights of dissenting members. The court did uphold the practice in some 30 states of requiring fee-paying bar membership by all lawyers. This looks like a closed-shop union, but the justices couldn't quite bring themselves to view fellow lawyers as mere guild members.

So lawyers can continue to be required to belong to state bars and pay dues, but at least none of their dues can go for pushing ideological goals they oppose. This could also quash proposals in several states to have mandatory "pro bono" (free service) requirements, which could be met by financial contributions to special-interest and typically left-wing litigation groups.

While this is good news for lawyers, other workers keep getting misinformation from the National Labor Relations Board. We wrote last year that the NLRB was not informing workers of their rights under the 1988 Supreme Court decision *Beck v. Communications Workers of America*. This case said that workers don't have to become full financial members of a union, and workers are obliged to pay union dues covering only collective bargaining. Workers do not have to pay for a union's political activities or any other non-bargaining activities.

The National Right to Work Committee last year discovered that NLRB literature made no mention of the workers' new rights granted by *Beck*, and that NLRB officials tended to describe incorrectly what union activities workers were compelled to pay for and which they were not.

The NLRB hasn't cleaned up its act. Steve Kerekes of the NRWC cites NLRB literature that states the so-called financial core members who "object" to the "use of their payments for non-representational purposes" might be compelled to pay for the "union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment)." Although the NLRB defends this language, it's at the least misleading. *Beck* doesn't even allow the collection of dues for non-bargaining purposes. Further, the such as before the list of union activities workers must fund seems to leave the door open for union activities, such as politics, that are prohibited.

Whether or not NLRB bureaucrats agree with *Beck*, it's the law. Even lawyers sometimes have to sue to ensure their rights against their bar groups. It's time the NLRB at least made sure that workers know what their rights are.

Corp., Rochester; owner Empire Theatres, Rochester. Mem. Soc. Motion Picture and TV Engrs. Home: 130 Lantern Ln Rochester NY 14623 Office: Sta WOKR-TV 4225 W Henrietta Rd Rochester NY 14623

HESSE, ROBERT RICHARD, arts administrator; b. Sept. 21, 1931; s. Richard E. and Marie (Aichholz) H.; m. Barbara Penny, Aug. 24, 1957; children—Deirdre, Alison, Kevin, Lisa. B.S., SUNY-Fredonia, 1953; M.S., Syracuse U., 1961; Ed.D., SUNY-Buffalo, 1970. Tchr. Holland Patent Central Sch., N.Y., 1953-54, 57-61, Manhasset Pub. Sch., N.Y., 1956-57; dir. coll. relations SUNY-Fredonia, 1961-67, exec. asst. to pres., 1967-71; asst. dir. chancellors panel on univ. purpose SUNY-Albany, 1970-71; dir. communication services Am. Coll. Pub. Relations Assn., 1971-74; pres. Medaille Coll., Buffalo, 1974-78, Chautauqua Inst., N.Y., 1978-83; exec. dir. Joffrey Ballet, N.Y.C. and Los Angeles, 1983—; adj. prof. SUNY-Buffalo. Author, editor: Handbook for Emerging Alumni Programs, 1973; contbr. articles to prof. jouns. Trustee Snowbird Inst. Served to Sgt. U.S. Army, 1954-56. Mem. Dance/USA. Club: Buffalo, Lodge: Rotary. Office: Found for Joffrey Ballet 130 W 56th St New York NY 10019 also: 135 N Grand Ave Los Angeles CA 90012

HESSEMAN, HOWARD, actor; b. Lebanon, Oreg., Feb. 27, 1940; s. George Henry and Edna (Forster) H. Student, U. Oreg. Mem. The Committee (Improvisational theatre co.), 1965-75. Appeared in: TV series as Dr. Johnny Fever, WKRP in Cin.; appeared in: numerous films including The Jerk, Petulia, Billy Jack, Steelyard Blues, Shampoo, The Sunshine Boys, Jackson County Jail, The Big Bus, The Other Side of Midnight, Silent Movie, Honky Tonk Freeway, Doctor Detroit, 1983, Police Academy II, 1985, Voyage of the Navigator Heat, 1987; TV movies Hustling, 1975, The Life and Times of Senator Joe McCarthy, The Amazing Howard Hughes, The TV Show, Tarantulas: The Deadly Cargo, The Comedy Company, 1978, The Ghost of Flight 401, 1978, You Can't Take It with You, In Our Hands, More than Friends, 1978, Outside Chance, 1980, Victims, 1982, One She Makes It Murder, 1982, Best Kept Secrets, 1984, TV series One Day At A Time, Murder, She Wrote, Soap, numerous others; appeared in TV series Head of the Class, 1986—. Office: care William Morris Agency 151 El Camino Beverly Hills CA 90212 *

HESSER, MICHAEL B., investment executive, management consultant; b. Chgo., Apr. 4, 1944; s. Abner and Miriam (Tobias) H.; m. Roberta Grossman, Sept. 3, 1972. BA, Roosevelt U., 1966. Tchr. Chgo. Pub. Schs., 1966-69; v.p. mktg. McKenna Industries, Inc., Chgo., 1969-75; acct. exec. ABC-FM, Chgo., 1975-76; exec. v.p., owner Sunbelt Communications, Ltd., San Luis Obispo, Calif., 1976-83; pres., owner SB Mgmt., Syndicom, Redwood City, Calif., 1983—, Media Capital, Inc., Redwood City, 1986—; cons. Broadcast Investment Analysts, Washington, 1985—. Author articles in Radio and Records Mag., 1985, Radio Only Mag., 1986, Teller Vision, 1987. Mem. Nat. Assn. Broadcasters. Avocations: golf, travel, film. Office: Media Capital Inc 550 Price Ave Suite #8 Redwood City CA 94063

HESTER, JEAN, producer; b. Kansas City, Mo., Nov. 15, 1953; d. Charles Morris and Una Virginia (McCrory) H.; m. Larry Gene Cloud, May 29, 1976 (div. Apr. 1981). BFA, U. Tex., 1975; MFA, U. So. Calif., 1978. Prodn. mgr. Pub. Service Broadcasting film Grief Journey's End Found., Los Angeles, 1979; prodn. assoc. various programs Embassy TV, Los Angeles, 1980-82, prodn. coordinator The Jeffersons, 1982-83; prodn. coordinator Empire Metro-Goldwyn-Mayer, Los Angeles, 1983-84; budget coordinator The Love Report ABC/Metro-Goldwyn-Mayer, Los Angeles, 1984; prodn. coordinator Jerry Lewis Show Metromedia, Los Angeles, 1984; budget coordinator New Love American Style Paramount, Los Angeles, 1985-86; co-producer Tender Loving Care MCA-TV, Sydney, Australia, 1987; asoc. producer Small Wonder Fox TV, Los Angeles, 1985—. Mem. Acad. TV Arts and Scis., Assn. Assoc. Producers, Producers Guild Am., Dirs. Guild Am. Avocations: scuba-diving, foreign travel. Home: 401 S Harvard Blvd #106 Los Angeles CA 90020

HESTER, STEVEN MICHAEL, television production specialist; b. Flint, Mich., Dec. 4, 1961; s. Clyde and Marcella Marie (McGuire) H.; m. Diane Mary Wrubel, June 26, 1982; children: Steven Michael II, Karl Anthony. Diploma TV/Film Specialist, USAF Coll., Denver, 1983. Film and video specialist U.S. Army, Liggett, Calif., 1983-85; dir., producer Channel 17, Flint, 1986-87; video and mktg. cons. Water St. Pavilion, Flint, 1987-88; producer, dir. pub. access video dept. Comcast Cablevision, Flint, 1988—; dir., technician U. Mich., Flint, 1987—, Comcast, Flint, 1986-87. Dir. (TV show) Teen Talk, 1987 (Best Show award 1987); dir., technician (videotape) Bishop International Airport in Transition, 1987; editor (videotape) Handicapped Services at Mott Community College, 1987. Vol. Dale Kildee for Congress, Flint, 1976; video technician Matt Collier for Mayor, Flint, 1987. Served to E-4 U.S. Army, 1982-85. Grantee C.S. Mott Endowment for the Arts, Flint, 1980. Mem. Nat. Fedn. Local Cable Programmers, U.S. Parachute Assn. Democrat. Avocations: skydiving, skiing, fishing, video projects. Home: 3020 Oklahoma Flint MI 48506 Office: Comcast Cablevision 3008 Airpark Dr S Flint MI 48507

HESTON, CHARLTON, actor; b. Evanston, Ill., Oct. 4, 1924; s. Russell Whitford and Lilla (Charlton) Carter; m. Lydia Marie Clarke, Mar. 17, 1944; children—Fraser Clarke, Holly Ann. Student, Northwestern U., 1941-43. Mem. Nat. Council on the Arts, 1967-72. Stage appearances in Antony and Cleopatra, 1947, Leaf and Bough, 1948, Design for a Stained Glass Window, 1949, The Tumbler, 1960; TV appearances in Wuthering Heights, Macbeth, Taming of the Shrew, Of Human Bondage, Jane Eyre; motion picture star appearing in: Gray Lady Down, Dark City, Greatest Show on Earth, Ruby Gentry, Naked Jungle, The Ten Commandments, The Big Country, Ben Hur, El Cid, 55 Days of Peking, The Greatest Story Ever Told, The Agony and the Ecstasy, Khartoum, Will Penny, Planet of the Apes, Julius Caesar, The Hawaiians, The Omega Man, Antony and Cleopatra, Soylent Green, The Three Musketeers, Airport, Earthquake, Midway, Two-Minute Warning, The Prince and the Pauper. Trustee Los Angeles Center Theatre Group, Am. Film Inst., 1971—, chmn., 1973; head President's Task Force on Arts and Humanities, 1981—. Served in USAF, World War II. Recipient Acad. award for best actor in Ben-Hur, 1959; Jean Hersholt award as humanitarian of yr. Am. Acad. Motion Picture Arts and Scis., 1978. Mem. Screen Actors Guild (pres. 1966-71). Office: Michael Levine Pub Relations 8730 Sunset Blvd 6th Floor Los Angeles CA 90069

HETRICK, WILLIAM EUGENE, music educator; b. Toledo, Nov. 15, 1939; s. William E. Jr. and Marian (Morse) H.; m. Jane Helen Schmitt, June 3, 1966. B.Mus., U. Mich., 1962; M.A., 1964. Ph.D.

(bd. govs. 1988—), Am. Recorder Soc., Gesellschaft fuer Bayerische Musikgeschichte, Coll. Music Soc., Phi Beta Kappa. Home: 48-21 Glenwood St Little Neck NY 11362 Office: Hofstra U Hempstead NY 11550

HEUER, ROBERT MAYNARD, II, opera company executive; b. Detroit, Nov. 27, 1944; s. Robert Maynard and May Elizabeth (Quinn) H. Student, Capital U., 1963-64; B.A., Wayne State U., 1976. Youth dir. Grace Lutheran Ch., Detroit, 1964-66; costume designer, prodn. mgr. U. Windsor, Ont., Can., 1967-69; program coordinator Detroit Youththeatre, Detroit Inst. Arts, 1970-71; mng. dir. Mich. Opera Theatre, Detroit, 1971-79; prodn. dir. Greater Miami (Fla.) Opera, 1979-84, asst. gen. mgr., 1984-85, gen. mgr., 1986—; cons. Nat. Endowment Arts. Adv. council Fla. Alliance for Arts Edn. Mem. OPERA Am. (sec., bd. dirs.), Greater Miami C. of C. Home: 5955 NE 6th Ave Miami FL 33137 Office: Greater Miami Opera Assn 1200 Coral Way Miami FL 33145

HEUERTZ, JOHN ANTHONY, radio program director; b. Dodge City, Kans., Aug. 27, 1949; s. Anthony Joseph and Anne Virginia (Phillips) H.; m. Linda Louise Culig, March 21, 1985; 1 child, Christopher. BA in History, Benedictine Coll., 1972. Librarian Sta. KBOO-FM, Portland, Oreg., 1977-78; announcer, programmer Sta. KLCC-FM, Eugene, Oreg., 1978, Sta. KANU-FM, Lawrence, Kans., 1979-82; ops. mgr. Sta. KXTR-FM, Kansas City, Mo., 1980-86; program dir. Sta. KHCC/KHCD-FM, Hutchinson, Kans., 1986—. Roman Catholic. Home: 920 Wheatland Dr Butler KS 67522 Office: Sta. KHCC/KHCD-FM 815 N Walnut Suite 300 Hutchinson KS 67501

HEUMANN, MICHAEL CARL, video production executive; b. Munich, Jan. 2, 1952; came to U.S., 1954; s. Thomas and Edith (Reiss) H.; m. Sue Ludwig; children: Nikki, Dawn. BS in Biology, Sonoma State U., 1975. Cert. post-secondary tchr., Calif. Instr. video Sonoma State U., Rohnert Park, Calif., 1979; owner Sonoma Video Prods., Santa Rosa, Calif., 1979—; instr. video CETA, Santa Rosa, 1980-81. Producer over 25 home videos including 3M Sportsman's Video Collection, Fly Fishing Secrets, Germany, The Alaska Experience, Brazil - Heart of South America, Impressions of Hong Kong and Macau, Singapore - Crossroads of Asia, Bali - Impressions of Paradise, other instructional, travel and spl. interest titles. Home: 1717 Darby Rd Sebastopol CA 95472 Office: Sonoma Video Prods 553 Mendocino Ave Santa Rosa CA 95401

HEUMANN, SCOTT FREDRIC, artistic director; b. Tulsa, Apr. 19, 1951. BA, Trinity U., San Antonio, 1973; MA, U. Cin., 1975. Sr. editor Performing Arts Mago, Houston, 1977-83; artistic adminstr., dramaturge Houston Grand Opera, 1978—. Contbr. articles to artistic jouns. Home: 3116 Rice Blvd Houston TX 77005 Office: Houston Grand Opera 615 Louisiana St Houston TX 77002 *

HEUSINKVELD, FRANCES MARY, music educator; b. Hull, Iowa, Aug. 12, 1926; d. Derk and Ella G. (De Boer) H. BA, Central Coll., 1946; MA, U. Iowa, 1951, Ph.D., 1978. Music, English tchr. Castana Consolidated Sch., Iowa, 1947-49; music tchr. Denison Pub. Sch., Iowa, 1949-51; music, English tchr. Upper Iowa U., Fayette, Iowa, 1951-53; music tchr. Buena Vista Coll., Storm Lake, Iowa, 1955—; organist Methodist Ch., Storm Lake, 1955-70, Congl. Ch., Spencer, Iowa, 1987—. Contbr. articles prof. jouns. Mem. Music Tchr. Nat. Assn., Iowa Music Tchr. Assn. (chmn. bd.), Am. Guild of Organists (treas.). Club: Melody. Avocations: travel, languages, reading, music. Home: 35 Peterson Dr Storm Lake IA 50588 Office: Buena Vista Coll 4th and College Storm Lake IA 50588

HEWES, HENRY, drama critic; b. Boston, Apr. 9, 1917; s. Henry Fox and Margaret (Warman) H.; m. Jane Fowle, Aug. 21, 1945; children—Henry Fox, Tucker Fowle, Havelock. B.S., Columbia, 1948. Staff writer N.Y. Times, 1949-51; drama editor Saturday Review, 1952-73, drama critic, 1954-77, critic-at-large, 1977; drama critic Internat. Theatre Yearbook, 1978-80; lectr. Sarah Lawrence Coll., 1955-56, Columbia, 1956-57, Salzburg Seminar in Am. Studies, 1970. New Sch. for Social Research, 1972-79; exec. sec. Bd. Standards and Planning for Living Theatre, 1956-66, Am. Theatre Planning Bd., 1966—. mem. Pulitzer Prize Jury for Drama, 1968, 81, chmn., 1985; chmn. Margo Jones Award Com., 1967—, Joseph Maharam Award Com., 1965-86; cons. Bicentennial World Theatre Season, 1974; bd. dirs. Am. Theatre Wing, 1972—; mem. adv. council Theatre Hall of Fame, 1972—. Tony awards nominating com., 1966-70, 79—. Adapter: play La Belle Aventure (produced as Accounting for Love), London, 1954; adaptor, dir.: play Tennessee Williams' Three Players of a Summer Game, Westport, Conn., 1955, (with Siobhan McKenna) Exptl. Hamlet, N.Y.C., 1957, Our Very Own Hole in the Ground, N.Y.C., 1972; adaptor, dir.: play Watergate version Measure for Measure, Ot. Lakes Shakespeare Festival, 1974; moderator (1976-84) play Am. Theatre Wing TV Seminars; Editor: The Best Plays of 1960-61, 61-62, 63-64; editor Famous American Plays of the 1940s. Served as tech. sup. USAF, 1941-45. Mem. N.Y. Drama Critics Circle (v.p. 1969-71, pres. 1971-73), Drama Desk (pres. 1967-74), Am. Theatre Critics Assn. (exec. sec. 1973-85), ANTA (exec. dir. Greater N.Y. ctht. 1953-58), Internat. Assn. Theatre Critics, New Drama Forum, Critics Circle, London. Address: 1326 Madison Ave New York NY 10028

HEWITT, DON S., television news producer; b. N.Y.C., Dec. 14, 1922; s. Ely S. and Frieda (Pike) H.; children—Jeffrey, Steven, Jill, Lisa; m. Marilyn Berger, Apr. 14, 1979. Student, N.Y.U., 1941. War corr. World War II; exec. producer CBS Evening News, 1950-64; producer 1st Kennedy-Nixon TV debate, 1960; CBS News producer Cape Canaveral, 1960-65; exec. producer 60 Minutes (with Mike Wallace, Morley Safer, Dan Rather, Harry Reasoner, Ed Bradley and Diane Sawyer), 1968—. Recipient Paul White award Radio and TV News Dirs. Assn., 1987, Gold medal Internat. Radio and TV Soc., 1988; named Broadcaster of Yr. Internat. Radio and TV Soc., 1980.

HEWITT, KEN, communications executive, lawyer; b. June 3, 1949; m. Diane Hewitt, Nov. 20, 1979; 1 child, Brittany. Owner Starmount Entertainment, Atlanta, 1981—. Office: Starmount Entertainment 8 Perimeter Center E Suite 8007 Atlanta GA 30346

HEYER, JOHN HAJDU, college dean, conductor; b. Altoona, Pa., Jan. 4, 1945; s. Joseph and Martha Elizabeth (Somerville) Hajdu; m. Sandra L. Heyer, 1973; children: John E., David J., MusB, DePaul U., 1966; MusM, U. Colo., 1970, Ph.D., 1973. Asst./assoc. prof. U. Calif., Santa Cruz, 1973-79, prof., dept. chmn., 1980-87; dean Coll. Fine Arts, Indiana (Pa.) U., 1987—; lectr. Carmel (Calif.) Bach Festival, 1980—. cond.: (recordings) Messe des Morts, Gilles, 1980, Motets, Lully, 1987; editor (score) Messe des Morts, Gilles, 1984.

Knowles Electronics, Inc., Elgin, Ill., 1979-84, Hui Tucson, 1984-85; quality assurance mgr. MDA Sci., Ill., 1985-86; sr. quality assurance mgr. Rank Video brook, Ill., 1986—; instr. Am. Soc. Quality Control 1982-84. Contbr. tech. articles, 1983—. Mem. A History: youth counselor Sangamon State U., Spri youth soccer coach park dist. City of Elgin, 1983. scholar, 1972-76. Mem. Am. Soc. Quality Control publs. chmn. Ill. ctht. 1982-84, seminar chmn. 1983. Soc., Chgo. Soc. for Coatings Technology. Club: J. Video Services Am 720 Landwehr Northbrook IL 6

HEYMONT, GEORGE ADAM, editor; b. Bklyn Joseph and Rose Hilda Heymont. BA, Bklyn. Coll editor Bay Area Reporter, San Francisco, 1977—; ople Expressions, North Miami, Fla., 1985-87, Huntington, N.Y., 1985—. Nat. editor Opera 1988—. Recipient Cable Car award, 1979, 82-83. Assn. (Journalism award 1983), Music Critics A theater, opera, bodybuilding. Home and Office: 487 Francisco CA 94110

HEYN, GERALD HENRY, broadcast engineer; b. Apr. 1, 1936; s. Fred Adolph and Amelia Berth Patricia Ann Johnson, Oct. 3, 1966; 1 child, Amanc Capitol Radio Engring, Inst., 1960-63. Enlisted US mechanic USAF, U.S. and overseas, 1954-58 technician, 1958-65, calibration technician, 1965-75; electronic technician Consumer Electronics, Marqu 76; communications engr. El-Com Services, Inc., M NWR Electronics, Marquette, 1977-81; broadcast e TV-FM, Marquette, 1981—. Decorated Air For medal with two oak leaf clusters. Mem. Internat. Sc Technicians (cert. administrator, 1983), Soc. Broad cations: computers, family outings. Home: 640 Marquette MI 49855 Office: No Mich U Sta WNM MI 49855

HEYN-CUBACUB, JAN JUDITH, dancer, dance ographer; b. Grosse Point, Mich., Oct. 15, 1956; d. Jacquelyn Jean (Kjackle) Heyn; m. Arturo C 1982. Student, No. Ill. U., 1974-75; BFA, U. Ill., 1 Mariott's Gt. Am., Gurnee, Ill., 1976-77, 78; as Dancers, Chgo., 1978-83; prin. dancer Urban Gatew 81; instr. Discovery Ctr., Chgo., 1980—; dir., ct tards, Chgo., 1981—; promoter Bugs Bunny Follie instr. Chgo. Heart Assn., 1981, Chgo. Alternative Bank, 1982-83. Choreographer, performer: (video) 1981, Janusian Two-Step, 1982; 60 Flowers, 70 C (in prize 12th Poetry Film Festival 1987), 1982, Ahluvaliyale, 1984 (Bronze award Internat. Film and 1983, Spl. award Video/Culture Can. 1983, 2d pri 1984), La Ci Dorem La Mano, 1985 (Gold Can awa Kalyian, 1986 (cert. merit 11th Festival of Ill. Film 1986, cert. merit Suffolk County Motion Picture and trophy 29th Ann. Rochester Internat. Film Festiv award Herland Film and Video Festival 1987) Orbi Chgo. Internat. Film Festival 1986, 2d place aw Internat. Film Festival 1987, Best of Fest award Video Festival 1987, numerous others). Mem. In Exercise Assn. Avocations: creating porcelain p painting on porcelain arts and crafts. Home and 3744 N Hoyne Ave Chicago IL 60618

HEYWARD, ANDY, television producer; b. N.Y.C. Louis Mortimere and Sylvia (Block) H.; m. Evelyn 1981; children: Robert Evan, Michael Monroe. B Writer, story editor Hanna-Barbera Prods., Holly 80; pres. DICO Enterprises, Burbank, Calif., 1981—. (TV cartoons) Inspector Gadget, Littles, Pole Positi producer live action shows including Hitchhik (Achievement award Action for Children's TV 198 for Missing and Exploited Children, Washington, Golden Reel award Motion Picture Sound Editors Nat. Acad. TV Arts and Scis., Writer's Guild. Enterprises 3601 W Olive Ave Burbank CA 915

HEYWOOD, MAX (RICHARD LEE SMITH), sultan; b. Canton, Ohio, Oct. 9, 1950; s. Richard (Matilda (Hemmerling) S.; m. Diane Lyne Burr, (Feb. 1988). Student, U. Akron, 1968-71. Nightirr WCUE, Akron, Ohio, 1970-71; news dir. Sta. W Ohio, 1971-74; radio personality Sta. WGCL, Cleve dir. Sta. WZZP, Cleve., 1975-76; prodn. engr. WOAC-TV, Canton, 1976-83; owner Heywood F 1978—; program dir. Sta. WBTC and WNPO, Ohio, 1979-80; on-air personality Sta. WGCL, Cl WCNX, Cleve., 1988—; cons. various nightclut 1983—. Avocations: tropical fish, electronics. Heywood Formatics 1103 Colonial Blvd Canton

HEYWOOD, SANDRA RENE, video company Richardson, Alaska, Dec. 31, 1946; d. William I. Phyllis (Rogerson) Conant Colter; m. Kumen Lelar 3, 1965; children—Brian Kumen, Tori, Cele. Studer Coll., 1964-65, Utah Trade Inst. Tech., 1965-66 Farmington, N. Mex., 1973-75; State U., 197 Farmington Realty, 1972-76; reading tutor and trai Program, Mesa, Ariz., 1977-80; sales mgr. KDJI, 1980-83; mgr. Rent-A-Flik, Holbrook, 1983; v.p. Inc., Springfield, Ariz., 1983—. Pres. Young We Christ Of Latter-day Saints, Holbrook, 1967-82. speech and dance, other activities; den mother, council Cub Scouts Am., 1974-77; chmn. Holbrook Com., 1982; mem. Planning and Zoning Comm., State of Ariz. grantee, 1964. Mem. Am. Video As 86). Republican.

HEZLEP, WILLIAM EARL, theater educator, pl Creek, Pa., Sept. 14, 1936; s. Harry Morgan and A H.; m. Norma Simpson, Apr. 1965 (dec. Nov. DeSutter, Aug. 1977 (dec. May 1982); m. Ruth El- 3, 1983; children: Dirk Morgan, Erin Casey. BA, 1961; MA, Wayne State U., 1965, Ph.D., 1973. Southwest Minn. State U., Marshall, 1968-72.

1987-1990

the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President.

The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it *ought* to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that “[t]he executive Power shall be vested in a President of the United States.”

COMMUNICATIONS WORKERS OF AMERICA ET AL. *v.*
BECK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 86–637. Argued January 11, 1988—Decided June 29, 1988

Section 8(a)(3) of the National Labor Relations Act (NLRA) permits an employer and a union to enter into an agreement requiring all employees in the bargaining unit to pay union dues as a condition of continued employment, whether or not the employees become union members. Petitioner Communications Workers of America (CWA) entered into a collective-bargaining agreement that contains a union-security clause under which all represented employees who do not become union members must pay the union “agency fees” in amounts equal to the dues paid by union members. Respondents, bargaining-unit employees who chose not to become union members, filed this suit in Federal District Court, challenging CWA’s use of their agency fees for purposes other than collective bargaining, contract administration, or grievance adjustment (hereinafter “collective-bargaining” activities). They alleged that expenditure of their fees on activities such as organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events violated CWA’s duty of fair representation, § 8(a)(3), and the First Amendment. The court concluded that CWA’s collection and disbursement of agency fees for purposes other than collective-bargaining activities violated the associational and free speech rights of objecting nonmembers, and granted injunctive relief and an order for reimbursement of excess fees. The Court of Appeals, preferring to rest its judgment on a ground other than the Constitution, ultimately concluded, *inter alia*, that the collection of nonmembers’ fees for purposes unrelated to collective bargaining violated CWA’s duty of fair representation.

Held:

1. The courts below properly exercised jurisdiction over respondents’ claims that exactions of agency fees beyond those necessary to finance collective-bargaining activities violated the judicially created duty of fair representation and respondents’ First Amendment rights. Although the National Labor Relations Board (Board) had primary jurisdiction over respondents’ § 8(a)(3) claim, cf. *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, the courts below were not precluded from deciding the merits of that claim insofar as such a decision was necessary

to the disposition of respondents' duty-of-fair-representation challenge. Federal courts may resolve unfair labor practice questions that emerge as collateral issues in suits brought under independent federal remedies. Respondents did not attempt to circumvent the Board's primary jurisdiction by casting their statutory claim as a violation of CWA's duty of fair representation. Instead, the necessity of deciding the scope of § 8(a)(3) arose because CWA and its copetitioner local unions sought to defend themselves on the ground that the statute authorizes the type of union-security agreement in issue. Pp. 742-744.

2. Section 8(a)(3) does not permit a union, over the objections of dues-paying nonmember employees, to expend funds collected from them on activities unrelated to collective-bargaining activities. Pp. 744-762.

(a) The decision in *Machinists v. Street*, 367 U. S. 740—holding that § 2, Eleventh of the Railway Labor Act (RLA) does not permit a union, over the objections of nonmembers, to expend agency fees on political causes—is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical. Their nearly identical language reflects the fact that in both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. Indeed, Congress, in 1951, expressly modeled § 2, Eleventh on § 8(a)(3), which it had added to the NLRA by the Taft-Hartley Act only four years earlier, and emphasized that it was extending to railroad labor the same rights and privileges of the union shop that were contained in the Taft-Hartley Act. Pp. 744-747.

(b) Section 8(a)(3) was intended to correct abuses of compulsory unionism that had developed under "closed shop" agreements and, at the same time, to require, through union-security clauses, that nonmember employees pay their share of the cost of benefits secured by the union through collective bargaining. These same concerns prompted Congress' later amendment of the RLA. Given the parallel purpose, structure, and language of § 8(a)(3) and § 2, Eleventh, both provisions must be interpreted in the same manner. Only the most compelling evidence would support a contrary conclusion, and petitioners have not proffered such evidence here. Pp. 747-754.

(c) Petitioners claim that the union-security provisions of the RLA and NLRA should be read differently in light of the different history of unionism in the regulated industries—that is, the tradition of voluntary unionism in the railway industry prior to the 1951 amendment of the RLA and the history of compulsory unionism in NLRA-regulated industries prior to 1947. Petitioners contend that because agreements requiring the payment of uniform dues were not among the specific abuses Congress sought to remedy in the Taft-Hartley Act, § 8(a)(3) cannot plausibly be read to prohibit the collection of fees in excess of those

necessary to cover the costs of collective bargaining. This argument is unpersuasive because the legislative history of § 8(a)(3) shows that Congress was concerned with numerous and systemic abuses of the closed shop and therefore resolved to ban the closed shop altogether; to the extent it permitted union-security agreements at all, Congress was guided—as it was in its later amendment of the RLA—by the principle that those enjoying the benefits of union representation should contribute their fair share to the expense of securing those benefits. Moreover, it is clear that Congress understood its actions in 1947 and 1951 to have placed the respective regulated industries on an equal footing insofar as compulsory unionism was concerned. Pp. 754-756.

(d) The fact that in the Taft-Hartley Act Congress expressly considered proposals regulating union finances but ultimately placed only a few limitations on the collection and use of dues and fees, and otherwise left unions free to arrange their financial affairs as they saw fit, is not sufficient to compel a broader construction of § 8(a)(3) than that accorded § 2, Eleventh in *Street*. The legislative history of § 8(a)(3) shows that Congress was concerned with the dues and rights of union members, not the agency fees and rights of nonmembers. The absence, in such legislative history, of congressional concern for the rights of nonmembers is consistent with the view that Congress understood § 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities. Nor is there any merit to the contention that, because unions had previously used members' dues for a variety of purposes in addition to collective-bargaining agreements, Congress' silence in 1947 as to the uses to which unions could put nonmembers' fees should be understood as an acquiescence in such union practices. Pp. 756-761.

(e) *Street* cannot be distinguished on the theory that the construction of § 2, Eleventh was merely expedient to avoid the constitutional question—as to the use of fees for political causes that nonmembers find objectionable—that otherwise would have been raised because the RLA (unlike the NLRA) pre-empts state laws banning union-security agreements and thus nonmember fees were compelled by "governmental action." Even assuming that the exercise of rights permitted, though not compelled, by § 8(a)(3) does not involve state action, and that the NLRA and RLA therefore differ in such respect, nevertheless the absence of any constitutional concerns in this case would not warrant reading the nearly identical language of § 8(a)(3) and § 2, Eleventh differently. Pp. 761-762.

800 F. 2d 1280, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, and STEVENS, JJ., joined, and in Parts I and II of which BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR and SCALIA, JJ., joined, *post*, p. 763. KENNEDY, J., took no part in the consideration or decision of the case.

Laurence Gold argued the cause for petitioners. With him on the briefs were *Thomas S. Adair*, *James Coppess*, and *George Kaufmann*.

Edwin Vieira, Jr., argued the cause for respondents. With him on the brief was *Hugh L. Reilly*.*

JUSTICE BRENNAN delivered the opinion of the Court.

Section 8(a)(3) of the National Labor Relations Act of 1935 (NLRA), 49 Stat. 452, as amended, 29 U. S. C. § 158(a)(3), permits an employer and an exclusive bargaining representative 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, whether or not the employees otherwise wish to become union members. Today we must decide whether this provision also permits a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment, and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights.

**David M. Silberman* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Landmark Legal Foundation by *Jerald L. Hill* and *Mark J. Bredemeier*; for the Pacific Legal Foundation et al. by *Ronald A. Zumbun* and *Anthony T. Caso*; and for Senator Jesse Helms et al. by *Thomas A. Farr*, *W. W. Taylor, Jr.*, and *Robert A. Valois*.

Solicitor General Fried, *Deputy Solicitor General Cohen*, *Norton J. Come*, and *Linda Sher* filed a brief for the United States as *amicus curiae*.

I

In accordance with § 9 of the NLRA, 49 Stat. 453, as amended, 29 U. S. C. § 159, a majority of the employees of American Telephone and Telegraph Company and several of its subsidiaries selected petitioner Communications Workers of America (CWA) as their exclusive bargaining representative. As such, the union is empowered to bargain collectively with the employer on behalf of all employees in the bargaining unit over wages, hours, and other terms and conditions of employment, § 9(a), 29 U. S. C. § 159(a), and it accordingly enjoys "broad authority . . . in the negotiation and administration of [the] collective bargaining contract." *Humphrey v. Moore*, 375 U. S. 335, 342 (1964). This broad authority, however, is tempered by the union's "statutory obligation to serve the interests of all members without hostility or discrimination toward any," *Vaca v. Sipes*, 386 U. S. 171, 177 (1967), a duty that extends not only to the negotiation of the collective-bargaining agreement itself but also to the subsequent enforcement of that agreement, including the administration of any grievance procedure the agreement may establish. *Ibid.* CWA chartered several local unions, copetitioners in this case, to assist it in discharging these statutory duties. In addition, at least in part to help defray the considerable costs it incurs in performing these tasks, CWA negotiated a union-security clause in the collective-bargaining agreement under which all represented employees, including those who do not wish to become union members, must pay the union "agency fees" in "amounts equal to the periodic dues" paid by union members. Plaintiffs' Complaint ¶ 11 and Plaintiffs' Exhibit A-1, 1 Record. Under the clause, failure to tender the required fee may be grounds for discharge.

In June 1976, respondents, 20 employees who chose not to become union members, initiated this suit challenging CWA's use of their agency fees for purposes other than collective bargaining, contract administration, or grievance adjustment

(hereinafter "collective-bargaining" or "representational" activities). Specifically, respondents alleged that the union's expenditure of their fees on activities such as organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events violated petitioners' duty of fair representation, § 8(a)(3) of the NLRA, the First Amendment, and various common-law fiduciary duties. In addition to declaratory relief, respondents sought an injunction barring petitioners from exacting fees above those necessary to finance collective-bargaining activities, as well as damages for the past collection of such excess fees.

The District Court concluded that the union's collection and disbursement of agency fees for purposes other than bargaining unit representation violated the associational and free speech rights of objecting nonmembers, and therefore enjoined their future collection. 468 F. Supp. 93 (Md. 1979). Applying a "clear and convincing" evidentiary standard, the District Court concluded that the union had failed to show that more than 21% of its funds were expended on collective-bargaining matters. App. to Pet. for Cert. 119a. The court ordered reimbursement of all excess fees respondents had paid since January 1976, and directed the union to institute a recordkeeping system to segregate accounts for representational and noncollective-bargaining activities. *Id.*, at 125a, 108a-109a.

A divided panel of the United States Court of Appeals for the Fourth Circuit agreed that respondents stated a valid claim for relief under the First Amendment, but, preferring to rest its judgment on a ground other than the Constitution, concluded that the collection of nonmembers' fees for purposes unrelated to collective bargaining violated § 8(a)(3). 776 F. 2d 1187 (1985). Turning to the specific activities challenged, the majority noted that the District Court's adoption of a "clear and convincing" standard of proof was improper, but found that for certain categories of expenditures, such

as lobbying, organizing employees in other companies, and funding various community services, the error was harmless inasmuch as the activities were indisputably unrelated to bargaining unit representation. The majority remanded the case for reconsideration of the remaining expenditures, which the union claimed were made in connection with valid collective-bargaining activities. Chief Judge Winter dissented. *Id.*, at 1214. He concluded that § 8(a)(3) authorized exaction of fees in amounts equivalent to full union dues, including fees expended on nonrepresentational activities, and that the negotiation and enforcement of agreements permitting such exactions was private conduct incapable of violating the constitutional rights of objecting nonmembers.

On rehearing, the en banc court vacated the panel opinion and by a 6-to-4 vote again affirmed in part, reversed in part, and remanded for further proceedings. 800 F. 2d 1280 (1986). The court explained in a brief *per curiam* opinion that five of the six majority judges believed there was federal jurisdiction over both the § 8(a)(3) and the duty-of-fair-representation claims, and that respondents were entitled to judgment on both. Judge Murnaghan, casting the deciding vote, concluded that the court had jurisdiction over only the duty-of-fair-representation claim; although he believed that § 8(a)(3) permits union-security clauses requiring payment of full union dues, he concluded that the collection of such fees from nonmembers to finance activities unrelated to collective bargaining violates the union's duty of fair representation. All six of these judges agreed with the panel's resolution of the specific allocations issue and accordingly remanded the action. Chief Judge Winter, joined by three others, again dissented for the reasons set out in his earlier panel dissent.

The decision below directly conflicts with that of the United States Court of Appeals for the Second Circuit. See *Price v. Auto Workers*, 795 F. 2d 1128 (1986). We granted certiorari to resolve the important question concerning the

validity of such agreements, 482 U. S. 904 (1987), and now affirm.

II

At the outset, we address briefly the jurisdictional question that divided the Court of Appeals. Respondents sought relief on three separate federal claims: that the exaction of fees beyond those necessary to finance collective-bargaining activities violates §8(a)(3); that such exactions violate the judicially created duty of fair representation; and that such exactions violate respondents' First Amendment rights. We think it clear that the courts below properly exercised jurisdiction over the latter two claims, but that the National Labor Relations Board (NLRB or Board) had primary jurisdiction over respondents' §8(a)(3) claim.

In *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), we held that "[w]hen an activity is arguably subject to §7 or §8 of the [NLRA], the States *as well as the federal courts* must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted." *Id.*, at 245 (emphasis added). A simple recitation of respondents' §8(a)(3) claim reveals that it falls squarely within the primary jurisdiction of the Board: respondents contend that, by collecting and using agency fees for nonrepresentational purposes, the union has contravened the express terms of §8(a)(3), which, respondents argue, provides a limited authorization for the collection of only those fees necessary to finance collective-bargaining activities. There can be no doubt, therefore, that the challenged fee-collecting activity is "subject to" §8.

While the five-judge plurality of the en banc court did not explain the basis of its jurisdictional holding, the panel majority concluded that because courts have jurisdiction over challenges to union-security clauses negotiated under §2, Eleventh of the Railway Labor Act (RLA), 64 Stat. 1238, 45 U. S. C. §152, Eleventh, which is in all material respects identical to §8(a)(3), there must be a parity of federal juris-

diction over §8(a)(3) claims. Unlike the NLRA, however, the RLA establishes no agency charged with administering its provisions, and instead leaves it to the courts to determine the validity of activities challenged under the Act. The primary jurisdiction of the NLRB, therefore, cannot be diminished by analogies to the RLA, for in this regard the two labor statutes do not parallel one another. The Court of Appeals erred, then, to the extent that it concluded it possessed jurisdiction to pass directly on respondents' §8(a)(3) claim.

The court was not precluded, however, from deciding the merits of this claim insofar as such a decision was necessary to the disposition of respondents' duty-of-fair-representation challenge. Federal courts may resolve unfair labor practice questions that "emerge as collateral issues in suits brought under independent federal remedies," *Connell Construction Co. v. Plumbers*, 421 U. S. 616, 626 (1975), and one such remedy over which federal jurisdiction is well settled is the judicially implied duty of fair representation. *Vaca v. Sipes*, 386 U. S. 171 (1967). This jurisdiction to adjudicate fair-representation claims encompasses challenges leveled not only at a union's contract administration and enforcement efforts, *id.*, at 176-188, but at its negotiation activities as well. *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953). Employees, of course, may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation. Respondents, however, have done no such thing here; rather, they claim that the union failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs. The necessity of deciding the scope of §8(a)(3) arises because *petitioners* seek to defend themselves on the ground that the statute authorizes precisely this type of agreement. Under these circumstances, the Court of Ap-

peals had jurisdiction to decide the § 8(a)(3) question raised by respondents' duty-of-fair-representation claim.¹

III

Added as part of the Labor Management Relations Act, 1947, or Taft-Hartley Act, § 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U. S. C. § 158(a)(3). The section contains two provisos without which all union-security clauses would fall within this otherwise broad condemnation: the first states that nothing in the Act "preclude[s] an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein" 30 days after the employee attains employment, *ibid.*; the second, limiting the first, provides:

"[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure . . . to tender the periodic

¹The courts below, of course, possessed jurisdiction over respondents' constitutional challenges. Whether or not the NLRB entertains constitutional claims, see *Florida Gulf Coast Building & Construction Trades Council (Edward J. DeBartolo Corp.)*, 273 N. L. R. B. 1431, 1432 (1985) (Board "will presume the constitutionality of the Act [it] administer[s]"); *Handy Andy, Inc.*, 228 N. L. R. B. 447, 452 (1977) (Board lacks the authority "to determine the constitutionality of mandatory language in the Act"); see also *Johnson v. Robison*, 415 U. S. 361, 368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"); cf. *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 495-499 (1979) (reviewing Board's history of determining its jurisdiction over religious schools in light of Free Exercise Clause concerns), such claims would not fall within the Board's primary jurisdiction.

dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." *Ibid.*

Taken as a whole, § 8(a)(3) permits an employer and a union² to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the "membership" that may be so required has been "whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U. S. 734, 742 (1963). The statutory question presented in this case, then, is whether this "financial core" includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not.

Although we have never before delineated the precise limits § 8(a)(3) places on the negotiation and enforcement of union-security agreements, the question the parties proffer is not an entirely new one. Over a quarter century ago we held that § 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes. *Machinists v. Street*, 367 U. S. 740 (1961). Because the NLRA and RLA differ in certain crucial respects, we have frequently warned that decisions construing the latter often provide only the roughest of guidance when interpreting the former. See, e. g., *Street, supra*, at 743; *First National Maintenance Corp. v. NLRB*, 452 U. S. 666, 686, n. 23 (1984). Our decision in *Street*, however, is far more than merely instructive here: we believe it is controlling, for § 8(a)(3) and § 2, Eleventh are in all material respects identical.³ Indeed, we have previously described

²Section 8(b)(2) makes it unlawful for unions "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)," 29 U. S. C. § 158(b)(2); accordingly, the provisos to § 8(a)(3) also allow unions to seek and enter into union-security agreements.

³Section 2, Eleventh provides, in pertinent part:

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or

the two provisions as "statutory equivalent[s]," *Ellis v. Railway Clerks*, 466 U. S. 435, 452, n. 13 (1984), and with good reason, because their nearly identical language reflects the fact that in both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. Thus, in amending the RLA in 1951, Congress expressly modeled § 2, Eleventh on § 8(a)(3), which it had added to the NLRA only four years earlier, and repeatedly emphasized that it was extending "to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act." 96 Cong. Rec. 17055 (1951) (remarks of Rep. Brown).⁴ In

labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U. S. C. § 152, Eleventh.

Although § 2, Eleventh allows termination of an employee for failure to pay "periodic dues, initiation fees, and assessments (*not including fines and penalties*)," the italicized language was added to the RLA only because some railway unions required only nominal dues, and financed their bargaining activities through monthly assessments; having added "assessments" as a proper element of agency fees, Congress simply clarified that the term did not refer, as it often did in the parlance of other industries, to fines or penalties. See *Machinists v. Street*, 367 U. S., at 766. In addition, § 2, Eleventh pre-empts state laws that would otherwise ban union shops. This difference, however, has no bearing on the types of union-security agreements that the statute permits, and thus does not distinguish the union shop authorization of § 2, Eleventh from that of § 8(a)(3).

⁴See also S. Rep. No. 2262, 81st Cong., 2d Sess., 3 (1950) ("[T]he terms of [the bill] are substantially the same as those of the Labor-Management

these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes.

A

Both the structure and purpose of § 8(a)(3) are best understood in light of the statute's historical origins. Prior to the enactment of the Taft-Hartley Act of 1947, 61 Stat. 140, § 8(3) of the Wagner Act of 1935 (NLRA) permitted majority unions to negotiate "closed shop" agreements requiring employers to hire only persons who were already union members.

Relations Act"); H. R. Rep. No. 2811, 81st Cong., 2d Sess., 4 (1950) (the bill allows unions "to negotiate agreements with railroads and airlines of a character permitted in the case of labor organizations in the other large industries of the country"); 96 Cong. Rec. 15737 (1950) (remarks of Sen. Hill) ("The bill . . . is designed merely to extend to employees and employers subject to the [RLA] rights now possessed by employees and employers under the Taft-Hartley Act"); *id.*, at 15740 (remarks of Sen. Lehman) ("The railroad brotherhoods should have the same right that any other union has to negotiate for the union shop"); *id.*, at 16267 (remarks of Sen. Taft) ("[T]he bill inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law"); *id.*, at 17049 (remarks of Rep. Beckworth) (the bill permits railway unions "to bring about agreements with carriers providing for union shops, a principle enacted into law in the Taft-Hartley bill"); *id.*, at 17055 (remarks of Rep. Biemiller) ("[The] provision . . . gives to railway labor the right to bargain for the union shop just as any other labor group in the country may do"); *id.*, at 17056 (remarks of Rep. Bennett) ("The purpose of the bill is to amend the [RLA] to give railroad workers . . . the same right to enjoy the benefits and privileges of a union-shop arrangement that is now accorded to all workmen in most other types of employment"); *ibid.* (remarks of Rep. Heselton) ("[T]his bill primarily provides for the same kind of treatment of railroad and airline employees as is now accorded employees in all other industries under existing law"); *id.*, at 17059 (remarks of Rep. Harris) ("The fundamental proposition involved in the bill [is to extend] the national policy expressed in the Taft-Hartley Act regarding the lawfulness of . . . the union shop . . . to . . . railroad and airline labor organizations"); *id.*, at 17061 (remarks of Rep. Vursell) ("This bill simply extends to the railroad workers and employers the benefit of this provision now enjoyed by all other laboring men under the Taft-Hartley Act").

See *Algoma Plywood Co. v. Wisconsin Employment Relations Board*, 336 U. S. 301, 307–311 (1949). By 1947, such agreements had come under increasing attack, and after extensive hearings Congress determined that the closed shop and the abuses associated with it “create[d] too great a barrier to free employment to be longer tolerated.” S. Rep. No. 105, 80th Cong., 1st Sess., 6 (1947) (S. Rep.), Legislative History of Labor Management Relations Act, 1947 (Committee Print compiled for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), p. 412 (1974) (Leg. Hist.). The 1947 Congress was equally concerned, however, that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts. As Senator Taft, one of the authors of the 1947 legislation, explained, “the argument . . . against abolishing the closed shop . . . is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself.” 93 Cong. Rec. 4887 (1947), Leg. Hist. 1422.⁵ Thus, the Taft-Hartley Act was

⁵This sentiment was repeated throughout the hearings and lengthy debate that preceded passage of the bill. See, e. g., 93 Cong. Rec. 3557 (1947), Leg. Hist. 740 (remarks of Rep. Jennings) (because members of the minority “would get the benefit of that 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”); 93 Cong. Rec. 3558, Leg. Hist. 741 (remarks of Rep. Robison) (“If [union-negotiated] benefits come to the workers all alike, is it not only fair that the beneficiaries, whether the majority or the minority, contribute their equal share in securing these benefits?”); 93 Cong. Rec. 3837, Leg. Hist. 1010 (remarks of Sen. Taft) (“[T]he legislation, ‘in effect, . . . say[s], that no one can get a free ride in such a shop. That meets one of the arguments for a union shop. The employee has to pay the union dues’”); S. Rep., at 6, Leg. Hist. 412 (“In testifying before this Committee, . . . leaders of organized labor have stressed the fact that in the absence of [union-security] provisions many employees sharing the benefits of what unions are able to ac-

“intended to accomplish twin purposes. On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision ‘many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.’” *NLRB v. General Motors Corp.*, 373 U. S., at 740–741 (quoting S. Rep., at 6, Leg. Hist. 412).

The legislative solution embodied in § 8(a)(3) allows employers to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired as long as such membership is available to all workers on a nondiscriminatory basis, but it prohibits the mandatory discharge of an employee who is expelled from the union for any reason other than his or her failure to pay initiation fees or dues. As we have previously observed, Congress carefully tailored this solution to the evils at which it was aimed:

“Th[e] legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions’ concerns about ‘free riders,’ i. e., employees who receive the benefits of union representation but are unwilling to contribute their *fair share* of financial support to such union, and gave unions the power to contract to meet *that problem* while withholding from unions the power to cause the discharge of employees for any other reason.” *Radio Officers v. NLRB*, 347 U. S. 17, 41 (1954) (emphasis added).

compish by collective bargaining will refuse to pay their share of the cost”). See also H. R. Rep. No. 245, 80th Cong., 1st Sess., 80 (1947) (H. R. Rep.), Leg. Hist. 371 (“[Closed shop] agreements prevent nonunion workers from sharing in the benefits resulting from union activities without also sharing in the obligations”).

Indeed, "Congress' decision to allow union-security agreements *at all* reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." *Oil Workers v. Mobil Oil Corp.*, 426 U. S. 407, 416 (1976) (emphasis added).

This same concern over the resentment spawned by "free riders" in the railroad industry prompted Congress, four years after the passage of the Taft-Hartley Act, to amend the RLA. As the House Report explained, 75 to 80% of the 1.2 million railroad industry workers belonged to one or another of the railway unions. H. R. Rep. No. 2811, 81st Cong., 2d Sess., 4 (1950). These unions, of course, were legally obligated to represent the interests of all workers, including those who did not become members; thus nonunion workers were able, at no expense to themselves, to share in all the benefits the unions obtained through collective bargaining. *Ibid.* Noting that the "principle of authorizing agreements for the union shop and the deduction of union dues has now become firmly established as a national policy for all industry subject to the Labor Management Relations Act of 1947," the House Report concluded that "[n]o sound reason exists for continuing to deny to labor organizations subject to the Railway Labor Act the right to negotiate agreements with railroads and airlines of a character permitted in the case of labor organizations in the other large industries of the country." *Ibid.*

In drafting what was to become § 2, Eleventh, Congress did not look to § 8(a)(3) merely for guidance. Rather, as Senator Taft argued in support of the legislation, the amendment "inserts in the railway mediation law almost the exact provisions, so far as they fit, of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and the rail-

roads." 96 Cong. Rec. 16267 (1950).⁶ This was the universal understanding, among both supporters and opponents, of the purpose and effect of the amendment. See n. 4, *supra*. Indeed, railroad union representatives themselves proposed the amendment that incorporated in § 2, Eleventh, § 8(a)(3)'s prohibition against the discharge of employees who fail to obtain or maintain union membership for any reason other than nonpayment of periodic dues; in offering this proposal the unions argued, in terms echoing the language of the Senate Report accompanying the Taft-Hartley Act, that such a prohibition "remedies the alleged abuses of compulsory union membership . . . , yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activity." Hearings on H. R. 7789 before the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., 253 (1950).

In *Street* we concluded "that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes," but that Congress did not intend "to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." 367 U. S., at 764. Construc-

⁶ Although Senator Taft qualified his comparison by explaining that the provisions of the Taft-Hartley law were incorporated into the RLA "so far as they fit," this qualification merely reflected the fact that the laws were not identical in all respects, their chief difference inhering in their preemptive effect, or lack thereof, on all state regulation of union-security agreements. See n. 3, *supra*. This difference, of course, does not detract from the near identity of the provisions insofar as they confer on unions and employers authority to enter into union-security agreements, nor does it in any way undermine the force of Senator Taft's comparison with respect to this authority. Indeed, Taft himself explained that he initially "objected to some of the original terms of the bill, but when the [bill's] proponents agreed to accept amendments which made the provisions *identical* with the Taft-Hartley law," he decided to support the law. 96 Cong. Rec. 16267 (1950) (emphasis added).

ing the statute in light of this legislative history and purpose, we held that although § 2, Eleventh on its face authorizes the collection from nonmembers of "periodic dues, initiation fees, and assessments . . . *uniformly required* as a condition of acquiring or retaining membership" in a union, 45 U. S. C. § 152, Eleventh (b) (emphasis added), this authorization did not "ves[t] the unions with unlimited power to spend exacted money." 367 U. S., at 768. We have since reaffirmed that "Congress' essential justification for authorizing the union shop" limits the expenditures that may properly be charged to nonmembers under § 2, Eleventh to those "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative." *Ellis v. Railway Clerks*, 466 U. S., at 447-448. Given the parallel purpose, structure, and language of § 8(a)(3), we must interpret that provision in the same manner.⁷ Like § 2, Eleventh,

⁷ We note that the NLRB, at least for a time, also took the position that the uniform "periodic dues and initiation fees" required by § 8(a)(3) were limited by the congressional concern with free riders to those fees necessary to finance collective-bargaining activities. In *Teamsters Local No. 959*, 167 N. L. R. B. 1042, 1045 (1967), the Board explained:

"[T]he right to charge 'periodic dues' granted unions by the proviso to Section 8(a)(3) is concerned exclusively with the concept that those enjoying the benefits of collective bargaining should bear their fair share of the costs incurred by the collective-bargaining agent in representing them. But it is manifest that dues that do not contribute, and are not intended to contribute, to the cost of operation of a union in its capacity as collective-bargaining agent cannot be justified as necessary for the elimination of 'free riders.'"

The Board, however, subsequently repudiated that view. See *Detroit Mailers Union No. 40*, 192 N. L. R. B. 951, 952 (1971).

Notwithstanding this unequivocal language, the dissent advises us, *post*, at 767, n. 5, that we have misread *Teamsters Local*. Choosing to ignore the above-quoted passage, the dissent asserts that the Board never "embraced . . . the view," *post*, at 767, n. 5, that "periodic dues and initiation fees" are limited to those that finance the union in its capacity as collective-bargaining agent, because in *Teamsters Local* itself the Board concluded that the dues in question "were actually 'special purpose funds,'" and were thus "'assessments' not contemplated by the proviso to § 8(a)(3)." *Post*, at 767, n. 5

§ 8(a)(3) permits the collection of "periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership" in the union,⁸ and like its counterpart in the RLA, § 8(a)(3) was designed to remedy the inequities posed by "free riders" who would otherwise unfairly profit from the

(quoting *Teamsters Local*, *supra*, at 1044). This observation, however, avails the dissent nothing; obviously, once the Board determined that the dues were not used for collective-bargaining purposes, the conclusion that they were not dues within the meaning of § 8(a)(3) followed automatically. Under the dissent's reading, had the union simply built the increase into its dues base, rather than initially denominating it as a "special assessment," it would have been entitled to exact the fees as "periodic dues" and spend them for precisely the same purposes without running afoul of § 8(a)(3). The Board made entirely clear, however, that it was the *purpose* of the fee, not the manner in which it was collected, that controlled, and thus explained that "[m]onies collected for a credit union or building fund even if regularly recurring, as here, are obviously not 'for the maintenance of the' [union] as an organization, but are for a 'special purpose' and could be terminated without affecting the continued existence of [the union] as the bargaining representative." *Teamsters Local*, *supra*, at 1045 (emphasis added). Finally, the dissent's portrayal of *Teamsters Local* as part of an unbroken string of consistent Board decisions on the issue is belied by the dissenting statement in *Detroit Mailers*, in which member Jenkins, who joined the decision in *Teamsters Local*, charged that the Board had ignored the clear holding of that earlier case. 192 N. L. R. B., at 952-953.

⁸ Construing both § 8(a)(3) and § 2, Eleventh as permitting the collection and use of only those fees germane to collective bargaining does not, as petitioners seem to believe, read the term "uniform" out of the statutes. The uniformity requirement makes clear that the costs of representational activities must be borne equally by all those who benefit; without this language, unions could conceivably establish different dues rates both among members and between members and nonmembers, and thereby apportion the costs of collective bargaining unevenly. Indeed, the uniformity requirement inures to the benefit of dissident union members as well, by ensuring that if the union discriminates against them by charging higher dues, their failure to pay such dues cannot be grounds for discharge. See § 8(b)(2), 29 U. S. C. § 158(b)(2) (making it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee . . . with respect to whom membership in [the union] has been denied or terminated on some ground other than [the] failure to tender the periodic dues and initiation fees uniformly required") (emphasis added).

Taft-Hartley Act's abolition of the closed shop. In the face of such statutory congruity, only the most compelling evidence could persuade us that Congress intended the nearly identical language of these two provisions to have different meanings. Petitioners have not proffered such evidence here.

B

(1)

Petitioners claim that the union-security provisions of the RLA and NLRA can and should be read differently in light of the vastly different history of unionism in the industries the two statutes regulate. Thus they note that in *Street* we emphasized the "long-standing tradition of voluntary unionism" in the railway industry prior to the 1951 amendment, and the fact that in 1934 Congress had expressly endorsed an "open shop" policy in the RLA. 367 U. S., at 750. It was this historical background, petitioners contend, that led us to conclude that in amending the RLA in 1951, Congress "did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider.'" *Id.*, at 767. The history of union security in industries governed by the NLRA was precisely the opposite: under the Wagner Act of 1935, all forms of compulsory unionism, including the closed shop, were permitted. Petitioners accordingly argue that the inroads Congress made in 1947 on the policy of compulsory unionism were likewise limited, and were designed to remedy only those "carefully-defined" abuses of the union shop system that Congress had expressly identified. Brief for Petitioners 42. Because agreements requiring the payment of uniform dues were not among these specified abuses, petitioners contend that § 8(a) (3) cannot plausibly be read to prohibit the collection of fees in excess of those necessary to cover the costs of collective bargaining.

We find this argument unpersuasive for several reasons. To begin with, the fact that Congress sought to remedy "the most serious abuses of compulsory union membership," S. Rep., at 7, Leg. Hist. 413, hardly suggests that the Taft-Hartley Act effected only limited changes in union-security practices. Quite to the contrary, in *Street* we concluded that Congress' purpose in amending the RLA was "limited" precisely because Congress did not perceive voluntary unionism as the source of widespread and flagrant abuses, and thus modified the railroad industry's open shop system only to the extent necessary to eliminate the problems associated with "free riders." That Congress viewed the Wagner Act's regime of compulsory unionism as seriously flawed, on the other hand, indicates that its purposes in overhauling that system were, if anything, far less limited, and not, as petitioners and the dissent contend, equally circumspect. Not surprisingly, therefore—and in stark contrast to petitioners' "limited inroads" theory—congressional opponents of the Taft-Hartley Act's union-security provisions understood the Act to provide only the most grudging authorization of such agreements, permitting "union-shop agreement[s] only under limited and administratively burdensome conditions." S. Rep., pt. 2, p. 8, Leg. Hist. 470 (Minority Report). That understanding comports with our own recognition that "Congress' decision to allow union-security agreements *at all* reflects its concern that . . . the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." *Oil Workers v. Mobil Oil Corp.*, 426 U. S., at 416 (emphasis added). Congress thus did not set out in 1947 simply to tinker in some limited fashion with the NLRA's authorization of union-security agreements. Rather, to the extent Congress preserved the status quo, it did so because of the considerable evidence adduced at congressional hearings indicating that "such agreements promoted stability by eliminating 'free riders,'" S. Rep., at 7,

Leg. Hist. 413, and Congress accordingly "gave unions the power to contract to meet *that problem* while withholding from unions the power to cause the discharge of employees for any other reason." *Radio Officers v. NLRB*, 347 U. S., at 41 (emphasis added). We therefore think it not only permissible but altogether proper to read § 8(a)(3), as we read § 2, Eleventh, in light of this animating principle.

Finally, however much union-security practices may have differed between the railway and NLRA-governed industries prior to 1951, it is abundantly clear that Congress itself understood its actions in 1947 and 1951 to have placed these respective industries on an equal footing insofar as compulsory unionism was concerned. Not only did the 1951 proponents of the union shop propose adding to the RLA language nearly identical to that of § 8(a)(3), they repeatedly insisted that the purpose of the amendment was to confer on railway unions precisely the same right to negotiate and enter into union-security agreements that all unions subject to the NLRA enjoyed. See n. 4, *supra*. Indeed, a subtheme running throughout the comments of these supporters was that the inequity of permitting "free riders" in the railroad industry was especially egregious in view of the fact that the Taft-Hartley Act gave exclusive bargaining representatives in all other industries adequate means to redress such problems. It would surely come as a surprise to these legislators to learn that their efforts to provide these same means of redress to railway unions were frustrated by the very historical disparity they sought to eliminate.

(2)

Petitioners also rely on certain aspects of the Taft-Hartley Act's legislative history as evidence that Congress intended to permit the collection and use of full union dues, including those allocable to activities other than collective bargaining. Again, however, we find this history insufficient to compel a

broader construction of § 8(a)(3) than that accorded § 2, Eleventh in *Street*.

First and foremost, petitioners point to the fact that Congress expressly considered proposals regulating union finances but ultimately placed only a few limitations on the collection and use of dues and fees, and otherwise left unions free to arrange their financial affairs as they saw fit. In light of this history and the specific prohibitions Congress did enact, petitioners argue that there is no warrant for implying any further limitations on the amount of dues equivalents that unions may collect or the manner in which they may use them. As originally passed, § 7(b) of the House bill guaranteed union members the "right to be free from unreasonable or discriminatory financial demands of" unions. Leg. Hist. 176. Similarly, § 8(c) of the bill, the so-called "bill of rights for union members," H. R. Rep., at 31, Leg. Hist. 322, set out 10 protections against arbitrary action by union officers, one of which made it an unfair labor practice for a union to impose initiation fees in excess of \$25 without NLRB approval, or to fix dues in amounts that were unreasonable, nonuniform, or not approved by majority vote of the members. *Id.*, at 53. In addition, § 304 of the bill prohibited unions from making contributions to or expenditures on behalf of candidates for federal office. *Id.*, at 97-98. The conferees adopted the latter provision, see *Pipefitters v. United States*, 407 U. S. 385, 405 (1972), and agreed to a prohibition on "excessive" initiation fees, see § 8(b)(5), 29 U. S. C. § 158(b)(5), but the Senate steadfastly resisted any further attempts to regulate internal union affairs. Referring to the House provisions, Senator Taft explained:

"[T]he Senate conferees refused to agree to the inclusion of this subsection in the conference agreement since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated In the opinion of the Senate conferees the language

which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection." 93 Cong. Rec. 6443 (1947), Leg. Hist. 1540.

Petitioners would have us infer from the demise of this "bill of rights" that Congress "rejected . . . general federal restrictions on either the dues equivalents that employees may be required to pay or the uses to which unions may put such dues-equivalents," and that aside from the prohibition on political expenditures Congress placed no limitations on union exactions other than the requirement that they be equal to uniform dues. Brief for Petitioners 39-40 (quoting Brief for United States as *Amicus Curiae* 19). We believe petitioners' reliance on this legislative compromise is misplaced. The House bill did not purport to set out the rights of *nonmembers* who are compelled to pay union dues, but rather sought to establish a "bill of rights for union *members*" vis-à-vis their union leaders. H. R. Rep., at 31, Leg. Hist. 322 (emphasis added). Thus, §8(c) of the House bill sought to regulate, among other things, the ability of unions to fine, discipline, suspend, or expel members; the manner in which unions conduct certain elections or maintain financial records; and the extent to which they can compel contributions to insurance or other benefit plans, or encumber the rights of members to resign. Leg. Hist. 52-56. The debate over these provisions focused on the desirability of Government oversight of internal union affairs, and a myriad of reasons having nothing whatever to do with the rights of nonmembers accounted for Congress' decision to forgo such detailed regulation. In rejecting any limitation on dues, therefore, Congress was not concerned with restrictions on "dues-equivalents," but rather with the administrative burdens and

potential threat to individual liberties posed by Government regulation of purely internal union matters.⁹

It simply does not follow from this that Congress left unions free to exact dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective-bargaining activities. On the contrary, the complete lack of congressional concern for the rights of nonmembers in the debate surrounding the House "bill of rights" is perfectly consistent with the view that Congress understood §8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities: because the amount of such fees would be fixed by their underlying purpose—defraying the costs of collective bargaining—Congress would have every reason to believe that the lack of any limitations on union dues was entirely irrelevant so far as the rights of nonmembers were concerned. In short, we think it far safer and far more appropriate to construe §8(a)(3) in light of its legislative justification, *i. e.*, ensuring that nonmembers who obtain the benefits of union representation can be made to pay for them, than by drawing inferences from Congress' rejection of a proposal that did not address the rights of nonmembers at all.

Petitioners also deem it highly significant that prior to 1947 unions "rather typically" used their members' dues for a "variety of purposes . . . in addition to meeting the . . . costs of collective bargaining," *Retail Clerks v. Schermerhorn*, 373 U. S. 746, 754 (1963), and yet Congress, which was presumably well aware of the practice, in no way limited the

⁹ See, *e. g.*, H. R. Rep., at 76-77, Leg. Hist. 367-368 (Minority Views) (charging that Government regulation was essentially impossible; that the encroachment on the rights of voluntary organizations such as unions was "without parallel"; and that such regulation invited harassment by rival unions and employers, and ultimately complete governmental control over union affairs).

uses to which unions could put fees collected from nonmembers. This silence, petitioners suggest, should be understood as congressional acquiescence in these practices. The short answer to this argument is that Congress was equally well aware of the same practices by railway unions, see *Street*, 367 U. S., at 767 ("We may assume that Congress was . . . fully conversant with the long history of intensive involvement of the railroad unions in political activities"); *Ellis*, 466 U. S., at 446 ("Congress was adequately informed about the broad scope of union activities"), yet neither in *Street* nor in any of the cases that followed it have we deemed Congress' failure in § 2, Eleventh to prohibit or otherwise regulate such expenditures as an endorsement of fee collections unrelated to collective-bargaining expenses. We see no reason to give greater weight to Congress' silence in the NLRA than we did in the RLA, particularly where such silence is again perfectly consistent with the rationale underlying § 8(a)(3): prohibiting the collection of fees that are not germane to representational activities would have been redundant if Congress understood § 8(a)(3) simply to enable unions to charge nonmembers only for those activities that actually benefit them.

Finally, petitioners rely on a statement Senator Taft made during floor debate in which he explained how the provisos of § 8(a)(3) remedied the abuses of the closed shop. "The great difference [between the closed shop and the union shop]," the Senator stated, "is that [under the union shop] a man can get a job without joining the union or asking favors of the union. . . . The fact that the employee has to pay dues to the union seems to me to be much less important." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1422. On its face, the statement—made during a lengthy legislative debate—is somewhat ambiguous, for the reference to "union dues" could connote "full union dues" or could as easily be a shorthand method of referring to "collective-bargaining-related dues." In any event, as noted above, Senator Taft later described § 2, Eleventh as "almost the exact provisions . . . of the Taft-Hartley law," 96 Cong.

Rec. 16267 (1950), and we have construed the latter statute as permitting the exaction of only those dues related to representational activities. In view of Senator Taft's own comparison of the two statutory provisions, his comment in 1947 fails to persuade us that Congress intended virtually identical language in two statutes to have different meanings.

(3)

We come then to petitioners' final reason for distinguishing *Street*. Five years prior to our decision in that case, we ruled in *Railway Employees v. Hanson*, 351 U. S. 225 (1956), that because the RLA pre-empts all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves "governmental action" and is therefore subject to constitutional limitations. Accordingly, in *Street* we interpreted § 2, Eleventh to avoid the serious constitutional question that would otherwise be raised by a construction permitting unions to expend governmentally compelled fees on political causes that nonmembers find objectionable. See 367 U. S., at 749. No such constitutional questions lurk here, petitioners contend, for § 14(b) of the NLRA expressly preserves the authority of States to outlaw union-security agreements. Thus, petitioners' argument runs, the federal pre-emption essential to *Hanson's* finding of governmental action is missing in the NLRA context, and we therefore need not strain to avoid the plain meaning of § 8(a)(3) as we did with § 2, Eleventh.

We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action. Cf. *Steelworkers v. Sadlowski*, 457 U. S. 102, 121, n. 16 (1982) (union's decision to adopt an internal rule governing its elections does not involve state action); *Steelworkers v. Weber*, 443 U. S. 193, 200 (1979) (negotiation of collective-bargaining agreement's affirmative-action plan does not involve state action). Even assuming that it does not, and

that the NLRA and RLA therefore differ in this respect, we do not believe that the absence of any constitutional concerns in this case would warrant reading the nearly identical language of § 8(a)(3) and § 2, Eleventh differently. It is, of course, true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568 (1988); *Crowell v. Benson*, 285 U. S. 22, 62 (1932). But statutory construction may not be pressed “to the point of disingenuous evasion,” *United States v. Locke*, 471 U. S. 84, 96 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 379 (1933)), and in avoiding constitutional questions the Court may not embrace a construction that “is plainly contrary to the intent of Congress.” *DeBartolo*, *supra*, at 575. In *Street*, we concluded that our interpretation of § 2, Eleventh was “not only ‘fairly possible’ but entirely reasonable,” 367 U. S., at 750, and we have adhered to that interpretation since. We therefore decline to construe the language of § 8(a)(3) differently from that of § 2, Eleventh on the theory that our construction of the latter provision was merely constitutionally expedient. Congress enacted the two provisions for the same purpose, eliminating “free riders,” and that purpose dictates our construction of § 8(a)(3) no less than it did that of § 2, Eleventh, regardless of whether the negotiation of union-security agreements under the NLRA partakes of governmental action.

IV

We conclude that § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to “performing the duties of an exclusive representative of the employees in dealing with the

employer on labor-management issues.” *Ellis*, 466 U. S., at 448. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE BLACKMUN, with whom JUSTICE O’CONNOR and JUSTICE SCALIA join, concurring in part and dissenting in part.

I agree that the District Court and the Court of Appeals properly exercised jurisdiction over respondents’ duty-of-fair-representation and First Amendment claims, and that the National Labor Relations Board had primary jurisdiction over respondents’ claim brought under § 8(a)(3) of the National Labor Relations Act of 1935, 49 Stat. 452, as amended, 29 U. S. C. § 158(a)(3). I also agree that the Court of Appeals had jurisdiction to decide the § 8(a)(3) question raised by respondents’ duty-of-fair-representation claim.¹ I therefore join Parts I and II of the Court’s opinion.

My agreement with the majority ends there, however, for I cannot agree with its resolution of the § 8(a)(3) issue. Without the decision in *Machinists v. Street*, 367 U. S. 740 (1961), involving the Railway Labor Act (RLA), the Court could not reach the result it does today. Our accepted mode of resolving statutory questions would not lead to a construction of § 8(a)(3) so foreign to that section’s express language and legislative history, which show that Congress did not intend to limit either the amount of “agency fees” (or what the majority labels “dues-equivalents”) a union may collect under a union-security agreement, or the union’s expenditure of such funds. The Court’s excessive reliance on *Street* to reach a

¹ Like the majority, I do not reach the First Amendment issue raised below by respondents, and therefore similarly do not address whether a union’s exercise of rights pursuant to § 8(a)(3) involves state action. See *ante*, at 761.

contrary conclusion is manifested by its unique line of reasoning. No sooner is the language of § 8(a)(3) intoned, than the Court abandons all attempt at construction of *this* statute and leaps to its interpretation over a quarter century ago of another statute enacted by a different Congress, a statute with a distinct history and purpose. See *ante*, at 744–745. I am unwilling to offend our established doctrines of statutory construction and strain the meaning of the language used by Congress in § 8(a)(3), simply to conform § 8(a)(3)'s construction to the Court's interpretation of similar language in a different later-enacted statute, an interpretation which is itself "not without its difficulties." *Aboud v. Detroit Board of Education*, 431 U. S. 209, 232 (1977) (characterizing the Court's decision in *Street*). I therefore dissent from Parts III and IV of the Court's opinion.

I

As the Court observes, "we have never before delineated the precise limits § 8(a)(3) places on the negotiation and enforcement of union-security agreements." *Ante*, at 745. Unlike the majority, however, I think the issue is an entirely new one. I shall endeavor, therefore, to resolve it in accordance with our well-settled principles of statutory construction.

A

As with any question of statutory interpretation, the starting point is the language of the statute itself. Section 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U. S. C. § 158(a)(3). Standing alone, this proscription, and thus § 8(b)(2)'s corollary proscription,² effectively would outlaw union-security agreements. The proscription, however, is qualified by two provisos. The first, which appeared initially in § 8(a)(3) of the

²Section 8(b)(2) makes it unlawful for a union "to cause or attempt to cause an employer" to violate § 8(a)(3). 29 U. S. C. § 158(b)(2).

NLRA as originally enacted in 1935, 49 Stat. 452, generally excludes union-security agreements from statutory condemnation by explaining that

"nothing in [the NLRA] or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees as provided in section 159(a) of this title" § 8(a)(3), 29 U. S. C. § 158(a)(3).

The second proviso, incorporated in § 8(a)(3) by the Taft-Hartley Amendments of 1947, 61 Stat. 141,³ circumscribes the first proviso's general exemption by the following limitations:

"[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

The plain language of these statutory provisions, read together, permits an employer and union to enter into an agreement requiring *all* employees, as a condition of continued employment, to pay uniform periodic dues and initiation fees.⁴ The second proviso expressly allows an employer to terminate any "employee," pursuant to a union-security agreement permitted by the first proviso, if the employee

³The Taft-Hartley Act also amended the first proviso to prohibit the application of a union-security agreement to an individual until he has been employed for 30 days. See 29 U. S. C. § 158(a)(3).

⁴This reading, of course, flows from the fact that "membership" as used in the first proviso, means not *actual* membership in the union, but rather "the payment of initiation fees and monthly dues." *NLRB v. General Motors Corp.*, 373 U. S. 734, 742 (1963).

fails "to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" in the union. 29 U. S. C. § 158(a)(3). The term "employee," as statutorily defined, includes any employee, without regard to union membership. See 29 U. S. C. § 152 (3). Union-member employees and nonunion-member employees are treated alike under § 8(a)(3).

"[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co. v. Patterson*, 456 U. S. 63, 68 (1982), quoting *Richards v. United States*, 369 U. S. 1, 9 (1962). The terms "dues" and "fees," as used in the proviso, can refer to nothing other than the regular, periodic dues and initiation fees paid by "voluntary" union members. This was the apparent understanding of the Court in those decisions in which it held that § 8(a)(3) permits union-security agreements. See *NLRB v. General Motors Corp.*, 373 U. S. 734, 736 (1963) (approving a union-security proposal that would have conditioned employment "upon the payment of sums equal to the initiation fee and regular monthly dues paid by the union members"); *Retail Clerks v. Schermerhorn*, 373 U. S. 746, 753 (1963) (upholding agreement requiring nonmembers to pay a "service fee [which] is admittedly the exact equal of membership initiation fees and monthly dues"). It also has been the consistent view of the NLRB,⁵ "the agency en-

⁵See, e. g., *In re Union Starch & Refining Co.*, 87 N. L. R. B. 779, (1949), enf'd, 186 F. 2d 1008 (CA7), cert. denied, 342 U. S. 815 (1951); *Detroit Mailers Union No. 40*, 192 N. L. R. B. 951, 951-952 (1971). In *Detroit Mailers*, the Board explained:

"Neither on its face nor in the congressional purpose behind [§ 8(a)(3)] can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union. . . . '[D]ues collected from members may be used for a variety of purposes, in addition to meeting the union's costs of collective bargaining.' Unions 'rather typically' use their membership dues 'to do those things which the members authorized the union to do in their interest and on their behalf.' By virtue of Sec-

trusted by Congress with the authority to administer the NLRA." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 574 (1988). The provisos do not give any employee, union member or not, the right to pay less than the full amount of regular dues and initiation fees charged to all other bargaining-unit employees.

tion 8(a)(3), such dues may be required from an employee under a union-security contract so long as they are periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy." *Id.*, at 952, quoting *Retail Clerks v. Schermerhorn*, 373 U. S., at 753-754 (internal quotations omitted).

The United States, appearing here as *amicus curiae*, maintains that position in this case.

Contrary to the Court's suggestion, the NLRB has not embraced and then "repudiated" the view that, for purposes of § 8(a)(3), "periodic dues and initiation fees" mean only "those fees necessary to finance collective-bargaining activities." *Ante*, at 752, n. 7. *Teamsters Local No. 959*, 167 N. L. R. B. 1042 (1967), does not demonstrate otherwise. In *Teamsters Local*, the NLRB held that "working dues" designated to fund a union building program and a credit union were actually "assessments" not contemplated by the proviso to § 8(a)(3). *Id.*, at 1044. The Board found that the union itself regarded the levy as a "temporary assessment," clearly distinct from its "regular dues." *Ibid.* Moreover, because the financing for the programs was constructed in such a way that the union treasury might never have received 90% of the moneys, the Board concluded that the "working dues" were actually "special purposes funds," and that "the support of such funds cannot come from 'periodic dues' as that term is used in § 8(a)(3)." *Ibid.* In *Detroit Mailers*, the NLRB distinguished such assessments from "periodic and uniformly required" dues, which, in its view, a union is not precluded from demanding of nonmembers pursuant to § 8(a)(3). 192 N. L. R. B., at 952.

While the majority credits an interpretation of *Teamsters Local* propounded by a dissenting member of the Board in *Detroit Mailers*, *ante*, at 752-753, n. 7, I prefer to take the Board's word at face value: *Teamsters Local* did not create "controlling precedent" endorsing the view of § 8(a)(3) enunciated by the Court today. 192 N. L. R. B., at 952. Significantly, the majority cannot cite one case in which the Board has held that uniformly required, periodic dues used for purposes other than "collective bargaining" are not dues within the meaning of § 8(a)(3).

The Court's conclusion that § 8(a)(3) prohibits petitioners from requiring respondents to pay fees for purposes other than those "germane" to collective bargaining, contract administration, and grievance adjustment simply cannot be derived from the plain language of the statute. In effect, the Court accepts respondents' contention that the words "dues" and "fees," as used in § 8(a)(3), refer not to the periodic amount a union charges its members but to the portion of that amount that the union expends on statutory collective bargaining.⁶ See Brief for Respondents 17-20. Not only is this reading implausible as a matter of simple English usage, but it is also contradicted by the decisions of this Court and of the NLRB interpreting the section. Section 8(a)(3) does not speak of "dues" and "fees" that employees covered by a

⁶The Court's insistence that it has not changed the meaning of the term "uniform," see *ante*, at 753, n. 8, misses the point. The uniformity requirement obviously requires that the union can collect from nonmembers under a union-security agreement only those "periodic dues and initiation fees" collected equally from its members. But this begs the question: what "periodic dues and initiation fees"? It is the meaning of those terms which the Court misconceives.

Under our settled doctrines of statutory construction, were there any ambiguity in the meaning of § 8(a)(3)—which there is not—the Court would be constrained to defer to the interpretation of the NLRB, unless the agency's construction were contrary to the clear intent of Congress. *Chevron U. S. A. Inc. v. National Resources Defense Council, Inc.*, 467 U. S. 837, 842-843, and n. 9 (1984). Although the Court apparently finds such ambiguity, it fails to apply this doctrine. By reference to a narrow view of congressional "purpose" gleaned from isolated statements in the legislative history, and in reliance upon this Court's interpretation of another statute, the Court constructs an interpretation that not only finds no support in the statutory language or legislative history of § 8(a)(3), but also contradicts the Board's settled interpretation of the statutory provision. The Court previously has directed: "Where the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.'" *Pattern Makers v. NLRB*, 473 U. S. 95, 114 (1985), quoting *Ford Motor Co. v. NLRB*, 441 U. S. 488, 497 (1979). Here, the only apparent motivation for holding that the Board's interpretation of § 8(a)(3) is impermissible, is the Court's view of *another* statute.

union-security agreement may be required to tender to their union representative; rather, the section speaks only of "the periodic dues and the initiation fees *uniformly required as a condition of acquiring or retaining membership*" (emphasis added). Thus, the section, by its terms, defines "periodic dues" and "initiation fees" as those dues and fees "uniformly required" of all members, not as a portion of full dues. As recognized by this Court, "dues collected from members may be used for a variety of purposes, in addition to meeting the union's costs of collective bargaining. Unions rather typically use their membership dues to do those things which the members authorize the union to do in their interest and on their behalf." *Retail Clerks v. Schermerhorn*, 373 U. S., at 753-754 (internal quotations omitted). By virtue of § 8(a)(3), such dues may be required from *any* employee under a union-security agreement. Nothing in § 8(a)(3) limits, or even addresses, the purposes to which a union may devote the monies collected pursuant to such an agreement.⁷

B

The Court's attempt to squeeze support from the legislative history for its reading of congressional intent contrary to the plain language of § 8(a)(3) is unavailing. As its own discussion of the relevant legislative materials reveals, *ante*, at 747-750, there is no indication that the 1947 Congress intended to limit the union's authority to collect from nonmembers the same periodic dues and initiation fees it collects from members. Indeed, on balance, the legislative history rein-

⁷The Court's answer to the absolute lack of evidence that Congress intended to regulate such expenditures is no answer at all: the Court simply reiterates that in *Machinists v. Street*, 367 U. S. 740 (1961), it did not give weight to congressional silence in the RLA on this issue. See *ante*, at 760. The point, however, is *not* that the Court should give weight to Congress' silence in the NLRA; the point is that the Court must find *some* support in the NLRA for its proposition. Congress' silence simply highlights that there is no support for the Court's interpretation of the 1947 Congress' intent.

forces what the statutory language suggests: the provisos neither limit the uses to which agency fees may be put nor require nonmembers to be charged less than the "uniform" dues and initiation fees.

In *Machinists v. NLRB*, 362 U. S. 411 (1960), the Court stated:

"It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly." *Id.*, at 418, n. 7.

The legislative debates surrounding the adoption of § 8(a)(3) in 1947, show that in crafting the proviso to § 8(a)(3), Congress was attempting "only to remedy the most serious abuses of compulsory union membership" *NLRB v. General Motors Corp.*, 373 U. S., at 741, quoting from the legislative history. The particular "abuses" Congress identified and attempted to correct were two: the closed shop, which "deprives management of any real choice of the men it hires" and gives union leaders "a method of depriving employees of their jobs, and in some cases [of] a means of securing a livelihood in their trade or calling, for purely capricious reasons," S. Rep. No. 105, 80th Cong., 1st Sess., 6 (1947) (S. Rep.), Legislative History of the Labor Management Relations Act, 1947 (Committee Print compiled for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), p. 412 (1974) (Leg. Hist.); and those union shops in which the union sought to obtain indirectly the same

result as that obtained through a closed shop by negotiating a union-shop agreement and maintaining a "closed" union where it was free to deny membership to an individual arbitrarily or discriminatorily and then compel the discharge of that person because of his nonmembership, 93 Cong. Rec. 3836-3837, 4193, 4885-4886 (1947), Leg. Hist. 1010, 1096-1097, 1420-1421 (remarks of Sen. Taft); 93 Cong. Rec. 4135, Leg. Hist. 1061-1062 (remarks of Sen. Ellender). Senator Taft, the chief sponsor of the Senate bill, in arguing against an amendment to proscribe all forms of union-security agreements, stated that it was unwise to outlaw union-security agreements altogether "since there had been for such a long time so many union shops in the United States, [and] since in many trades it was entirely customary and had worked satisfactorily," and that therefore the appropriate approach was to "meet the problem of dealing with the abuses which had appeared." 93 Cong. Rec. 4885, Leg. Hist. 1420.⁸ "Con-

⁸ See also, *e. g.*, 93 Cong. Rec. 3837 (1947), Leg. Hist. 1010 (remarks of Sen. Taft) ("[B]ecause the union shop has been in force in many industries for so many years . . . to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure").

Despite a legislative history rife with unequivocal statements to the contrary, the Court concludes that the 1947 Congress did not set out to restrict union-security agreements in a "limited fashion." *Ante*, at 755. Quite apart from the Court's unorthodox reliance on representations of those *opposed* to the Taft-Hartley amendments, the majority's observation that "Congress viewed the Wagner Act's regime of compulsory unionism as seriously flawed," *ibid.*, begs the question. The perceived flaws were embedded in the *closed-shop* system, not the *union-shop* system. Thus, as is characteristic of the majority's opinion, its comparison to the RLA, under which there was no closed-shop system, is beside the point. See *ibid.* Congress was aware that under the NLRA, "the one system [the closed shop] ha[d] led to very serious abuses and the other system [the union shop] ha[d] not led to such serious abuses." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1421 (remarks of Sen. Taft). Accordingly, Congress banned closed shops altogether, but it made only limited inroads on the union-shop system that had been in effect prior to 1947, carefully describing its limitations on such agreements. H. R. Rep. No. 245, 80th Cong.,

gress [also] recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.'" *NLRB v. General Motors Corp.*, 373 U. S., at 740-741, quoting S. Rep., at 6, Leg. Hist. 412.

Congress' solution was to ban the closed shop and to permit the enforcement of union-shop agreements as long as union membership is available "on the same terms and conditions" to all employees, and mandatory discharge is required only for "nonpayment of regular dues and initiation fees." S. Rep., at 7, 20, Leg. Hist. 413, 426. Congress was of the view, that, as Senator Taft stated, "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important. The important thing is that the man will have the job." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1422. "[A] man can get a job with an employer and can continue in that job if, in effect, he joins the union and pays the union dues.

"If he pays the dues without joining the union, he has the right to be employed." 93 Cong. Rec. 4886 (1947), Leg. Hist.

1st Sess., 9 (1947), Leg. Hist. 300; S. Rep., at 6-7, Leg. Hist. 412-413. It could not be clearer from the legislative history that in enacting the provisos to § 8(a)(3), Congress attempted to deal only with specific abuses in the union-shop system, only the "actual problems that ha[d] arisen." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1421 (remarks of Sen. Taft); accord, 93 Cong. Rec. 3836-3837 (1947), Leg. Hist. 1010-1011 (remarks of Sen. Taft). Congress' philosophy was that it had "to decree either an open shop or an open union. [It] decreed an open union . . . [which would] permit the continuation of existing relationships, and [would] not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it [would] meet the abuses which exist." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1420 (remarks of Sen. Taft). Union-security agreements requiring the payment of uniform periodic dues and standard initiation fees were not among the specified abuses. There was no testimony regarding problems arising from such arrangements. Indeed, the subtext of the entire debate was that such arrangements were acceptable. The Court's suggestion to the contrary is simply untenable.

1421-1422. There is no serious doubt that what Congress had in mind was a situation in which the nonmember employee would "pay the same dues as other members of the union." 93 Cong. Rec. 4272 (1947), Leg. Hist. 1142 (remarks of Sen. Taft); accord, 93 Cong. Rec. 3557 (1947), Leg. Hist. 740 (remarks of Sen. Jennings) (members of the minority "should go along and contribute dues like the others"). In their financial obligations, therefore, these employees were "in effect," union members, and could not be discharged pursuant to a union-security agreement as long as they maintained this aspect of union "membership."⁹ This solution was viewed as "tak[ing] care" of the free-rider issue. 93 Cong. Rec. 4887 (1947), Leg. Hist. 1422 (remarks of Sen. Taft).

Throughout the hearings and lengthy debate on one of the most hotly contested issues that confronted the 1947 Congress, not once did any Member of Congress suggest that § 8(a)(3) did not leave employers and unions free to adopt and enforce union-security agreements requiring all employees in the bargaining unit to pay an amount equal to full union dues and standard initiation fees. Nor did anyone suggest that § 8(a)(3) affected a union's expenditure of such funds.

Indeed, the legislative history indicates that Congress affirmatively declined to place limitations on either the amount of dues a union could charge or the uses to which it could put these dues. The Court dismisses as irrelevant the fact that Congress expressly rejected the House proposal that would have empowered the NLRB to regulate the "reasonableness" of union dues and expenditures. The Court finds meaningful the fact that "[t]he House bill did not purport to set out the

⁹The Senate Report explained: Congress "did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But [it] did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union." S. Rep., at 20, Leg. Hist. 426.

rights of *nonmembers* who are compelled to pay union dues, but rather sought to establish a 'bill of rights for union *members*' vis-à-vis their union leaders. H. R. Rep., at 31, Leg. Hist. 322 (emphasis added)." *Ante*, at 758. But this is a distinction without a difference. Contrary to the Court's view, Congress viewed this proposal as directly related to §8(a)(3); Congress clearly saw the nonmembers' interests in this context as being represented by union members.¹⁰ Thus, Senator Taft explained the Senate conferees' reasons for refusing to accept the provisions in the House bill:

"In the opinion of the Senate conferees[,] the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection." 93 Cong. Rec. 6443 (1947), Leg. Hist. 1540.

Congress' decision, in the course of the well-documented Senate-House compromise, not to place any general federal restrictions on the levels or uses of union dues,¹¹ indicates

¹⁰The Court appears to believe that Congress intended §8(a)(3) to protect the interests of individual nonmembers in the uses to which the union puts their moneys. See *ante*, at 759. It could not be clearer, however, that Congress did not have this in mind at all. As Senator Taft explained to his colleague who complained that requiring a man to join a union he does not wish to join (pursuant to §8(a)(3)) was no less restrictive than a closed shop: in enacting §8(a)(3), Congress was not trying "to go into the broader fields of the rights of particular persons." 93 Cong. Rec. 4886 (1947), Leg. Hist. 1421.

The only "rights" protected by the §8(a)(3) provisos are workers' employment rights. As the legislative debates reflect, Congress was principally concerned with insulating workers' jobs from capricious actions by union leaders. "The purpose of the union unfair labor practice provisions added to §8(a)(3) was to 'prevent[] the union from inducing the employer to use the emoluments of the job to enforce the union's rules.'" *Pattern Makers v. NLRB*, 473 U. S., at 126 (dissenting opinion), quoting *Scofield v. NLRB*, 394 U. S. 423, 429 (1969).

¹¹Congress placed only one limitation on the uses which can be made of union dues. "[W]ith little apparent discussion or opposition," the Senate

that it did not intend the provisos to limit the uses to which agency fees may be put.

The Court invokes what it apparently sees as a single-minded legislative purpose, namely, the eradication of a "free-rider" problem, and then views the legislative history through this narrow prism. The legislative materials demonstrate, however, that, contrary to the impression left by the Court, Congress was not guided solely by a desire to eliminate "free riders." The 1947 Congress that carefully crafted §8(a)(3) was focusing on a quite different problem—the most serious abuses of compulsory unionism. As the majority observes, "Congress carefully tailored [its] solution to the evils at which it was aimed." *Ante*, at 749. In serving its purpose, Congress went only so far in foreclosing compulsory unionism. It outlawed closed shops altogether, but banned unions from using union-security provisions only where those provisions exact more than the initiation fees and "periodic dues" uniformly required as conditions of union

conferees adopted the House bill's prohibition limiting what unions may spend from dues money on federal elections. *Pipefitters v. United States*, 407 U. S. 385, 405 (1972). In §304 of the Labor Management Relations (Taft-Hartley) Act, 61 Stat. 159–160, which is now incorporated in the Federal Election Campaign Act of 1976, 90 Stat. 490, 2 U. S. C. §441b(a), Congress made it unlawful for a union "to make a contribution or expenditure in connection with" certain political elections, primaries, or political conventions.

The Senate conferees also agreed with the House that some safeguard was needed to prevent unions from charging new members exorbitant initiation fees that effectively "close" the union, thereby "frustrat[ing] the intent of [§8(a)(3)]." 93 Cong. Rec. 6443 (1947), Leg. Hist. 1540 (remarks of Sen. Taft). Hence, §8(b)(5) was added to the final bill, which makes it an unfair labor practice for a union which has negotiated a union-security agreement to require initiation fees that the NLRB "finds excessive or discriminatory under all the circumstances." 29 U. S. C. §158(b)(5). The Senate passed §8(b)(5) only after receiving assurances from Senator Taft that it would not allow the NLRB to regulate union expenditures. See 93 Cong. Rec. 6859 (1947), Leg. Hist. 1623 (stressing that the provision "is limited to initiation fees and does not cover dues").

membership. Otherwise, it determined that the regulation of union-security agreements should be left to specific federal legislation and to the legislatures and courts of the several States.¹² Congress explicitly declined to mandate the kind of particularized regulation of union dues and fees which the Court attributes to it today.

II

By suggesting that the 1947 Congress was driven principally by a desire to eradicate a "free-rider" problem, the Court finds the means not only to distort the legislative justification for § 8(a)(3) and to ignore the provision's plain language, but also to draw a controlling parallelism to § 2, Eleventh of the RLA, 64 Stat. 1238, 45 U. S. C. § 152. As mistaken as the Court is in its view of Congress' purpose in enacting § 8(a)(3), the Court is even more mistaken in its reliance on this Court's interpretation of § 2, Eleventh in *Machinists v. Street*, 367 U. S. 740 (1961).

The text of § 8(a)(3) of the NLRA is, of course, very much like the text of the later enacted § 2, Eleventh of the RLA. This similarity, however, does not dictate the conclusion that the 1947 Congress intended § 8(a)(3) to have a meaning identical to that which the 1951 Congress intended § 2, Eleventh to have. The Court previously has held that the scope of the RLA is not identical to that of the NLRA and that courts should be wary of drawing parallels between the two stat-

¹² "It was never the intention of the [NLRA] . . . to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism." H. R. Conf. Rep. 510, 80th Cong., 1st Sess., 60 (1947), Leg. Hist. 564. Accordingly, Congress added § 14(b) to the final bill, which, as enacted, expressly preserves the authority of the States to regulate union-security agreements, including the use of funds collected from employees pursuant to such an agreement. See *Retail Clerks v. Schermerhorn*, 373 U. S., at 751-752. Many States in fact have imposed limitations on the union-security agreements that are permitted in their jurisdictions. See 2 C. Morris, *The Developing Labor Law* 1391-1392 (2d ed. 1983).

utes. See, e. g., *First National Maintenance Corp. v. NLRB*, 452 U. S. 666, 686, n. 23 (1981); *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 383 (1969). Thus, parallels between § 8(a)(3) and § 2, Eleventh, "like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." *Chicago & N. W. R. Co. v. Transportation Union*, 402 U. S. 570, 579, n. 11 (1971). Contrary to the majority's conclusion, *ante*, at 750, the two provisions were not born of the "same concern[s]"; indeed, they were born of competing concerns. This Court's interpretation of § 2, Eleventh, therefore, provides no support for construing § 8(a)(3) in a fashion inconsistent with its plain language and legislative history.¹³

The considerations that enabled the Court to conclude in *Street*, 367 U. S., at 750, that it is "fairly possible" and "entirely reasonable" to read § 2, Eleventh to proscribe union-security agreements requiring uniform payments from all bargaining-unit employees are wholly absent with respect to § 8(a)(3). In *Street*, the Court stressed the fact that from 1926, when the RLA was first enacted, until 1951 when § 2, Eleventh assumed its present form, that Act prohibited all forms of union security and declared a "policy of complete freedom of choice of employees to join or not to join a union." *Ibid.* By 1951, however, Congress recognized "the expenses and burdens incurred by the unions in the administration of the complex scheme of the [RLA]." 367 U. S., at 751. The purpose advanced for amending the RLA in 1951 to authorize union-security agreements for the first time was "the elimi-

¹³ The dissent in the original panel decision in this case appropriately observed: "If the legislative purposes behind § 8(a)(3) and § 2, Eleventh were identical, one would expect that [this] Court in *Street* would have looked to the NLRA for guidance in interpreting § 2, Eleventh. The *Street* opinion, however, does not significantly rely on or discuss either the NLRA or § 8(a)(3). Instead, it focuses on the distinctive features of the railroad industry and the Railway Labor Act in construing § 2, Eleventh." 776 F. 2d 1187, 1220 (CA4 1985).

nation of the 'free riders.'" 367 U. S., at 761. Given that background, the Court was persuaded that it was possible to conclude that "Congress did not completely abandon the policy of full freedom of choice embodied in the . . . Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider.'" *Id.*, at 767.

The NLRA does not share the RLA's underlying policy, which propelled the Court's interpretation of § 2, Eleventh in *Street*. Indeed, the history of the NLRA points in the opposite direction: the original policy of the Wagner Act was to permit all forms of union-security agreements, and such agreements were commonplace in 1947. Thus, in enacting § 8(a)(3), the 1947 Congress, unlike the 1951 Congress, was not making inroads on a policy of full freedom of choice in order to provide "a specific response," *id.*, at 751, to a particular problem facing unions. Rather, the 1947 amendments to § 8(a)(3) were designed to make an inroad into a pre-existing policy of the absolute freedom of private parties under federal law to negotiate union-security agreements. It was a "limited" inroad, responding to carefully defined abuses that Congress concluded had arisen in the union-security agreements permitted by the Wagner Act. The 1947 Congress did not enact § 8(a)(3) for the "same purpose" as did the 1951 Congress in enacting § 2, Eleventh. Therefore, contrary to the Court's conclusion, *ante*, at 762, the latter purpose, "eliminating 'free riders,'" does not dictate our construction of § 8(a)(3), regardless of its impact on our construction of § 2, Eleventh.

In order to overcome this inevitable conclusion, the Court relies on remarks made by a few Members of the Congress in enacting the 1951 amendments to § 2, Eleventh of the RLA, which the Court contends show that the 1951 Congress viewed those amendments as identical to the amendments that had been made to § 8(a)(3) of the NLRA in 1947. See *ante*, at 756; see also *ante*, at 746, and n. 4. But even assuming the Court's view of the legislative history of § 2, Elev-

enth is correct (and the legislative materials do not obviously impart the message the Court receives¹⁴), it does not provide support for the Court's strained reading of § 8(a)(3). Its only possible relevance in this case is to evidence the 1951 Congress' understanding of a statute that particular Congress did not enact. The relevant question here, however, is what the 1947 Congress intended by the statute that it enacted. "[I]t is well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Russello v. United States*, 464 U. S. 16, 26 (1983), quoting *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, 460 U. S. 150, 165, n. 27 (1983), in turn quoting *United States v. Price*, 361 U. S. 304, 313 (1960). See also *United States v. Clark*, 445 U. S. 23, 33, n. 9 (1980). It

¹⁴The Court overstates the clarity of what was said about § 8(a)(3) when § 2, Eleventh was amended in 1951. As the Court's recitation of various statements reflects, the extent to which the 1951 Congress saw itself engrafting onto the RLA terms *identical*, in all respects, to the terms of § 8(a)(3) is uncertain. See *ante*, at 746-747, n. 4. The remarks are only general comments about the similarity of the NLRA union-security provisions, rather than explicit comparisons of § 8(a)(3) with the provisions of the RLA. For example, Senator Taft explained: "In effect, the bill inserts in the railway mediation law *almost the exact provisions, so far as they fit*, of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and the railroads." 96 Cong. Rec. 16267 (1950) (emphasis added). See also, e. g., H. R. Rep. No. 2811, 81st Cong., 2d Sess., 4 (1950) (§ 2, Eleventh allows agreements "of a character" permitted in § 8(a)(3)); 96 Cong. Rec. 17049 (1951) (remarks of Rep. Beckworth) (§ 2, Eleventh extends to railroads "a principle" embodied in § 8(a)(3)). Especially when it is remembered that Congress was *extending* to unions in the railroad industry the authority to enter into agreements for which they previously had *no* authority, whereas the 1947 Congress had rescinded authorization for certain kinds of union-security agreements, the import of these statements is ambiguous. To borrow a phrase from the majority, I "think it far safer and far more appropriate to construe § 8(a)(3) in light of its" language and legislative history, "than by drawing inferences from" ambiguous statements made by Members of a later Congress in enacting a different statute. *Ante*, at 759.

would "surely come as a surprise" to the legislators who enacted §8(a)(3) to learn that, in discerning their intent, the Court listens not to their voices, but to those of a later Congress. *Ante*, at 756. Unlike the majority, I am unwilling to put the 1951 legislators' words into the 1947 legislators' mouths.

The relevant sources for gleaning the 1947 Congress' intent are the plain language of §8(a)(3), and, at least to the extent that it might reflect a clear intention contrary to the plain meaning of the statute, the legislative history of §8(a)(3). Those sources show that the 1947 Congress did not intend §8(a)(3) to have the same meaning the Court has attributed to §2, Eleventh of the RLA. I therefore must disagree with the majority's assertion that the Court's decision in *Street* is "controlling" here. See *ante*, at 745.

III

In sum, I conclude that, in enacting §8(a)(3) of the NLRA, Congress did not intend to prohibit union-security agreements that require the tender of full union dues and standard union initiation fees from nonmember employees, without regard to how the union expends the funds so collected. In finding controlling weight in this Court's interpretation of §2, Eleventh of the RLA to reach a contrary conclusion, the Court has not only eschewed our well-established methods of statutory construction, but also interpreted the terms of §8(a)(3) in a manner inconsistent with the congressional purpose clearly expressed in the statutory language and amply documented in the legislative history. I dissent.

RILEY, DISTRICT ATTORNEY OF THE TENTH PROSECUTORIAL DISTRICT OF NORTH CAROLINA, ET AL.
v. NATIONAL FEDERATION OF THE BLIND
OF NORTH CAROLINA, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 87-328. Argued March 23, 1988—Decided June 29, 1988

The North Carolina Charitable Solicitations Act defines the *prima facie* "reasonable fee" that a professional fundraiser may charge according to a three-tiered schedule. A fee up to 20% of receipts collected is deemed reasonable. A fee between 20% and 35% is deemed unreasonable upon a showing that the solicitation at issue did not involve the "dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation." A fee exceeding 35% is presumed unreasonable, but the fundraiser may rebut the presumption by showing that the fee was necessary either because the solicitation involved the dissemination of information or advocacy on public issues directed by the charity, or because otherwise the charity's ability to raise money or communicate would be significantly diminished. The Act also provides that a professional fundraiser must disclose to potential donors the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in the State within the previous 12 months. Finally, the Act provides that professional fundraisers may not solicit without an approved license, whereas volunteer fundraisers may solicit immediately upon submitting a license application. Appellees, a coalition of professional fundraisers, charitable organizations, and potential donors, brought suit against appellant government officials charged with the enforcement of the Act (hereinafter collectively referred to as North Carolina or the State), seeking injunctive and declaratory relief. The District Court ruled that the challenged provisions on their face unconstitutionally infringed upon freedom of speech and enjoined their enforcement. The Court of Appeals affirmed.

Held:

1. North Carolina's three-tiered definition of "reasonable fees" unconstitutionally infringes upon freedom of speech. The solicitation of charitable contributions is protected speech, and using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's

THE WHITE HOUSE
Office of the Press Secretary

For immediate release

March 20, 1992

IMPLEMENTING THE BECK DECISION

FACT SHEET

Declaring that "no worker should be forced to have money taken out of his paycheck to fund politicians he or she disagrees with," the President announced he is taking steps to protect workers' rights recognized by the Supreme Court in Communications Workers of America v. Beck.

In Beck, the Supreme Court held that a union may not, if an employee objects, use dues or fees collected from that employee on activities unrelated to collective bargaining, contract administration or grievance adjustment. In particular, a union may not spend an employee's dues or fees to fund political candidates or causes, if the employee objects.

Many employees are still unaware of their rights recognized in the Beck decision. Moreover, some employees who have objected to the use of their dues for purposes unrelated to collective bargaining have been hindered or frustrated from exercising their Beck rights.

- The President will soon issue an Executive Order to ensure that employees working on Government contracts are informed of their Beck rights.
- The Department of Labor will soon issue a proposed rule amending the financial reporting requirements for unions. The proposed rule would require unions to report their expenditures by functional categories, such as contract negotiation and administration, safety and health, political activities and other functions. Functional reporting will enable workers to monitor expenditures by the union to ensure that their dues are not spent in ways that they do not support.
- The National Labor Relations Board has begun a rulemaking proceeding to implement the Beck decision on several related issues. This rulemaking promises to implement the Beck decision earlier than would be done by case-by case adjudication of the hundreds of cases now in the Board's pipeline.

HARRY BECK'S EARTHQUAKE

The Coming Dues-Payers' Revolt Against Organized Labor

REED LARSON

In June 1988, the Supreme Court handed down a far-reaching decision that clarifies the rights of employees and may sharply reduce the political power of organized labor. The Court ruled in *Beck v. Communications Workers of America (CWA)* that employees do not have to pay union dues for anything other than collective bargaining, contract administration, and grievance procedures. Since most union dues now go for political rather than bargaining-related purposes, the 15.4 million Americans who currently work under compulsory union contracts now have the option of reducing their dues by as much as a half or more.

The National Labor Relations Board (NLRB) has so far failed to inform employees of their rights under the *Beck* decision. But once employees learn that they can save half or more of their union dues and fees (which average \$330 a year), we can expect a dues-payers' revolt with serious political consequences. Last year, unions gave \$35.5 million in cash to candidates for federal office—most of them left-of-center and most of them Democratic—plus unknown, but probably similar, amounts to state and local candidates. Another \$100 million to \$350 million was given in in-kind contributions such as free printing or voter registration drives. Since union members are increasingly conservative—with 45 percent voting for Reagan in 1984 and 33 percent for Bush in 1988—we can expect growing numbers to restrict their dues to bargaining-related activities. Other employees may opt out not for political reasons but simply to save some money.

The National Right to Work Legal Defense Foundation launched the *Beck* case more than 13 years ago when Harry Beck, a CWA member and former union shop steward from La Plata, Maryland, asked if we could help right what he and some of his coworkers perceived to be a terrible wrong: the expenditure of dues they were required to pay under the union's contract with AT&T and its then-subsidiary Chesapeake & Potomac Telephone Co. to promote political candidates and causes they opposed.

The federal district court in Baltimore agreed with Beck, ruling in 1979 that the use of compulsory "agency fees" to finance union officials' political, ideological, and

other nonbargaining activities violates the rights of objecting non-members. So did a three-member panel of the Fourth Circuit Court of Appeals in 1985; the entire Fourth Circuit affirmed the decision on statutory grounds in 1986.

Then last year, in a 5-to-3 majority opinion by Justice William Brennan, the Supreme Court affirmed Beck's earlier victories. It ruled that workers covered by "union security" arrangements can be required to pay only a prorated amount of union dues equivalent to the amount of their money union officials spend on three activities—collective bargaining, contract administration, and grievance proceedings. Collecting or spending compulsory dues money for anything else—politics, parties, picnics, participation in Labor Day parades, you name it—is prohibited.

79 Percent Refund

The *Beck* decision will not affect workers' rights in the 21 states that have right to work laws. In these states, you cannot be required to pay union dues as a condition of employment. In the District of Columbia and 29 states without right to work laws, employees can be required to pay union dues for collective bargaining.

Many union contracts go further, often with the help of misinformation from employers and the NLRB, and say that holding a job depends on union membership. But in fact, in 1963 the Supreme Court ruled in *NLRB v. General Motors Corp.* that employees can be required to pay only the equivalent of union dues and initiation fees; they don't have to join the union, participate in union activities, obey union by-laws, submit to union "discipline," or take part in strikes, picketing, slowdowns, or even the annual union picnic.

The *Beck* decision clarifies this earlier ruling, spelling out what fees and assessments can be required under the law from an employee who pays only dues without joining the union.

After exhaustive discovery proceedings and two lengthy trials, a "special master" appointed by the trial

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court in the *Beck* case found that CWA officials had been using just a fraction of the money collected from members and non-member dues-payers—21 cents out of every dollar—for bargaining-related activities. Beck and his coplaintiffs could therefore get 79 percent of their money back. Indeed, in both the *Beck* case and the more recently settled case of *Steve Havas* against CWA (a New York case practically identical in fact and law to the *Beck* case), the union agreed to refund employees 100 percent of all the fees they had paid, plus 10 percent interest, in order to avoid further litigation.

The 21 percent finding in *Beck* is not atypical. In another case still in litigation (after 11 years), *James P. Lehnert v. Ferris Faculty Association*, involving a National Education Association union affiliate, a Michigan judge found that only 10 percent of the union dues collected during the 1981-82 academic year could be shown to have been spent on legitimate collective bargaining and related activities. If this holds up, plaintiffs will be able to get 90 percent of their money back.

In a number of similar cases, slipshod union book-keeping methods have made it impossible for courts to determine how union dues are allocated and spent. In these cases the courts have ordered a full refund because the burden of proof is on the union officials, not the employees.

Backbone of the Democratic Party

The political consequences of the *Beck* decision could be devastating to left-of-center candidates and causes. Only 17 percent of the working population belongs to unions today—down from 36 percent in 1945. But organized labor, still the most powerful political machine in America, remains the backbone of the Democratic Party. The unions spend \$3.8 billion a year on payroll—more than \$10 million a day. That's a lot of man- and woman-power when it's diverted—as much of it routinely is—to political campaigning, lobbying, organizing political protest marches and rallies, and similar activities, sometimes for weeks and even months at a time.

Unlike any other special interest involved in politics, unions provide unlimited in-kind contributions: thousands of union staffers who simultaneously serve as political campaign staffers, union-financed services that



The Supreme Court ruled that Harry Beck does not have to pay union dues for political causes he opposes.

Imagine, then, the political consequences of a dues-payers' revolt. Two to three million Americans working in union shops already have opted not to join their union and instead only to pay agency fees. If thousands, or tens of thousands, or a million working people insisted on not paying that portion of their fees being used for nonbargaining purposes, AFL-CIO and other union officials would have more than a rebellion on their hands; they would have a political catastrophe that would force them to sharply curtail political spending and lobbying.

Read Them Their Rights

Union officials, of course, have no particular incentive to broadcast news of the *Beck* decision. Nor do employers; they don't want to risk trouble with their unions.

No steps have been taken by the National Labor Relations Board to inform employees of their full rights under the law. The NLRB requires employers to post several kinds of notices on bulletin boards; it ought to do the same for the *Beck* decision. America today makes a fetish of reading criminals their rights. Why not require employers similarly to "read" employees their rights?

It is also essential that the NLRB correct its actively misleading statements. For example, a NLRB pamphlet on union representation elections, with the catchy title "Your Government Conducts an Election for You—On the Job," advises working men and women that the NLRB "is the agency of the United States Government which protects" their right to "form, join, or assist labor organizations." It also tells them, contrary to the Supreme

No steps have been taken by the National Labor Relations Board to inform employees of their full rights under the law.

are made available to candidates, allegedly nonpartisan get-out-the-vote drives, union-staffed phone banks, printing, mailing, publicity. While it is impossible to put an exact dollar value on these in-kind contributions, election-year estimates range from \$100 million to more than \$350 million.



Steve and Susan Havas each received refunds of \$8,000 from the CWA in a lawsuit similar to Beck's.

Jacquelyn M. Crickey

Court ruling of 1968, that they have the right to "refuse" to do so, except "in a State where...agreements are permitted...requiring employees to join the union." Another NLRB brochure, "A Guide to Basic Law and Procedures under the National Labor Relations Act," similarly advises workers of their right to join or refrain from joining unions "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment."

A Victory for Civil Liberties

More important than the political consequences of the *Beck* decision is its clarification of the civil liberties of working people. Why should a liberal Minnesota truck driver, because he is required to pay compulsory agency shop dues to the Teamsters union, be forced to help elect Republican presidential candidates? Similarly, why should a conservative California construction worker have his forced dues used to support liberal political candidates or causes?

Quoting from its 1961 decision in *International Association of Machinists v. Street*, the Supreme Court in *Beck* addressed the political liberties issue squarely: "Congress did not intend to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." But the practice will continue as long as union officials are permitted to get away with it—until either an aroused public opinion or enough rank-and-file dues-payers demand a halt to the practice.

Many liberals who otherwise are thankful for and rely heavily on organized labor's political muscle are con-

vinced on the more narrow question of individual rights that the use of compulsory dues for politics is indeed an injustice. Attorney Joseph Rauh, for example, one of the guiding forces behind Americans for Democratic Action in its heyday and a staunch political ally of union officials for many decades, argued during the internal mine-workers union struggles of the late 1970s that "The labor movement ought to have a program for giving back political expenditures to those members who don't want their money spent that way."

California Showdown

Many working men and women are willing union members and are quite happy with the way union officers are spending their money. I have no quarrel with them, and wish them well.

It's just as obvious, however, that thousands, perhaps millions, of men and women are union dues payers only because they will end up in the unemployment line—or think they will end up in the unemployment line—if they stop. It is their rights about which we are concerned. Nationally, the National Right to Work Legal Defense Foundation is already representing some 4,200 plaintiffs in 300 active political-spending cases. Several of these cases are class-action suits, with one Pennsylvania case affecting 18,000 employees.

As the *Miami Herald* wrote following the *Beck* decision: "The court's wise decision doesn't prevent unions from playing a vigorous role in politics, but it does institute some needed checks and balances. It will force the unions to be more accountable for their spending. Best of all, it will free workers of conscience such as Harry Beck from having to contribute indirectly to causes and candidates that they abhor."

That's right, of course, as a theoretical statement. The *Beck* decision does provide needed checks and balances and does "free workers" from having to support candidates and causes they personally oppose. But as a result of NLRB inaction, most rank-and-file workers aren't aware of their rights.

Later this summer we will begin a year-long public information campaign to inform working men and women of Harry Beck's hard-fought victory and what it means to them. We have chosen to test our strategy in California, a non-right-to-work state with approximately 2.2 million union members. Public records indicate that California locals had total revenues of \$771 million last year. We don't know how many union members will join the dues-payers' revolt when they know more about the *Beck* decision. But, at the very least, rank-and-file workers deserve to know their legal rights. ■

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ARTICLE

UNION SECURITY AGREEMENTS UNDER THE NATIONAL LABOR RELATIONS ACT: THE STATUTE, THE CONSTITUTION, AND THE COURT'S OPINION IN *BECK*

KENNETH G. DAU-SCHMIDT*

The Supreme Court's recent decision in Communications Workers of America v. Beck interpreted section 8(a)(3) of the National Labor Relations Act (NLRA) to prohibit the observance of agency shop agreements. By interpreting the statute in this way, the Court avoided the question of whether union security agreements under the NLRA are subject to constitutional scrutiny. The Court's determination that section 8(a)(3) does not allow agency shop agreements was an important decision affecting the enforceability of union security agreements in the vast majority of private sector bargaining agreements.

In this Article, Professor Dau-Schmidt criticizes the Court's interpretation of section 8(a)(3) in Beck. The Article examines the Court's NLRA precedents and the legislative history of the NLRA's section 8(a)(3). Several methods of statutory construction and constitutional adjudication are analyzed. Finally, Professor Dau-Schmidt argues that union security agreements under the NLRA are not subject to constitutional scrutiny because there is no state action in their negotiation or observance.

In its recent opinion, *Communications Workers of America v. Beck*,¹ the Supreme Court announced the governing principle for determining the extent to which union security agreements² may be observed under the National Labor Relations Act (NLRA).³ In *Beck*, the Court faced the questions of whether

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¹ _____ U.S. _____, 108 S. Ct. 2641 (1988).

² A "union security agreement" is an agreement between a union and an employer that the employer will require all employees to undertake a specified level of support for the union as a condition of employment. R. GORMAN, LABOR LAW 639 (1976). See *infra* notes 32-36 and accompanying text.

³ 29 U.S.C. §§ 141-87 (1982).

section 8(a)(3) of the NLRA⁴ allowed a union and an employer to negotiate and observe an agency shop agreement,⁵ and if so, whether such agreements violated dissenting employees' first amendment rights.⁶ In answering these questions, the Court found that Congress's sole purpose in allowing union security agreements under section 8(a)(3) was to ensure that workers who shared in the benefits of collective bargaining also shared in the costs of that bargaining.⁷ Based on this perception of congressional purpose, the Court concluded that section 8(a)(3) allows unions to compel contributions from dissenting employees only to the extent that the union expenditures are "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative."⁸ The Court's resolution of the statutory issue obviated the need to answer the constitutional question.

The Court's opinion in *Beck* has potentially far-reaching implications. The NLRA is the nation's basic labor statute cov-

⁴ The pertinent portions of § 8(a)(3) read as follows:

(a) It shall be an unfair labor practice for an employer—. . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in [the NLRA], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section [9(a) of the NLRA], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section [9(e) of the NLRA] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

29 U.S.C. § 158(a)(3) (1982).

⁵ An "agency shop" is a form of union security agreement in which the employer agrees to require all employees to begin making agency fee payments to the union within a specified period of time after accepting employment, and to continue such payments for the term of their employment. Traditionally the agency fees required under an agency shop agreement are equal to union dues. R. GORMAN, *supra* note 2, at 642.

⁶ *Beck*, 108 S. Ct. at 2645.

⁷ *Id.* at 2650 (citing *Radio Officers v. NLRB*, 347 U.S. 17, 41, 74 (1974)).

⁸ *Id.* at 2652 (citing *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 447-48 (1984)).

ering virtually the entire private sector. Although section 14(b) of the NLRA allows states to proscribe union security agreements,⁹ thirty states, comprising two-thirds of the United States's population, have elected not to do so.¹⁰ In those states over ninety percent of collective bargaining agreements,¹¹ covering over six million workers, include union security agreements.¹² The Court's decision in *Beck* limits the enforceability of all of these agreements. Although the number of employees who will dissent from full agency shop payments will probably be small,¹³ and the reduction in fees that will accompany such dissension will be small for most unions,¹⁴ the bookkeeping and litigation expenses required to resolve the complaints of dissenters may prove a significant drain on the resources of the American labor movement.¹⁵

The Court's opinion in *Beck* also promises to be controversial. The Court failed to interpret section 8(a)(3) by direct examination of the statute's words, administrative interpretations, or legislative history. Instead, the majority announced an identity

⁹ Section 14(b) of the NLRA provides that "[n]othing in [the NLRA] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (1982).

¹⁰ AFL-CIO, *ECONOMIC COMPARISONS BETWEEN OPEN SHOP STATES AND FREE COLLECTIVE BARGAINING STATES* 1 (1986).

¹¹ 2 *Collective Bargaining Negot. & Cont.* (BNA) 87:1 (July 1986).

¹² BUREAU OF LABOR STATISTICS, *MAJOR COLLECTIVE BARGAINING SETTLEMENTS IN PRIVATE INDUSTRY*, 1988 1 (Jan. 1989). By comparison, the Supreme Court's opinion in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), holding that agency shop agreements could not be fully observed under the Railway Labor Act, affected only about one million workers, many of whom were not unionized. See BUREAU OF LABOR STATISTICS, *EMPLOYMENT AND EARNINGS* 17 (Jan. 1962). This argument first appeared approximately in this form in the petition for writ of certiorari in *Beck*.

¹³ If the experience of private sector unions with voluntary programs to refund the portion of union dues spent on political expenditures is any indication, the number of dissenting employees may be very small indeed. Such a refund program has been in effect for several years at United Auto Workers, and in a typical year dissenting dues-payers number only about 100 (approximately 0.01% of their membership). B. TAYLOR & F. WITNEY, *LABOR RELATIONS LAW* 389 (5th ed. 1987).

¹⁴ Under the *Ellis* formula made applicable to NLRA unions by *Beck*, see *infra* note 69 and accompanying text, the largest expenditures that a union cannot charge dissenting employees are expenditures for organizing and political activities. These expenditures have been estimated at 15% and 5% respectively for the average private sector union. Henkel & Wood, *Limitations on the Uses of Union Shop Funds After Ellis: What Activities are "Germane" to Collective Bargaining?* 35 *LAB. L.J.* 736 (1984); B. TAYLOR & F. WITNEY, *supra* note 13, at 388-89.

¹⁵ See Brief of the AFL-CIO at 25, *Beck*, 108 S. Ct. 2641. The *Beck* decision also provides an opportunity for employers to harass the trade union movement through employer organizations ostensibly organized to protect the interests of individual employees. See *infra* note 55.

between section 8(a)(3) of the NLRA and section 2 Eleventh of the Railway Labor Act (RLA), and found that its prior opinion, that section 2 Eleventh allowed the observance of union security agreements only for the recoupment of collective bargaining expenses, was controlling in its interpretation of section 8(a)(3).¹⁶ The Court then battled mightily to make the legislative history of the NLRA fit this limited interpretation of section 8(a)(3).¹⁷ The Court's task was not eased by its earlier failure, when interpreting section 2 Eleventh, to consider the legislative history of section 8(a)(3).¹⁸ This omission is inconsistent with the Court's new-found identity between the two sections, since section 8(a)(3) was passed four years before the passage of section 2 Eleventh. Finally, it should be noted that the Court's earlier interpretation of section 2 Eleventh has itself been criticized as inconsistent with the language of the RLA¹⁹ and affected by the Court's desire to avoid the question of whether agency shop agreements under the RLA violate dissenting employees' first amendment rights.²⁰

In this Article, I argue that the Court's interpretation of section 8(a)(3) of the NLRA in *Beck* cannot be supported by direct examination of the statute's words, administrative interpretations, or legislative history. Such a direct examination of the usual intrinsic and extrinsic evidence for statutory interpretation suggests that in enacting section 8(a)(3), Congress intended to allow the full observance of agency shop agreements and rec-

¹⁶ *Beck*, 108 S. Ct. at 2648-49. The relevant language of section 2 Eleventh of the RLA reads as follows:

Notwithstanding any other provisions of [the RLA], or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—a) to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership . . .

45 U.S.C. § 152 Eleventh (1982).

¹⁷ *Beck*, 108 S. Ct. at 2649-57.

¹⁸ See *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

¹⁹ See *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 445-46 (1984).

²⁰ See *id.*; *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977); *Street*, 367 U.S. at 749; *Cantor, Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61, 65-72 (1983).

ognized purposes for union security agreements beyond the mere recoupment of collective bargaining expenses. The Court's interpretation of section 8(a)(3) deviates from Congress's intent because it relies on the Court's prior interpretation of section 2 Eleventh of the RLA and on that interpretation's constitutionally colored view of the purpose and extent of union security agreements allowed under the RLA.²¹ The Court's reliance on its prior interpretation of section 2 Eleventh in interpreting section 8(a)(3) amounts to an application of the doctrine of avoiding constitutional questions.²² Because the *Beck* Court failed to acknowledge or consider the effect of its past constitutional concerns on its interpretation of section 2 Eleventh,²³ it never considered whether imposing this interpretation on section 8(a)(3) was an appropriate application of this doctrine.

I also argue that the Court's interpretation of section 8(a)(3) in *Beck* is an inappropriate application of the doctrine of avoiding constitutional questions. The negotiation and observance of agency shop agreements under the NLRA raises no serious constitutional question to avoid. Under the Court's recent precedents, there is no plausible argument that the actions of a union and a private employer in negotiating and observing such agreements represent state action subject to constitutional scrutiny. Moreover, the Court's interpretation in *Beck* is not supported by the rationales typically given for the doctrine of avoiding constitutional questions. One rationale is that the Court should presume that Congress avoids constitutional controversy in its enactments.²⁴ The words and legislative history of the NLRA suggest that, in enacting that statute, Congress consciously raised a host of constitutional questions including whether union security agreements infringe dissenting employees' first amendment rights. Another rationale is that the Court should avoid constitutional questions to minimize its encroachment on the powers of the elected legislature.²⁵ The Court's interpretation of section 8(a)(3) actively encroaches on the domain of the

²¹ See *Beck*, 108 S. Ct. at 2648 (citing *Street*, 367 U.S. 740).

²² The doctrine holds that where a "serious question" of a statute's constitutionality has been raised, the Court should, if possible, "fairly" construe the statute to avoid the constitutional question. *Crowell v. Benson*, 285 U.S. 22, 62 (1935).

²³ *Beck*, 108 S. Ct. at 2657.

²⁴ W. ESKRIDGE & P. FRICKEY, *LEGISLATION, STATUTES, AND THE CREATION OF PUBLIC POLICY* 676 (1988).

²⁵ *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1935) (Brandeis, J., concurring); Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815 (1983).

legislature by specifying both the policy and the form of the statute. Both rationales suggest that, even where application of the doctrine is appropriate, the Court should undertake the minimum deviation from legislative intent necessary to avoid the constitutional question. However, the Court's opinion in *Beck* ignores an alternative interpretation of section 9(a) of the NLRA²⁶ that would allow the negotiation of agency shop agreements, but would avoid constitutional objections by removing the negotiation of employee fees for non-collective bargaining expenses from the exclusive province of the union.²⁷

Finally, I examine the question, avoided in *Beck*, of whether the negotiation and observance of union security agreements under section 8(a)(3) are subject to constitutional constraints. This question is of continuing importance, since the Court will probably soon be asked to decide whether the procedural protections of dissenting employees' rights it has found constitutionally required in the public sector²⁸ apply to employees governed by the NLRA. I find that under the current precedents of the Court there is insufficient state action in the negotiation and observance of union security agreements under the NLRA to support constitutional objections. There is insufficient grant of authority in the designation of the union as the exclusive bargaining representative to make the union a state actor. Moreover, it is a fundamental tenet of American labor law that the government regulates only the process of collective bargaining, leaving the determination of the actual provisions of collective agreement to the parties.²⁹ Thus, there is insufficient state en-

²⁶ 29 U.S.C. § 159(a) (1982).

²⁷ As discussed below, the designation of the union as the exclusive representative of the employees under section 9(a) is the primary argument for state action in the negotiation and observance of union security agreements. Such state action is a prerequisite for dissenting employees' constitutional objections to agency fees for expenses unrelated to collective bargaining. See *infra* text accompanying notes 310-313, 373-380.

²⁸ Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

²⁹ One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom . . . is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (citations omitted). "[T]he Wagner Act became law on the floodtide of the belief that the conflicting interests of management and worker can be adjusted only by private negotiation, backed, if necessary, by economic weapons, without the intervention of law." Cox, *The Right To Engage In Concerted Activities*, 26 IND. L.J. 319, 322 (1951). "The basic philosophy of the Wagner Act was that labor problems would be resolved by a private process of negotiation and contracting, backed up by the threat or use of self-help measures to secure bargaining

couragement of the negotiation of union security agreements to designate observance of such agreements as state action. The fact that the government, in hopes of achieving certain public policies, has fostered a particular system of private negotiation—collective bargaining through elected exclusive representatives—does not change the private nature of these negotiations or their results. The government commonly fosters certain private institutions, for example private corporations, in hopes that these institutions will benefit their participants. To extend constitutional scrutiny to the negotiation and observance of union security agreements made by private unions and private employers under the NLRA would undermine the individual liberty the state action requirement is designed to protect³⁰ and extend judicial power beyond the bounds circumscribed for it in our Constitution.³¹

I. COMMUNICATIONS WORKERS OF AMERICA V. BECK: A LACK OF UNION SECURITY IN STATUTORY RIGHTS

A. The Prelude to Beck

A union security agreement is an agreement between a union and an employer that the employer will require all employees to undertake some specified level of union support as a condition of employment.³² Such agreements can take several forms. If the union and the employer negotiate a "closed shop" agreement, the employer agrees to require union membership and the payment of union dues as a condition of both gaining and retaining employment. Under such an agreement, the employer may hire only union members and must require all employees to maintain their union membership and pay union dues.³³ Under

advantage." Klare, *The Public-Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1390 (1982).

³⁰ [I]f the Constitution is used to restrict private conduct, its role will be transformed. Rather than retaining its position as the protector of liberty, it will become for many, if not all, a vehicle of regulation and annoyance as the populace is forced continually to look over its collective shoulder in fear that its actions might be in contravention of the judiciary's demarcation of another's constitutional rights.

Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 NW. U.L. REV. 558, 569-70 (1985).

³¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-2 (2d ed. 1988).

³² R. GORMAN, *supra* note 2, at 639-41.

³³ *Id.* at 641-42.

a "union shop" agreement, the employer may hire without regard to union membership, but agrees to require all employees to join the union and begin paying union dues within a specified period of time after being hired.³⁴ An "agency shop" agreement is similar to a union shop agreement, except that the employees are only required to pay dues to the union. Whether the employees actually join the union is left to their discretion.³⁵ Finally, if the union and employer agree to a "maintenance of membership" agreement, the employer agrees that, if any employees join the union during the term of their employment, the employer will require that they continue their membership and pay dues as a condition of employment.³⁶ As discussed below, the closed shop is now largely of only historical significance.³⁷

For the vast majority of employees in the private sector, the legality of union security agreements is governed by section 8(a)(3) of the NLRA and by state law.³⁸ Section 8(a)(3) was first enacted in 1935 as section 8(3) of the Wagner Act.³⁹ At that time, Congress enacted the general prohibition of section 8(a)(3), which forbids employers from "encourag[ing] or discourag[ing] membership in any labor organization" "by discrimination in regard to hire or tenure of employment or any term or condition of employment."⁴⁰ By itself, this general prohibition would forbid union security agreements. However, to preserve the negotiation and observance of union security agreements, Congress added the following proviso:

Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employ-

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ In the Taft-Hartley Act, Congress outlawed the closed shop. *See infra* notes 46, 243 and accompanying text. The Supreme Court has also interpreted the second proviso of section 8(a)(3) to prohibit enforcement or observance of the membership requirement of a union shop agreement. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). *See infra* notes 154-156 and accompanying text.

³⁸ Section 8(a)(3) allows certain forms of union security agreements for employees governed by the NLRA. 29 U.S.C. § 158(a)(3) (1982). However, section 14(b) allows state laws prohibiting union security agreements to supersede section 8(a)(3)'s authorization. 29 U.S.C. § 164(b) (1982). For the text of NLRA section 14(b), *see supra* note 9.

³⁹ National Labor Relations Act § 8(3), ch. 372, Pub. L. No. 198, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1982)).

⁴⁰ 29 U.S.C. § 158(a)(3) (1982).

ees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, ...⁴¹

Section 159(a) referred to in the proviso is now section 9(a) of the NLRA. It specifies that a union elected by a majority of the employees is the "exclusive representative" of those employees with the right and obligation to represent all of the employees fairly, including non-members, in negotiating and enforcing a collective agreement.⁴²

In the Taft-Hartley Act of 1947,⁴³ Congress relettered section 8(3) as section 8(a)(3)⁴⁴ and placed additional limitations on union security agreements. Congress limited the existing proviso by specifying that union security agreements could not require union membership as a condition of employment until "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later"⁴⁵ By limiting union membership to a post-condition of employment, Congress outlawed the closed shop.⁴⁶ Congress imposed further limitations by adding a second proviso to section 8(a)(3):

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership ⁴⁷

⁴¹ *Id.*

⁴² "Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit . . . shall be the exclusive representatives of all the employees in such unit" 29 U.S.C. § 159(a) (1982); *see also* *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944) (union, as exclusive representative, has duty to represent all employees fairly in negotiation and enforcement of the collective agreement); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (precedent of *Steele* under RLA applied to section 9(a) of the NLRA).

⁴³ Labor Management Relations Act, ch. 120, § 101, 61 Stat. 136, 140 (1947) (amending 29 U.S.C. § 158(3) (1946), now codified at 29 U.S.C. § 158(a)(3) (1982)).

⁴⁴ Congress relettered section 8(3) because it created a new subsection, 8(b), specifying prohibited or "unfair" labor practices for unions. 29 U.S.C. § 158(b) (1982).

⁴⁵ 29 U.S.C. § 158(a)(3) (1982).

⁴⁶ *Beck*, 108 S. Ct. at 2649-50.

⁴⁷ 29 U.S.C. § 158(a)(3) (1982).

This proviso seeks to limit union discretion under union security agreements to the enforcement of the obligation to pay dues. Finally, Congress enacted sections 8(b)(2) and 14(b) of the NLRA. Section 8(b)(2) prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of section 8(a)(3).⁴⁸ Section 14(b) states that nothing in the NLRA, including section 8(a)(3), pre-empts state laws prohibiting union security agreements.⁴⁹ Section 14(b) was included merely to clarify the pre-emption question since, even under the Wagner Act, the pre-emption of state laws prohibiting union security agreements was not intended.⁵⁰

For employees in the railroad and airline industries, the legality of union security agreements is governed by section 2 Eleventh of the RLA.⁵¹ Under this Act, union security agreements were unlawful until 1951.⁵² At that time Congress amended section 2 Eleventh so that it is now very similar to section 8(a)(3) of the NLRA, except that section 2 Eleventh explicitly pre-empts contrary state laws.⁵³ Indeed, the legislative history of the 1951 amendments suggests that Congress intended to allow the same sort of union security agreements under section 2 Eleventh as it had permitted under section 8(a)(3) of the NLRA.⁵⁴

The statutory constructions of both section 8(a)(3) and section 2 Eleventh sparked disputes between nonunion employees and their employers. The resentment of these dissenting employees over mandatory payments to support unions they opposed, and the ready access to the litigation resources of employer-dominated "right-to-work" organizations,⁵⁵ inevitably led to litigation to determine the extent and constitutionality of union security

⁴⁸ 29 U.S.C. § 158(b)(2) (1982).

⁴⁹ 29 U.S.C. § 164(b) (1982).

⁵⁰ See *infra* note 217.

⁵¹ 45 U.S.C. § 152 Eleventh (1982).

⁵² *Beck*, 108 S. Ct. at 2665 (Blackmun, J., dissenting).

⁵³ For the text of RLA section 2 Eleventh, see *supra* note 16.

⁵⁴ *Beck*, 108 S. Ct. at 2649 (citing various sections of NLRA legislative history).

⁵⁵ Almost all of the major union security litigation under the RLA and the NLRA has been supported by the National Right to Work Legal Defense and Education Foundation. Wright, *Clipping the Political Wings of Unions: An Examination of Existing Law and Proposals for Change*, 5 HARV. J.L. & PUB. POL'Y 1, 34 n.203 (1982). The National Right to Work Legal Defense and Education Foundation was founded, and is largely supported, by employer interests. *UAW v. National Right to Work Legal Defense & Educ. Found., Inc.*, 781 F.2d 928, 929, 934 (D.C. Cir. 1986); see also *UAW v. National Right to Work Legal Defense & Educ. Found., Inc.*, 590 F.2d 1139 (D.C. Cir. 1978).

agreements allowed under section 8(a)(3) and section 2 Eleventh. The test came first under section 2 Eleventh of the RLA.

In *Railway Employer's Department v. Hanson*⁵⁶ the Supreme Court faced the question of whether a union shop agreement under section 2 Eleventh of the RLA violated dissenting employees' first amendment freedom of association and fifth amendment "liberty" to work. The parties did not dispute, nor did the Court question, whether a union shop was allowed by section 2 Eleventh. Although the Court recognized that section 2 Eleventh did not compel the parties to agree to a union shop, it found the prerequisite state action to support the constitutional claims in the section's pre-emption of an applicable state constitutional provision prohibiting union shop agreements.⁵⁷ Because of this pre-emption, the Court viewed "the federal statute [as] the source of . . . power and authority by which [the employees'] private rights are lost or sacrificed."⁵⁸ However, no violation of the employees' first or fifth amendment rights was found. Rather, the Court found that trade unions and their support strengthen the liberty to work.⁵⁹ Moreover, it held that with respect to the periodic dues and fees allowed by the RLA, any infringement of first amendment rights was justified by the state's compelling interest in promoting collective bargaining and industrial peace.⁶⁰ The Court specifically reserved the question of whether the imposition of "other conditions . . . or . . . the exaction of dues . . . as a cover for forcing ideological

⁵⁶ 351 U.S. 225 (1956).

⁵⁷ The Court in passing alluded to several theories for state action including *Smith v. Allwright*, 321 U.S. 649 (1944), and *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944). The mention of *Smith* perhaps suggests that because under the RLA the government once prohibited union security, the withdrawal of this prohibition made union security agreements state action. Read, *Minority Rights and the Union Shop: A Basis for Constitutional Attack*, 49 MINN. L. REV. 227, 243 (1964). *Steele* suggests that the union's designation as the exclusive representative under section 9(a) of the NLRA makes it a state actor. The Court, in dicta, also expressed its opinion that if a court were to enforce a union security agreement, a valid state action claim would arise. *Railway Employees Dep't v. Hanson*, 351 U.S. 225, 232 n.4 (1956) (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)). However, the basis of the Court's holding of state action in *Hanson* is the exercise of the Supremacy Clause. *Hanson*, 351 U.S. at 232; Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345, 355-56 (1961).

⁵⁸ *Hanson*, 351 U.S. at 232.

⁵⁹ *Id.* at 235.

⁶⁰ *Id.* at 238. The Court's opinion is ambiguous as to whether it found no infringement of dissenters' first amendment rights or whether it found such infringement justified. The later interpretation of *Hanson* was adopted by the Court in *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

conformity or other action . . ." would be a violation of dissenters' first amendment rights.⁶¹

Five years later, the Court determined that the very question it had reserved in *Hanson* was raised by the facts in *International Association of Machinists v. Street*.⁶² In *Street*, dissenting employees had challenged the constitutionality of an agency shop agreement negotiated under section 2 Eleventh.⁶³ The trial court found that, in fact, the union had spent a portion of the money it had collected in dues on political activities.⁶⁴ Again, neither party disputed the legality of the agency shop agreement under section 2 Eleventh.⁶⁵ However, after citing the doctrine of "fairly" construing statutes to avoid serious questions of constitutionality, the Supreme Court held that it did not have to answer the constitutional question. It interpreted section 2 Eleventh to allow the compulsion of dues for collective bargaining purposes, but not for political purposes.⁶⁶ To support this conclusion, the Court argued that the legislative history of the 1951 revisions to the RLA showed that Congress's purpose in allowing union security agreements under the RLA was to allow unions to recoup the expenses of their obligations under the RLA in negotiating and enforcing the collective agreement.⁶⁷ Thus, dissenters could not be compelled to fund political activities. The Court concluded that this was not only a "fair" but a "reasonable" interpretation of section 2 Eleventh, implying that it could have reached this interpretation without resort to the doctrine of construing statutes to avoid constitutional questions.⁶⁸ The holding in *Street* was further refined in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*,⁶⁹ where the Court interpreted section 2 Eleventh to allow the compulsion of dues only to cover expenses "necessarily or reasonably"

⁶¹ *Hanson*, 351 U.S. at 238.

⁶² 367 U.S. 740 (1961).

⁶³ *Id.* at 743-44.

⁶⁴ *Id.* at 744-45.

⁶⁵ *Id.* at 803 (Frankfurter, J., dissenting).

⁶⁶ *Id.* at 749-50.

⁶⁷ *Id.* at 764.

⁶⁸ *Id.* at 750; but see *id.* at 786 (Black, J., dissenting) ("Yet no one has suggested that the Court's statutory construction of § 2 Eleventh could possibly be supported without the crutch of its fear of unconstitutionality."). "In order to avoid the constitutional issue assumed to be lurking in *Street*, Justice Brennan's opinion tortured the legislative history to find a congressional limitation on the use of union security for political purposes." Cantor, *supra* note 20, at 72.

⁶⁹ 466 U.S. 435 (1984).

incurred by the union in the performance of its collective bargaining duties under the Act.⁷⁰

A test of the constitutionality of the negotiation and observance of agency shop agreements next arose in the public sector in *Abood v. Detroit Board of Education*.⁷¹ In *Abood*, the legality of union security agreements for state employees was governed by a state statute modeled after both section 8(a)(3) and section 2 Eleventh.⁷² The Court could not avoid the constitutional question because it was bound by a state court interpretation that the statute allowed the negotiation and observance of agency shop agreements.⁷³ Because the employer in the case was a state government, there was no question that the negotiation and observance of the agency shop agreement constituted state action. The Court held that the negotiation and enforcement of an agency shop agreement infringed dissenting employees' first amendment rights. The majority reasoned that although this infringement was justified with respect to collective bargaining expenses by the state's interest in promoting collective bargaining,⁷⁴ it could not be justified with respect to expenses for political activities.⁷⁵ Thus, the Court held that where there is state action in the negotiation and observance of a union security agreement, the agency shop violates dissenters' first amendment rights.

B. Communications Workers of America v. Beck

The test of the extent of union security agreements allowed under section 8(a)(3) of the NLRA finally arose in *Communications Workers of America v. Beck*.⁷⁶ Plaintiffs, twenty dis-

⁷⁰ *Id.* at 448.

⁷¹ 431 U.S. 209 (1976).

⁷² *Id.* at 223-24.

⁷³ *Id.* at 211, 214-15.

⁷⁴ *Id.* at 225-26.

⁷⁵ *Id.* at 235-36.

⁷⁶ 108 S. Ct. 2641 (1988). There is a reason why the test of section 8(a)(3) came after that of section 2 Eleventh. Under the NLRA, primary jurisdiction for the enforcement and interpretation of section 8(a)(3) lies with the National Labor Relations Board. 29 U.S.C. § 160(a) (1982). The Board has consistently given a broad interpretation of the extent of union security agreements allowed under section 8(a)(3). See *infra* notes 169-188 and accompanying text. Thus, the Board has not prosecuted cases to test the limits of section 8(a)(3). There is no corresponding administrative agency under the RLA to restrict individual tests of particular sections of the Act. The plaintiffs in *Beck* escaped the primary jurisdiction of the Board by alleging a violation of the duty of fair representation and of the Constitution, raising the interpretation of section 8(a)(3) as a collateral issue. 108 S. Ct. at 2647. The Supreme Court failed to discuss substantively either the duty of fair representation or the constitutional claim in its opinion in *Beck*.

sending employees, objected to an agency shop agreement that required them to pay agency fees equal to periodic union dues.⁷⁷ It was undisputed that a portion of the dues and agency fees collected by the union had been used for political purposes.⁷⁸ The plaintiffs argued that the agency shop agreement violated section 8(a)(3) of the NLRA, or in the alternative, that the agreement violated their first amendment rights and that section 8(a)(3) was therefore unconstitutional.⁷⁹

The parties' briefs before the Supreme Court suggest four major areas of contention.⁸⁰ First, the parties disputed the relevance of the Supreme Court's interpretations of section 2 Eleventh in *Street* and *Ellis*.⁸¹ The plaintiffs argued that the Court's RLA precedents should govern the interpretation of section 8(a)(3) because of the similarity in the language of the two sections and the legislative history of section 2 Eleventh, which suggested that Congress intended it to have the same scope as section 8(a)(3).⁸² The union attempted to distinguish the RLA precedents, arguing that the RLA had a different legislative history⁸³ and that the Court's interpretations of section 2 Eleventh were colored by its attempt to avoid constitutional questions that do not arise under the NLRA.⁸⁴

⁷⁷ 108 S. Ct. at 2645. The plaintiffs' cause was supported and financed by the National Right to Work Legal Defense and Education Foundation. See Brief for the AFL-CIO at 24, *Beck*, 108 S. Ct. 2641. Many interested parties filed *amicus* briefs before the Supreme Court. The AFL-CIO filed a brief supporting the Communications Workers of America, as did Solicitor General Charles Fried, who was joined by NLRB General Counsel Rosemary Collyer. The Landmark Legal Foundation, the Pacific Legal Foundation (joined by a group of dissident Screen Actors Guild members including Charlton Heston, Claude Akins, and Rory Calhoun), and a group of four Senators (Jessie Helms (R-N.C.), Strom Thurmond (R-S.C.), Dan Quayle (R-Ind.), and Steven Symms (R-Idaho)) filed briefs supporting plaintiffs.

⁷⁸ *Beck*, 108 S. Ct. at 2645.

⁷⁹ *Id.* at 2645-46. The plaintiffs also argued that the negotiation and enforcement of an agency shop agreement by the union violated the union's duty of fair representation, and that if the NLRA allowed the agency shop, it violated the plaintiffs' fifth as well as first amendment rights. Brief for Respondents at 29-44. However, these arguments were not addressed by the Supreme Court and are beyond the scope of this Article.

⁸⁰ Not all of these arguments were raised before the district and circuit courts, but they are presented at this point to facilitate exposition. For a summary of the oral presentation of these arguments before the Supreme Court, see 56 U.S.L.W. 3475 (Jan. 19, 1988).

⁸¹ See *supra* notes 62-70 and accompanying text.

⁸² Brief for Respondents at 23-27.

⁸³ The union argued that the history of the NLRA was one of first allowing all union security agreements and then prohibiting only the worst abuses, while the history of the RLA was one of first prohibiting all union security and then allowing only limited union security. Thus, the union argued that the legislative histories of the two acts with respect to union security are diametrically opposed. Brief for Petitioners at 41-42.

⁸⁴ *Id.* at 40-41. The constitutional question which the Court avoided in its RLA cases

Second, the parties differed in their interpretations of the plain language of section 8(a)(3). The plaintiffs argued that the definitions of "labor organization" and "exclusive representative" in the NLRA limited the purpose of unions under the statute to collective bargaining.⁸⁵ Because section 8(a)(3) allows only exclusive representatives to negotiate union security agreements, the plaintiffs reasoned that the section limited the "dues" which the representative could compel to those necessary to cover collective bargaining expenses.⁸⁶ The union disputed whether the NLRA limited union purposes to collective bargaining and argued that the plain language of section 8(a)(3) allows unions to charge all employees "uniform dues" on pain of loss of their jobs.⁸⁷

Third, the parties had different interpretations of the legislative history of section 8(a)(3). The plaintiffs contended that Congress's purpose in allowing union security agreements under section 8(a)(3) was to prevent "free-riding" by nonunion employees who benefitted from collective bargaining but did not share its cost.⁸⁸ Accordingly, they argued that the only fees allowed in union security agreements under section 8(a)(3)

was whether an agency shop agreement between a private union as exclusive representative and a private employer violates dissenting employees' first amendment rights. *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). Although a similar constitutional question was raised in *Beck*, the union argued that *Beck* did not pose the same constitutional concern as the RLA cases because it did not share the basis for the finding of state action in the RLA cases. The basis for finding state action in the RLA union security cases was the exercise of the Supremacy Clause by Congress in pre-empting state legislation which prohibited union security agreements. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232 (1956). There is no such pre-emption under the NLRA. See 29 U.S.C. § 164(b) (1982).

⁸⁵ Brief for Respondents at 19-20. Section 2(5) of the NLRA defines a "labor organization" as

... any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1982). Section 9(a) of the NLRA gives the following "definition" of "exclusive representative:"

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

29 U.S.C. § 159(a) (1982).

⁸⁶ Brief for Respondents at 18.

⁸⁷ Brief for Petitioners at 21-23.

⁸⁸ Brief for Respondents at 21.

would be payments for collective bargaining services.⁸⁹ The union countered that, prior to the Taft-Hartley amendments, all forms of union security agreements had been legal; and in enacting the amendments, Congress had intended to prohibit only the worst abuses of union security—the closed shop and union discrimination in membership. Thus, Congress did not intend to intrude into the internal affairs of unions or to place restrictions on the use of union funds.⁹⁰

Finally, the parties disputed whether there was sufficient state action to support the plaintiffs' constitutional claim. The plaintiffs argued that the state action prerequisite was met by the union's designation as the exclusive bargaining representative under section 9(a).⁹¹ They quoted dicta from *Steele v. Louisville & Nashville Railroad Co.*⁹² suggesting that because the Union, as exclusive representative, is "clothed with power not unlike that of a legislature" it may be a state actor and subject to constitutional scrutiny.⁹³ The plaintiffs also argued that the designation of the union as the exclusive representative under the NLRA encourages the negotiation of agency shop agreements because it prevents individual employees from negotiating employment contracts without such agreements, and it requires the employer to negotiate such agreements in good faith.⁹⁴ The union maintained that its designation as the exclusive bargaining representative did not make it a state actor since the Supreme Court had recently established that governmental grants of mo-

⁸⁹ *Id.* at 17.

⁹⁰ Brief for Petitioners at 38–39.

⁹¹ Brief for Respondents at 5.

⁹² 323 U.S. 192 (1944).

⁹³ Brief for Respondents at 11. The quote from *Steele* is as follows:

For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on . . . [the nonunion employees] the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the . . . [union's] own members, we must decide the constitutional questions, which . . . [the nonunion member] raises . . .

323 U.S. 192, 198–99. See also *id.* at 208 (Murphy, J., concurring). Although *Steele* is a RLA case, the Court has found a similar duty of fair representation under the NLRA, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), and considers the reasoning of *Steele* equally applicable to NLRA-governed unions.

⁹⁴ 29 U.S.C. § 158(a)(5) (1982); Brief for Respondents at 5, *Beck*, 108 S. Ct. 2641. The Supreme Court established that union security agreements are a mandatory subject of bargaining under section 8(a)(5) of the NLRA in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

nopoly status to private institutions in the provision of services did not make those institutions state actors.⁹⁵ The union saw no government encouragement of union security agreements since section 8(a)(3) does not require, but merely permits, such agreements.⁹⁶ The union closed its argument by noting that the Supreme Court had previously rejected the notion that a union's designation as the exclusive bargaining representative made its actions state action.⁹⁷

The district court, acting *sua sponte*, granted partial summary judgment to the plaintiffs. Without ruling on the legality of the agency shop under the NLRA, the trial court found that "collect[ing] from the plaintiffs amounts beyond that allocable to collective bargaining . . . violates the First Amendment rights of the plaintiffs."⁹⁸ On appeal, a divided panel for the Fourth Circuit affirmed the district court's decision regarding the union's liability.⁹⁹ Based on the Supreme Court's interpretation of section 2 Eleventh, the majority held that section 8(a)(3) did not allow the compulsion of fees for purposes unrelated to collective bargaining.¹⁰⁰ The majority also stated in dicta that such collection would violate the employees' first amendment rights.¹⁰¹ The Fourth Circuit granted the union's request for

⁹⁵ Brief for Petitioners at 17–18, *Beck*, 108 S. Ct. 2641 (citing *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1975)).

⁹⁶ Brief for Petitioners at 13–15, *Beck*, 108 S. Ct. 2641.

⁹⁷ *Id.* at 18–19 (citing *United Steelworkers v. Sadlowski*, 457 U.S. 102, 122 n.16 (1982) ("union rule precluding candidates for union office from accepting campaign contributions from nonmembers 'does not involve state action'"); *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) ("collectively bargained affirmative action plan 'does not involve state action'" (dicta)).

⁹⁸ *Beck v. Communications Workers of Am.*, 468 F. Supp. 93, 97 (D. Md. 1979), *aff'd in part*, 776 F.2d 1187 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 108 S. Ct. 2641 (1988). The court ordered the union to return to the plaintiffs all dues for expenses other than "collective bargaining, contract administration and grievance adjustment" since January 1, 1976, and to institute a record-keeping system to segregate expenses for collective bargaining and non-collective bargaining purposes. *Id.* The district court appointed a special master who determined the percent of the union's expenditures allocable to collective bargaining since the beginning of 1976. *Beck*, 776 F.2d at 1191–92.

⁹⁹ However, the court, unclear about the standard used by the appointed special master in the district court, held that the "preponderance of evidence" standard, rather than the "clear and convincing" standard, should have been applied to the union's burden of showing that expenses were related to collective bargaining. The case was remanded for further proceedings. *Beck*, 776 F.2d at 1212.

¹⁰⁰ *Id.* at 1201–02. The majority also held that the union's negotiation and enforcement of an agency shop agreement violated its duty of fair representation. *Id.* at 1203.

¹⁰¹ *Id.* at 1205.

rehearing *en banc*¹⁰² and, by a six to four majority, affirmed the panel majority's disposition of the case.¹⁰³ Because the Fourth Circuit's opinion in *Beck* directly conflicted with the Second Circuit's opinion in *Price v. United Auto Workers*,¹⁰⁴ the Supreme Court granted certiorari to resolve the conflict.¹⁰⁵

The Supreme Court affirmed the judgment of the Fourth Circuit Court of Appeals, holding that section 8(a)(3) of the NLRA did not allow the compulsion of dues for purposes unrelated to collective bargaining.¹⁰⁶ The majority held that the Court's prior interpretation of section 2 Eleventh, announced in *International Association of Machinists v. Street*,¹⁰⁷ was controlling with respect to the interpretation of section 8(a)(3).¹⁰⁸ They described the two provisions as "identical" in "all material respects" and noted that the legislative history of section 2 Eleventh suggests that Congress intended to model it after section 8(a)(3).¹⁰⁹ Based on this identity, the majority imposed on section 8(a)(3) the same narrow purpose for union security agreements the Court had found under section 2 Eleventh in *Street*. They asserted that the "nearly identical language [of the two sections] reflects the fact that, in both, Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost."¹¹⁰ The majority concluded that "in these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes."¹¹¹

¹⁰² *Beck v. Communications Workers of Am.*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 108 S. Ct. 2641 (1988).

¹⁰³ The *en banc* opinion of the court gives little insight into the rationale of the Fourth Circuit in disallowing agency shop payments. The arguments of the parties at the *en banc* hearing focused primarily on whether the NLRB or the federal courts had primary jurisdiction over the case. *Id.* at 1282. This was probably due to the fact that the panel majority erroneously cited RLA cases as authority for jurisdiction even though no such jurisdictional issue arises under the RLA. *Beck*, 108 S. Ct. at 2647. As a result, the *en banc* opinions are expressed in terms of the judges' beliefs regarding the court's jurisdiction, rather than in terms of the merit of the questions at hand. The *per curiam* opinion indicated that five judges found federal jurisdiction over the plaintiffs' claims under both section 8(a)(3) and the duty of fair representation, while one judge found jurisdiction only over the plaintiffs' duty of fair representation claim alone. *Beck*, 800 F.2d at 1282. The opinion indicated that all six of these judges had voted to affirm "the majority panel opinion's disposition of the allocation issue." *Id.*

¹⁰⁴ 795 F.2d 1128 (2d Cir. 1986).

¹⁰⁵ *Communications Workers of Am. v. Beck*, 482 U.S. 904 (1987) (mem.).

¹⁰⁶ *Beck*, 108 S. Ct. at 2657.

¹⁰⁷ 367 U.S. 740 (1961).

¹⁰⁸ 108 S. Ct. at 2648.

¹⁰⁹ *Id.* at 2648-49.

¹¹⁰ *Id.* at 2649.

¹¹¹ *Id.*

The Court attempted to support its narrow interpretation of the purpose of union security agreements under section 8(a)(3) by referring to the legislative history of the NLRA. The majority argued that during the enactment of the Taft-Hartley amendments, Congress was not only concerned that the closed shop "create[d] too great a barrier to free employment," but was "equally concerned . . . that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without . . . contributing financial support to those efforts."¹¹² They concluded that these dual purposes, one for limiting union security and one for allowing the continuation of some form of union security, were both represented in section 8(a)(3).¹¹³

The Court gave a very expansive reading of the Congress's purpose in limiting union security agreements under section 8(a)(3). The union's argument that in enacting section 8(a)(3) Congress sought only to prohibit the worst abuses of union security under the Wagner Act was rejected. Instead, the majority maintained that in 1947 "Congress viewed the Wagner Act's regime of compulsory unionism as seriously flawed,"¹¹⁴ and did not "set out . . . simply to tinker in some limited fashion with the [Act's] authorization of union-security agreements."¹¹⁵ According to the majority, Congress retained union security to the extent that it did only because "such agreements promoted stability [in labor relations] by eliminating 'free-riders.'"¹¹⁶ To strengthen their argument, the majority resorted to the unusual practice of quoting a minority report on the Taft-Hartley Act. The report asserted that the Act allowed "union-shop agreement[s] only under limited and administratively burdensome conditions."¹¹⁷

¹¹² *Id.* at 2649-50 (quoting S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947) [hereinafter S. REP. NO. 105], *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 407, 412 (1974) [hereinafter LMRA LEGISLATIVE HISTORY]).

¹¹³ *Id.* at 2650.

¹¹⁴ *Id.* at 2653.

¹¹⁵ *Id.* at 2653-54 (quoting S. REP. NO. 105, *supra* note 112, at 7, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2653 (quoting S. REP. NO. 105, Pt. 2, 80th Cong., 1st Sess. 8, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 463, 470 (Minority Report)). This practice seems ill-advised given the natural tendency of opponents to exaggerate the purpose and effect of a bill in seeking its demise. For example, opponents of the Wagner Act alleged that it repealed the thirteenth amendment, creating labor despots and czars. *Hearings Before the Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. 965-66 (1934) [hereinafter 1934 Senate Hearings], *reprinted in* 1 LEGISLATIVE HISTORY OF

The Court limited the purpose of union security under section 8(a)(3) to merely the recoupment of collective bargaining expenses. The majority did this by reference to the analogy between section 8(a)(3) and section 2 Eleventh. They insisted that the same concern over free-riders that had caused Congress to retain limited union security under section 8(a)(3) had also prompted it to enact section 2 Eleventh.¹¹⁸ The union's argument, that the different legislative histories of the two sections required that they be interpreted differently, was rejected on the basis of the legislative history of section 2 Eleventh, which suggested that it was to allow the same union security provisions as section 8(a)(3).¹¹⁹ The union's assertion that the Court's interpretations of section 2 Eleventh had been constitutionally colored was likewise dismissed. The Court maintained, as it had in *Street*, that its interpretation of section 2 Eleventh was "not only 'fairly possible' but entirely reasonable" and thus not distorted by constitutional concerns.¹²⁰

The Court's interpretation of section 8(a)(3) obviated the need to answer the constitutional question. However, in passing the majority made an interesting attribution on the issue of whether the exercise of rights permitted by section 8(a)(3) involves state action. They cited as analogous the holdings in *Steelworkers v. Sadlowski*¹²¹ and *Steelworkers v. Weber*,¹²² the cases cited by the union as supporting its argument that there is no state action.¹²³ Without noting that the relevant language in *Weber* is dicta, the majority attributed to that case the holding that "negotiation of [a] collective bargaining agreement's affirmative action plan does not involve state action."¹²⁴ This attribution would seem to defeat any arguments that a union's actions in negoti-

THE NATIONAL LABOR RELATIONS ACT 27, 1003-04 (1959) [hereinafter NLRA LEGISLATIVE HISTORY]. Opponents of the Taft-Hartley Act alleged that it would once again allow "yellow dog" contracts between an employer and his employees, restraining them from joining a union during the term of their employment. 93 CONG. REC. 6672 (1947), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1565, 1588-89 (comments of Sen. Pepper (D-Fla.)). Moreover, since it is the majority of the legislature who enact the law, the opinion of the minority as to its purpose and effect is, arguably, irrelevant.

¹¹⁸ *Beck*, 108 S. Ct. at 2653.

¹¹⁹ *Id.* at 2654.

¹²⁰ *Id.* at 2657 (citing *International Ass'n of Machinists v. Street*, 367 U.S. 740, 750 (1961)).

¹²¹ 457 U.S. 102 (1982).

¹²² 443 U.S. 193 (1979).

¹²³ *Id.* at 2656-57 (citing *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982); *United Steelworkers v. Weber*, 443 U.S. 193 (1979)).

¹²⁴ *Id.* at 2657.

ating 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.

Justice Blackmun, joined by Justices O'Connor and Scalia, dissented from the Court's interpretation of section 8(a)(3). Blackmun stated that he was unable to join the majority's opinion because he was "unwilling to offend our established doctrines of statutory construction and strain the meaning of the language used by Congress in section 8(a)(3), simply to conform section 8(a)(3)'s construction to the Court's interpretation of similar language in a different later-enacted statute . . ."¹²⁵ He further commented that the interpretation of section 2 Eleventh was itself "not without its difficulties."¹²⁶ In criticizing the majority's decision, Blackmun first argued that the plain language of section 8(a)(3) allowed the agency shop, that this had been the consistent interpretation of the statute by the National Labor Relations Board (NLRB), and that the Court had previously approved agency shop agreements.¹²⁷ Second, he asserted that the legislative history of the NLRA showed that Congress's purpose in limiting union security under the Taft-Hartley amendments to section 8(a)(3) was to proscribe only the most serious abuses of union security—the closed shop and union discrimination in membership and employment.¹²⁸ He urged that the legislative history did not support the majority's conclusion that Congress's "single minded" purpose in continuing to allow union security under section 8(a)(3) was to prevent free-riders.¹²⁹ To Blackmun, nothing in the legislative history suggested that Congress intended to outlaw the agency shop or limit the dues that can be collected from dissenting employees.¹³⁰ Finally, Blackmun had no problem with interpreting section 8(a)(3) differently from section 2 Eleventh, since he saw these statutes as born of different concerns with different legislative histories.¹³¹ Rather, he reasoned that even if Congress intended in 1951 to enact section 8(a)(3) into the RLA by enacting section 2 Eleventh, the events of 1951 were irrelevant to the determination of what

¹²⁵ *Id.* at 2658 (Blackmun, J., dissenting) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977)).

¹²⁶ *Id.*

¹²⁷ *Id.* at 2659.

¹²⁸ *Id.* at 2661.

¹²⁹ *Id.* at 2664.

¹³⁰ *Id.* at 2661-62.

¹³¹ *Id.* at 2664-65.

Congress enacted in section 8(a)(3) in 1947.¹³² For Blackmun, "[t]he relevant sources for gleaning the 1947 Congress' intent are the plain language of section 8(a)(3), and . . . the legislative history of section 8(a)(3)."¹³³

II. AN INTERPRETATION OF SECTION 8(A)(3) OF THE NLRA BY DIRECT EXAMINATION OF ITS WORDS, ADMINISTRATIVE INTERPRETATIONS, AND LEGISLATIVE HISTORY

The Supreme Court's interpretation of section 8(a)(3) in *Beck* does not follow the usual rules of statutory construction. The canons of construction require that a court first examine the "plain meaning" of the words of the statute,¹³⁴ and then, if the meaning is ambiguous, the administrative interpretations and legislative history.¹³⁵ The *Beck* Court referred to the words of section 8(a)(3) only to note its similarity to section 2 Eleventh of the RLA.¹³⁶ The Court ignored the NLRB's *amicus curiae* position that section 8(a)(3) allows agency shop agreements.¹³⁷ It alluded to the Board's prior opinions on section 8(a)(3) only to note some errant language which, by the Court's own admission, deviated from the Board's other interpretations of section 8(a)(3).¹³⁸ The majority examined the legislative history of section 8(a)(3) only to corroborate its imposition of the RLA precedents rather than to make a direct determination of the section's meaning.¹³⁹ Instead of undertaking a direct examination of the words, administrative interpretations, and legislative history of section 8(a)(3), the Court identified section 8(a)(3) with section 2 Eleventh and then imposed on section 8(a)(3) its previous interpretations of section 2 Eleventh.¹⁴⁰ Thus, the Court bypassed the traditional starting points for statutory construc-

¹³² *Id.* at 2665-66.

¹³³ *Id.* at 2666.

¹³⁴ *Caminetti v. United States*, 242 U.S. 470 (1916) (a court should first look to the plain meaning of the statutory language); see also 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1984).

¹³⁵ Posner, *supra* note 25, at 807-08; *Ex parte Collett*, 337 U.S. 55, 61 (1949) (extrinsic aids, such as legislative history, are used only when the statute is unclear); see also 2A N. SINGER, *supra* note 134, § 48.01.

¹³⁶ *Beck*, 108 S. Ct. at 2648-49.

¹³⁷ Brief for the United States at 12-19, 23, *Beck*, 108 S. Ct. 2641.

¹³⁸ *Beck*, 108 S. Ct. at 2652 n.7.

¹³⁹ *Id.* at 2649-50.

¹⁴⁰ *Id.* at 2648-49.

tion in favor of the more remote canon of interpreting similar statutory provisions the same.¹⁴¹

One need not subscribe to the belief that the canons of construction provide a determinative formula for the discovery of the "true" meaning of a statute to object to the Court's analysis in *Beck*.¹⁴² Almost all critics of the canons of construction have argued that a statute's words and legislative history are the best evidence to examine in discerning a meaning grounded in the intent of the legislature.¹⁴³ Some commentators have also argued that, regardless of the canons of construction, administrative interpretations merit deference by the courts where the relevant agency has special expertise in the subject area or where experience in the statute's enactment has given the agency special insight into the legislature's intent.¹⁴⁴ Deference by the courts to the intent of the elected legislature is, of course, a fundamental premise of our democratic government.¹⁴⁵

It would not be impossible to derive an interpretation of a statute which fairly represented the intent of the legislature by interpreting the statute identically to a previous interpretation of a similar statute without direct examination of the statute's words, administrative interpretations, or legislative history. Presumably the similar language of the two statutes should convey the same meaning to the court and represent the same legislative purposes in their enactment. Moreover, if the similarity of the statutes was recognized when the court first considered their meaning, the court might legitimately consider the words, administrative interpretations, and legislative history of both statutes in its initial interpretation. There may even be some policy

¹⁴¹ For a discussion of this canon, see 2A N. SINGER, *supra* note 134, § 51.02.

¹⁴² This myth was of course "debunked" long ago by Karl Llewellyn. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

¹⁴³ R. DWORIN, LAW'S EMPIRE 313-54 (1986) (statutory interpretation is part of an ongoing process of creating new and evolving meaning from the text of the statute, in which the court should read that text in light of the political history of the statute); H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1156-57 (tent. ed. 1957) (in interpreting a statute, a court should examine the statute's words and history to determine legislative purpose); Posner, *supra* note 25, at 817-18 (in interpreting a statute, a court should look at its words, history, and the values of the enacting legislature to reconstruct how the enacting legislators would have wanted the statute applied to the case at bar); but see J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 123-24 (1982) (the meaning of a statute cannot be determined out of context, but because context knows no bounds of description, interpretation is utterly subjective).

¹⁴⁴ See, e.g., Posner, *supra* note 25, at 811.

¹⁴⁵ See, e.g., Hatch, *Modern Marbury Myths*, 57 U. CIN. L. REV. 891, 893-94 (1989).

reason expressed or implied by Congress as to why the statutes should be interpreted similarly, regardless of extrinsic evidence to the contrary. However, by imposing its previous interpretation of a similar statute without direct examination of the words, administrative interpretations, and legislative history of the statute in question, a court ignores the best evidence of congressional intent in favor of assumptions and evidence concerning a different statute.

In this Part, I undertake a direct examination of section 8(a)(3)'s words, administrative interpretations, and legislative history to determine Congress's purposes in allowing union security agreements under the NLRA and to determine whether Congress intended to allow the observance of agency shop agreements under section 8(a)(3). The results of this examination can be used to verify whether the Court's circuitous route of statutory interpretation in *Beck* has led to a fair interpretation of Congress's intent.

A. The Words of the Statute

Under the canons of construction, the usual starting point for statutory interpretation is the plain meaning of the words of the statute. If the words of the statute are unambiguous, the court ends its inquiry and adopts their plain meaning as its interpretation of the statute.¹⁴⁶ Even divorced from the rhetoric of the canons of construction, the words of the statute are of course the primary intrinsic evidence of congressional intent in the interpretation of a statute.¹⁴⁷

On its face, the language of section 8(a)(3) of the NLRA permits the negotiation of union security agreements that require all employees to pay dues and initiation fees equal to those of union members.¹⁴⁸ The first proviso of the section allows employers and the unions designated as exclusive bargaining representatives to enter into union security agreements which require all employees to become members of the union as a post-condition of employment.¹⁴⁹ The second proviso prevents the employer from discharging an employee covered by the union

¹⁴⁶ *Caminetti v. United States*, 242 U.S. 470, 485 (1916).

¹⁴⁷ See generally W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 639-46; Posner, *supra* note 25, at 807-08.

¹⁴⁸ 29 U.S.C. § 158(a)(3) (1982).

¹⁴⁹ See *supra* text accompanying note 41.

security agreement if "... [union] membership was not available to the employee on the same terms and conditions generally applicable to other members . . ." or if the employee is denied membership for any reason other than "the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."¹⁵⁰ There is no ambiguity that the dues and fees that can be charged are equal to full membership dues and fees. By adding the word "uniformly" to the proviso, Congress emphasized that all employees are to be charged the same dues and fees.¹⁵¹ Nothing in the language of section 8(a)(3) suggests that there is any difference between the dues that can be charged dissenting and non-dissenting employees, or that there are any limitations on the union expenses that can be included in these dues and fees.

The only ambiguity in this plain reading of section 8(a)(3) concerns the exact form of union security agreement allowed by the section. The first proviso, in allowing union security agreements requiring membership as a post-condition of employment, defines a union shop agreement.¹⁵² The second proviso, in stating that union security agreements can be enforced only to the extent of requiring the payment of uniform dues, defines an agency shop agreement.¹⁵³ This conflict was resolved by the Supreme Court in *NLRB v. General Motors Corp.*,¹⁵⁴ where the Court held that "membership," as used in section 8(a)(3) after the Taft-Hartley amendments, consists only of the obligation to pay dues.¹⁵⁵ Agency shop obligations thus became the "practical equivalent" of membership obligations for the purposes of section 8(a)(3).¹⁵⁶ With the resolution of this question in favor of the agency shop, the language of section 8(a)(3) unambiguously allows employers and unions to negotiate and observe agency shop agreements that require all employees, as

¹⁵⁰ See *supra* text accompanying note 47.

¹⁵¹ *Id.*

¹⁵² See *supra* text accompanying note 34.

¹⁵³ See *supra* text accompanying note 35.

¹⁵⁴ 373 U.S. 734 (1963).

¹⁵⁵ *Id.* at 742. In *General Motors*, the employer refused to bargain with the union over an agency shop agreement, arguing that because the agency shop does not require membership, it was not allowed under the first proviso of section 8(a)(3). *Id.* The Court held that the Taft-Hartley amendments to the NLRA had "whittled" the term "membership" down to its "financial core" of merely the obligation to pay dues. *Id.* Accordingly, the Court ordered the employer to bargain with the union over the agency shop agreement. *Id.* at 744-45.

¹⁵⁶ *Id.* at 743.

a condition of employment, to pay dues and fees equal to those paid by union members.

The plaintiffs' argument in *Beck* with respect to the plain language of the statute is unpersuasive. They argued that the language of the NLRA limits the dues that can be charged employees under a union security agreement to collective bargaining expenses because the definitions of "labor organization" and "exclusive representative" are limited to collective bargaining and section 8(a)(3) specifies that only exclusive representatives can negotiate union security agreements.¹⁵⁷ In fact the Act defines a "labor organization" as an organization which exists "in whole or in part" for the purposes of collective bargaining.¹⁵⁸ Moreover, in the "findings and declaration of policy" of the NLRA, Congress stated that it is the policy of the United States to "protect . . . the exercise by workers of full freedom of association, self-organization, and designation of representatives . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."¹⁵⁹ On its face, the limitation that only an exclusive representative can negotiate a union security agreement appears to strive to ensure the legitimacy of the union and its representation of the majority of employees rather than to limit the type of union security agreement it can negotiate.¹⁶⁰ Finally, both the definitions of "labor organization" and "exclusive representative" and the limitation in section 8(a)(3) were carried forward from the original Wagner Act.¹⁶¹ Since the Wagner Act allowed all forms of union security, including the closed shop, it does not seem likely that these definitions and limitations were intended to limit the dues and fees a union can charge under a union security agreement.¹⁶²

B. The Interpretation of the National Labor Relations Board

Another canon of statutory construction is that courts should give great deference to prior interpretations of the statute by

¹⁵⁷ Brief for Respondents at 19-20, *Beck*, 108 S. Ct. 2641.

¹⁵⁸ 29 U.S.C. § 152(5) (1982) (emphasis added).

¹⁵⁹ 29 U.S.C. § 151 (1982) (emphasis added).

¹⁶⁰ Cf. THE DEVELOPING LABOR LAW 1362 (C. Morris 2d ed. 1983) [hereinafter DEVELOPING LABOR LAW] (Wagner Act authorized union security agreements only for unions which "legitimately represented" the employees).

¹⁶¹ See National Labor Relations Act, ch. 372, §§ 2(5), 8(3), 9(a), 49 Stat. 449, 450, 452-53 (1935) (current version at 29 U.S.C. §§ 152(5), 158(3), 159(a) (1982)).

¹⁶² See *infra* notes 209-219 and accompanying text.

the administrative agency charged with the enforcement of that statute.¹⁶³ This is especially true where the agency has special expertise in the subject area, or where the agency's construction was undertaken by people who helped in the enactment of the statute.¹⁶⁴ Judge Posner has criticized this canon, pointing out that an administrative agency's interpretation of a statute may show more fidelity to the views of the current administration than the intent of the enacting Congress.¹⁶⁵ However, even Judge Posner admits that the interpretation of the administrative agency may be a valuable piece of extrinsic evidence of congressional intent where the agency has special knowledge of the subject matter or legislative history.¹⁶⁶ The NLRB was created precisely to provide a body with special expertise in labor relations to enforce the NLRA.¹⁶⁷ Moreover, the opinion of a General Counsel appointed by President Reagan that favors organized labor by arguing that section 8(a)(3) allows the negotiation of agency shop agreements does not seem subject to the criticism of political bias.

As previously mentioned,¹⁶⁸ the Board and the Department of Justice joined in an *amicus curiae* brief in *Beck*, supporting the union's arguments that section 8(a)(3) allowed the negotiation and observance of agency shop agreements.¹⁶⁹ Because of the Board's active support of the union's position, and because the Board's prior interpretations of section 8(a)(3) are fairly straightforward, those interpretations were not a primary matter of dispute between the parties in *Beck*. They do provide insight, however, into the Board's view of the legislative intent behind section 8(a)(3).

The Board has approved the negotiation and observance of agency shop agreements requiring agency fees equal to full union dues under section 8(a)(3) of the NLRA. In *American Seating Co.*,¹⁷⁰ the Board upheld the legality of a union shop agreement which allowed religious objectors to pay an agency

¹⁶³ See, e.g., *Chevron v. Natural Resources Defense*, 467 U.S. 837, 843 (1984); *NLRB v. Hendrick County Rural Elec. Membership Corp.*, 454 U.S. 170, 177, 178-90 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

¹⁶⁴ *Udall*, 380 U.S. at 16.

¹⁶⁵ Posner, *supra* note 25, at 811.

¹⁶⁶ *Id.*

¹⁶⁷ See generally J. GETMAN & B. POGREBIN, *LABOR RELATIONS* (1988); J. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* (1974).

¹⁶⁸ See *supra* text accompanying note 137.

¹⁶⁹ Brief for the United States at 12-19, 23, *Beck*, 108 S. Ct. 2641.

¹⁷⁰ 98 N.L.R.B. 800 (1952).

fee equal to full union dues in lieu of joining the union.¹⁷¹ The Board reasoned that such an agreement would have been legal under section 8(3) of the Wagner Act,¹⁷² that the enactment of section 8(a)(3) in the Taft-Hartley amendments added only "qualifications not pertinent here," and that "the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining support payments from nonunion members who would otherwise be 'free-riders.'"¹⁷³

Similarly, in *General Motors Corp.*,¹⁷⁴ the Board approved the negotiation of a union security agreement which required all employees to pay agency fees equal to full union dues.¹⁷⁵ In upholding the lawfulness of the agency shop agreement under consideration, the Board stated: "[W]e are unable to distinguish, so far as its legality is concerned, the instant agency-shop proposal from any other union-security proposal which predicates a right of discharge only upon an employee's failure to tender the equivalent of regular union dues and initiation fees."¹⁷⁶ The Board stated that it was "impelled" to such a holding by "the clear intention of the Congress as expressed in Section 8(a)(3) of the Act, in the legislative history of the Wagner and Taft-Hartley Acts, and by the Board and court decisions in which that section has been construed."¹⁷⁷

Moreover, the Board has specifically held that section 8(a)(3) allows unions to charge non-members and dissenters agency fees equal to full union dues without regard to whether such

¹⁷¹ The Board examined the legality of the agreement to determine whether the collective bargaining agreement was valid and could act as a bar to severance of a portion of the bargaining unit by the employer. *Id.* at 801.

¹⁷² *Id.* at 802 (citing *Public Service Co. of Colorado*, 89 N.L.R.B. 418 (1950)).

¹⁷³ *Id.*

¹⁷⁴ 130 N.L.R.B. 481 (1961), *vacated*, 133 N.L.R.B. 451 (1961), *enforcement denied*, 303 F.2d 428 (6th Cir., 1962), *rev'd*, 373 U.S. 734 (1963).

¹⁷⁵ See *supra* notes 154-155 and accompanying text. The Board was asked to decide whether the proviso to section 8(a)(3) allowed only union security agreements requiring "membership," such as the union shop, or whether the employer's duty to bargain extended to the agency shop, a lesser form of union security. *Id.* at 481. The Board initially decided that the proviso did in fact allow only union shop agreements requiring membership. *Id.* at 486, 500. To reach this conclusion the Board had to ignore its precedent under the Wagner Act that section 8(3), the precursor to section 8(a)(3) of the current NLRA, prescribed the maximum union security provisions allowed rather than the minimum. *Public Service Co. of Colorado*, 89 N.L.R.B. 418 (1950). However, on rehearing after a change in the membership of the Board, the Board followed its precedent under the Wagner Act and upheld the negotiation of the agency shop. *General Motors Corp.*, 133 N.L.R.B. 451, 457 (1961), *enforcement denied*, 303 F.2d 428 (6th Cir. 1962), *rev'd*, 373 U.S. 734 (1963).

¹⁷⁶ *General Motors Corp.*, 133 N.L.R.B. at 459 (original emphasis suppressed, emphasis added).

¹⁷⁷ *Id.* at 457 (citations omitted).

dues are used for collective bargaining or other purposes. In *Detroit Mailers Union No. 40 (Detroit Newspaper Publishers Ass'n)*,¹⁷⁸ the Board rejected arguments that the second proviso of section 8(a)(3) prevented the discharge under a union security agreement of dissenting employees who had tendered a portion of union dues, but who objected to paying the remainder of the dues which had been committed to non-collective bargaining purposes.¹⁷⁹ The Board stated that "[n]either on its face nor in the congressional purpose behind [section 8(a)(3)] can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union."¹⁸⁰ Hence, full union dues could be required of dissenting employees under a union security agreement "so long as they are periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy."¹⁸¹

The only deviation from this consistent line of rulings upholding the agency shop under section 8(a)(3) came in *Local 959, International Brotherhood of Teamsters*,¹⁸² the Board's opinion cited by the Supreme Court in *Beck*.¹⁸³ In *Local 959* the Board stayed the union's attempts to compel payments for a savings and loan program and a building program. The payments were "assessments" which went into separate funds established by the union for a "special purpose," rather than into the union's general funds established to support and maintain the union. According to the Board, these payments did not constitute "periodic dues" within the meaning of section 8(a)(3).¹⁸⁴ The Board supported its finding that the monies were for a "special purpose" by asserting that they would be used "to accomplish ends not encompassed in its duties as a collective-bargaining agent of the employees."¹⁸⁵ The examination of the purpose to which the monies would be spent was justified by arguing that Con-

¹⁷⁸ 192 N.L.R.B. 951 (1971). See also *Great Lakes Dist., Seafarers' Int'l Union (Tomlinson Fleet Corp.)*, 149 N.L.R.B. 1114, 1120 (1964).

¹⁷⁹ The dues were committed to the fraternal purposes of an old age pension and mortuary fund and to maintain a home for aged and infirm printers. *Detroit Mailers*, 192 N.L.R.B. at 951, 956.

¹⁸⁰ *Id.* at 952.

¹⁸¹ *Id.*

¹⁸² 167 N.L.R.B. 1042 (1967).

¹⁸³ *Beck*, 108 S. Ct. at 2652 n.7.

¹⁸⁴ *Local 959*, 167 N.L.R.B. at 1044.

¹⁸⁵ *Id.*

gress's purpose in allowing union security under the NLRA was to prevent non-members from free-riding with respect to collective bargaining expenses.¹⁸⁶ During the course of this argument the Board concluded: "It would thus appear that the right to charge 'periodic dues' granted unions by the proviso to Section 8(a)(3) is concerned exclusively with the concept that those enjoying the benefits of collective bargaining should bear their fair share of the cost incurred by the collective-bargaining agent in representing them."¹⁸⁷

However, the Board's opinion in *Detroit Mailers* succeeded its opinion in *Local 959* and clearly repudiates any implication that section 8(a)(3) does not allow an agency shop. In *Local 959*, the Board described a congressional purpose for allowing union security agreements under section 8(a)(3) which is inconsistent with allowing agency shop agreements. The narrow holding of the opinion, however, was that the assessments in question were not "periodic dues" within the meaning of section 8(a)(3). The Board in *Detroit Mailers* distinguished its decision in *Local 959* on precisely these grounds, characterizing the case simply as one in which the union treasury never received the collected monies and in which even the union viewed the charges as an assessment rather than periodic dues.¹⁸⁸ Indeed, this may be the only basis on which *Local 959* can be consistently read, since it would seem counterfactual to disallow charges for the construction of union buildings on the grounds that these buildings would not be used for collective bargaining. When actually confronted in *Detroit Mailers* with the question of whether section 8(a)(3) allowed an agency shop agreement, the Board's response was an unequivocal "yes."

C. The Legislative History of Section 8(a)(3) of the NLRA

When the words of a statute are ambiguous, courts traditionally refer to legislative history to determine the legislature's intent.¹⁸⁹ The record of a bill's progress through the legislature,

¹⁸⁶ *Id.* at 1044-45 (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41 (1954)).

¹⁸⁷ *Id.* at 1045. This was the language quoted in a footnote by the majority in *Beck*, 108 S. Ct. at 2652 n.7.

¹⁸⁸ *Detroit Mailers* Union No. 40 (Detroit Newspaper Publishers Ass'n), 192 N.L.R.B. 951, 952 (1971).

¹⁸⁹ *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); 2A N. SINGER, *supra* note 134, § 48.01.

from committee hearings to final passage, is the best extrinsic evidence of the context in which the words of the statute evolved.¹⁹⁰

1. The History, Effects, and Objectives of Union Security Agreements

In order to understand the legislative history of the NLRA with respect to union security agreements, it is necessary to understand both the law on union security agreements at the time of the enactment of the Wagner Act and unions' objectives in promoting the negotiation of such agreements.

Since their inception in this country, unions have sought to obtain union security agreements.¹⁹¹ Under the common law, such agreements initially were held unlawful as being in furtherance of an unlawful conspiracy.¹⁹² Once the courts accepted that unions were not unlawful conspiracies,¹⁹³ most jurisdictions held that union security agreements, including the closed, union, and agency shop, were lawful.¹⁹⁴ A few states enacted statutes outlawing specific forms of union security, in particular the closed shop, but most state legislatures remained silent on the subject.¹⁹⁵ The federal government took no role in regulating union security agreements outside of the railway industry prior

¹⁹⁰ See W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 698-99, 709-10, 717-19. Of course, there is a traditional hierarchy of extrinsic evidence in statutory interpretation. Certain sources, such as committee reports or statements by the author, are given greater weight than other sources in the interpretation of the statute. *Id.*, 709, 717, 735.

¹⁹¹ F. DULLES, *LABOR IN AMERICA: A HISTORY* 27 (3d ed. 1966).

¹⁹² See generally Despres, *The Collective Agreement For The Union Shop*, 7 U. CHI. L. REV. 24, 31-33 (1939); Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 695-97 (1930).

¹⁹³ E.g., *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, (1842).

¹⁹⁴ See, e.g., *Jacobs v. Cohen*, 183 N.Y. 207, 76 N.E. 5 (1905); *Parkinson v. Building Trades Council*, 154 Cal. 581, 98 P. 1027 (1908); *Kemp v. Division 241, Amalgamated Ass'n of Street and Elec. Ry. Employees*, 255 Ill. 213, 99 N.E. 389 (1912); *Local Branch No. 248, Nat'l Decorators Ass'n v. Solt*, 8 Ohio App. 437 (1918); *Gasaway v. Borderland Coal Corp.*, 278 F. 56 (7th Cir. 1921); *Ribner v. Rasco Butter & Egg Co.*, 135 Misc. 616, 238 N.Y.S. 132 (1929); *Harper v. Electrical Workers Local 520*, 48 S.W.2d 1033 (Tex. Civ. App. 1932); *Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615*, 174 Miss. 439, 164 So. 887 (1936). See generally 1 L. TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING* § 170 (1940); Despres, *supra* note 192, at 31-44; *RESTATEMENT OF CONTRACTS* § 515(c), illustration 18 (1932).

¹⁹⁵ In 1939, only five states (California, Colorado, Louisiana, Maryland, and Nevada) had statutes which prohibited compulsory union membership. Despres, *supra* note 192, at 54-55.

to 1935.¹⁹⁶ In 1933 Congress passed the National Industrial Recovery Act (NIRA).¹⁹⁷ Section 7(a) of the NIRA prohibited employer discrimination on the basis of union affiliation.¹⁹⁸ Some courts, apparently contrary to the intent of Congress,¹⁹⁹ interpreted this provision to prohibit the closed shop.²⁰⁰ Thus, in the early 1930's the legality of union security agreements was governed by state law, with most states allowing union security agreements and a few errant courts striking down closed shop agreements under section 7(a) of the NIRA.

The unions' objectives in seeking union security agreements are evident from an examination of the effects of such agreements. All union security agreements require that, as a condition of employment, employees represented by the union provide support for the union either through membership and financial

¹⁹⁶ The Railway Labor Act of 1934 prohibited all union security agreements. Railway Labor Act of 1934, § 2 Fourth and Fifth, 48 Stat. 1185, 1187-88. However, the Act's prohibition on union security agreements was as much to prevent their use by the railways in preserving company unions, S. REP. NO. 2262, 81st Cong., 2d Sess. 3, cited in *Railway Employees Dep't. v. Hanson* 351 U.S. 225, 231 (1956), as to protect dissenting employees' rights. 1934 Senate Hearings, *supra* note 117 at 157, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 187; International Ass'n of Machinists v. Street, 367 U.S. 740, 752-53 (1961). In 1951 Congress enacted Section 2 Eleventh of the RLA to allow union security agreements in the railway industry. Act of January 10, 1951, Pub. L. No. 914, 64 Stat. 1238, (now codified at 45 U.S.C. § 152 Eleventh).

¹⁹⁷ National Industrial Recovery Act of 1933, Pub. L. No. 67, 48 Stat. 195. The NIRA was later declared unconstitutional by the Supreme Court in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁹⁸ Section 7(a) of the National Industrial Recovery Act provided as follows: Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other considered activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

¹⁹⁹ National Industrial Recovery Act, § 7(a), 48 Stat. at 198-99.

²⁰⁰ Memorandum Comparing S. 1958, 74th Cong., 1st Sess., with Substitute S. 2926, 73d Cong., 2d Sess. 29 (Mar. 11, 1935), [hereinafter *Comparison Memorandum*], reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1319, 1355.

²⁰¹ See, e.g., *Fryns v. Fair Lawn Fur Dressing Co.*, 114 N.J. Eq. 462, 168 A. 862 (Ch. 1933) (closed shop violates NIRA § 7(a) right to join rival union); *Bayonne Textile Corp. v. American Fed. of Silk Workers*, 114 N.J. Eq. 307, 168 A. 799 (Ch. 1933) (strike for closed shop is illegal), *rev'd*, 116 N.J. Eq. 146, 172 A. 551 (N.J. 1934). *Contra*, e.g., *De Agostina v. Parkshire Ridge Amusements, Inc.*, 155 Misc. 518, 278 N.Y.S. 622 (Sup. 1935) (closed shop lawful); *Farulla v. Ralph A. Freundlich, Inc.*, 153 Misc. 738, 277 N.Y.S. 47 (Sup. 1934) (same).

contribution, or solely through financial contribution. Since the union determines the conditions of membership, the requirement of membership under a closed or union shop can provide the union with some discretion over the constituency of the employer's work force. Furthermore, the requirements imposed on employees by a closed shop, a union shop, or an agency shop increase the interchangeability of workers with respect to union support, as well as providing a source of financial support and perhaps loyalty for the union. Each effect can be examined separately with respect to its union objectives.

The union's discretion over who is a member and works in a closed or union shop allows the union to achieve a variety of objectives. Although the amount of discretion exercised by unions in excluding workers from membership has varied greatly, historically unions have used the closed or union shop to exclude workers who were careless or poorly trained,²⁰¹ who were disloyal to the union,²⁰² or who violated union rules by failing to pay dues, by undertaking a wildcat strike, or by crossing a picket line.²⁰³ Unfortunately, some unions also used their membership rules to exclude workers on the basis of race, gender, religion, or nationality.²⁰⁴ The closed shop was also used in some cases to control the supply of labor available to the employer in order to raise wages.²⁰⁵

The increase in the interchangeability of workers with respect to union support furthers at least three union objectives. First, the increase in interchangeability decreases the employer's incentive to discriminate on the basis of union affiliation. An employer who operates under a union security agreement has less incentive to fire an employee for union activity, since he knows he will just have to replace that worker with another union supporter. This reduction in employer incentive to discriminate protects both the individual employee's right of association and the integrity of the union as an organization from

²⁰¹ F. DULLES, *supra* note 191, at 27. Union members were particularly concerned that fellow employees undertake their work with the requisite skill and due care to do the job safely during the reign of the "fellow servant" rule prior to the advent of workers' compensation. 79 CONG. REC. 9732 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3231-33 (extension of remarks by Rep. Beiter(D-N.Y.)).

²⁰² B. TAYLOR & F. WHITNEY, *supra* note 13, at 367-68.

²⁰³ R. GORMAN, *supra* note 2, at 639.

²⁰⁴ *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944); *Oliphant v. Brotherhood of Locomotive Firemen*, 156 F. Supp. 89 (N.D. Ohio 1957). This practice has since been outlawed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982).

²⁰⁵ F. DULLES, *supra* note 191, at 63.

being undermined by the employer. Second, the increase in interchangeability decreases the resentment of workers who voluntarily join the union toward other workers who otherwise would not share the burdens of solidarity. By reducing the resentment of the voluntary union members, the union security agreement removes an irritant and a potential obstacle to solidarity with those who do not join voluntarily. Finally, the increase in interchangeability prevents workers who do not voluntarily join the union from free-riding on the benefits of union representation that cannot be consumed exclusively by union members.²⁰⁶ Workers who do not join the union voluntarily may in fact value the benefits of union representation very highly, but may not wish to pay for them since they know that other workers will support the union and will obtain the benefits of union representation for them anyway. Such free-riding saps the strength of the union and undercuts its ability to provide union benefits desired by the workers.²⁰⁷

Finally, financial support and potential loyalty resulting from union security agreements further several other union objectives. The resources provided by a union security agreement allow the union to do a better job in representing the employees: organizing, lobbying elected officials, supporting strikes, negotiating, and enforcing agreements. By doing a better job, the union can protect itself from being undermined by the employer or by rival unions, and can facilitate the organization of other employees. Also, to the extent that the union does a better job at the expense of the insular interests of the employer, the union security agreement shifts bargaining power from the employer to the employees. Thus, union security agreements provide unions with resources to maintain their activities, to grow, and perhaps to alter the balance of power in the workplace. All of these union objectives in pursuing union security agreements were well known among labor leaders, management representatives, and labor relations experts of the 1930's.²⁰⁸

²⁰⁶ Such benefits would include benefits which the union must legally provide to all workers in the bargaining unit and public goods such as a safe and healthy workplace or comfortable environment which the union cannot supply to some workers without supplying to all.

²⁰⁷ In the lexicon of economics, such a free-rider problem would result in the inefficiently low provision of union benefits. M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 15-16 (1971); H. VARIAN, *INTERMEDIATE MICROECONOMICS* 574-76 (1987).

²⁰⁸ The unions' desire to achieve some control over the constituency of the workplace, whether to ensure safety, to preserve union discipline, to protect the union, or for any of the less venerable reasons, had long been recognized. Despres, *supra* note 192, at

2. The Wagner Act

Against this background, section 8(a)(3) of the NLRA was first enacted in 1935 as section 8(3) of the Wagner Act.²⁰⁹ As previously stated,²¹⁰ this section contained a general prohibition against employer discrimination on the basis of union affiliation and the first proviso, which allowed the negotiation of union security agreements.²¹¹ Neither the limitation on the first proviso—that union membership could not be a pre-condition to employment—nor the limitations of the second proviso were included. Section 8(3) contained only two explicit limitations on the negotiation of union security agreements: that such agreements were to be negotiated by a union designated as the exclusive bargaining representative of the employees under section 9(a) of the Act, and that the union could not be “established, maintained, or assisted” by the employer.²¹² Because the first proviso refers only to agreements requiring “membership” as a condition of employment, it was later argued that this proviso did not allow the agency shop.²¹³ However, the Board and the Supreme Court interpreted section 8(3) of the Wagner Act to allow both the closed shop and all weaker forms of union se-

28-30. The protection of individual members' right to engage in union activity against employer impingement was perhaps the first purpose of union security agreements. Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344, 350 (1976). During the nineteenth and early twentieth centuries, union adherents referred to employees who worked in an organized shop but did not join the union as “rats,” in reference to their unpleasant and parasitic nature, and sought union security agreements to avoid association and to protect their union from free-riding. Despres, *supra* note 192, at 27-38. Finally, historically both employees and employers understood that a union security agreement could foster the incumbent union and shift bargaining power from the employer to the employees. *Id.* at 28.

²⁰⁹ National Labor Relations (Wagner) Act, ch. 372, § 8(3), Pub. L. No. 74-198, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(3) (1982)).

²¹⁰ See *supra* notes 39-42 and accompanying text.

²¹¹ Section 8(3) of the Wagner Act provided that it would be an unfair labor practice for an employer:

[B]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

National Labor Relations (Wagner) Act, *supra* note 209.

²¹² *Id.*, §§ 8(2), 8(3).

²¹³ See *NLRB v. General Motors Corp.*, 373 U.S. 734, 738 (1963).

curity not prohibited by state law, including the union shop and the agency shop.²¹⁴

The broad interpretation of the extent of union security allowed under the Wagner Act was warranted by its legislative history. Both supporters and opponents of the Act understood it to allow the strongest form of union security—the closed shop.²¹⁵ The language of the statute and statements by supporters of the Act show that it also allowed weaker forms of union security.²¹⁶ In contravention of the general prohibition against employer discrimination based on union affiliation, Congress intended the first proviso to preserve the "status quo" with

²¹⁴The prevailing administrative and judicial view under the Wagner Act was or came to be that the proviso to § 8(3) covered both the closed and union shop, as well as less onerous union-security arrangements, if they were otherwise legal. The National Labor Relations Board construed the proviso as shielding from an unfair labor practice charge less severe forms of union-security arrangements than the closed or the union shop, including an arrangement in *Public Service Co. of Colorado* [requiring nonunion members to pay an agency fee].

Id. at 739–40 (citing *J.E. Pearce Contracting & Stevedoring Co.*, 20 N.L.R.B. 1061, 1070–73 (1940) (section 8(3) of Wagner Act allows agency shop)); *M & J Tracy, Inc.*, 12 N.L.R.B. 916, 931–34 (1939) (section 8(3) allows arrangement giving hiring preference to union members)) (citations omitted). See also *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 361 (1949) (closed shop lawful under section 8(3) of the Wagner Act); *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 307 (1949) (Wagner Act did not preclude state regulation of union security agreements, but merely disclaimed former policy "hostile to the closed shop or other forms of union-security"); *General Motors Corp.*, 133 N.L.R.B. 451 (1961) (section 8(a)(3) of NLRA allows agency shop agreements), *enforcement denied*, 303 F.2d 428 (6th Cir. 1962), *rev'd*, 373 U.S. 734 (1963); *Public Service Co. of Colorado*, 89 N.L.R.B. 418 (1950) (Wagner Act allows agency shop agreements).

²¹⁵ See, e.g., *National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 305 (1935) [hereinafter 1935 Senate Hearings], reprinted in 1–2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1373, 1691; *id.* at 602–03, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1988–89; 79 CONG. REC. 7673–74 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2345, 2394–95; *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 61 (1935) [hereinafter 1935 House Hearings], reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2473, 2535.

²¹⁶ The language of the proviso does not require that union membership be a precondition to employment. Thus it allows at least the closed shop and the union shop. Furthermore, in commenting on the final bill, Senate counsel indicated in a memorandum that the exemption of the proviso was not limited to the closed or union shop:

Unless this change is made as provided in S. 1958, most strikes for a closed shop or even for a preferential shop would by this act in effect be declared to be for an illegal purpose As the legislative history of [National Industrial Recovery Act] § 7(a) demonstrates, nothing in that section was intended to deprive labor of its existing right in many States to contract or strike for a closed or preferential shop No reason appears for a contrary view here.

Comparison Memorandum, *supra* note 199, at 29, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1319, 1354–55.

respect to union security agreements.²¹⁷ Section 8(3) of the Wagner Act was not intended to outlaw any form of union security, but if a form was illegal under state law, section 8(3) would not pre-empt its prohibition.²¹⁸ Additionally, Congress intended section 8(3) to clear up the courts' uncertainty over whether section 7(a) of the NIRA outlawed the closed shop and to prevent such confusion under the general prohibition against employer discrimination in section 8(3). The proviso was drafted to preserve

²¹⁷ Responding to "misconceptions" that the proviso to section 8(3) of the Wagner Act would pre-empt state laws outlawing the closed shop, the Senate report on the bill stated:

In other words, the bill does nothing to facilitate closed-shop agreements to or [sic] make them legal in any state where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now be legally consummated

S. REP. NO. 573, 74th Cong., 1st Sess. 11–12 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2311.

Similarly in debate on the proviso Senator Wagner (D-N.Y.) stated:

The provision will not change the status quo. That is the law today; and wherever it is the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation.

79 CONG. REC. 7673 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2345, 2395.

²¹⁸ The House report on the Wagner Act stated:

The proviso to the third unfair labor practice, dealing with the making of closed-shop agreements, has been widely misrepresented. The proviso does not impose a closed shop on all industry; it does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions in regard to the effect of section 7(a) [of the National Industrial Recovery Act prohibiting employer discrimination with respect to union affiliation] upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-shop agreements in the States where they are legal.

H.R. REP. NO. 969, 74th Cong., 1st Sess. 17 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2910, 2927. Similarly, in his major speech to the Senate in support of the bill, Senator Wagner said:

While outlawing the organization that is interfered with by the employer, this bill does not establish the closed-shop or even encourage it. The much-discussed closed-shop proviso merely states that nothing in any Federal law shall be held to illegalize the confirmation of voluntary closed-shop agreements between employers and workers.

79 CONG. REC. 7570 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2321, 2335. Representative Connery (D-Mass.), House sponsor of the bill, opposed an amendment offered by Representative Taber (R-N.Y.) to strike the proviso allowing union security agreements by alleging that it would allow 51% of the employees in any organization to bring about the discharge of the other 49%:

Mr. Chairman, I merely rise to say this in opposition: The closed-shop proposition in this bill does not refer to any State which has any law forbidding the closed shop. It does not interfere with that in any way.

79 CONG. REC. 9726 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3112, 3217.

agreements requiring "membership" against "this Act [and] . . . any other statute of the United States" to make it clear that the closed shop was not outlawed by either section 7(a) or section 8(3).²¹⁹ The desire to clarify that federal law allowed the closed shop seems to be the only significance of using the word "membership" in section 8(3).

Congress's determination to carve such an exception for union security agreements out of the general prohibition against employer discrimination is not surprising. Unions' objectives in seeking such agreements fulfill many of Congress's purposes in enacting the Wagner Act. Through the Wagner Act, Congress sought to increase employee control over the rules of the workplace, to protect employees' right to organize, to foster unions and collective bargaining, to promote stability in industrial relations, and to shift bargaining power from employers to employees.²²⁰ By encouraging a stable system of collective bargaining with more power in the hands of employees, Congress hoped that employees would gain both a greater voice in the operation of their workplace and a greater share of the fruits of their labor, and that the nation as a whole would enjoy a greater measure of industrial peace and economic prosperity.²²¹ Union

²¹⁹ The Senate report on the bill states:

The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of section 7(a) of the National Industrial Recovery Act [48 Stat. 198], assuring the freedom of employees to organize and bargain collectively through representatives of their own choosing, was deemed to legalize the closed shop. The Committee feels that this was not the intent of Congress when it wrote 7(a): that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

S. REP. NO. 573, 74th Cong., 1st Sess. 11 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2311. Similarly the House report states with respect to the proviso in section 8(3) of the Wagner Act:

All that it does is eliminate the doubts and misconstructions in regard to the effect of section 7(a) [of the NIRA prohibiting employer discrimination on the basis of union affiliation] upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill, by providing that nothing in the bill or in section 7(a) or in any other statute of the United States shall legalize a closed-shop agreement between an employer and a labor organization

H.R. REP. NO. 969, 74th Cong., 1st Sess. 17 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2910, 2927.

²²⁰ National Labor Relations Act, § 1, 49 Stat. 449 (codified as amended at 29 U.S.C. § 151 (1982)). See also Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 206, 215-18 (1960); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 281-84 (1978); Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1126-27 (1986).

²²¹ Keyserling, *supra* note 220, at 218-24.

security agreements help to achieve all these purposes as well as to facilitate and to reinforce such a collective bargaining system.²²² Thus, it is reasonable to infer that to the extent union security agreements achieve the general purposes of the Wagner Act, these purposes were behind Congress's preservation of the status quo on union security agreements.

This inference is supported by the express statements of congressmen contained in the legislative history of the Wagner Act.²²³ Senator Robert Wagner (D-N.Y.), in testimony before the Senate Education and Labor Committee, defended the proviso's allowance of the closed shop by attributing to "many experts" the belief that the closed shop²²⁴ is "necessary, in some situations, to obtain for labor equality of bargaining power [with management] and substantial justice."²²⁵ In later testimony before the Senate committee, the House Committee on Labor, and the full Senate, the Senator made a similar (perhaps conclusory) attribution that "many" believe that the closed shop "at times may be necessary to advance and preserve the living standards of employees."²²⁶ Comments by Senator Wagner and the Senate Report on the bill suggest that the existing law on union security agreements was working well and that no adequate reason had been advanced to disrupt industrial relations and industrial peace by outlawing extant union security agreements.²²⁷ Representative Alfred Beiter (D-N.Y.), a supporter of the bill, made

²²² See *supra* notes 201-208 and accompanying text.

²²³ Supreme Court holdings also partially support this inference. See, e.g., *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 364 (1949) ("It is quite reasonable to suppose that Congress thought it conducive to stability of labor relations that parties be required to live up to a valid closed-shop contract made voluntarily with the recognized bargaining representative . . .").

²²⁴ Comments contained in the legislative history most often state the purposes of allowing union security agreements with respect to the closed shop because that was the form of union security put at issue by the errant court interpretations of NIRA section 7(a). Nonetheless, the reasoning behind these statements applies to union security agreements in general.

²²⁵ 1934 Senate Hearings, *supra* note 117, at 9, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 39.

²²⁶ 1935 Senate Hearings, *supra* note 215, at 41, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1417. Senator Wagner made similar comments during the Senate debate, 79 CONG. REC. 7570 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2321, 2335, and in the House committee hearings, 1935 House Hearings, *supra* note 215, at 16, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2490.

²²⁷ S. REP. NO. 1184, 73d Cong., 2d Sess. 6 (1934), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1099, 1105; 1934 Senate Hearings, *supra* note 117, at 41, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1417; 1935 House Hearings, *supra* note 215, at 16, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2490.

a longer and more eloquent statement for allowing union security agreements. In extended comments published in the Congressional Record on the day the House first passed the Wagner Act,²²⁸ Representative Beiter argued that the closed shop allowed unions to exercise "collective responsibility" in meeting their obligations under collective bargaining to supply good, efficient, and safe workers.²²⁹ The congressman also argued that the closed shop was necessary to protect individuals and unions from employer discrimination²³⁰ and to promote stability in labor relations.²³¹ He then concluded that such stability in labor relations was necessary for industrial peace.²³² Finally,

²²⁸ 79 CONG. REC. 9732-35 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3228, 3232-34. The final version of the Act was agreed to in conference committee, without relevant changes, and passed by the House on June 27, 1935. 79 CONG. REC. 10300 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3260, 3267.

²²⁹ A well-organized union offers to supply all the labor an employer needs in a certain line. It proposes a contract covering wages, hours, and so forth. It is based on the principle of collective bargaining and, as a necessary corollary, collective responsibility. The union guarantees efficient and good work on the part of the employees. It cannot assume responsibility for outsiders having no control over them.

79 CONG. REC. 9732 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3228, 3231.

²³⁰ The closed shop is the only sure protection for trade agreements and for the defense of the individual. The open shop destroys organization, and in reality is the open door through which the union man goes out and the non-union man takes his place. The open shop means uncertainties, anxiety, and a shifting basis for the principles of industry. Under the open shop, the easy job goes to the non-union man, to the friend of the employer; the hard and dangerous task to the man whose devotion to his fellows incurs the enmity of the boss.

Id. at 9733, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3233.

²³¹ [The principle of the closed shop] asserts that a shop cannot be half union and half non-union and, therefore, it asks the employer who is willing to recognize the union at all, and with it the principle of collective bargaining, to agree to employ none but union labor. The union shop, in other words, is to be closed to non-union workmen, not only in the interest of the contracting employees, but also in the interest of the employer . . . In practice it was discovered that majority rule was best for employers as well as employees. Workers found it impossible to approach the employer in a friendly spirit if they remained divided among themselves. Employers likewise found it more satisfactory to confer voluntarily with a united and contented group of workers than with a group torn by internal dissension. Singleness of purpose and responsibility on each side gave to business transactions that stability which every employer desires.

Id. at 9732, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3231-32.

²³² *Id.* at 9732-33, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3232-33.

Representative Beiter also argued that it is the right of union members to contract with their employers to be free from association with people they considered "disloyal to . . . [their] class":

The right of every man to sell his labor as he sees fit is exactly the right on which the closed shop is based. The right to work and to contract for work includes the right to refuse to work except under certain conditions, and the nonemployment of certain classes of labor may very well be one of these

the House and Senate committees heard testimony from supporters of the bill arguing that union security agreements were necessary to allow unions to exercise responsibility,²³³ to promote stability in labor relations,²³⁴ to prevent employer discrimination,²³⁵ to strengthen unions in order to increase employees' say in the operation of the workplace, and to maintain wages to prevent a worsening of the Great Depression.²³⁶

3. The Taft-Hartley Amendments

The NLRA was substantially amended in 1947 with the passage of the Taft-Hartley Act.²³⁷ After renumbering section 8(3) as section 8(a)(3),²³⁸ the Act amended the first proviso to limit the allowance of union security agreements to agreements which required membership as a condition of employment "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . ."²³⁹ A second proviso to section 8(a)(3) was added, prohib-

conditions. The right of the non-union man is not infringed upon when the unionist merely refuses to work beside him or when he asks the employer to choose between them. As to the employer, he has the right to hire anyone he pleases, and he may discriminate at will against union and nonunion labor . . . The reasons that appeal to a union man for not working with a nonunion man are manifest and obvious. Men instinctively love the society of their kind, whether in work or play, and the man who desires the society of his companions must arrange his life so that his associates are content to live with him.

Trade unionists have for centuries believed that they were upholding the rights of men, protecting the welfare of their class, and promoting the interests of their homes; that without the union shop, their liberty and independence would be gone. This is not a fact of trade unionism alone, but a deep abiding fact in human life. In the last analysis, it is the law of self-defense; and employers have exactly the same feeling toward one of their members who gives his influence to the other side. Both feel that the offending man is disloyal to his class, and just so long as industry is carried on by two classes in hostile camps this feeling must and will continue.

Id. at 9732, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3232.

²³³ 1935 Senate Hearings, *supra* note 215, at 121 (statement of William Green, President of the American Federation of Labor), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1497.

²³⁴ *Id.*

²³⁵ *Id.* at 180 (statement of Professor H.A. Mills), reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1560.

²³⁶ 1935 House Hearings, *supra* note 215, at 86-87 (statement of William Dennison, representative of Society of Designing Engineers), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2560-61.

²³⁷ Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 101, 61 Stat. 136.

²³⁸ The renumbering occurred because section 8(a) was used to list employer unfair labor practices while a separate section 8(b) was created to list union unfair labor practices. *Id.*, 61 Stat. at 140-42 (enacting 29 U.S.C. § 158(b)).

²³⁹ *Id.*, 61 Stat. at 140-41 (codified as amended at 29 U.S.C. § 158(a)(3) (1982)).

iting employer discrimination for nonmembership in the union if the employer has "reasonable grounds" for believing that "membership was not available to the employee on the same terms and conditions generally applicable to other members" or "membership was denied or terminated for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of . . . membership."²⁴⁰ Finally, the Act added a requirement that a majority of employees in the bargaining unit had to approve a union security agreement in an election conducted by the Board before the union could negotiate such an agreement.²⁴¹ This requirement was repealed in 1951.²⁴²

The legislative history of the Taft-Hartley Act demonstrates that Congress understood that the new language in section 8(a)(3) prohibited the closed shop and limited the enforceability of the remaining lawful types of union security agreements. The limitation on the first proviso—that union security agreements could require membership only after thirty days of employment—was understood to prohibit the closed shop's pre-condition of union membership for employment.²⁴³ However, the union shop and other lesser forms of union security were to remain lawful.²⁴⁴ The second proviso was added to prohibit an

²⁴⁰ *Id.*, 61 Stat. at 141.

²⁴¹ *Id.* Employees could rescind this approval in a new election at any time at least one year after the approval election. *Id.*, 61 Stat. at 145 (codified as amended at 29 U.S.C. § 159(e) (1982)).

²⁴² Act of Oct. 22, 1951, ch. 534, § 1(b), (c), 65 Stat. 601, 601-02. The requirement was repealed because unions won approximately 97% of these approval elections with an average vote of 77.5% in their favor. As a result, Congress saw these elections as a futile and expensive exercise. 1951 NLRB ANN. REP. 54 (1952); 1949 NLRB ANN. REP. 6 (1950). See also H.R. REP. NO. 1082, 82d Cong., 1st Sess. 2-3 (1951). Current law retains such elections only as an option for rescission of approval. 29 U.S.C. § 159(e) (1982).

²⁴³ The House Report on the Hartley bill states:

The bill bans the closed shop. Under carefully drawn regulations it permits an employer and a union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them or after the agreement is signed.

H.R. REP. NO. 245, 80th Cong., 1st Sess. 9 (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 292, 300. See also *id.* at 34; S. REP. NO. 105, 80th Cong., 1st Sess. 3, 5-7 (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 409, 411-13; 93 CONG. REC. 5036, 5088 (1947) (remarks of Sen. Taft (R-Ohio)), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1421.

²⁴⁴ The House Report on the Hartley bill stated that "the bill permits, subject to certain regulations and limitations, 'union security' agreements in the nature of union shops and maintenance of membership, but it bans the closed shop." H.R. REP. NO. 245, 80th Cong., 1st Sess. 30 (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 292, 321. See also *id.* at 34, reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 325. The union security language of the Hartley Act varied somewhat

employer from discharging an employee under a lawful union security agreement if the union discriminatorily excluded the employee from membership or denied that membership for any reason other than failure to pay dues.²⁴⁵ The legislative history suggests that employees who are discriminatorily excluded from the union are protected from discharge under the first clause of the second proviso even if they do not apply for membership or tender union dues.²⁴⁶ However, the legislative history is ambiguous as to whether, under the second clause of the second proviso, the employee can be required to apply for union membership as well as pay dues.²⁴⁷

from the language which was finally passed in the Taft-Hartley Act, but these differences were irrelevant to the question of whether the statute allowed the union shop and lesser forms of union security. The Senate report on the Taft bill stated that the bill "abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership . . ." S. REP. NO. 105, 80th Cong., 1st Sess. 3 (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 409. See also H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 41, 44 (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 505, 545, 548; 93 CONG. REC. 3950, 3952 (1947) (remarks of Sen. Taft), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1009; 93 CONG. REC. 5036, 5079 (1947) (remarks of Sen. Malone (R-Nev.) to the effect that "the proposal to outlaw the union shop has never been seriously considered by a majority of this body"), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1405.

²⁴⁵ In the second place, we have proposed a proviso in the case where a man is refused admittance to a union, . . . In effect, we say, 'If you are going to have a union shop, then you must have an open union . . .' The bill further provides that if the man is admitted to the union, and subsequently is fired from the union for any reason other than the nonpayment of dues, then the employer shall not be required to fire that man . . . The employee has to pay the union dues. But on the other hand, if the union discriminates against him and fires him from the union, the employer shall not be required to fire him from the job.

93 CONG. REC. 3950, 3953 (1947) (remarks of Sen. Taft), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010; see also S. REP. NO. 105, 80th Cong., 1st Sess. 20 (1947) (remarks of Sen. Ellender (D-La.)), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 426; 93 CONG. REC. 4258 (1947), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1054, 1061-62; 93 CONG. REC. 4317-18 (1947) (remarks of Sen. Taft), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1090, 1096-97; 93 CONG. REC. 5087-88 (1947) (remarks of Sen. Taft), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1420-21.

²⁴⁶ Senator Taft's explanation of the first clause of the second proviso does not seem to require that the employee who suffers from discrimination apply for union membership or pay union dues. 93 CONG. REC. 3953 (1947), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010. However, the Board has interpreted the first clause of the proviso as not requiring payment of dues by employees who have been discriminatorily denied union membership. *Union Starch & Refining Co.*, 87 N.L.R.B. 779, 784 (1949), enforced, 186 F.2d 1008 (7th Cir. 1951), cert. denied, 342 U.S. 815 (1951).

²⁴⁷ The second proviso refers to the employee's membership being "denied or terminated," perhaps implying that the employee must apply for membership. 29 U.S.C. § 158(a)(3) (1982). The examples of the second proviso's application given by Senator Taft seem to contemplate application for membership. 93 CONG. REC. 3952-53 (1947), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010. Represent-

Supporters of the Taft-Hartley bill understood that the dues which could be required of employees under the second proviso were the union's full periodic dues and initiation fees. In explaining the amendments to section 8(a)(3), Senator Robert Taft (R-Ohio) stated unequivocally that "[t]he employee has to pay the union dues."²⁴⁸ Later, in further explanation of the workings of the second clause of the second proviso of section 8(a)(3), the Senator stated:

The union could refuse a man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.²⁴⁹

The same understanding is reflected in comments of other supporters of the bill and in House and Senate reports on the bill.²⁵⁰

tative Smith (D-Va.) also understood the Taft-Hartley bill to require an application for membership. 93 CONG. REC. A3141 (1947), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 906. Cf. 93 CONG. REC. 3614 (1947), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 669, 736 (remarks of Rep. Buck (R-N.Y.) that under the Hartley bill, which had somewhat different wording with respect to membership requirements, an employee must join the union and pay dues to keep his job). However, House and Senate reports on the bill and some comments by its supporters and detractors suggest that all that could be required under the proviso was the payment of dues. S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 407, 413; H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 41 (1947), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 505, 545; 93 CONG. REC. 3550 (1947) (remarks of Rep. McConnell (R-Pa.) with respect to the Hartley bill), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 601, 640.

²⁴⁸ 93 CONG. REC. 3953 (1947), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1005, 1010.

²⁴⁹ 93 CONG. REC. 4400 (1947), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1129, 1142. See also 93 CONG. REC. 4317-18 (1947), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1090, 1096-97, where Senator Taft four times refers to the money which the employee must pay under section 8(a)(3) as "union dues." The Senator also described the rule adopted under section 8(a)(3) as "substantially the rule now in effect in Canada." 93 CONG. REC. 5088 (1947), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1347, 1422. The Canadian "Rand Rule" required the payment of full union dues, but did not require membership application. Justice I.C. Rand of the Supreme Court of Canada set out the "Rand Rule" in an interest arbitration decision. *Ford Motor Co., 1 Lab. Arb. (BNA) 439* (1946). At issue in the case was whether the collective bargaining agreement should contain a union shop clause and a dues check-off provision. *Id.* at 444. Basing his judgment on the "principles" held by the "large majority" of Canadians, Justice Rand declined to require a union shop (where employees must apply to or join the union), but did require that the employer check-off or deduct from each employee's wages "union dues," defined as "such sum as may from time to time be assessed by the union on its members according to its constitution, for general union purposes." *Id.* at 444-45. The decision thus required the payment of full periodic union dues by both members and nonmembers.

²⁵⁰ In debate on the House floor, Representative Kersten (R-Wis.) stated "I also understand that [under] the provisions of the bill, . . . [employees] are merely required to pay reasonable dues which are required for the unions." 93 CONG. REC. 3615 (1947),

The dues and fees that could be required under section 8(a)(3) did not include special assessments for purposes not of general benefit to the employees or not part of the union's periodic dues.²⁵¹ However, Congress specifically rejected limitations on the amount a union could charge for periodic dues²⁵² and limited

reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 739. Representative Smith (D-Va.) understood the Taft-Hartley bill to provide that "the union cannot compel the employer to discharge an employee unless he refuses to join the union or maintain his membership in the union," presumably including full membership dues. 93 CONG. REC. A3141 (1947) (extension of remarks by Rep. Smith), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 906. Similarly, Senator Thye (R-Minn.) understood the bill to mean that "the employer can hire any man . . . , but after he has been in the plant 30 days he must become a qualified member of the union in order to remain on the payroll," indicating that he believed the employee must meet the qualifications of membership, i.e., paying full union dues. 93 CONG. REC. 5089 (1947), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1347, 1422. See also S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 407, 413; H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 41 (1947), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 505, 545.

Moreover, prohibiting unions from collecting full union dues from dissenters would have violated the Eightieth Congress's desire for a simple, unobtrusive statutory scheme. Senator Taft described the amendments to section 8(a)(3) as merely "[making it] an unfair labor practice for a union to try to get an employer to discharge a man who has been improperly fired from the union." 93 CONG. REC. 3954 (1947), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1005, 1012. Senator Taft also stated:

I believe . . . [the amended section 8(a)(3)] will permit the continuation of existing relationships, and will not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it will meet the abuses which exist.

93 CONG. REC. 5088 (1947), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1347, 1420. Senator Taft assured the Congress that the Act's limitations on union security did not interfere with the internal operations of the union or require the employer to inquire into internal union affairs in deciding whether to discharge an employee under a union security agreement. 93 CONG. REC. 4318 (1947) ("The pending measure does not propose any limitation with respect to the internal affairs of unions."), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1090, 1097. The Senate report on the Act stated that "[t]he tests provided by the amendment [to prohibit discharge under a union security agreement] are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union." S. REP. NO. 105, 80th Cong., 1st Sess. 20 (1947), *reprinted in 1 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 407, 426.

²⁵¹ See *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41 (1954) ("[The] legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any reason other than to compel payment of union dues and fees."); *Local 959, Int'l Bhd. of Teamsters, 167 N.L.R.B. 1042, 1045* (1976) (special assessment cannot be collected under union security agreement). Among other problems, Congress sought to redress the experience of Cecil B. DeMille, who had been terminated from union membership and his job for refusing to contribute to a fund for a political cause which he opposed. 93 CONG. REC. 4528 (1947) (remarks of Sen. Ellender (D-La.)), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1054, 1061-62. Finally, Senator Taft stated that the rule adopted under section 8(a)(3) was "substantially" the rule in Canada. 93 CONG. REC. 5088 (1947), *reprinted in 2 LMRA LEGISLATIVE HISTORY*, *supra* note 112, at 1347, 1422. The Canadian "Rand Rule" did not include special assessments. *Ford Motor Co., 1 Lab. Arb. (BNA) 439, 445* (1946).

²⁵² The Hartley bill, as originally passed by the House, prohibited initiation fees in excess of \$25 unless the Board approved a greater amount as reasonable. It also

the use of dues only to the extent of prohibiting contributions to federal election campaigns.²⁵³ Apparently, Congress was willing to trust union democracy to provide the necessary restraints on the size and uses of periodic union dues.²⁵⁴

prohibited "dues or general or special assessments that are not uniform upon the same class of members, or are in excess of such reasonable amounts as the members thereof, . . . by a majority of those voting, . . . shall authorize." H.R. 3020, 80th Cong., 1st Sess. § 8(c)(2) (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 158, 179-80. However, the conference committee deleted these restrictions with the exception of section 8(b)(5)'s prohibition on a union charging excessive or discriminatory union initiation fees. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 46 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 505, 550.

²⁵³ Labor Management Relations Act of 1947, ch. 120, § 304, 61 Stat. 136, 159-60. This section of the Act amended § 313 of the Federal Corrupt Practices Act (1925), and was originally codified at 18 U.S.C. § 610. The latter was amended by the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), and then repealed by the Federal Election Campaign Act of 1976, 90 Stat. 490 (1976). Section 321 of the 1976 Act reenacted limitations on union and corporate political spending, which were codified at 2 U.S.C. § 441(b). This limitation has been held not to apply to union-controlled funds collected by voluntary contributions and kept segregated from union dues funds. *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972). *See also* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976) (questioning the constitutionality of such limitations on campaign contributions); 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 571-72, 928; 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1526-35, 1603-04, 1609; Cantor, *supra* note 20, at 75.

²⁵⁴ As discussed above, the House version of the bill originally included a limitation that union dues be "reasonable." *See supra* note 252. The Senate version of the bill contained no such limitation, and the Conference Committee rejected the limitation in the final version of the bill. Senator Taft explained the Senate conferees' reasons for refusing to accept this limitation:

The Senate conferees refused to agree to the inclusion of this subsection in the conference agreement since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated without further study of the structure of unions. In the opinion of the Senate conferees the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection.

93 CONG. REC. 6601 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1526, 1540. There is a seeming contradiction in disallowing the charging of special assessments while setting no limitation on the amount of periodic dues and only one limitation on their use. Arguably, in a union the same democratic forces which would regulate the amount and uses of dues would also regulate the amount and uses of special assessments. However, Congress saw the special assessments as fraught with abuse. 93 CONG. REC. 4258 (1947) (remarks of Sen. Ellender (D-La.) concerning the case of Cecil B. DeMille), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1054, 1061-62. Although Congress might also have believed that a portion of periodic dues would be misused, the disallowance of special assessments but not periodic dues was in keeping with Congress's desire for an unobtrusive solution. Congress did not want to impose limitations on internal union affairs, 93 CONG. REC. 4318 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1090, 1097, or to make unnecessary trouble for unions, 93 CONG. REC. 5088 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1420. It thus made sense for Congress to prohibit the charging of special assessments to dissenting employees, thereby curing a serious problem with little intrusion into unions' internal affairs. It also made sense to refrain from prohibiting the collection of full union dues from dissenters, a remedy to a less serious problem that would involve a much greater intrusion into internal union affairs.

The Taft-Hartley amendments to section 8(a)(3) reflected the political compromises necessary to enact the legislation. The Eightieth Congress included many strong proponents of labor law reform. They sought to redress what they viewed as the excesses in union power allowed by the Wagner Act in unions' dealings with individual employees.²⁵⁵ Some supporters of the bill would have liked to outlaw union security agreements altogether.²⁵⁶ However, their zeal for amending the NLRA was tempered by the knowledge that a successful bill would need the support of a super-majority of Congress to survive a probable veto by President Truman.²⁵⁷ As a result, the Taft-Hartley amendments to section 8(a)(3) reflected a compromise between those in Congress who opposed union security agreements and those congressmen who wanted no restraints on such agreements.²⁵⁸

²⁵⁵ E.g., 93 CONG. REC. 3538 (1947) (remarks of Rep. Hoffman (R-Mich.)), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 601, 622-23; *id.* at 3544 (remarks of Rep. Barden (D-N.C.)); *id.* at 3547 (remarks of Rep. Schwabe (R-Minn.)); 93 CONG. REC. 3951 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1006-07; *id.* at 3953 (remarks of Sen. Taft). *See generally* Rosenthal, *The National Labor Relations Act and Compulsory Unionism*, 1954 WIS. L. REV. 53, 57-58. Congress also sought to redress what was viewed as excessive union power in bargaining with employers. *See generally* DEVELOPING LABOR LAW, *supra* note 160, at 35-36. However, this concern was addressed in other amendments prohibiting secondary boycotts and hot cargo provisions and not in the amendments to section 8(a)(3). *See* Labor Management Relations Act, ch. 120, § 8(b)(4), 61 Stat. 136, 141-42 (1947) (codified at 29 U.S.C. § 158(b)(4) (1982)); Labor-Management Reporting and Disclosure Act, § 704(b), 73 Stat. 519, 543-44 (1959) (codified at 29 U.S.C. § 158(e) (1982)).

²⁵⁶ E.g., 93 CONG. REC. 3612 (1947) (amendment by Rep. Hoffman (R-Mich.) to delete the first proviso of section 8(a)(3) allowing union security agreements), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 732-33; 93 CONG. REC. 5087 (1947) (amendment by Sen. Ball (R-Minn.) to delete the first proviso of section 8(a)(3) allowing union security agreements), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1418.

²⁵⁷ F. DULLES, *supra* note 191, at 359.

²⁵⁸ Rosenthal, *supra* note 255, at 58. While deciding a secondary boycott issue, the Supreme Court in *Local 176, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958) stated:

It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's.

Id. at 99-100 (cited in *Beck v. Communications Workers of Am.*, 800 F.2d 1280, 1293 (4th Cir. 1986) (Winter, C.J., dissenting), *aff'd*, 108 S. Ct. 2641 (1988)).

The amendments to section 8(a)(3) sought to eliminate only what were perceived as the worst abuses of union security.²⁵⁹ These abuses were the denial of employment to non-union employees under the closed shop and the loss of employment by workers whose union membership was denied or terminated for arbitrary or discriminatory reasons under a union shop.²⁶⁰ They were eliminated by outlawing the closed shop and by limiting the enforceability of union shop agreements to cases in which the employee neither had been discriminatorily excluded from union membership nor had failed to fulfill the objective membership requirement of paying dues.²⁶¹ Neither the abuses discussed nor the solution proposed related in any way to the payment of union dues or to the enforceability of agency shop agreements.²⁶²

²⁵⁹ "[T]hese amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413. "[I]n this bill we are trying to be strictly practical and to meet the actual problems which have arisen, and not to go into the broader fields of the rights of particular persons." 93 CONG. REC. 5088 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1421. "However, both the House and Senate bills correct the worst abuses." 93 CONG. REC. A2378 (1947) (extension of remarks by Sen. Ball (R-Minn.)), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1523, 1524. *See also* NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963) (Taft-Hartley intended to correct only the most serious abuses); 93 CONG. REC. 3952-53 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010-11; 93 CONG. REC. 5087-88 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, 1347, 1420-21.

²⁶⁰ S. REP. NO. 105, 80th Cong., 1st Sess. 6-7, 20 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 412-13; 93 CONG. REC. 3952-53 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010-11; 93 CONG. REC. 4258-59, 4262 (1947) (remarks of Sen. Ellender (D-La.)), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1054, 1061-62, 1068.

²⁶¹ It was important to Congress that the conditions under which an employee could be discharged under a union security agreement be objective not only from the union's perspective to protect the employee from union discrimination, but also from the employer's perspective to protect the employer from liability under section 8(a)(3). S. REP. NO. 105, 80th Cong., 1st Sess. 20 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 426.

²⁶² Senator Taft and Senator Donnell (R-Mo.) made it clear that their primary concern was employees' ability to obtain and retain employment rather than their obligation to pay dues. When questioned by Senator Donnell as to why the union shop should remain lawful when the closed shop was being prohibited, Senator Taft responded, "the great difference is that in the [union shop] . . . a man can get a job without joining the union or asking favors of the union The fact that the employee will have to pay dues to the union seems to me to be much less important. The important thing is that the man will have the job." 93 CONG. REC. 5088 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422. Senator Donnell responded, "I do not regard the payment of dues as the important point, at all." *Id.*

Congress rejected floor amendments that would have outlawed all forms of union security agreements.²⁶³ A variety of purposes for preserving the legality of the union shop and the enforceability of the obligation to pay dues were offered.²⁶⁴ Senator Taft defended the legality of the union shop. He argued that it was the "customary" form of union security, of long and widespread usage, that it was not fatally flawed like the closed shop, that his bill had remedied the closed shop's abuses, and that outlawing it would upset established relationships and cause industrial strife.²⁶⁵ He defended the enforcement of the obligation to pay dues by arguing that it prevented employees from free-riding on union benefits.²⁶⁶ The Senate Report on the bill stated that the Taft-Hartley amendments to section 8(a)(3) "remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promote[] stability by eliminating 'free riders' the right to continue such arrangements."²⁶⁷

In the House, a number of representatives voiced support for union security agreements. Representative Buck (R-N.Y.) defended the union shop by arguing that "millions of men are working on union [shop] terms satisfactory to the men and satisfactory to the employer" and that prohibiting the union shop "would lead to complete chaos in labor relations."²⁶⁸ Representatives Jennings (R-Tenn.) and Robsion (R-Ky.) raised the free-rider argument, asserting that it was "fair" to require all employees to pay dues to the union since all employees benefit from the union.²⁶⁹ Representative MacKinnon (R-Minn.) stressed the importance of union security agreements to shifting

²⁶³ Amendments were offered on both the House and Senate floors to delete the first proviso of section 8(a)(3), thereby outlawing all forms of union security agreements. *See supra* note 256.

²⁶⁴ *Id.*

²⁶⁵ 93 CONG. REC. 5087-88, 5089 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, 1347, 1420, 1422; *see also* 93 CONG. REC. 3952-53 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010-11.

²⁶⁶ 93 CONG. REC. 5089 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422; 93 CONG. REC. 3953 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010.

²⁶⁷ S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413.

²⁶⁸ 93 CONG. REC. 3614 (1947) (remarks of Rep. Buck), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 736.

²⁶⁹ *Id.* at 3616-17, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 740-42.

bargaining power to unions so that they can "combat the large concentration of economic power that exists on the other side."²⁷⁰ Representative Kersten (R-Wis.) opined that union security agreements were necessary in order for unions to be "effective."²⁷¹ Finally, Representative Brehm (R-Ohio) argued for the freedom of the union majority contractually to require all employees to support the union.²⁷²

The free-rider argument raised by the supporters of the bill was not limited in purpose to the recoupment of collective bargaining expenses. Although collective bargaining benefits were used as examples of the benefits on which employees could free-ride,²⁷³ none of the statements limited the argument to such examples.²⁷⁴ Such a limitation would have been contrary to Congress's understanding that the dues collectible under section 8(a)(3) were full union dues. Indeed, each of the congressmen who used collective bargaining benefits as examples of benefits which are subject to free-riding stated, shortly before or after his argument, that the dues that could be required under section 8(a)(3) were full union dues.²⁷⁵ Congress was well aware that a portion of periodic union dues was commonly used for political and other non-collective bargaining purposes.²⁷⁶ No rationale

²⁷⁰ Representative MacKinnon stated: "I . . . believe that . . . we should permit and encourage voluntary [employer-union agreements for] union security, in order that the American worker may fairly combat the large concentration of economic power that exists on the other side." *Id.* at 3613.

²⁷¹ *Id.* at 3615.

²⁷² *Id.* at 3614.

²⁷³ S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413; 93 CONG. REC. 3616 (1947) (remarks of Rep. Jennings), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 740; *id.* at 3617 (remarks of Rep. Robsion); 93 CONG. REC. 5089 (1947) (remarks of Sen. Taft), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422.

²⁷⁴ See *supra* notes 262-272 and accompanying text. See also 93 CONG. REC. 3614 (1947) (remarks of Rep. Buck), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 736; 93 CONG. REC. 3953 (1947) (remarks of Sen. Taft), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010.

²⁷⁵ Representative Jennings understood that dissenters would have to "contribute dues like the others." 93 CONG. REC. 3616 (1947), reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 740. Representative Robsion referred to the amount which the dissenters must pay as "union dues" and argued that it was fair that the dissenters contribute their "equal share" in securing union benefits. *Id.* at 3617, reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 741. Senator Taft argued that under the provisions of the bill "a man can get a job . . . if, in effect, he joins the union and pays the union dues." 93 CONG. REC. 5088 (1947), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1421.

²⁷⁶ See, e.g., 93 CONG. REC. 6593-98 (1947) (Senate debate concerning union political contributions), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1526, 1526-35; Cantor, *supra* note 20, at 74. In fact, several legislators noted in the debates over the Taft-Hartley amendments that organized labor was spending considerable sums

for why a union could collect only collective bargaining expenses from dissenters was discussed.²⁷⁷ Such a limitation constrains the free-rider argument well short of its full logical force. Employees can free-ride on any public good provided by the union, including political representation and organizing as well as collective bargaining services.²⁷⁸

4. The Purposes of Union Security Agreements Under the National Labor Relations Act: A Synthesis

To discuss the synthesis of Congress's purposes in preserving union security agreements under the Wagner and Taft-Hartley Acts as represented in the present NLRA, it is illuminating to place these purposes in the context of the previous discussion of the effects of union security agreements and the purposes of promoting such agreements.²⁷⁹

In the Wagner Act, Congress preserved all of the effects of union security agreements: union control over the constituency of the workplace, increased interchangeability of workers, and increased support (financial or otherwise) for unions. It made sense for Congress to preserve union security agreements because many of the unions' objectives in seeking such agreements supported Congress's general purposes in enacting the Wagner Act. The Act's legislative history suggests that Congress preserved union security agreements to achieve all, or almost all, of the laudable union objectives in seeking such agreements: increasing union control over the quality of the work force, decreasing employer incentive to discriminate against union supporters, avoiding resentment of union supporters for non-supporters, preventing free-riders, providing sufficient support for

to oppose the passage of the Act. 93 CONG. REC. 6605-06 (1947), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1526, 1549-51.

²⁷⁷ Cantor, *supra* note 20, at 81-82; Gaebler, *Union Political Activity or Collective Bargaining?: First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C. DAVIS L. REV. 591, 603 (1981).

²⁷⁸ It seems doubtful that in 1947 Congress envisioned the distinction the Supreme Court would draw in *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 447-48 (1984), that unions are entitled to compensation for collective bargaining expenses they incur in the course of performing their duties as exclusive representatives but not their other expenses. The doctrine of the duty of fair representation and the legal obligation of the exclusive representative to provide collective bargaining services to dissenters were not extended to the NLRA until 1955. *Syres v. Oil Workers Int'l Union, Local 23*, 350 U.S. 892 (1955) (per curiam) (reversing 223 F.2d 739 (5th Cir. 1955)).

²⁷⁹ See *supra* notes 201-208 and accompanying text.

the union, shifting bargaining power from the employer to the employees, and promoting stability in labor relations.

In the Taft-Hartley Act, Congress sought to place limitations on union security agreements to eliminate union control over the constituency of the workplace. The abuses that the Taft-Hartley amendments were designed to eliminate were by-products of such control. By prohibiting the closed shop and by limiting the enforcement of the union shop to cases in which the union did not discriminate against the employee and the employee failed the objective requirement of paying union dues, Congress sought to remove union discretion over who did and did not work. Congress did not seek to constrain or eliminate the effectiveness of union security agreements in increasing the interchangeability of workers or providing support for the union. Neither the abuses at which the Act was aimed nor the solution devised by Congress were related to the agency shop or the obligation to pay dues.

Through the Taft-Hartley Act, Congress sought to amend the Wagner Act, not to repeal it. To the extent that Congress's purposes in enacting the Taft-Hartley Act conflict with its purposes in enacting the Wagner Act, the purposes of the Taft-Hartley Act must be given pre-eminence. By seeking to abolish union control over the constituency of the workplace, the Taft-Hartley Act countermanded Congress's prior purpose under the Wagner Act of allowing union control over the quality of the work force. However, in enacting the Taft-Hartley Act, Congress did not intend to abandon its prior purposes under the Wagner Act, which related to increased interchangeability of workers and support for unions. Thus, Congress's purposes under the Wagner Act of decreasing employer incentive to discriminate, preventing free-riders, providing sufficient support for unions, shifting bargaining power from the employer to the employees, and promoting stability in labor relations survive as purposes behind today's NLRA section 8(a)(3). Indeed, in response to proposed amendments to prohibit union security agreements, the advocates of the Taft-Hartley Act reiterated many of the same purposes for preserving union security agreements expressed by advocates of the Wagner Act.²⁸⁰

²⁸⁰ The only argument in favor of union security agreements related to their effectiveness at increasing worker interchangeability or providing support to the union which was raised in the passage of the Wagner Act but not raised by the Congress which passed the Taft-Hartley Act was the argument that union security agreements decrease

In conclusion, there are many purposes behind Congress's limited preservation of union security under section 8(a)(3) of the NLRA. Most of Congress's purposes under the Wagner Act continue as purposes behind the present section 8(a)(3) of the NLRA. Far from limiting its purpose merely to preventing free-riding on collective bargaining benefits, Congress implicitly and explicitly stated purposes ranging from the lessening of incentive for employer discrimination to the promotion of stability in labor relations. Moreover, Congress's purpose of the prevention of free-riders was never limited to collective bargaining benefits, nor could it logically be so limited.

III. BECK AND THE DOCTRINE OF CONSTRUING STATUTES TO AVOID CONSTITUTIONAL QUESTIONS

The Supreme Court's interpretation of section 8(a)(3) varies greatly from the interpretation suggested by the words, administrative interpretations, and legislative history of the NLRA. In *Beck*, the Court drew an identity between section 8(a)(3) and section 2 Eleventh of the Railway Labor Act²⁸¹ and imposed on section 8(a)(3) the same limited interpretation of the purpose and enforceability of union security agreements as it had previously found under section 2 Eleventh. The Court held that Congress's sole purpose in preserving union security agreements under section 8(a)(3) was to allow the prevention of free-riding on collective bargaining benefits. This limited vision of statutory purpose was used to determine that only those expenses "necessarily or reasonably" related to collective bargaining can be charged to dissenting employees. The Court therefore held that section 8(a)(3) does not allow the compulsion of dues

employer incentive to discriminate on the basis of union affiliation. However, there is evidence that the Taft-Hartley Congress was aware of this argument and rejected the notion that it was no longer relevant to the purposes of section 8(a)(3). Arguing in favor of his amendment to prohibit all union security agreements, Senator Ball (R-Minn.) stated that the only purpose for allowing such agreements was to prevent employer discrimination and that section 8(a)(3)'s general prohibition on employer discrimination adequately solved this problem. 93 CONG. REC. 5087 (1947), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1419. Senator Ball's amendment was soundly defeated, 57 to 21. *Id.* at 5092. There is no evidence in the legislative history to suggest that Congress sought to limit the purpose of allowing union security agreements to prevent employer discrimination any more than necessary to eliminate union control over the constituency of the workplace.

²⁸¹ See *supra* notes 106-111 and accompanying text.

for non-collective bargaining purposes under an agency shop agreement.²⁸²

Direct examination of the words, administrative interpretations, and legislative history of section 8(a)(3) suggests a much broader interpretation of the purpose and enforceability of union security agreements. These sources establish that Congress intended section 8(a)(3) to allow full enforcement of an agency shop agreement. The legislative histories of the Wagner and Taft-Hartley Acts demonstrate that Congress preserved union security agreements under section 8(a)(3) because such agreements lessen employer incentive to discriminate on the basis of union affiliation, lessen animosity of union supporters towards non-supporters, prevent free-riding on public goods provided by unions, provide unions with resources necessary to be effective, shift bargaining power from the employer to the employees, and promote stability in labor relations.²⁸³

The Court's interpretation of section 8(a)(3) is inconsistent with the best evidence of congressional intent in the enactment of the NLRA. Why did the Court's reliance on its prior interpretations of section 2 Eleventh produce such a poor interpretation of section 8(a)(3)? There are several possible explanations.

The Court may have been mistaken that Congress intended an identity between section 8(a)(3) and section 2 Eleventh. However, this explanation appears doubtful. The similar language and legislative histories of the two statutes suggest that Congress did intend to allow the same forms of union security agreements under the two statutes.²⁸⁴ Moreover, although when it enacted section 2 Eleventh Congress may not have understood all the purposes for union security agreements represented in section 8(a)(3), it has been argued persuasively that Congress understood section 8(a)(3) to allow agency shop agreements.²⁸⁵

Perhaps the Court's interpretation of section 8(a)(3) has gone awry because of its reliance on an indirect method of interpretation: analogizing to a similar statute rather than directly examining section 8(a)(3)'s words, administrative interpretations, and legislative history. However, the Court's interpretation

²⁸² *Beck*, 108 S. Ct. at 2652.

²⁸³ See *supra* text accompanying notes 279-280.

²⁸⁴ *Beck*, 108 S. Ct. at 2649 (quoting 96 CONG. REC. 17055 (1951) (remarks of Rep. Brown (R-Ohio))).

²⁸⁵ Cantor, *supra* note 20, at 72-73.

seems to suffer less from reliance on second-best evidence than from a design to avoid a straightforward interpretation of section 2 Eleventh and consequently of section 8(a)(3). In interpreting the second of two similar statutes, one would expect that the Court would rely on a substantive analysis of its language and on consideration of the intrinsic and extrinsic evidence relevant to both statutes.²⁸⁶ The Court's interpretation of section 2 Eleventh does not rest on such considerations. By the Court's own admission, its opinions interpreting section 2 Eleventh do not give merit to the plain language of the RLA.²⁸⁷ Moreover, those opinions do not recognize an identity between section 2 Eleventh and section 8(a)(3), nor do they consider the interpretations or legislative history of section 8(a)(3) although section 8(a)(3) was passed four years before section 2 Eleventh.²⁸⁸ Thus, the sole basis for the interpretation of section 2 Eleventh imposed on section 8(a)(3) in *Beck* is the legislative history of section 2 Eleventh.²⁸⁹ This history chronicles events which occurred four years after the passage of section 8(a)(3) and are arguably irrelevant to its interpretation.

To answer why the *Beck* opinion makes such a pronounced deviation from the congressional intent of section 8(a)(3), we must consider why the Court so narrowly constrained its consideration of intrinsic and extrinsic evidence in its interpretation of section 2 Eleventh. The Court may have just been mistaken in its interpretation of section 2 Eleventh and consequently of section 8(a)(3). It may have decided to construe these statutes according to its own predilections without proper deference to legislative intent. However, the most likely explanation is that the Court's interpretation of section 2 Eleventh was influenced by its desire to avoid the constitutional question of whether the negotiation and observance of agency shop agreements under the RLA violates dissenting employees' constitutional rights. Because the Court's interpretation of section 8(a)(3) relies so heavily on its prior interpretation of section 2 Eleventh, it also reflects these constitutional concerns.²⁹⁰

²⁸⁶ See *supra* notes 134-135, 143-145 and accompanying text.

²⁸⁷ See *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 445-46 (1984).

²⁸⁸ *Ellis*, 466 U.S. 435; *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

²⁸⁹ The Court does not have the benefit of administrative rulings on section 2 Eleventh since there is no equivalent of the NLRB under the RLA.

²⁹⁰ Whether the *Beck* decision is a mistake, an abuse of power, or an application of the doctrine of avoiding constitutional questions, it should be noted that the case

A. *The Beck Decision as a Statutory Application of the Doctrine of Avoiding Constitutional Questions*

The Court has developed a doctrine of constitutional adjudication that where a "serious question" of a statute's constitutionality has been raised, the Court should, if possible, "fairly" construe the statute to avoid the constitutional question.²⁹¹ To

represents a continuation of the deradicalization of the NLRA. See Klare, *supra* note 220. For a further discussion on deradicalization, see Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984); Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985); Finkin, *Does Karl Klare Protest Too Much?*, 44 MD. L. REV. 1100 (1985); Klare, *Lost Opportunity: Some Concluding Thoughts of the Finkin Critique*, 44 MD. L. REV. 1111 (1985). As described by Klare, this deradicalization has occurred because, in its interpretation of the Wagner Act, the Court has repeatedly favored the purposes of the Act which are consistent with liberal capitalism and ignored the Act's more radical purposes. Klare, *supra* note 220, at 292-93. This process of deradicalization is present in the Court's emphasis on contractualism in collective bargaining, the development of the "public right" doctrine in the enforcement of the NLRA, and the limitation on the protection of employee concerted activity. *Id.* at 293. The limitation on the protection of employee concerted activity was achieved by separating the concept of union activity from the concept of employee activity and by limiting the extent of "legitimate" union activity which the Act would protect. *Id.* at 320-21. In *Beck*, the Court once again ignored Congress's more radical purposes, focusing only on a limited purpose of promoting collective bargaining. This limited congressional purpose was then used to resolve a conflict in which the activity of the union was conceived of as separate from that of the employees, with a resulting limitation on the extent of union activity allowed under the NLRA. The conflict between the preservation of the rights of the collective and the "privileging" of the rights of the individual is a central theme of Critical Legal Studies literature. See generally Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). The only distinctions between *Beck* and the examples cited by Klare are that in *Beck* the Court has directly limited the purposes of the NLRA it will consider rather than obscuring this limitation in a discussion of doctrine, and that in *Beck* the Court has undertaken the process of deradicalizing the Taft-Hartley Act as well as the Wagner Act.

²⁹¹ When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1935); see also *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981); *United States v. Rumley*, 345 U.S. 41, 45 (1952) (Frankfurter, J.); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346 (1928); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). Some judges and commentators view this doctrine as a canon of statutory construction. *Ashwander*, 297 U.S. at 346-48 (Brandeis, J., concurring); W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 676. However, the doctrine seems more properly viewed as a doctrine of constitutional adjudication, since to apply the doctrine the court must construe the Constitution at least to the extent of determining whether there is a serious constitutional question and how to avoid it. See *infra* note 330. Some respected justices and judges agree. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting); *Rumley*, 345 U.S. 41, 45 (1953) (Frankfurter, J.); *United States v. Lovett*, 328 U.S. 303, 319-20 (1946) (Frankfurter, J., concurring); H. FRIENDLY, *BENCHMARKS* 210-11 (1967). Also, treating the doctrine as one of statutory interpretation rather than constitutional adjudication can result in the needless frustration of congressional intent and inequity in the treatment of people affected by different statutes. See *infra* note 309 and accompanying text.

limit this doctrine, the Court has admonished itself not to "press statutory constructions 'to the point of disingenuous evasion' even to avoid a constitutional question."²⁹²

Two rationales have been put forth to support this doctrine. First, where alternatives exist, Congress will not choose to enact a statute that raises a serious constitutional question for fear the statute will inadvertently trample constitutional rights and turn out to be merely a wasteful legislative exercise when it is struck down by the courts.²⁹³ Second, the unelected judiciary should minimize its intrusion on the power of the elected Congress by declining to invoke its constitutional power of legislative review.²⁹⁴ The first rationale sets up a presumption as to what Congress might have intended the statute to say. The second constitutes a directive, arguably contained in the Constitution, to choose an interpretation which avoids the constitutional question despite a certain amount of evidence suggesting that the statute has raised the question. If accepted, these rationales can justify either a modest application of the doctrine—that among equally likely interpretations of a statute, one of which raises the constitutional question and one of which does not, a court should select the one which avoids the question;²⁹⁵ or a more radical application—that the doctrine effectively countermands some positive evidence which suggests an interpretation that raises the constitutional question.²⁹⁶

²⁹² *United States v. Lock*, 471 U.S. 84, 96 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

²⁹³ W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 676.

²⁹⁴ *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); Posner, *supra* note 25, at 815.

²⁹⁵ The cardinal principle of statutory construction is to save and not to destroy.

We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (emphasis added).

²⁹⁶ "This rule of Constitutional adjudication is normally invoked to narrow what would otherwise be the natural but constitutionally dubious scope of the language." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting); see also *Association of Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 453 (1955), *overruled on other grounds*; *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); H. FRIENDLY, *supra* note 291, at 210. The doctrine of construing statutes to avoid constitutional questions should be distinguished from the doctrine of construing statutes, where possible, to avoid unconstitutionality. Under the doctrine of avoiding constitutional questions, the court determines whether a likely interpretation of the statute raises a serious constitutional question, and then fairly construes the statute to avoid the question. Under the doctrine of avoiding unconstitutionality, the court determines whether a likely interpretation of the statute violates the Constitution, and then

Despite its protests to the contrary,²⁹⁷ there is strong evidence that the doctrine of avoiding constitutional questions lurks just below the surface of the court's interpretation of section 2 Eleventh in *Street*. The Court cited and discussed the doctrine at length as a preface to its interpretation of section 2 Eleventh.²⁹⁸ There seems no doubt that the Court's interpretation of section 2 Eleventh varies greatly from the ordinary interpretation of that statute.²⁹⁹ The Court itself has admitted that its interpretation of section 2 Eleventh is "not without difficulties,"³⁰⁰ while individual justices and commentators have described the Court's interpretation as "strained" and even "tortured."³⁰¹ Moreover, the Court's interpretation, allowing variation in the amount of dues that can be charged employees based on individual dissent,

construes the statute so that it is constitutional. Posner, *supra* note 25, at 814. The benefits of actually deciding the constitutional question are discussed below. See *infra* note 325. The rationale of avoiding unconstitutionality is similar to the first rationale of avoiding constitutional questions. *Lincoln Mills*, 353 U.S. at 477 (Frankfurter, J., dissenting) (Congress would not intentionally enact an unconstitutional statute); Posner, *supra* note 25, at 814-15 (Congress prefers that courts not nullify its efforts). As with the doctrine of avoiding constitutional questions, this rationale will support either a modest "tip the scales" application or a more radical "countermanding" application. See *Jones & Laughlin Steel Corp.*, 301 U.S. at 30 (1937) ("tip the scales" application); *United States v. Johnson*, 323 U.S. 273, 276 (1944); H. FRIENDLY, *supra* note 291, at 210 (application where doctrine countermands intrinsic and extrinsic evidence).

²⁹⁷ In *Street* the Court maintained that its interpretation of section 2 Eleventh was "reasonable," intimating that it was more than "fairly possible" and thus did not rely on the doctrine of avoiding constitutional questions. *Street*, 367 U.S. at 750. The Court repeated this claim in *Beck*. 108 S. Ct. at 2657.

²⁹⁸ *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961).

²⁹⁹ The Supreme Court has recognized that, contrary to its interpretation, an ordinary interpretation of the language and legislative history of section 2 Eleventh suggests that it allows the full observance of agency shop agreements. *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 445 (1984).

³⁰⁰ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). The *Abood* Court stated that the *Street* interpretation of the Railway Labor Act was embraced "precisely to avoid facing the constitutional issues presented by the use of union shop dues for political and ideological purposes unrelated to collective bargaining." *Id.* at 232 (citations omitted).

³⁰¹ *Abood*, 431 U.S. at 248 (Powell, J., concurring). Cantor, *supra* note 20, at 67-68, 72; Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 9 (1983); Read, *supra* note 57, at 256; Recent Development, *Union Shop Provision of the Railway Labor Act Held Not to Authorize Use of Union Dues for Political Purposes*, 61 COLUM. L. REV. 1513, 1517 (1961) [hereinafter Note, *Union Shop Provision*]. Justice Black, in his dissent in *Street*, said that "no one has suggested that the Court's statutory construction of [section] 2, Eleventh could possibly be supported without the crutch of its fear of unconstitutionality." *Street*, 367 U.S. at 786. Similarly, Justices Frankfurter and Harlan pointed out in their dissent in *Street* that the Court's interpretation of section 2 Eleventh deviated so far from an ordinary reading of the statute's language and legislative history that none of the parties to the case had urged that reading before the Court. *Id.* at 803. See also *Ellis*, 466 U.S. at 445-46; *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Street*, 367 U.S. at 786 (Black, J. dissenting).

smacks of constitutional remedy rather than statutory interpretation. Indeed, the Court's interpretation of section 2 Eleventh is very similar to the remedy that was found constitutionally required for the public sector in *Abood*.³⁰² It strains credulity to argue that this peculiar interpretation avoids the constitutional question merely by fortunate coincidence. Dissenting justices, commentators, and even the Court itself have recognized that the reason for the Court's strained interpretation of section 2 Eleventh was the Court's desire to avoid the constitutional question.³⁰³

The Court's imposition of the *Street* interpretation on section 8(a)(3) in *Beck* might still be justified if *Street* were an appropriate exercise of the doctrine of avoiding constitutional questions, and if there were important statutory reasons for interpreting sections 8(a)(3) and 2 Eleventh the same way. Regardless of the appropriateness of the Court's decision in *Street*,³⁰⁴ there is no reason to interpret these sections identically. Although the legislative history of section 2 Eleventh suggests that Congress intended to allow the same forms of union security agreements under the RLA as were allowed under section 8(a)(3), Congress's only expressed purpose for this uniformity was extension of the benefits of a system that was working well under the NLRA.³⁰⁵ Neither the Court nor the plaintiffs in *Beck* expressed any policy reason for interpreting section 8(a)(3) and section 2 Eleventh the same. Indeed, even after *Beck*, the extent of union security agreements allowed under the NLRA and the RLA differs in states that have prohibited union security agreements under section 14(b) of the NLRA,³⁰⁶ since such prohibition is pre-empted for agreements governed by the RLA.³⁰⁷ For the purpose of consistency it is desirable that similar statutes be

³⁰² *Abood*, 431 U.S. at 235-36.

³⁰³ "*Street* embraced an interpretation of the Railway Labor Act not without its difficulties precisely to avoid facing the constitutional issues presented by the use of union shop dues for political and ideological purposes unrelated to collective bargaining." *Abood*, 431 U.S. at 232 (citations omitted); see also *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. at 445-46 (1984); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Street*, 367 U.S. at 786 (Black, J., dissenting); Cantor, *supra* note 20, at 67-68; Note, *Union Shop Provision*, *supra* note 301, at 1517.

³⁰⁴ The Court's opinion in *Street* is subject to many of the objections to the application of the doctrine of avoiding constitutional questions raised by *Beck*. See Cantor, *supra* note 20, 70-75; see also *infra* text accompanying notes 310-336.

³⁰⁵ *Beck*, 108 S. Ct. at 2649 (quoting 96 CONG. REC. 17055 (1951) (remarks of Rep. Brown)).

³⁰⁶ 29 U.S.C. § 164(b) (1982).

³⁰⁷ 45 U.S.C. § 152 Eleventh (1982).

interpreted the same by the courts. However, where one statute's language and purpose has been attenuated due to constitutional concerns, such consistent interpretation serves only to frustrate legislative intent when these concerns are absent from the second statute.

The Court's imposition of the *Street* interpretation on section 8(a)(3) in *Beck* might also be justified if that interpretation were an appropriate exercise of the doctrine of avoiding constitutional questions with respect to section 8(a)(3). In fact, the Court's opinion in *Beck* is perhaps best understood as an application of the doctrine of avoiding constitutional questions as a doctrine of statutory interpretation rather than constitutional adjudication.³⁰⁸ The Court's constitutional concerns about union security agreements under the RLA molded its interpretation of section 2 Eleventh in *Street*. That interpretation was then treated as a reasonable statutory interpretation and controlling extrinsic evidence in the interpretation of section 8(a)(3) in *Beck*. As evidenced in the *Beck* decision, the mistake in treating an application of the doctrine as one of statutory interpretation rather than constitutional adjudication is that there is no examination of whether the case at hand raises the same constitutional concerns.³⁰⁹ Without such an examination, the Court may defeat the legislative intent of a statute without constitutional justification.

B. Can *Beck* Be Justified as an Application of the Doctrine of Avoiding Constitutional Questions?

To determine whether the *Beck* decision can be justified as an appropriate application of the doctrine of avoiding constitu-

³⁰⁸ See *supra* note 291.

³⁰⁹ Treating the doctrine as one of statutory interpretation also can cause inequitable treatment of people affected by different laws due to the dynamic nature of constitutional interpretation. W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 687-88. For example, the Court may avoid a constitutional question by restrictively interpreting a statutory right or power, and then find no constitutional infirmity with the right or power when forced to answer the constitutional question under a different statute. If the interpretation of the first statute is viewed as statutory and thus does not evolve with the constitutionally-based decision, people affected by the first statute will be governed by a different constitutional standard than people affected by the second statute. Justice Black noted this problem in discussing the inequity in the different treatment afforded statutory union security rights and integrated state bars. *Street*, 387 U.S. at 785 (Black, J., dissenting). Apparently this inequity continues to this day. See *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1989) (compelled bar membership does not violate the first amendment). One might argue that the aggrieved parties need only return to Congress and seek amendment of the relevant statute under the new constitutional standard. However, in most cases the problems and costs of returning to Congress to re-enact a negated statute will be significant or perhaps even prohibitive.

tional questions, we must first examine whether agency shop agreements under the NLRA raise a serious constitutional question.³¹⁰ Although this question seems similar to the question avoided in *Street*, the underlying constitutional concerns are quite different. In *Street* the existence of state action in the negotiation of the agency shop agreement had been established by the Court's decision in *Hanson*.³¹¹ The underlying constitutional concern was whether, given state action, charging dissenting employees for political expenses violated their first amendment rights. The legitimacy of this concern was verified by the Court's decision in *Abood v. Detroit Board of Education*.³¹² Under the NLRA, the constitutional concern is whether there is state action in the negotiation and observance of an agency shop agreement.³¹³

There seems no serious question as to the constitutionality of agency shop agreements under the NLRA. Although the Court once may have entertained notions that a union's activities as exclusive representative constituted state action,³¹⁴ the Court's conception of state action has since narrowed so that this is no longer a real possibility. The Court now requires substantial grants of government authority or direct government coercion in promoting the activity in question to elevate a private party's actions to state action. No such grant of authority or coercion can be found in the NLRA.³¹⁵ *Hanson* cannot act as precedent on the question of state action under the NLRA because its finding of state action is based on section 2 Eleventh's preemption of contrary state laws.³¹⁶ The NLRA does not pre-empt state laws prohibiting union security agreements.³¹⁷ *Abood* cannot act as precedent for state action under the NLRA because it was a public sector case.³¹⁸ Even Justices Brennan and Marshall, who retain a broad vision of the state action doctrine,³¹⁹ seem to have abandoned the idea that the union's actions as

³¹⁰ See *infra* notes 337-339 and accompanying text.

³¹¹ *Railway Employees Dep't v. Hanson*, 351 U.S. 225, 232 n.4 (1956); *Wellington*, *supra* note 57, at 354-59.

³¹² 431 U.S. 209, 232-37 (1977).

³¹³ See *infra* notes 337-345 and accompanying text.

³¹⁴ *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 198-99 (1944).

³¹⁵ See *infra* notes 388-399 and accompanying text.

³¹⁶ *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225, 232 (1956).

³¹⁷ 29 U.S.C. § 164(b) (1982).

³¹⁸ See *infra* notes 340-343 and accompanying text.

³¹⁹ *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 548-60 (1987) (Brennan, J., dissenting); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 365-74 (1974) (Marshall, J., dissenting).

exclusive representative constitute state action.³²⁰ With no real prospect for establishing the prerequisite state action, there is no serious question concerning the constitutionality of agency shop agreements under the NLRA.

The second question to consider is whether the Court's interpretation of section 8(a)(3) in *Beck* constitutes a "fair" interpretation or a "disingenuous evasion."³²¹ This inquiry is a subjective matter. However, it may be fruitful to examine the majority's interpretation in light of the rationales of the doctrine of avoiding constitutional questions.³²² If the Court's interpretation of section 8(a)(3) cannot be supported by these rationales, then it cannot be an appropriate application of the doctrine of avoiding constitutional questions.

It would indeed seem disingenuous to justify the Court's opinion on the basis of a general presumption that Congress avoids constitutional questions. The language and legislative history of section 8(a)(3) plainly allow the negotiation of an agency shop, overcoming any possible presumption. Moreover, the legislative history of the NLRA establishes that Congress enacted the statute with full knowledge that it raised many constitutional questions, including whether union security agreements violate dissenting employees' first amendment rights.³²³ The passage of

³²⁰ In Justice Brennan's opinion for the majority in *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), he stated in dicta that a union's collective agreement "does not involve state action." *Id.* at 200. Similarly, Justice Marshall wrote the Court's opinion in *United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102 (1982), which held that a union's internal rules governing the procedures of its elections were not state action. *Id.* at 121 n.16.

³²¹ See *supra* note 292 and accompanying text.

³²² See *supra* notes 293-296 and accompanying text.

³²³ The opponents of the Wagner Act raised a host of constitutional objections to its enactment. Their primary objection was that the regulation of labor relations exceeded Congress's power under the Commerce Clause. 1934 *Senate Hearings*, *supra* note 117, at 390-94, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 424-48 (statement of James H. Emery, General Counsel of the National Association of Manufacturers). See also 1935 *Senate Hearings*, *supra* note 117, at 243-53, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1629-39 (statement of Mr. Emery); 1934 *Senate Hearings*, at 692-94, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 730-32 (statement of Wagner Fisher, an employer); NATIONAL LAWYERS' COMMITTEE OF THE AMERICAN LIBERTY LEAGUE, REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (1935), reprinted in *Amendments to the National Labor Relations Act: Hearings Before the House Comm. on Labor*, 76th Cong., 1st Sess. 2242-45 (1939) [hereinafter REPORT ON THE CONSTITUTIONALITY OF THE NLRA]. This argument was based soundly on the precedents of the Court. See, e.g., *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918). The opponents also argued that the Act violated (1) the employer's fifth amendment due process rights because the prohibited unfair labor practices were vague and interfered with the employer's freedom of contract in prohibiting anti-union discrimination; (2) the fourth, fifth, and seventh amendments, and article

the Wagner Act represented the pinnacle of an historic conflict between the legislative aspirations of the New Deal Congress and the constitutional interpretations of the pre-New Deal Court.³²⁴ It would therefore seem inappropriate to interpret the NLRA on the presumption that Congress shied away from constitutional controversy in its enactment.³²⁵

III, by delegating responsibilities of the courts to the NLRB; and (3) the employee's first and fifth amendment rights by designating the union as the exclusive representative and allowing union security agreements. 1934 *Senate Hearings*, *supra* note 117, at 397-400, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 431-34 (statement of Mr. Emery); see also 1935 *Senate Hearings*, *supra* note 117, at 244, reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1630 (statement of Mr. Emery); 1934 *Senate Hearings*, *supra* note 117, at 690-91, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 728-29 (statement of Mr. Fisher); 1934 *Senate Hearings*, *supra* note 117, at 762-64, reprinted in 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 800-02 (statement of Earnest T. Weir, Chairman of National Steel Corp.); 79 CONG. REC. at 7677-80 (1935) reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2403-11 (remarks of Sen. Hastings (R-Del.)); REPORT ON THE CONSTITUTIONALITY OF THE NLRA, *supra* at 2242-45. Senator Hastings commented that one did not need to be a "constitutional lawyer" but merely a "law student to reach the conclusion that the proposed act is unconstitutional." 79 CONG. REC. 7676 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2403. These arguments also had some support in the decisions of the Court. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (statute outlawing employer discrimination against union members violates fifth amendment).

³²⁴ Approximately one month prior to the final passage of the Wagner Act, the Supreme Court struck down the National Industrial Recovery Act of 1933, 48 Stat. 19, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Court believed that NIRA's codes of fair competition, which included the right to select exclusive representatives and to bargain collectively, exceeded Congress's power under the Commerce Clause. *Id.* at 548-50. Congress was then inundated with a "barrage" of letters and opinions from employers and their counsel that the Wagner Act was unconstitutional and should be abandoned. 79 CONG. REC. 8540 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3011-12 (remarks of Rep. Connery (D-Mass.)). After the enactment of the Wagner Act, employer resistance and disregard for the Act was widespread because of its presumed unconstitutionality. Maden, *The Origin and Early History of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 234, 242-46 (1960); DEVELOPING LABOR LAW, *supra* note 160, at 30-31. The Supreme Court finally ended the controversy in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), finding that the Wagner Act was a lawful exercise of Commerce Clause power without violating article III or employer fifth or seventh amendment rights. The *Jones & Laughlin* decision is recognized as the turning point in the Court's interpretation of congressional Commerce Clause power from its previously restrictive view. Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 674-85 (1946). The decision, along with its companion decision of similar issues under the RLA, *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937), is significant also with respect to the delineation of employer-fifth and seventh amendment rights.

³²⁵ Judge Friendly has taken issue with the doctrine's rationale that Congress generally shies away from enacting statutes that raise constitutional questions. H. FRIENDLY, *supra* note 291, at 210. The Judge has argued that Congress has little reason to avoid questions of constitutionality since they are usually resolved in the Congress's favor and, even if they are not, the Court will salvage any constitutional portion of the statute by applying the doctrine of avoiding unconstitutionality. *Id.*; see *supra* note 296 and accompanying text. The Judge puzzles as to why Congress would avoid such a "heads-I-win, tails-you-lose" situation. H. FRIENDLY, *supra* note 291, at 210. One response is that Congress abhors forcing people to suffer the temporary deprivation of rights and

The Court's interpretation of section 8(a)(3) in *Beck* is also inconsistent with the doctrine's rationale of minimizing the Court's intrusion into the powers of the elected legislature. Traditionally, the Court describes the broad outlines of permissible legislation while Congress specifies a statute's precise policy and form.³²⁶ When the Court interprets a statute to avoid a constitutional question, at least the initial determination of the law's policy and form is shifted away from Congress and to the Court. Where a possible constitutional problem admits to only one solution with little need of specification or where Congress can easily amend the statute, this initial determination poses a small intrusion into the domain of the legislature. In *Beck*, however, the Court chose one among several possible legislative solutions.³²⁷ The solution chosen requires a great deal of specification as to what expenses a union may charge dissenters, the necessary union bookkeeping procedures, and the allowable fee reduction plans.³²⁸ Moreover, given employers' desire and recent ability to resist reform of the NLRA,³²⁹ the Court's choice of policy and form in this instance is likely to prevail for some time. Thus, the Court's opinion in *Beck* not only impinges on the role of the legislature, it usurps that role in its entirety.³³⁰

expense involved in redressing their constitutional rights through the courts. This argument, however, is insufficient to support the general presumption of avoidance. It seems just as likely to Judge Friendly that Congress would enact what it viewed as reasonable legislation and leave it to the courts to determine the finer points of constitutional law. *Id.* Judge Friendly argues that considering the constitutional question is "very likely just what Congress thinks the Justices are paid to do." *Id.* Indeed, it may be part of a legislative compromise to defer questions of constitutionality to the courts. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 544-46 (1983).

³²⁶ See Hatch, *supra* note 145, at 894.

³²⁷ In response to a finding of constitutional infirmity, Congress could have (1) limited the collection of dissenters' dues to collective bargaining expenses, as the Court did; (2) limited the collection of dissenters' dues to non-political and non-ideological expenses, the constitutional line for the compulsion of dues; (3) omitted the compulsion of political or ideological contributions from the exclusive domain of the union, thereby avoiding state action in the negotiation of union security agreements; or (4) required agency fee payments like those in solutions (1) or (2) for any bargaining units in which a majority of employees voted for a union security agreement. In fact there was some sentiment to require union security agreements upon a vote of the employees during the enactment of the Taft-Hartley Act. Amendment to S. 1126 by Sen. Malone, 93 CONG. REC. 5077 (1947), reprinted in 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1400 (requiring employers to adopt a union shop on three-fourths vote of employees).

³²⁸ See, e.g., *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963).

³²⁹ This ability is evidenced in the demise of the Labor Law Reform Act of 1977, H.R. 8410, 95th Cong., 1st Sess. (1977). See *Filibuster v. U.S. Labor Law Reform Bill*, 34 CONG. Q. ALMANAC 284 (1978); see also DEVELOPING LABOR LAW, *supra* note 160, at 66-67.

³³⁰ A sound argument can be made that the doctrine's rationale of avoiding constitu-

The rationales of the doctrine also suggest that in interpreting the statute to avoid the constitutional question, the Court should do the least possible harm to the legislature's intent. The Court should not rely on a presumption of congressional avoidance of constitutional questions in the face of contrary expressions of legislative intent any further than necessary to avoid the constitutional question. Moreover, if the rationale of the doctrine is to minimize the incursion of the judiciary into the power of the legislative, that rationale itself requires a minimalist application. Properly applied, the doctrine requires more than a search for a superficially plausible interpretation which avoids constitutional questions; it requires an endeavor to give the fullest expression to legislative intent subject to avoidance of the constitutional question.

The Court's decision in *Beck* is not a proper application of the doctrine of avoiding constitutional questions because the Court could have interpreted section 9(a) of the NLRA to avoid the constitutional question without frustrating Congress's intent to allow the observance of agency shop agreements under section 8(a)(3). The Court could have concluded that although agency shop agreements are allowed by section 8(a)(3), the

tional questions to restrain judicial power is fallacious. The application of the doctrine does not avoid constitutional interpretation or exercise of judicial power. To apply the doctrine the Court must interpret the Constitution to determine whether a serious constitutional question exists. Justice Frankfurter and Judge Friendly, among others, perceived this, recognizing the doctrine as one of constitutional adjudication. H. FRIENDLY, *supra* note 291, at 211. Moreover, this determination is used in the same way as a determination of superficial unconstitutionality is used under the doctrine of avoiding unconstitutionality, see *supra* note 296, to choose among equally likely interpretations or to amend the interpretation away from unconstitutionality. The only saving afforded by the doctrine is an exact determination of the constitutional rights or limitations in question.

Judge Posner has pointed out that by retaining uncertainty as to what the constitution says, the application of the doctrine of avoiding constitutional questions creates a "judge-made 'penumbra'" around the Constitution, exaggerating its prohibitory effect and enlarging rather than diminishing the Court's exercise of judicial power. Posner, *supra* note 25, at 816. He recommends the abandonment of the doctrine in favor of application of the doctrine of avoiding unconstitutionality because the latter doctrine achieves the benefits of avoiding superficial unconstitutionality without expanding the prohibitory reach of the Constitution. *Id.*

However, it is the treatment of the doctrine as one of statutory interpretation rather than the penumbra of uncertainty which caused the needless erosion of unions' statutory rights in *Beck*. Had the Court in *Beck* recognized the application of the doctrine of avoiding constitutional questions in *Street*, treated the doctrine as one of constitutional adjudication, and examined whether it was appropriate to apply the doctrine in *Beck*, the Court would have decided against application of the doctrine and interpreted section 8(a)(3) to allow agency shop agreements. Thus, if the Court had properly acknowledged and applied the doctrine, Professor Posner's penumbra of uncertainty would never have come into play.

payment of fees for non-collective bargaining purposes as a condition of employment is not within the definition of "rates of pay, wages, hours of employment, or other conditions of employment" under section 9(a) of the NLRA.³³¹ As a result, while the negotiation of union security agreements would remain a mandatory subject of bargaining over which the union was the exclusive representative, the extension of such agreements to payments for non-collective bargaining purposes would be a permissive subject on which individual bargaining was possible.³³² Because the union would not be the exclusive representative with respect to the negotiation of fees for non-collective bargaining expenses, there would be no colorable argument of state action or constitutional violation. This interpretation of section 9(a) is at least as plausible as the Court's interpretation of section 8(a)(3) in *Beck*. The plain language of section 9(a) does not include such payments, and it takes no greater perversion of legislative history to exclude them from the coverage of section 9(a) than it does from the coverage of section 8(a)(3).³³³ Indeed, unless the Court would require employers to bargain over agency shop agreements which cannot be observed or enforced under section 8(a)(3), its interpretation of section 8(a)(3) in *Beck* requires a similar interpretation of section 9(a).

³³¹ 29 U.S.C. § 159(a) (1982).

³³² The employer's duty not to bargain with individuals extends only to subjects delineated in section 9(a) of the NLRA. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944); *Allied Chem. Co. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *R. Gorman*, *supra* note 2, at 380.

³³³ The legislative history of section 9(a) reveals that the principle of exclusive representation was meant to encompass all subjects of collective bargaining, including union security. The Senate Report on the Act noted:

Majority rule carries the clear implication that the employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all. But majority rule, it must be noted, does not imply that any employee can be required to join a union, *except through the traditional method of a closed-shop agreement, made with the assent of the employer.*

S. REP. NO. 573, 74th Cong., 1st Sess. 13 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2313 (emphasis added); *see also* H.R. REP. NO. 1147, 74th Cong., 1st Sess. 20-21 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3046, 3070-71 (majoritarian principle of § 9(a) permits, but does not automatically establish, closed shop); 1935 *House Hearings*, *supra* note 215, at 16-17, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2490-91 (statement of Sen. Wagner (D-N.Y.) that closed shop may only be established by agreement between employer and § 9(a) representative). However, the legislative history is silent on the exact extent of the exclusive representative's authority on union security agreements, leaving room for the maneuvers of a creative court.

The practical effect of this interpretation of section 9(a) on the legislative scheme for union security agreements under the NLRA would be miniscule: to avoid making the fine distinctions between collective and non-collective bargaining expenses and to avoid engaging in individual bargaining, private employers probably would choose to negotiate the traditional agency shop agreements envisioned by the Act.

Finally, the doctrine of avoiding constitutional questions should not be applied to avoid a question which will soon have to be answered in another case. The Court will soon be asked to decide whether union security agreements under the NLRA are subject to the same procedural protections of dissenters' rights that the Court found constitutionally mandated for the public sector in *Chicago Teachers Union, Local No. 1 v. Hudson*.³³⁴ Since the language of section 8(a)(3) and its legislative history admit to no such procedural protections,³³⁵ the Court should finally decide whether agency shop agreements under the NLRA are subject to constitutional scrutiny. Any delay in answering this constitutional question gained by the Court's decision in *Beck* seems pointless.

Thus, the Court's interpretation of section 8(a)(3) in *Beck* would not be an appropriate application of the doctrine of avoiding constitutional questions. There is no serious constitutional question to avoid and the Court's interpretation would seem to "[carry] the doctrine . . . to a wholly unjustifiable extreme"³³⁶ because the rationales of the doctrine do not support the interpretation. Moreover, any avoidance of the constitutional question in *Beck* seems futile because the Court will soon have to address the same constitutional question in deciding whether to extend *Hudson* to union security agreements covered by the NLRA. As a result, the doctrine of avoiding constitutional questions cannot justify the Court's deviation in its interpretation of

³³⁴ 475 U.S. 292 (1986).

³³⁵ *See supra* text accompanying notes 148-278. To interpret such procedural restrictions into the language of section 8(a)(3) would seem particularly at odds with Congress's desire for unobtrusive regulation of union security agreements which does not impinge on union internal affairs. *See supra* notes 251, 254.

³³⁶ *International Ass'n of Machinists v. Street*, 367 U.S. 740, 784 (1961) (Black, J. dissenting) (quoting *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 213 (1960) (Black, J., dissenting)); Note, *Union Shop Provision*, *supra* note 301, at 1517; Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 73. Although these sources refer to the Court's interpretation of section 2 Eleventh in *Street*, they are equally applicable to the extension of that interpretation to section 8(a)(3) in *Beck*.

section 8(a)(3) from Congress's intent, as represented in the statute's words, administrative interpretations, and legislative history.

IV. THE QUESTION LEFT UNANSWERED: DOES THE NEGOTIATION AND VOLUNTARY OBSERVANCE OF UNION SECURITY AGREEMENTS UNDER THE NLRA CONSTITUTE STATE ACTION?

As discussed at the outset of this Article, the *Beck* case involved two questions: whether section 8(a)(3) allows the negotiation and observance of agency shop agreements and, if so, whether such negotiation and observance violates dissenting employees' first amendment rights. The Court's determination that section 8(a)(3) did not allow agency shop agreements precluded the Court's consideration of the constitutional question. However, since I conclude in my analysis that the Court should have interpreted section 8(a)(3) to allow agency shop agreements, it is appropriate to proceed to an examination of the constitutional question.

In order to determine whether agency shop agreements under the NLRA violate dissenting employees' first amendment rights, one has to examine three questions. The first is whether the union's or employer's activity in negotiating and observing the agreement constitutes "state action."³³⁷ If state action is found, the inquiry proceeds to the question of whether compulsory financial support for a union infringes upon dissenters' first amendment rights.³³⁸ Finally, one must examine whether any state infringement which does occur can be justified by a compelling state interest and whether the state's activity is as narrow as possible to avoid the infringement of the dissenters' first amendment rights.³³⁹ If there is insufficient state interest or

³³⁷ See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

³³⁸ This question is not as simple as it might first appear. Professor Cantor has analogized a union's use of dissenters' dues, even for political purposes, to the government's use of tax revenue for programs or the expression of ideas ideologically offensive to the taxpayer. Based on this analogy, Professor Cantor argues that even if there is state action in the negotiation and observance of an agency shop agreement, such an agreement does not infringe upon dissenting employees' first amendment rights. Cantor, *supra* note 20, at 70-71. But see Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995, 1003-06 (1982).

³³⁹ See L. TRIBE, *supra* note 31, § 12-23.

unnecessarily broad state action, a first amendment violation has been established.

The Court has decided the last two of these questions in *Abood v. Detroit Board of Education*.³⁴⁰ There the Court held that compulsory financial support of union activities does infringe upon dissenters' first amendment rights.³⁴¹ Although the Court found sufficient state interests to justify such infringement in the case of collective bargaining expenses, it found no such justification in the case of compulsory financial support of union political activities.³⁴² However, *Abood* was a public sector case, not governed by the NLRA, which raised no serious question as to state action.³⁴³ Similarly, the existing precedent holding that the negotiation and observance of a union security agreement under the RLA constitutes state action is easily distinguishable from the problem posed under the NLRA.³⁴⁴ Thus, the question that remains unanswered is whether the negotiation and observance of an agency shop agreement under the NLRA constitutes state action.³⁴⁵

³⁴⁰ 431 U.S. 209 (1977).

³⁴¹ *Id.* at 234-35.

³⁴² *Id.* at 222, 234-36. The Court read *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), as establishing that compulsory financial support of a union did infringe on dissenters' first amendment rights, yet was justified in the case of collective bargaining expenses by the state's interest in a system of labor relations based on collective bargaining. *Abood*, 431 U.S. at 222. This reading of *Hanson*, however, is far from obvious. An equally plausible reading of *Hanson* is that the Court found that the compulsory financial support of a union does not infringe on dissenters' first amendment rights. See *Hanson*, 351 U.S. at 238.

³⁴³ In the public sector the government employer's agreement to the union security provision clearly satisfies the state action requirement. The issue was not even discussed in *Abood*.

³⁴⁴ The basis of the Supreme Court's finding of state action under the RLA in *Hanson* was the exercise of the Supremacy Clause in section 2 Eleventh. *Hanson*, 351 U.S. at 232. There is no such exercise of the Supremacy Clause in section 8(a)(3) of the NLRA. 29 U.S.C. § 164(b) (1982).

³⁴⁵ Another question which remains open is whether court enforcement of a union security agreement provides the state action necessary to give rise to a constitutional violation. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenant is state action). This question was not raised by the facts in *Beck*, since the employer had voluntarily complied with the union security agreement. The case was brought by dissenting employees who objected to this compliance. The fact that the vast majority of collective bargaining agreements rely in the first instance on private arbitration rather than on the courts for enforcement of the agreement's terms substantially decreases the importance of this question to determining the constitutionality of union security agreements. Moreover, the Court's opinion in *Shelley* has been subject to some criticism. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-31 (1959). One might question the continuing validity of the opinion in light of the Court's recent narrowing of the scope of the state action doctrine. See *infra* note 355 and accompanying text. In this Article I will concern myself only with the question raised in *Beck*—whether the negotiation and private observance of a union security agreement constitute state action.

A. *The State Action Doctrine*

1. State Action—An Historical Perspective

The first amendment, like almost all of the Constitution's guarantees of individual rights, protects the individual only against *government* infringement.³⁴⁶ A finding that the complained of activity constitutes "state action" is a prerequisite to any first amendment claim.³⁴⁷ The restriction of the Constitution's protection to government action is both confining and liberating for the individual. Although other private parties need not respect a person's constitutional rights, the private person himself is not bound by constitutional standards in his dealings with other people. Thus, "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."³⁴⁸

The concept of state action extends beyond the official acts of government officers and employees. The acts of an ostensibly private party may be state action if the party engages in a joint venture with the state or performs a public function with the authority of the state, or if the state coerces or significantly encourages the party's action.³⁴⁹ The Supreme Court has not developed a unified test or doctrine to determine when ostensibly private activities constitute state action. Indeed, such a

³⁴⁶ L. TRIBE, *supra* note 31, § 18-1.

³⁴⁷ *Id.*

³⁴⁸ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Another benefit or purpose of the limitation of the Constitution's protections to government action is that this limitation reinforces federalism and the separation of powers. The requirement does this by limiting the range of wrongs the federal judiciary can redress in the absence of valid congressional legislation, thus creating a zone of action which is reserved to the states unencumbered by federal supremacy. L. TRIBE, *supra* note 31, § 18-2.

³⁴⁹ *Robinson v. Florida*, 378 U.S. 153 (1964) (state encouragement found where private restaurant owners segregated their restaurants pursuant to a state statute requiring separate toilet facilities for blacks); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (decision of private store owners to have sit-in demonstrators arrested for trespass pursuant to state encouragement to use trespass laws in a discriminatory manner constitutes state action); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (state coercion found where private restaurant owners segregated their restaurants pursuant to state law); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (state action found in refusal by private coffee shop to serve blacks, because coffee shop was leasing space in a state facility, making the state and coffee shop joint venturers); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town that carried out all the public functions of a municipality subject to constitutional restraints); *Smith v. Allwright*, 321 U.S. 649 (1944) (state political primary held to be a government function delegated by state to private parties and thus subject to constitutional restraints).

test is probably impossible.³⁵⁰ "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."³⁵¹ However, if the focus of the Court's inquiry is capable of summary, it seems to be "whether there is a sufficiently close nexus between the State and the challenged action of the [private party] so that the action of the latter may be fairly treated as that of the State itself."³⁵²

The Court's willingness to define a private party's activities as state action has undoubtedly changed over time. Prior to World War II, the concept of state action remained largely limited to actions taken by formal governmental actors—the legislature, the executive, and the judiciary.³⁵³ After the war, the simultaneous increase in the power of private entities, in the welfare state, and in the concern for civil rights led the Vinson and Warren Courts to expand the concept of state action to include an ever larger area of previously private activity.³⁵⁴

³⁵⁰ Professor Tribe asserts that a unified theory of state action is impossible under our current constitutional doctrine since the doctrine does not have an affirmative theory of individual liberty. Without an affirmative theory of individual liberty, he argues, it is impossible to distinguish when state inaction allowing private infringement of constitutional rights should be subject to constitutional standards. L. TRIBE, *supra* note 31, § 18-2. Professor Klare has argued that formulating any determinative test as to what constitutes state action is impossible since the distinction between public and private action is without determinative content. Klare, *supra* note 29, at 1415-21. The Court itself has acknowledged that "formulating an infallible test" of state action is "an impossible task." *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967).

³⁵¹ *Burton v. Wilmington Parking Auth.*, 365 U.S. at 722.

³⁵² *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

³⁵³ Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 685-89 (1984). See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (fourteenth amendment only prohibits action taken directly by the state).

³⁵⁴ *Schneider, State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737, 739-43 (1985). See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944) (resolution of state Democratic convention excluding blacks from the Democratic primary constitutes state action, *overruling* *Grovey v. Townsend*, 295 U.S. 45 (1935)); *Marsh v. Alabama*, 326 U.S. 501 (1946) (decision of company town to have religious proselytizer arrested under trespass law constitutes state action); *Terry v. Adams*, 345 U.S. 461 (1953) (exclusion of blacks from voting in primary elections of political association constitutes state action); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (refusal by private coffee shop leasing space in state parking facility to serve blacks constitutes state action); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (segregation of restaurants by private restaurant owners pursuant to state law constitutes state action); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (decision of private store owners to have sit-in demonstrators arrested for trespass pursuant to state encouragement to use trespass laws in a discriminatory manner constitutes state action); *Robinson v. Florida*, 378 U.S. 153 (1964) (segregation of restaurants by private restaurant owners pursuant to state statute requiring separate toilet facilities for blacks constitutes state action); *Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (decision of private shopping mall to have union picketers arrested under trespass laws constitutes state action).

This expansion of the state action doctrine into the realm of ostensibly private activity has suffered a sharp reversal under the Burger and Rehnquist Courts.³⁵⁵ This reversal has been accomplished largely without any change in the expressed state action doctrine, since none of the Vinson and Warren Courts' expansive holdings has been overturned. Instead, the contraction has been achieved through a significant narrowing of the relevant activity the Court will consider in determining whether there is state action.³⁵⁶ The Court will no longer accept arguments for state action where the state's influence or involvement in the discriminatory activity is indirect, but instead requires actual coercion or direct involvement of the government in the challenged decision or act.³⁵⁷ Thus, under the current Court, a nexus of actual state coercion or direct state interjection into the specific discriminatory act must exist in order to scrutinize the actions of a private party as those of the state.

2. State Action and Unions—An Historical Perspective

The argument that a union's negotiation and observance of a collective agreement constitutes state action has been raised in several contexts, but each time it has been avoided by the Court.

³⁵⁵ *Schneider*, *supra* note 354, at 739–43. The only major case since 1969 in which the Court has held that the actions of a private party were state action was *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (invocation of state prejudgment attachment procedure and aid of state officers by a private creditor constitute state action). That case was explicitly limited to its facts. *Id.* at 939 n.21. With the exception of *Lugar*, the Court has consistently found that the actions of a private party are not state action. See, e.g., *NCAA v. Tarkanian*, 109 S. Ct. 454 (1988) (decision by an unincorporated association whose members consisted of both public and private universities and colleges which resulted in suspension of basketball coach of a state university does not constitute state action); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (decision not to allow use of word "Olympic" by federal corporation with federal grant to exclusive use of the word does not constitute state action); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (decision to discharge or transfer Medicaid recipients by committees of private doctors required, reviewed, and supported by federal government does not constitute state action); *Rendel-Baker v. Kohn*, 457 U.S. 830 (1982) (decision to discharge teacher by private school subject to state regulation and supported by state does not constitute state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (decision of state regulated public utility to discontinue service does not constitute state action); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (sale of goods by private warehousemen to recover debt pursuant to self-help provision of state law does not constitute state action); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (refusal to serve blacks by private dinner club with state liquor license does not constitute state action).

³⁵⁶ *Schneider*, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, And A Proposal For Change*, 60 NOTRE DAME L. REV. 1150, 1156–57 (1985).

³⁵⁷ *Id.*

First, in *Steele v. Louisville & Nashville Railroad*³⁵⁸ the plaintiffs contended that the negotiation of a racially discriminatory collective agreement by the exclusive representative under the RLA violated black employees' fifth amendment rights. Perhaps foreshadowing the union security cases, the Supreme Court avoided this constitutional question by interpreting the RLA as imposing a statutory duty on the union to represent all employees in the bargaining unit fairly.³⁵⁹ This duty of fair representation was violated by such discriminatory activity. Next, in *Railway Employees' Department v. Hanson*³⁶⁰ the plaintiffs argued that there was state action in the negotiation of union security agreements under the RLA. Although state action was found in *Hanson*, it was based on Congress's exercise of the Supremacy Clause in section 2 Eleventh of the RLA to pre-empt inconsistent state laws, not on the union's role in negotiating the collective agreement.³⁶¹ Lastly, the plaintiffs in *Oliphant v. Brotherhood of Locomotive Firemen and Enginemen*³⁶² argued that a union's discriminatory exclusion of blacks from membership violated their fifth amendment rights. Although this issue never reached the Supreme Court, two lower courts held that there was no state action and thus no constitutional infringement in a union's discriminatory denial of membership.³⁶³

Despite the Court's avoidance of the issue, it has suggested rather strongly in dicta that it would not find that the union's role in negotiating and observing the collective agreement constitutes state action. Although the issue was not raised by the parties to the dispute, in *United Steelworkers of America v. Weber*,³⁶⁴ the Court volunteered the observation that a collective

³⁵⁸ 323 U.S. 192 (1944).

³⁵⁹ *Id.* at 198–99; see also *Sayres v. Oil Workers Int'l Union, Local No. 23*, 223 F.2d 739 (5th Cir. 1955), *rev'd*, 350 U.S. 892 (1955) (mem.) (parallel case to *Steele* dealing with a discriminatory collective agreement governed by the NLRA). This avoidance, to be sure, can be criticized on the basis that it expands, perhaps unevenly, the prohibitory effect of the Constitution. Yet the avoidance of the constitutional question in the case of the duty of fair representation seems more appropriate than in the case of union security agreements, since there seems to be no realistic legislative alternative and the question of whether a union's representation has been fair is one that is amenable to judicial determination.

³⁶⁰ 351 U.S. 225 (1956).

³⁶¹ *Id.* at 232.

³⁶² 156 F. Supp. 89 (N.D. Ohio 1957), *aff'd*, 262 F.2d 359 (6th Cir. 1959), *cert. denied*, 359 U.S. 935 (1959).

³⁶³ *Id.*; but see *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946) (exclusive bargaining representative under RLA may not exclude members of the bargaining unit on the basis of race).

³⁶⁴ 443 U.S. 193 (1979).

agreement "does not involve state action."³⁶⁵ In *United Steelworkers of America v. Sadlowski*,³⁶⁶ the Court, citing *Weber*, held that the union's internal rule prohibiting candidates for union office from accepting campaign contributions from non-members did not constitute state action.³⁶⁷ Finally, in *Beck* both *Sadlowski* and *Weber* were cited in passing, although the resolution of the statutory question obviated the need to resolve the constitutional question. In a parenthetical phrase, *Weber* was cited for the proposition that "negotiation of a collective bargaining agreement's affirmative action plan does not involve state action."³⁶⁸ If the Court really believes that *Weber* can be cited for the proposition that an affirmative action plan negotiated by an exclusive representative is not state action, then it would seem very difficult to argue successfully that a union security agreement negotiated by the exclusive representative is state action.³⁶⁹

The argument over whether a union's negotiation and observance of a collective agreement constitute state action is not merely of historical significance. In *Chicago Teachers Union, Local No. 1 v. Hudson*,³⁷⁰ the Court held that in the public sector the protection of dissenters' first amendment rights requires that the union's procedure for accommodating dissenters under a union security agreement minimize the risk that dissenters' contributions might be used for impermissible purposes, provide adequate justification to dissenters for the remaining fee after any advance reduction in dues, and offer a reasonably prompt decision by an impartial decision-maker as to disputes over the allowable fee that can be charged dissenters.³⁷¹ It seems inevitable that some dissenting employees cov-

³⁶⁵ *Id.*

³⁶⁶ 457 U.S. 102 (1982), *reh'g denied*, 459 U.S. 899 (1982).

³⁶⁷ *Id.* at 121 n.16. The issue of whether a union's internal rules covering its voluntary members constitute state action is arguably distinguishable from the issue of whether its activities under section 9(a) affecting dissenting employees constitute state action.

³⁶⁸ *Beck*, 108 S. Ct. at 2657.

³⁶⁹ See also *Black v. Cutter Laboratories*, 351 U.S. 292, 298-99 (1956) (just cause provision in a collective bargaining agreement allowing discharge for Communist Party affiliation does not raise federal issue); *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) (dicta, "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become government agencies or may be regulated as such."); *but see Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring) (negotiation of discriminatory collective agreement by exclusive representative is state action).

³⁷⁰ 475 U.S. 292 (1986).

³⁷¹ *Id.* at 304-09.

ered by a union security agreement under the NLRA will argue that without procedural safeguards equal to those outlined in *Hudson*, their interest in preventing the impermissible use of their contributions has not received adequate protection under the Constitution. The Court would then have several options: it could refuse to take the question, allowing possibly conflicting lower court opinions to stand; it could interpret section 8(a)(3) to include the procedural safeguards of *Hudson*, a feat from which I hope the Court would shrink;³⁷² or it could finally answer the question of whether there is sufficient state action in the negotiation and observance of a union security agreement under the NLRA to give rise to constitutional scrutiny.

There are two plausible arguments to support the contention that the negotiation and observance of a union security agreement by a union and private employer constitute state action. The first is that the union's designation as the exclusive bargaining representative under section 9(a) of the NLRA makes the union an arm of the state, subject to constitutional scrutiny in all of its activities as the exclusive representative. The second is that by promoting collective bargaining and shifting bargaining power to unions through various provisions of the NLRA, the federal government coerces or substantially encourages unions and employers to reach collective agreements containing terms favorable to unions—including union security agreements. I shall now consider each of these arguments.

B. The Exclusive Representative as State Actor

It is often asserted that the strongest argument for state action in the negotiation and observance of agency shop agreements lies in the designation of the union as the exclusive representative under section 9(a) of the NLRA.³⁷³ When a union is elected the exclusive representative, it has the right to negotiate and enforce a collective bargaining agreement with the employer for all employees in the bargaining unit, including non-members

³⁷² Of course, the words of section 8(a)(3) say nothing of any such procedures. The legislative history shows that Congress never considered any such procedure. In fact, Congress desired an unobtrusive solution to the problem of dissenting employees that would not interfere with the internal affairs of unions. See *supra* notes 251, 254.

³⁷³ See, e.g., Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1026 (1984).

and dissenters.³⁷⁴ The employer, in turn, must bargain in good faith with the union to reach such an agreement.³⁷⁵ The NLRA does not protect employee collective action which is independent of, or opposed to, the exclusive representative.³⁷⁶ All individual employee contracts which are inconsistent with the collective agreement are superseded by it.³⁷⁷

Two arguments may be advanced as to how the designation of the union as the exclusive representative provides the necessary nexus between the state and the union's acts to make the latter state action. First, from the perspective of dissenting employees, the union is granted, over their opposition, a monopoly on the negotiation of their conditions of employment by operation of federal law.³⁷⁸ It is argued that the exercise of this state grant of exclusive authority to bargain is state action. However, such a simple formulation of the problem ignores the fact that the union is elected by the employees and that even dissenters have an equal say in whether they are represented by a union.

A more sophisticated argument analogizes the elected union to an elected legislature, the employer to the executive, the negotiations between the union and the employer to the legislative process, and the collective agreement to legislation.³⁷⁹ Under this scenario, unions and employers are performing a delegated government function in negotiating a collective agreement. Therefore, collective agreements—the "industrial legislation" of unions and employers—should be subject to constitutional restraints, just like the legislation of federal and state governments.³⁸⁰

³⁷⁴ *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

³⁷⁵ 29 U.S.C. § 158(a)(5), (d) (1982).

³⁷⁶ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (black employees who picketed employer on their own, believing that their union did not adequately represent their interests, not protected by NLRA).

³⁷⁷ *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

³⁷⁸ Amicus Brief of Senators Jesse Helms (R-N.C.), Strom Thurmond (R-S.C.), Dan Quayle (R-Ind.), and Steven Symms (R-Idaho) at 16-17, *Beck*, 108 S. Ct. 2641.

³⁷⁹ The Court itself has analogized collective bargaining to "industrial self-government." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). See also *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 198 (1944) (making a similar analogy to find a statutory duty of fair representation under the RLA); *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 180 (1967) (quoting *Steele* and drawing a similar analogy for the purposes of statutory interpretation under the NLRA).

³⁸⁰ Symposium, *Individual Rights in Industrial Self-Government—A "State Action" Analysis*, 63 NW. U.L. REV. 4, 8-19 (1968). Cf., Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432, 482-83 (1959).

This analogy, however, is tenuous. Employers make peculiar executives, since they are unelected, unimpeachable and, if unincorporated, thoroughly private. Should employers really be held to constitutional standards? Amending the argument to hold only unions to constitutional standards not only fractures the analogy, but forces us to deal with the fact that the union is not entirely responsible for the results of collective bargaining. Unlike "real" government, the union does not always have the power to impose contract terms on the other party to its agreements. Indeed, it has been persuasively argued that under the current formulation of the NLRA, the employer's role in constructing the collective agreement exceeds that of the union.³⁸¹ Should the union be held responsible for unconstitutional contract terms sponsored by the employer? If not, how are we to separate which party is responsible for an offending term in the give-and-take of collective bargaining?³⁸² Furthermore, the process of collective bargaining is not analogous to the legislative process. A strike seems a poor analogy to a vote to override a veto, and no legislative analogue exists for an employer's threat to subcontract work or close the plant altogether. Thus, it would seem a mistake to elevate the metaphor of industrial legislation to the level of constitutional doctrine without deeper examination.

If we apply current Supreme Court doctrine to the problem, we find little hope that the union's status as the exclusive representative under section 9(a) would supply the necessary nexus between the state and the union's actions to make them state action. In *Jackson v. Metropolitan Edison Co.*,³⁸³ the Supreme Court held that a state grant of monopoly status to a private utility company did not make the utility's decision to terminate service to customers state action.³⁸⁴ Similarly, in *San Francisco*

³⁸¹ Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1546-47 (1981); see also *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981) (under the NLRA, Congress did not intend to make unions an "equal partner" with the employer in running the business); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897, 901-02 (1975).

³⁸² For example, if the union asks for a grievance procedure, and the employer agrees to such a procedure on condition of a broad no-strike clause prohibiting job actions and demonstrations of any kind, could the no-strike clause be considered a violation of the first amendment perpetrated by the union?

³⁸³ 419 U.S. 345 (1974).

³⁸⁴ *Id.* at 351-52. Although the Court found some nebulous reasons to doubt the utility's monopoly status, it held that even if the utility did have a grant of pure monopoly, this was not determinative in considering whether the utility's decision to terminate service was state action. *Id.*

*Arts & Athletics v. United States Olympic Committee*³⁸⁵ the Court held that the grant of a corporate charter or trademark did not make the actions of the recipients of such grants state action.³⁸⁶

One might try to distinguish *Jackson* by arguing that the grant of authority examined in that case is narrower than the grant of authority to a union under section 9(a). Arguably, the provision of gas and electricity has a less intimate effect on people's lives than the determination of their conditions of employment. However, there are some compelling counterarguments. The grant of authority to provide utility service is a powerful one, since a home, under modern conditions, is likely to become uninhabitable if service is denied.³⁸⁷ The self-help remedy for individuals dissenting from the selection of a public utility is moving to a new town. In general, moving is more burdensome than finding a new job, the self-help remedy for individuals dissenting from the selection of an exclusive representative. Moreover, because of the union's elected status, the nexus between the state and the challenged activity under section 9(a) is weaker than in *Jackson*. Unlike employees under the NLRA, the utility customers in *Jackson* were not allowed to vote directly on the selection or retention of Metropolitan Edison as their public utility. Given the precedent of *Jackson* and the current disposition of the Court to define state action narrowly, it seems doubtful that state action could be established on the basis of the state's grant of exclusive authority under section 9(a).

Nor does current state action doctrine hold much promise for the argument that industrial self-government represents a delegated government function. The government-function argument under section 9(a) is based on an analogy between the process and product of collective bargaining and the process and product of state legislation. However, to determine what is a government function for the purposes of defining state action, the Court looks not at process and product, but instead at the subject matter of the function performed. The activities of a private party performing a function assigned by the state are considered state action only if the party performs a function which is "tra-

³⁸⁵ 483 U.S. 522 (1987).

³⁸⁶ *Id.* at 543-44. See also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) (a private club's discrimination against blacks not state action despite the fact that the state had granted the club one of a limited number of liquor licenses).

³⁸⁷ *Jackson*, 353 U.S. at 361 (Douglas, J., dissenting).

ditionally the exclusive prerogative of the State."³⁸⁸ The Supreme Court has also pointed out that "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"³⁸⁹ Although the state has sometimes passed laws regulating minimum wages, maximum hours, and working conditions,³⁹⁰ the determination of the terms of employment among private employers and employees has never been its exclusive prerogative. Traditionally, the determination of private terms of employment has been left to the private parties.³⁹¹ Thus, under section 9(a) of the NLRA, unions exercise a private function rather than a delegated government function which would constitute state action.³⁹²

The failure, under existing precedent, of the state action argument based on the union's designation as the exclusive representative is consistent with the state action doctrine's purpose of preserving the Constitution's balance of individual freedom. Certainly an unbounded application of *Jackson*, exempting all authorizations of private power in areas which are not the traditional prerogative of the state, would be wrong. When the state assigns a monopoly to a private party, it substitutes regu-

³⁸⁸ *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-61 (1978); *Jackson*, 419 U.S. at 353.

³⁸⁹ *Flagg Bros.*, 436 U.S. at 158.

³⁹⁰ *E.g.*, Fair Labor Standards Act of 1938, 52 Stat. 1060 (current version codified at 29 U.S.C. §§ 201-19 (1982)) (regulating minimum wage); Occupational Safety and Health Act of 1970, 84 Stat. 1590 (current version codified at 29 U.S.C. §§ 651-78) (regulating workplace safety).

³⁹¹ Even if we assume that the union's grant of exclusive bargaining authority under section 9(a) makes the union a state actor, a centuries-old tradition of private determination of the terms of employment in this country preceded the passage of the NLRA. This tradition has continued after the passage of the NLRA in the unorganized bulk of the private sector.

³⁹² This analysis brings to the forefront what is really the most interesting constitutional question posed by section 9(a), not whether the state's assignment to the union of the private function of bargaining makes the union a state actor, but whether the state can reassign the right to bargain from the private employees to the union without infringing upon the employees' first amendment, fifth amendment, or freedom of contract rights. Although the Court has never addressed this issue from the perspective of dissenting employees' constitutional rights, the Court has found no violation of the employer's fifth amendment and freedom of contract rights in the designation of the union as the exclusive representative under section 9(a). *NRLB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937); *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 557-59 (1937). There have been some lower court opinions upholding the concept of exclusive representation over the constitutional objections of dissenting employees. See, *e.g.*, *Local 858 American Fed'n of Teachers v. School Dist. No. 1*, 314 F. Supp. 1069 (D. Colo. 1970). See generally Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. INDUS. COM. L. REV. 993, 1001-02 nn.57-58 (1976).

lation for whatever discipline on individual behavior the market might impose. The regulation may increase or decrease the individual freedom of the monopolist or its customers over what the market may provide. Although the results of current or past markets are not constitutionally protected,³⁹³ if the state unilaterally assigned a complete and unfettered monopoly over an aspect of some importance to people's lives, one must wonder whether the Constitution would require that this monopoly be subject to constitutional constraints.³⁹⁴ On the other hand, almost every law involves some grant of authority to a private party which affects the individual freedom of the party or the people with whom it deals.³⁹⁵ Unless every law is to create a state actor, some rule or line must be constructed to distinguish when the exercise of a grant of authority to a private party constitutes state action and when it does not. The construction of such a general rule is beyond the scope of this Article. However, I would argue that the union's designation as exclusive representative is not such an extensive grant of authority that the union's acts should be subject to constitutional scrutiny.

The grant of authority to the exclusive representative is far from that of a unilaterally imposed, unfettered monopoly. In fact, one could argue that the union's designation under section 9(a) is not a grant of authority at all. Long before the passage of the NLRA, unions bargained for and received enforceable agreements of employer recognition that they were the employees' exclusive bargaining representatives.³⁹⁶ At times such recognition was achieved without majority support of the represented employees or after a strike. By enacting the election and exclusive representation provisions of section 9 and by prohibiting recognition strikes in section 8(b)(7), Congress did not create a new status; it created only a fairer and more peaceful

³⁹³ "[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State, or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting).

³⁹⁴ For example, if the NLRA required that all employees be represented by worker committees consisting of private employees designated by the government in each shop and that these committees have complete and unilateral power over the setting of wages, hours, and working conditions in the shop, I would think that there would be a good argument that the acts of these worker committees would be state action. Such is not the case under the current NLRA.

³⁹⁵ For example, in labor law the simple rule that collective agreements are enforceable grants unions authority in their relationships with employers.

³⁹⁶ S. REP. NO. 573, 74th Cong., 1st Sess. 11-12 (1935), reprinted in 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2311-12 (1949).

system for allowing unions to achieve the status of exclusive representative.³⁹⁷ The election process, in which each employee has an equal say, decreases any grant of authority or state nexus by interjecting the employees' private decision as to whether to select or retain the union as their exclusive representative. Finally, the union's authority as exclusive representative has significant limitations. The union must bargain with the employer to determine the terms of the collective agreement and must work with the employer in its enforcement. The union is also bound in its treatment of the employees and their concerns by its duty of fair representation³⁹⁸ and by specific limitations in the NLRA and the Labor Management Reporting and Disclosure Act (LMRDA).³⁹⁹ Far from being unfettered, the union's grant of authority under section 9(a) is carefully confined and constrained to protect dissenting employees' rights.

Similarly, the Court's emphasis on subject matter over process and product in the determination of what is a government function for the purposes of finding state action makes sense in light of the purpose of the state action doctrine of preserving individual liberty. Democratic procedures and bargaining are commonly used by private parties in our society. Partnerships, cooperatives, corporations, associations, and fraternal organizations all use, and sometimes are required by law to use, democratic procedures for making decisions. Bargaining is the predominant mode of exchange in our economy. Moreover, many of the documents produced by these institutions, including charters, by-laws, rules, and contracts, can be analogized to legislation. It would not only unduly impinge the liberty of such parties but also extend the Constitution beyond any reasonable reading to hold that they are subject to constitutional constraints. On the other hand, if the government were allowed to assign its traditional functions without subjecting the performance of those functions to constitutional scrutiny, the Consti-

³⁹⁷ See DEVELOPING LABOR LAW, *supra* note 160, at 29, 43, 56-58.

³⁹⁸ See, e.g., *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944) (duty of fair representation); 29 U.S.C. § 158(b) (1982) (union unfair labor practices); 29 U.S.C. § 411 (1982) (union members' "bill of rights"); 29 U.S.C. § 501 (1982) (union officers subject to fiduciary duties). Some may think it ironic that the duty of fair representation, which the Court found implied in section 9(a) to avoid the question of whether the exclusive representative's acts constitute state action, should now be used to argue that the exclusive representative's acts do not constitute state action. Nevertheless, as currently formulated, the duty of fair representation is a significant statutory limitation on the grant of authority to exclusive representatives under section 9(a).

³⁹⁹ 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1982 & Supp. 1987)).

tution's protection of individual liberty would soon be undermined. The government could merely delegate its functions of conducting elections, tax collection, benefit distribution, and law enforcement to private parties with all of the authority of the government, but with none of its constraints or responsibilities.

C. State Encouragement of Union Security Agreements

The second argument in favor of finding state action in the negotiation and observance of agency shop agreements under the NLRA is that section 8(a)(3) and other provisions of the Act encourage collective bargaining and agency shop agreements, and therefore the negotiation of such an agreement is an act attributable to the state. As previously discussed, congressional purposes in enacting the NLRA included promoting collective bargaining and shifting bargaining power to employees.⁴⁰⁰ These purposes are reflected in several provisions of the Act. Not only does the ban on unfair labor practices listed in section 8(a) prohibit a variety of employer techniques for discouraging employee organization,⁴⁰¹ but the election procedure of section 9 arguably facilitates such employee organization.⁴⁰² Once the employees select a representative, that union is designated under section 9(a) as the exclusive representative for all employees in the unit.⁴⁰³ The employer is required to bargain in good faith with this exclusive representative over wages, hours, and working conditions, including union security agreements.⁴⁰⁴ Union security agreements, including agency shop agreements, are authorized by section 8(a)(3), exempting them from the general prohibition against employer discrimination on the basis of union affiliation.⁴⁰⁵ One could argue that if the Act encourages collective bargaining and shifts bargaining power to employees, the predictable result is that unions will achieve more of their

⁴⁰⁰ 29 U.S.C. § 151 (1982); DEVELOPING LABOR LAW, *supra* note 160, at 27-28; Keyserling, *supra* note 220, at 206-08.

⁴⁰¹ 29 U.S.C. § 158(a) (1982).

⁴⁰² See 29 U.S.C. § 159 (1982). But see Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (election procedure under NLRA lends itself to employer delay and obstruction).

⁴⁰³ 29 U.S.C. § 159(a) (1982).

⁴⁰⁴ 29 U.S.C. §§ 158(a)(5), (d) (1982).

⁴⁰⁵ 29 U.S.C. § 158(a)(3) (1982).

collective bargaining objectives—including agency shop agreements.⁴⁰⁶

This argument is subject to empirical criticism. Although the NLRA's purposes of promoting collective bargaining and shifting bargaining power to employees are well established in the lore of labor law, it is questionable whether these objectives have in fact been achieved by the statute. Professor Weiler has argued persuasively that the lack of adequate penalties for employer unfair labor practices and the protracted election procedures under the NLRA allow employers effectively to discourage employee organization.⁴⁰⁷ Comparisons of employee organizing under the NLRA with employee organizing in the public sector and in other countries support this assertion and suggest that employer recalcitrance has contributed significantly to the recent precipitous decline in the percentage of employees organized in the private sector.⁴⁰⁸ There is no substantial penalty to enforce the employer's obligation to bargain under the NLRA.⁴⁰⁹ Moreover, as Professor Stone has noted, the Supreme Court has weakened the employer's obligation to bargain by excluding such "management decisions" as subcontracting and the introduction of new technology from the range of subjects which the employer must negotiate.⁴¹⁰ Stone argues that this circumscription has lessened unions' bargaining power.⁴¹¹ Finally, Professor Klare has argued that in interpreting the NLRA the Court has "deradicalized" the statute by emphasizing the congressional purposes consistent with liberal capitalism while

⁴⁰⁶ Brief of Respondents at 8-9, *Beck*, 108 S. Ct. 2641. It is also sometimes argued that Section 8(a)(3) itself encourages the negotiation of union security agreements. *Id.* This argument, however, seems baseless. The language of Section 8(a)(3) merely authorizes union security agreements, it does not encourage or coerce them. 29 U.S.C. § 158(a)(3) (1982). Indeed, before the passage of Section 8(a)(3) all manner of union security agreements both existed and were enforceable, perhaps even by a minority union. Reply Brief of Petitioners at 1-2, *Beck*, 108 S. Ct. 2641. In its current form, Section 8(a)(3) prohibits the closed shop, limits the enforceability of the union shop and conditions the negotiation of a union security agreement on the union's status as the duly elected or recognized exclusive representative. 29 U.S.C. § 158(a)(3) (1982). Thus, by itself, Section 8(a)(3) can be viewed as a limitation on the negotiation of union security agreements.

⁴⁰⁷ See Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 358-62 (1984); Weiler, *supra* note 402, at 787-97.

⁴⁰⁸ R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 221 (1984).

⁴⁰⁹ See, e.g., *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970) (denying NLRB power to order employer who refused to bargain to compensate employees by the amount they would have received if there had been good faith bargaining).

⁴¹⁰ Stone, *supra* note 381, at 1547-52.

⁴¹¹ *Id.* at 1557-58.

ignoring Congress's more radical purposes,⁴¹² including the equalization of bargaining power between employees and employers.⁴¹³

The argument that the NLRA encourages agency shop agreements is also subject to criticism on theoretical grounds. It seems clear that encouragement of collective bargaining would encourage, or at least create more opportunities for, the negotiation of agency shop agreements. However, an increase in employees' bargaining power due to the NLRA would not necessarily encourage the negotiation of agency shop agreements. If agency shop agreements are worth more to employees than they cost employers, presumably even a very powerful employer will offer to include such a provision in the collective agreement in exchange for a wage decrease of greater value to him, but of lesser value to the employees than the agency shop agreement. Similarly, if agency shop agreements are worth less to employees than they cost employers, even a very powerful union would agree to omit an agency shop agreement in exchange for a wage increase of greater value to the employees, but less cost to the employer than the agency shop agreement. In other words, whether an agency shop agreement is included in the collective agreement will depend on whether it is an "efficient" contract term, in that its benefits to the employees outweigh its costs to the employer, and not on the respective bargaining power of the parties.⁴¹⁴ At least in a simple economic model, bargaining power is used to determine the division of any economic profits or rents, not to determine the inclusion or exclusion of any specific contract term.⁴¹⁵

⁴¹² Klare, *supra* note 220, at 265-70.

⁴¹³ *Id.* at 292-93. See also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981) (congressional purpose was to create system for resolution of conflicts, not to make labor an "equal partner" in the operation of the business).

⁴¹⁴ Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 245-49 (1987); see also Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁴¹⁵ Schwab, *supra* note 414, at 245-49. There are some subtle but potentially serious shortcomings in this argument. First, it ignores potential wealth effects. That is to say it assumes that as employees' bargaining power and wealth grow, their valuation of an agency shop agreement will remain the same. See Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427, 432-33 (1972). Whether or not such wealth effects would be important in the case of union security agreements is an empirical question. See Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEG. STUD. 237, 265 (1988). The argument also assumes that employers and unions always bargain to an efficient solution analogous to what would prevail in a competitive market. See Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221, 244 (1980); Cooter, *The Cost of Coase*, 11 J. LEG. STUD. 1, 14 (1982). Such an assumption seems a gross simplification of the bargaining relationship between employers and unions.

Once again, if we apply current Supreme Court doctrine to the argument that the NLRA encourages agency shop agreements, we find little hope that the Court would find the necessary nexus to establish state action. State encouragement of a private party's action will cause it to be considered state action only if the state "has exercised coercive power or has provided such significant encouragement, either overt or covert," that the action "must in law be deemed to be that of the State."⁴¹⁶ "Mere [state] approval of or acquiescence in the initiatives of a private party is not sufficient" for a finding of state action.⁴¹⁷ Moreover, during the tenures of the Burger and Rehnquist Courts, the tendency has been to examine the activity in question very narrowly, requiring state coercion or significant encouragement of the specific action or decision.⁴¹⁸ A general argument that the NLRA encourages collective bargaining and shifts bargaining power to employees, resulting in more agency shop agreements, would not prevail under the current doctrine. Instead, one would have to show that the government coerced or significantly encouraged the specific decision by the union and the employer to enter into an agency shop agreement.

It is "the fundamental premise" of the NLRA that the government regulates only the process of collective bargaining,

⁴¹⁶ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)). See also *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 543-44 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

⁴¹⁷ *Blum*, 457 U.S. at 1004-05, (citing *Flagg Bros.*, 436 U.S. at 164-65; *Jackson*, 419 U.S. at 357 (1974)). See also *San Francisco Arts & Athletics*, 483 U.S. at 543-44.

⁴¹⁸ For example, in *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court found that the decisions of committees of private doctors to discharge and transfer Medicare patients were not state action because the actual decisions to discharge and transfer were made by the doctors on the basis of professional standards not established by the state. *Id.* at 1008. No state action was found, despite the fact that the federal government paid for the patients' medical care, regulated their treatment, required nursing homes and hospitals to set up the committees, prescribed the form the committees would use in deciding on discharges and transfers, penalized nursing homes and hospitals if they did not make appropriate decisions in discharges and transfers, reviewed the decisions to discharge or transfer, and reduced payments for services in accordance with the committee decisions. *Id.* at 1006-10. Similarly, in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), the decision of a private school to discharge a teacher was not considered state action because the state did not coerce or significantly encourage the specific decision to fire the teacher. *Id.* at 841. In *Rendell-Baker* the school performed a public function (although not one exclusively performed by the state) and the state sent the students to the school, provided 90% of its funding, and had the right of approval in some hiring. *Id.* at 832-35. See also *San Francisco Arts & Athletics*, 483 U.S. at 543-44; *Flagg Bros.*, 436 U.S. at 166; *Jackson*, 419 U.S. at 357.

leaving the determination of the specific terms of the collective agreement to the private parties.⁴¹⁹ Since the passage of the Wagner Act, both Congress and the courts have understood that the NLRA's obligation to bargain in good faith does not require the parties to make any specific concessions; the Act does not allow the government to supervise the terms of collective agreements.⁴²⁰ With the passage of the Taft-Hartley Act in 1947, Congress has expressly excepted any obligation to make a concession from the obligation to bargain in good faith.⁴²¹ As described by Senator Walsh (D-Mass.), chairman of the Committee on Education and Labor during the enactment of the Wagner Act, the Act "indicates the method and manner in which employees may organize . . . and leads them to the office door of their employer, . . . [but] does not go beyond the office door"⁴²² Whatever encouragement for collective bargaining and the promotion of employee interests can be found in the NLRA, it is not used to coerce or significantly encourage the inclusion of any specific term in the collective agreement. Consistent with this approach, section 8(a)(3) merely authorizes the parties to enter into union security agreements, neither requiring nor encouraging them.⁴²³

⁴¹⁹ While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (footnote omitted). See also *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 254 (1974).

⁴²⁰ The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), reprinted in 2 *NLRA LEGISLATIVE HISTORY*, supra note 117, at 2300, 2312. Similarly, in the first major test of the constitutionality of the NLRA, the Court said:

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

⁴²¹ 29 U.S.C. § 158(d) (1982).

⁴²² 79 CONG. REC. 7659 (1935), reprinted in 2 *NLRA LEGISLATIVE HISTORY*, supra note 117, at 2373.

⁴²³ See supra notes 406–415 and accompanying text.

The analysis above ignores the fact that in *Railway Employees' Department v. Hanson*,⁴²⁴ the Supreme Court found that the negotiation of a union security agreement under section 2 Eleventh of the RLA (the RLA provision analogous to section 8(a)(3)) was sufficiently encouraged to constitute state action.⁴²⁵ However, the Court's finding of state action in that case turned on the exercise of the Supremacy Clause in section 2 Eleventh.⁴²⁶ The RLA authorizes union security agreements notwithstanding contrary state laws. By pre-empting contrary state laws, the RLA legalizes otherwise unlawful private action and thus is said to give union security agreements the imprimatur of federal law.⁴²⁷ There is no similar exercise of the Supremacy Clause under the NLRA. Section 14(b) of the Act allows contrary state law to supersede the authorization of union security agreements in section 8(a)(3).⁴²⁸

The denial of a finding of state action based on the NLRA's general promotion of collective bargaining and employee interests is consistent with the purpose of the state action doctrine to preserve individual liberty. To allow the state to resort to any form of encouragement or coercion of specific private acts without subjecting them to constitutional scrutiny would undermine the Constitution's check on government power. The government could escape its constitutional limitations merely by coercing powerful private parties to carry out its forbidden objectives.⁴²⁹ However, it is commonplace for states to pass laws designed to foster a type of private institution or activity with the hope of obtaining certain desired results. General encouragement of this sort is much less subject to abuse by the government. Although I will not construct a general dividing line between these two cases, the encouragement of collective bargaining under the NLRA clearly falls much closer to the latter case than to the former. Moreover, the level of government encouragement under the NLRA is well below the level of encouragement that has been tolerated in other instances. For example, the government has undertaken extensive efforts to foster private enter-

⁴²⁴ 351 U.S. 225 (1956).

⁴²⁵ *Id.* at 232.

⁴²⁶ *Id.*

⁴²⁷ See *id.*; see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1987).

⁴²⁸ 29 U.S.C. § 164(b) (1982).

⁴²⁹ For example, the state might silence a dissenting author by offering great rewards or punishments to private publishers according to their refusal or agreement to publish the author's work.

prise in hopes of promoting economic well-being. Incorporation laws, partnership laws, tax laws, government loans and grants, and even our conceptions of private property and theft are all arguably designed to protect and support private enterprise and economic growth.⁴³⁰ The government's efforts to foster employee organization and collective bargaining in hopes of promoting employee interests and industrial peace pale by comparison. If the Court were to find that collective bargaining and its results are attributable to the state, it would also have to consider whether a vast portion of private enterprise and its results are attributable to the state.⁴³¹

What seems at odds with the purpose of the state action doctrine is the Supreme Court's holding in *Hanson*. In section 2 Eleventh of the RLA, Congress exempted union security agreements from a general prohibition against employer discrimination on the basis of union affiliation. Thus, Congress decided not to prohibit this type of conduct. Moreover, because section 2 Eleventh pre-empted contrary state laws, Congress decided that states would not prohibit such conduct. It seems curious that a decision *not* to regulate an area of private activity gives rise to a finding of state action. By finding state action this way, the Court interjects constitutional standards that restrict the private parties' individual freedom which are "uninvited" by affirmative legislation.⁴³² The fact that Congress exercised the Supremacy Clause in its decision not to prohibit union security agreements' seems irrelevant to the determination of whether there is state action. The Supremacy Clause was fashioned to cope with problems entirely unrelated to the question of when

⁴³⁰ See, e.g., R. CUNNINGHAM, W. STOECK & D. WHITMAN, *THE LAW OF PROPERTY* § 1.1 (1984) (property is a legally protected expectation of deriving enjoyment from a thing); R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.1 (3d ed. 1986) (creation of exclusive property rights is a necessary condition for the efficient use of resources); Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 363-65 (1954) (discussion of property as an allocation of wealth).

⁴³¹ There have been commentators who believe corporations should be subject to constitutional constraints. See, e.g., A. MILLER, *THE MODERN CORPORATE STATE* 182-87 (1976); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 933-34, 942 (1952); Latham, *The Commonwealth of the Corporation*, 55 NW. U.L. REV. 25, 25-29 (1960). There have also been commentators who disagree. Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U.L. REV. 38, 38-54 (1960); Marshall, *supra* note 30, at 569-70.

⁴³² The fact that this constitutional interjection is "uninvited" by statutory regulation suggests that *Hanson* violates the second purpose of the state action doctrine—preserving federalism and the separation of state and federal powers. See *supra* note 348 and accompanying text.

constitutional restraints should apply to private actions. Indeed, I know of no other case in which the Court has made a similar finding. Confusion of the Supremacy Clause with the state action doctrine can yield ridiculous results. Professor Wellington has suggested that the logic of *Hanson* requires that if Congress legislates to pre-empt state law in a given area, it must affirmatively outlaw all private behavior contrary to the Constitution.⁴³³

Holding that a union's negotiation and observance of a collective agreement is state action would result in a radical change in our conception of unions under the NLRA. Unions are currently viewed by both the Court and Congress as *private* centers of employee power under the NLRA.⁴³⁴ Although existing limitations on unions already subject them to constraints similar to those contained in the Constitution,⁴³⁵ a change in the status of unions from private to state actors would fundamentally affect our labor law and the current conduct of industrial relations. All of a union's actions in the negotiation and enforcement of the collective agreement would be subject to constitutional scrutiny. Would the negotiation of a grievance arbitration procedure in place of the right to litigate contract violations violate employees' seventh amendment rights?⁴³⁶ The substitution of such

⁴³³ Wellington, *supra* note 57, at 356-57.

⁴³⁴ "[T]he fundamental premise on which the [NLRA] . . . is based [is] . . . private bargaining under government supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (emphasis added).

⁴³⁵ For example, the duty of fair representation and the employee's "bill of rights" in the LMRDA, 73 Stat. 519 (codified at 29 U.S.C. §§ 401-531) (1982).

⁴³⁶ Under current labor law, arbitration of contract disputes is favored over litigation because the parties, who are considered private actors, have voluntarily chosen the arbitrator to be an official interpreter of their contract. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-82 (1960). If the union were viewed as a state actor, the typical contract grievance procedure most likely would be considered to violate the grievant's seventh amendment right to a trial by jury. While the state may establish a compulsory non-jury forum for litigation, it must provide a right to trial *de novo* before a jury to avoid seventh amendment invalidity. See, e.g., *Capital Traction Co. v. Hof*, 174 U.S. 1 (1898) (upholding statute requiring trial before justice of the peace, with appeal to jury trial before court of record); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979) (upholding Florida statute requiring referral of malpractice claims to nonbinding "mediation panel"); *Kimbrough v. Holiday Inn of Lionville, Inc.*, 478 F. Supp. 566 (E.D. Pa. 1979) (upholding local rule establishing compulsory non-binding arbitration). Because the typical grievance arbitration is subject only to limited review, there would be serious seventh amendment problems if the union were considered a state actor. But see *Keith Fulton & Sons, Inc., v. New England Teamsters and Trucking Indus. Pension Fund*, 762 F.2d 1124 (1st Cir. 1984) (compulsory arbitration under Multiemployer Pension Plan Amendments Act not invalid under seventh amendment because Congress may commit enforcement of new public rights to alternative tribunals such as an administrative agency).

grievance arbitration procedures for court procedures in the settlement of contract disputes has been recognized as one of the primary achievements of collective bargaining.⁴³⁷ It is a cornerstone in the current conduct of labor relations. Finally, a change in the status of unions would result in a fundamental change in the way we make national labor policy. If unions are viewed as state actors, power over our federal labor policy would shift from Congress to the courts.⁴³⁸ The courts are ill-suited for this task, due to their lack of expertise in the area of labor relations and lack of political mandate to make policy decisions.⁴³⁹

V. CONCLUSION

The Court's interpretation of section 8(a)(3) of the NLRA in *Beck* cannot be justified by recourse to the usual intrinsic and extrinsic resources for statutory interpretation. The words, administrative interpretations, and legislative history of the statute all indicate that Congress intended to allow agency shop agreements under section 8(a)(3) and intended purposes for union security agreements beyond the mere recoupment of collective bargaining expenses.

Nor can the Court's interpretation be justified by recourse to the Court's prior interpretations of section 2 Eleventh of the RLA or to the doctrine of avoiding constitutional questions. The Court's interpretation of section 2 Eleventh was affected by its desire to avoid the question of whether the negotiation and observance of agency shop agreements under the RLA violated dissenting employees' constitutional rights. Regardless of whether the Court's constitutionally colored interpretation of section 2 Eleventh was appropriate, *Beck* is an inappropriate case for application of the doctrine of avoiding constitutional questions. There is no serious question of the constitutionality of agency shop agreements to avoid in *Beck*, and the Court's

⁴³⁷ John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549-50 (1964); L. HILL & C. HOOK, MANAGEMENT OF THE BARGAINING TABLE 199 (1945). See generally N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 138-65 (3d ed. 1986); S. SLECHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 692-738 (1960).

⁴³⁸ Wellington, *supra* note 57, at 361.

⁴³⁹ *Id.* at 361-64.

interpretation of section 8(a)(3) is not supported by the rationales of the doctrine.

An examination of the constitutional question avoided in *Beck* discloses that there is no state action to support the claim that negotiation and observance of agency shop agreements under the NLRA violate dissenting employees' first amendment rights. Under the Court's current formulation of the state action doctrine, there is insufficient grant of authority to the union as exclusive representative and insufficient encouragement of the negotiation of union security agreements for the negotiation and observance of such agreements to constitute state action. Indeed, it is well established in American labor law that the parties to the collective agreement, not the government, determine the provisions of that agreement. The determination that there is no state action in the negotiation and observance of union security agreements is consistent with the purpose of preserving individual freedom represented in the state action doctrine. If constitutional scrutiny were extended to the negotiation and observance of union security agreements, it would logically extend to a host of other activities now considered private and not subject to constitutional constraints.

The Court's opinion in *Beck* amounts to judicial legislation with no basis in the statute or the Constitution. If the Court had properly performed its traditional role as statutory and constitutional umpire, it would have interpreted section 8(a)(3) to allow the negotiation and observance of agency shop agreements and would have determined that such agreements do not violate dissenting employees' first amendment rights. Instead, because of its failure to acknowledge the effect of past constitutional concerns on its interpretation of section 2 Eleventh and to consider whether constitutional concerns required a similar result in interpreting section 8(a)(3), the Court abandoned its traditional role and usurped the legislature's role by specifying both the policy and form of section 8(a)(3). The *Beck* decision limits the enforceability of agency shop agreements in collective bargaining agreements covering over six million workers and opens a potentially significant drain on the resources of the national labor movement through bookkeeping and litigation expenses required to resolve complaints of dissenters. One can only hope that the mistakes of the *Beck* decision will not be repeated.

COMMENT

COMMUNICATIONS WORKERS V. BECK: SUPREME COURT
THROWS UNIONS OUT ON STREET

INTRODUCTION

In 1976, twenty non-union employees of American Telephone and Telegraph Company ("AT&T") filed suit against their exclusive bargaining representative, Communications Workers of America ("CWA"), challenging CWA's use of their agency fees for non-collective bargaining purposes.¹

As part of the collective bargaining agreement in effect between AT&T and CWA, non-union employees were required to tender to CWA initiation fees and dues in amounts equivalent to members' fees and dues²—an arrangement known as an agency shop.³ The non-union employees objected to CWA's expenditure of these agency fees for purposes other than collective bargaining, such as lobbying for labor legislation, organizing the employees of other employers, and participating in social, charitable and political events.⁴ They alleged that such expenditures violated section 8(a)(3) of the National Labor Relations Act ("NLRA"),⁵ CWA's duty of fair representation,⁶ and the first amendment.⁷ The employees

1. See *Communications Workers v. Beck*, 108 S. Ct. 2641, 2645 (1988).

2. See *id.*; see also Reilly, *The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes*, 32 Mercer L. Rev. 561, 569 n.69 (1981) (reproducing text of agency shop agreement between CWA and AT&T).

3. The agency and union shops are different types of union security agreements. A union security agreement has been defined as a "contract[] between a labor union and an employer whereby the employer agrees to require his employees, as a condition of their employment, to affiliate with the union in some way." T. Haggard, *Compulsory Unionism*, the NLRB, and the Courts 4 (1977).

Under a union shop, this required affiliation takes the form of formal union membership. Under an agency shop, the affiliation is merely the payment of initiation fees and periodic dues to the union. See *id.*

4. See *Beck*, 108 S. Ct. at 2645.

5. 29 U.S.C. § 158(a)(3) (1982). Section 8(a)(3) of the National Labor Relations Act permits an employer and an exclusive bargaining representative to enter into an agency shop agreement whereby all employees in the bargaining unit must pay periodic union dues and initiation fees as a condition of continued employment, whether or not they wish to become union members. See *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

Under a 1980 addition to the NLRA, employees with religious objections to unions may make a contribution equivalent to union dues to a nonlabor, nonreligious, tax-exempt charity. See National Labor Relations Act Amendment of 1980, Pub. L. No. 96-593, 94 Stat. 3452 (1980) (codified at 29 U.S.C. § 169 (1982)).

6. A union's duty of fair representation is implied from § 9(a) of the NLRA, which grants unions exclusive representational status over members of the relevant bargaining unit. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-38 (1953). This duty requires that the union "serve the interests of all [employees] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

The non-union employees in *Beck* asserted that CWA breached its duty of fair repre-

sought an injunction barring CWA from collecting agency fees above those necessary to pay for collective bargaining activities.⁸

This dispute reached the United States Supreme Court in 1988. The Court, in *Communications Workers v. Beck*,⁹ held that section 8(a)(3) of the NLRA authorizes unions to collect only those agency fees germane to collective bargaining activities.¹⁰ According to this holding, section 8(a)(3) of the NLRA does not permit a union, over the objections of nonmembers, to expend funds collected from them on activities unrelated to collective bargaining. By finding a statutory limit on union expenditures, the Court avoided addressing possible limits imposed by the Constitution and by the duty of fair representation.¹¹

This Comment analyzes the *Beck* decision and concludes that the Court's interpretation of section 8(a)(3) was flawed. Part I reviews the case history of *Beck* and the Supreme Court's decision, and criticizes *Beck* for failing to follow the Supreme Court's established method of statutory construction. Part I then examines the language and legislative history of section 8(a)(3). Part II examines the constitutional issue avoided by the *Beck* Court: whether union expenditure of nonmembers' agency fees for political and other non-collective bargaining purposes violates the nonmembers' freedom of speech rights. This Comment concludes that Congress did not intend section 8(a)(3) to forbid all non-collective bargaining expenditures of monies collected pursuant to union security agreements authorized by that statute, and that the absence of state action in an agency shop agreement renders invalid the first amendment claims of objecting nonmembers.

sation by spending compelled agency fees for purposes that the employees found objectionable. See *Beck*, 108 S. Ct. at 2645.

No breach of the duty of fair representation occurs when a union expends agency fees on political activities. See *Price v. International Union*, 795 F.2d 1128, 1135 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988) (vacated and remanded in light of *Beck*). But see *Beck v. Communications Workers*, 800 F.2d 1280, 1286-88 (4th Cir. 1986) (en banc) (Murnaghan, J., concurring) (expenditure of agency fees on political activities breaches duty), *aff'd*, 108 S. Ct. 2641 (1988). First, a union's expenditure of agency fees on political activities does not necessarily involve arbitrary or dishonest conduct by the union. Second, expenditures on political activities may benefit nonmembers and members alike. See *infra* notes 52-54 and accompanying text. Indeed, in § 8(a)(3), Congress fixed the nonmembers' fee for union representation as the equivalent of regular union dues—fully cognizant of the union practice of using those dues for non-collective bargaining activities. See *Cantor, Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61, 80 (1983). The duty of fair representation reflects the notion that the exclusive bargaining representative should "exercise [its] power in [the represented employees'] interest and behalf." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202 (1944). A union's expenditure of agency fees on political activities fits this description.

7. See *infra* notes 65-66 and accompanying text.

8. See *Beck*, 108 S. Ct. at 2645.

9. 108 S. Ct. 2641 (1988).

10. See *id.* at 2657.

11. See *id.* at 2656-57.

I. COMMUNICATIONS WORKERS V. BECK

A. The Circuitous Path to the Supreme Court

The district court decided *Beck* on constitutional grounds. Although the opinion contained no analysis or explanation, the court found that CWA's collection of agency fees for non-collective bargaining purposes violated the first amendment¹² rights of the objecting nonmembers.¹³ The Court of Appeals for the Fourth Circuit affirmed, concluding that CWA's expenditure of agency fees for purposes unrelated to collective bargaining violated both NLRA section 8(a)(3) and the union's duty of fair representation.¹⁴ Though it rested its decision on statutory grounds, thereby removing any constitutional implications, the court opined in dictum that sufficient government action existed to give rise to first amendment claims.¹⁵ In a better reasoned analysis, however, Chief Judge Winter dissented, concluding that section 8(a)(3) of the NLRA authorized the collection of agency fees from nonmembers in amounts equivalent to full union dues.¹⁶ Judge Winter further noted that because agency shop agreements involve only private conduct, they are incapable of violating the first amendment rights of objecting nonmembers.¹⁷

B. The Supreme Court Decision

When *Beck* reached the Supreme Court, Justice Brennan, writing for the majority, relied on a curious method of statutory interpretation to reach the conclusion that section 8(a)(3) limits the uses to which a union may put its agency fees. The Supreme Court's well settled method of statutory construction entails examining, in order, first the language and then the legislative history of the statute.¹⁸ In *Beck*, however, the Court looked outside the statute entirely. The Court worked backwards: instead of beginning with the Labor-Management Relations Act of 1947 ("LMRA"),¹⁹ which added section 8(a)(3) to the NLRA, the Court began its analysis with the 1951 amendments of the Railway Labor Act ("RLA"),²⁰ which governs labor relations in the railroad and airline in-

12. See *infra* notes 65-66 and accompanying text.

13. See *Beck v. Communications Workers*, 468 F. Supp. 93 (D. Md. 1979), *aff'd on other grounds*, 776 F.2d 1187 (4th Cir. 1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988).

14. *Beck*, 776 F.2d at 1209.

15. See *id.* at 1205. On rehearing en banc, the court, in a short per curiam opinion, voted six-to-four to sustain federal jurisdiction, and affirmed the majority panel opinion below. See *id.* at 1280.

16. See *id.* at 1214-15 (Winter, C.J., dissenting).

17. See *id.* at 1214.

18. See, e.g., *Russello v. United States*, 464 U.S. 16, 20 (1983); *Dickerson v. New Banner Institute*, 460 U.S. 103, 110 (1983); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

19. Ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 151-169 (1982)).

20. Ch. 1220, 64 Stat. 1238, 1238-39 (1951) (codified at 45 U.S.C. § 152 (1982)).

dustries, and worked its way back to the statute under consideration, section 8(a)(3) of the NLRA.

Specifically, the Court concluded that *International Association of Machinists v. Street*,²¹ which interpreted section 2, Eleventh of the RLA,²² controlled the interpretation of NLRA section 8(a)(3) since both provisions are "in all material respects identical."²³ The Court reasoned that because *Street* had interpreted section 2, Eleventh of the RLA as prohibiting a union from expending agency fees on political causes,²⁴ and because Congress, when it amended the RLA in 1951, intended to give railroad employees the same rights that industrial employees enjoyed under section 8(a)(3), Congress in 1947 must have intended section 8(a)(3) to authorize the assessment of only those agency fees germane to collective bargaining.²⁵

Using this contorted reasoning, the Court was able to interpret section 8(a)(3) without analyzing its language or legislative history. The real issue, however, is the language and legislative history of section 8(a)(3)—what the Eightieth Congress intended that statute to mean. What the Eighty-first Congress intended in section 2, Eleventh of the RLA or what it thought the Eightieth Congress intended in enacting section 8(a)(3) is largely irrelevant.²⁶ As Justice Blackmun stated in his dissent to *Beck*,

21. 367 U.S. 740 (1961).

22. Section 2, Eleventh of the RLA provides in pertinent part:

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment . . . all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

45 U.S.C. § 152 (1982).

23. *Communications Workers v. Beck*, 108 S. Ct. 2641, 2648 (1988).

24. *See id.* at 2648-49 (citing *International Ass'n of Machinists v. Street*, 367 U.S. 740, 770 (1961)).

25. *Id.*

26. *See* *Russello v. United States*, 464 U.S. 16, 26 (1983) ("it is well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'") (quoting *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983)).

Furthermore, the language and legislative history of § 2, Eleventh do not clearly support *Street's* holding that the statute prohibits union expenditures of agency fees on political causes. *See* Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L. Rev. 3, 41-44 (1983); Cantor, *supra* note 6, at 75. As Justice Brennan himself admitted in an earlier decision, "*Street* embraced an interpretation of the [RLA] not without its difficulties precisely to avoid

"[w]ithout the decision in *Machinists v. Street* . . . the Court could not reach the result it does today. Our accepted mode of resolving statutory questions would not lead to a construction of § 8(a)(3) so foreign to that section's express language and legislative history . . ."²⁷ An examination of the language and legislative history of section 8(a)(3) reveals that Congress did not intend to limit either the amount of agency fees a union may collect or the uses to which a union may put such funds.

C. Statutory and Legislative History Analysis of Section 8(a)(3)

In 1947, the Labor-Management Relations Act added section 8(a)(3) to the NLRA.²⁸ Section 8(a)(3) replaced the original section 8(3) of the NLRA,²⁹ which had permitted unions and employers to enter into closed shop agreements requiring employers to hire only persons who were already union members.³⁰

Section 8(a)(3) embodies a twofold congressional purpose. First, Congress intended to end the abuses associated with compulsory unionism by eliminating unions' power over entry into the job market, and by insulating job status against changes in union membership status.³¹ Second, Congress sought to avoid the "free-rider" problem: in the absence of a union security agreement, the non-union employees reap the benefits of union representation without sharing in its cost.³²

Two provisos of section 8(a)(3) are relevant.³³ The first authorizes em-

facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes . . . " *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977) (emphasis added) (citations omitted).

27. *Beck*, 108 S. Ct. at 2657-58 (Blackmun, J., dissenting) (citations omitted).

28. Ch. 120, 61 Stat. 136, 140-41 (1947) (codified at 29 U.S.C. § 158(a)(3) (1982)).

29. The original section 8(3) provided in pertinent part:

[N]othing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees . . . in the appropriate collective bargaining unit covered by such agreement when made.

NLRA, ch. 372, 49 Stat. 449, 452 (1935) (repealed 1947).

30. *See* *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355 (1949).

31. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor-Management Relations Act of 1947*, at 407, 412-13 (1985) [hereinafter 1 NLRB]; 93 Cong. Rec. 1891, 4558-59, 5086-87 (1947), *reprinted in* 2 NLRB, *Legislative History of the Labor-Management Relations Act of 1947*, at 952-53, 1199, 1417, 1419-20 (1985) [hereinafter 2 NLRB].

Prior to 1947, unions abused closed shop agreements by arbitrarily preventing individuals from obtaining employment by refusing union membership, as well as causing workers to lose their jobs by expelling them from the union without justification. *See* T. Haggard, *supra* note 3, at 36.

32. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 6, 7 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 412-13; 93 Cong. Rec. 4887 (1947) (remarks of Sen. Taft); *see also* NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963).

33. Section 8(a)(3) provides:

It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term

employers and unions to enter into agreements requiring all employees to become union members within thirty days after being hired.³⁴ The second prohibits mandatory discharge of an employee for nonmembership if either, under Part A, membership was not available to the employee "on the same terms and conditions generally applicable to other members,"³⁵ or, under Part B, membership "was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."³⁶ Section 8(a)(3) therefore banned the closed shop, authorizing in its place a less onerous form of union security agreement.³⁷ The exact nature of this less onerous form of union security agreement, however, was the subject of some confusion.³⁸

In 1963, the Supreme Court ended this confusion by ruling, in *NLRB v. General Motors Corp.*,³⁹ that section 8(a)(3) authorizes the agency shop. It reached this conclusion by construing "membership," upon which employment can be conditioned, to mean only the payment of dues, rather than formal union membership.⁴⁰ By finding that section 8(a)(3) did not authorize the union shop, the Court shifted the constitutional inquiry. After *General Motors*, it was no longer necessary to assess the constitutional implications of mandatory union membership. The question remained, however, whether union expenditure of nonmembers' agency fees for political and other non-collective bargaining purposes violates the nonmembers' freedom of speech rights.

The Court in *Beck* similarly avoided the constitutional issue. This

or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

29 U.S.C. § 158(a)(3) (1982).

34. *See id.*

35. *Id.*

36. *Id.*

37. The requirement in § 8(a)(3) that employees affiliate with the union in some fashion was looked on as a small sacrifice necessary to the fiscal health of unions, and incidental to the achievement of job security. Senator Taft, a co-sponsor of the LMRA, reflected the view of Congress when he stated "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important. The important thing is that the man will have the job." See 93 Cong. Rec. 4886 (1947).

38. See T. Haggard, *supra* note 3, at 34.

39. 373 U.S. 734 (1963).

40. *See id.* at 740-44.

time, however, the Court stretched section 8(a)(3) beyond its breaking point—transgressing, in the process, its own doctrine that, in avoiding constitutional questions, the Court may not embrace a statutory construction that "is plainly contrary to the intent of Congress."⁴¹ In *Beck*, the Court adopted a construction of section 8(a)(3) that is inconsistent with the congressional intent expressed in the statutory language and legislative history.

To begin with, the language⁴² and legislative history⁴³ of section 8(a)(3) support a union security agreement more onerous than the agency shop.⁴⁴ The plain language of section 8(a)(3) requires union "membership," and the debates over the statute made no mention of the

41. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988).

42. Congress chose not to authorize explicitly the agency shop in § 8(a)(3). Indeed, § 8(a)(3) authorizes union security agreements requiring union "membership" within 30 days after being hired, see 29 U.S.C. § 158(a)(3) (1982), and the essence of the agency shop is that union membership is not required.

Moreover, the structure of § 8(a)(3) does not support the agency shop interpretation of that statute, for the agency shop interpretation renders part A of the second proviso redundant. Under the agency shop interpretation, the "membership" upon which employment is conditioned is merely the payment of periodic dues and initiation fees to the union. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Part B of the second proviso prohibits mandatory discharge for nonmembership if membership is denied or terminated for reasons other than the failure of the employee to pay periodic dues and initiation fees to the union. Thus, part A of the second proviso, which prohibits mandatory discharge for nonmembership if the union abused its membership criteria, is unnecessary.

43. See 93 Cong. Rec. 4886 ("[u]nder [§ 8(a)(3)], the closed shop is abolished, and a man can get a job with an employer and can continue in that job if . . . he joins the union and pays the union dues") (remarks of Sen. Taft) (emphasis added); S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947), reprinted in 1 *NLRB, supra* note 31, at 412-13; H.R. Rep. No. 245, 80th Cong., 1st Sess. 9 (1947), reprinted in 1 *NLRB, supra* note 31, at 300; Cantor, *supra* note 6, at 72; Hopfl, *The Agency Shop Question*, 49 Cornell L.Q. 478, 484 (1964). Despite hearing testimony on the agency shop, *see id.*, Congress never explicitly discussed the idea. See Stanner, *Legality of Agency Shop Contracts Under the National Labor Relations Act and the Effect of "Right to Work" Laws on Such Union Security Provisions*, 52 Ill. B.J. 247, 251 n.21 (1963) ("Senator Taft's comment on § 8(a)(3) is perhaps the nearest thing to a remark about the agency shop to be found in the legislative history."). To the contrary, Congress primarily focused on the problems associated with compulsory, formal union membership, see 93 Cong. Rec. 4858-77, 4885-87 (1947); *see also* Hopfl, *supra*, at 484. This supports the theory that Congress had some form of union shop in mind when enacting § 8(a)(3).

44. Congress apparently intended § 8(a)(3) to authorize a variation of the union shop. Congress called the union security agreement authorized in § 8(a)(3) a "union shop." See H.R. Rep. No. 245, 80th Cong., 1st Sess. 30 (1947), reprinted in 1 *NLRB, supra* note 31, at 321; 93 Cong. Rec. 5079-80 (1947), reprinted in 2 *NLRB, supra* note 31, at 1405. Indeed, the first proviso of § 8(a)(3) expressly authorizes a union shop. However, part B of the second proviso insulates members who are expelled from the union against termination of employment so long as they continue to tender union dues. This transforms the union security agreement authorized in § 8(a)(3) into a variation of the traditional union shop, for in a genuine union shop a worker expelled from the union loses his job.

Under this variation, an employee must apply for membership in his exclusive bargaining representative and accept a subsequent invitation to join. Workers who are initially refused membership, and those who are accepted but subsequently expelled from the

agency shop, instead focusing on compulsory membership.⁴⁵ Therefore, it is erroneous to conclude that Congress intended section 8(a)(3) to limit the amounts of agency fees unions may collect and the uses to which they may put them.

Furthermore, even if one assumes that Congress intended section 8(a)(3) to authorize only the agency shop, the statutory language and legislative history of the LMRA reveal that Congress did not intend section 8(a)(3) to prevent all non-collective bargaining-related expenditures by unions of the monies collected from employees pursuant to authorized union security agreements.

1. The Statutory Language

The plain language of section 8(a)(3) authorizes union security agreements under which unions can collect from any employee the "periodic dues and initiation fees *uniformly* required as a condition of acquiring or retaining membership."⁴⁶ The statute contains no mention of lesser "dues" and "fees" that nonmember employees covered by a union security agreement may be required to pay their exclusive bargaining representative. Furthermore, as the dissent in *Beck* pointed out, section 8(a)(3) does not address the uses to which a union may put the monies collected pursuant to a union security agreement.⁴⁷

The *Beck* Court explained away section 8(a)(3)'s silence⁴⁸ with two arguments. The Court first noted that, in *Street*, it had attached no significance to RLA section 2, Eleventh's silence concerning the permissible uses of agency fees, and now saw no reason to give greater weight to congressional silence in section 8(a)(3).⁴⁹ However, as the dissent aptly pointed out, the Court's "answer" to the absolute lack of evidence that Congress intended to regulate agency fee expenditures "is no answer at all."⁵⁰ When finding an implicit limitation in a statute, the Court's task is not to weigh silence, but to find some support for its proposition.⁵¹

The Court's second explanation for this silence was that explicitly

union cannot be discharged for nonmembership by the employer so long as they tender periodic dues and initiation fees to the union. See T. Haggard, *supra* note 3, at 37.

45. See Hopfl, *supra* note 43, at 484.

46. 29 U.S.C. § 158(a)(3) (1982) (emphasis added).

47. See *Communications Workers v. Beck*, 108 S. Ct. 2641, 2660-61 (1988) (Blackmun, J., dissenting).

48. See *id.* at 2656 (opinion of the Court).

49. The Court stated:

Congress was equally aware of the same practices by railway unions . . . yet neither in *Street* nor in any of the cases that followed it have we deemed Congress' failure in § 2, Eleventh to prohibit . . . such expenditures as an endorsement of fee collections unrelated to collective bargaining expenses. We see no reason to give greater weight to Congress' silence in the NLRA than we did in the RLA . . .

Id. (citations omitted).

50. *Id.* at 2661 n.7 (Blackmun, J., dissenting).

51. See *id.*

prohibiting non-collective bargaining expenditures of agency fees would have been redundant since Congress understood section 8(a)(3) "to enable unions to charge nonmembers only for those activities that actually benefit them."⁵² This rationale begs the question because non-collective bargaining expenditures can benefit nonmembers. Many of the employment-related benefits provided by unions are obtained through the political arena.⁵³ Items secured through legislative lobbying, such as pension plans and occupational health and safety measures, all benefit dues-paying employees as much as if they had been secured from the employer.

Thus, by limiting compelled agency fees to contract negotiation and administration expenses, *Beck* resurrected the "free rider" problem that section 8(a)(3) was designed to prevent. When a union secures an employment-related benefit, all represented employees benefit. This is true whether the benefit is secured through the political arena or at the bargaining table. If a represented employee enjoys the benefit without contributing to its cost, he is a free rider. Represented employees who enjoy the benefits derived from political expenditures without contributing to their cost are no less free riders than those who fail to financially support the benefits derived from contract negotiation and administration expenses.⁵⁴

2. The Legislative History

The legislative history of the LMRA also reveals that Congress did not intend to limit unions' use of fees. Congress was well aware of labor unions' use of the political arena to obtain workers' benefits,⁵⁵ and acknowledged that through such expenditures, the American worker "ha[d] been compelled to contribute to causes and candidates for public office to which he was opposed."⁵⁶ In response, Congress explicitly considered proposed provisions limiting labor unions' spending of dues and fees for non-collective bargaining purposes.⁵⁷ Congress, however, chose

52. *Id.* at 2656 (opinion of the Court).

53. See Cantor, *supra* note 6, at 75; Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C.D.L. Rev. 591, 601-02 (1981).

54. See Cantor, *supra* note 6, at 75; Gaebler, *supra* note 53, at 603.

55. See *United States v. UAW*, 352 U.S. 567, 579-80 (1957); H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947), reprinted in 1 NLRB, *supra* note 31, at 295.

56. H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947), reprinted in 1 NLRB, *supra* note 31, at 295.

57. For instance, the original House bill contained a "bill of rights" for workers. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 31-33 (1947), reprinted in 1 NLRB, *supra* note 31, at 322-24. Within this proposed "bill of rights" was a provision declaring that "[m]embers of any labor organization shall have the right to be free from unreasonable . . . financial demands of such organization," H.R. 3020, 80th Cong., 1st Sess. § 7(b) (1947), reprinted in 1 NLRB, *supra* note 31, at 49, as well as a provision that Representative Hartley described as allowing a worker "to decide for himself whether or not his money will be spent for political purposes." 93 Cong. Rec. 3425 (1947) (statement of Rep. Hartley). The Senate, despite hearing testimony on the danger of failing to limit uses of dues to be collected by unions pursuant to the union security agreements being

to add only section 304 to the LMRA.⁵⁸ Section 304 merely prohibits unions from using employees' dues for federal elections,⁵⁹ while leaving unions free to use dues for lobbying purposes and for political campaigns outside of federal elections. This Congressional refusal to place limits on the uses to which a union could put dues compels the conclusion that Congress did not intend section 8(a)(3) to forbid all non-collective bargaining expenditures of monies collected through union security agreements.

The *Beck* Court dismissed this argument as "misplaced" because these more stringent proposals did not concern the rights of nonmembers who are compelled to pay union dues, but rather applied only to union members.⁶⁰ As previously noted, however, Congress did not explicitly discuss the agency shop dues-paying nonmember; it was compulsory membership that received the greatest deliberation.⁶¹ But even if the term "membership" in section 8(a)(3) means only the payment of dues, as the Supreme Court said it does,⁶² then surely the "member" sought to be protected in the more stringent proposals included the dues-paying employee.

The House Committee on Education and Labor Report accompanying the more stringent proposals reveals this to be the case, because the Committee recognized the increased importance of the proposals in light of the authorization of union security agreements requiring union "membership."⁶³ If the dues-paying employee is a union "member," as the Supreme Court ruled in *General Motors*,⁶⁴ then the more stringent proposals were not limited in scope to voluntary union members, as the *Beck*

authorized, see *Beck v. Communications Workers*, 776 F.2d 1187, 1215 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd*, 108 S. Ct. 2641 (1988), refused to agree to the House's proposed "bill of rights" provisions. See 93 Cong. Rec. 6436 (1947).

58. LMRA, ch. 120, 61 Stat. 136, 159-60 (1947). Section 304 was repealed by § 201(a) of the Federal Election Campaign Act Amendments, Pub. L. No. 94-283, 90 Stat. 475, 496 (1976), and replaced by § 112(2) of the Federal Election Campaign Act Amendments, Pub. L. No. 94-283, 90 Stat. 475, 486-490 (1976) (codified as amended at 2 U.S.C. § 441b (1982)). Section 441b prohibits the use of agency fees by unions in connection with federal elections. See 2 U.S.C. § 441b (1982).

59. See 93 Cong. Rec. 6440 (1947) (statement of Sen. Taft).

60. See *Beck*, 108 S. Ct. at 2655.

61. See *supra* note 45 and accompanying text.

62. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 743-44 (1963).

63. H.R. Rep. No. 245, 80th Cong., 1st Sess. 31 (1947), reprinted in 1 *NLRB, supra* note 31, at 322, provides:

Having given to unions great power over workers, we now make sure that the unions will operate democratically, that they will use their powers in the interest of the workers, and that those that heretofore have exploited the workers no longer can do so. The permitting . . . of agreements between employers and labor organizations requiring union membership makes this bill of rights of even greater importance than would be the case if union membership were, in all respects, entirely voluntary.

Id. (emphasis added).

64. See *supra* notes 39-40 and accompanying text.

Court contended, but rather protected all employees bound by a union security agreement authorized by section 8(a)(3). Ironically, *Beck's* revision of section 8(a)(3) was unnecessary, for the constitutional implications are rendered moot by the absence of state action.

II. ABSENCE OF STATE ACTION IN AGENCY SHOP AGREEMENTS

Because a proper interpretation of section 8(a)(3) permits unions to collect agency fees from nonmembers in amounts equal to regular union dues, and does not place any restrictions on the uses to which unions may put these fees, the statute raises the constitutional issue whether a union's expenditure of agency fees on political activities violates the first amendment rights of the objecting nonmembers.⁶⁵

Although there is disagreement on this issue,⁶⁶ it is here suggested that such an expenditure cannot violate the objecting nonmembers' first amendment rights because an agency shop agreement by a union and an employer does not involve government action.

A. The State Action Requirement

By its terms, the first amendment proscribes only government action, not the action of private individuals.⁶⁷ This distinction gave rise to the "state action" doctrine: challenged conduct is subject to constitutional

65. The exact nature of the first amendment interests involved in the agency shop scenario is the subject of some confusion. It is not the freedom of association—that first amendment interest is implicated only in the closed shop and union shop situations where formal union membership is compulsory. Nor is it the traditional freedom of speech, for the objecting nonmembers claim the right not to speak.

Justice Stewart, in *Abood v. Detroit Board of Education*, 431 U.S. 209, 222-23 (1977), characterized the right of freedom of belief as the first amendment interest implicated when a non-union employee is compelled to financially support the union. However, some commentators disagree. See Cantor, *supra* note 26, at 71; Gaebler, *First Amendment Protections Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 1003 (1982).

66. Compare *Price v. International Union*, 795 F.2d 1128, 1133 (2d Cir. 1986) (no state action), *vacated*, 108 S. Ct. 2890 (1988) and *Beck v. Communications Workers*, 776 F.2d 1187, 1221-25 (4th Cir. 1985) (Winter, C.J., dissenting) (same), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988) and *Kolinske v. Lubbers*, 712 F.2d 471, 476 (D.C. Cir. 1983) (same) and *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410-11 (10th Cir. 1971) (same) and *Linscott v. Millers Falls Co.*, 440 F.2d 14, 19-20 (1st Cir. 1971) (Coffin, J., concurring) (same) and *Ottens v. Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953) (same), *aff'd*, 229 F.2d 919 (1956) with *Beck*, 776 F.2d at 1205 (finding state action) and *Hammond v. United Papermakers*, 462 F.2d 174, 175 (6th Cir.) (same), *cert. denied*, 409 U.S. 1028 (1972) and *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16 (1st Cir. 1971) (same) and *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003-04 (9th Cir. 1970) (same) and *Lykins v. Aluminum Workers Int'l Union*, 510 F. Supp. 21, 25-26 (E.D. Pa. 1980) (same) and *Havas v. Communications Workers*, 509 F. Supp. 144, 148-49 (N.D.N.Y. 1981) (same).

67. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794 n.34 (1978); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226-27 & n.23 (1977); *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973); U.S. Const. amend. I.

scrutiny only if it entails governmental action.⁶⁸ The Supreme Court has put forth many "tests" for determining the existence of state action.⁶⁹ These state action tests, however, have virtually no analytical utility, for they contain broad language that can support both sides of a state action controversy. Thus, as the Supreme Court itself has stated, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."⁷⁰

B. Absence of State Action in Section 8(a)(3)

An agency shop agreement is a contract between two private parties—labor and management⁷¹—which, standing alone, represents the product of purely private action. Section 8(a)(3) of the NLRA is permissive,⁷² and as such, does not sufficiently infuse the federal government into this private relationship to constitute state action.⁷³ Section 8(a)(3) simply provides that federal law does not preclude employers and their employees' bargaining representatives from entering into agency shop agreements.⁷⁴ Thus, section 8(a)(3) does not compel an employer and a union to adopt an agency shop agreement, or any other form of union security, as part of their collective bargaining agreement.

Two other provisions of the NLRA reinforce section 8(a)(3)'s permissiveness. Under section 14(b),⁷⁵ section 8(a)(3) does not preempt state laws banning the agency shop,⁷⁶ but merely authorizes agency shop agreements in the absence of state law proscriptions.⁷⁷ Accordingly, sec-

68. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978).

69. See, e.g., *Lugar*, 457 U.S. at 937; *Flagg Bros.*, 436 U.S. at 157; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); *Terry v. Adams*, 345 U.S. 461 (1953).

70. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *accord Kolinske v. Lubbers*, 712 F.2d 471, 477 (D.C. Cir. 1983); *Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221, 222; *T. Haggard, supra* note 3, at 244.

71. See *T. Haggard, supra* note 3, at 239.

72. See *Communications Workers v. Beck*, 108 S. Ct. 2641, 2644-45 (1988) (section 8(a)(3) "permits" an employer and union to enter into an agency shop agreement).

73. See *Price v. International Union*, 795 F.2d 1128, 1133 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988); *Beck v. Communications Workers*, 776 F.2d 1187, 1221-25 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); *Kolinske v. Lubbers*, 712 F.2d 471, 476 (D.C. Cir. 1983); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410-411 (10th Cir. 1971); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 19-20 (1st Cir. 1971) (Coffin, J., concurring); *Otten v. Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953), *aff'd*, 229 F.2d 919 (1956).

74. See 29 U.S.C. § 158(a)(3) (1982).

75. 29 U.S.C. § 164(b) (1982).

76. Twenty-one states have enacted laws allowing employees to withhold payment of union dues. See *W. Gould, A Primer on American Labor Law* 50-51 (2d ed. 1986).

77. Section 14(b) states: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (1982).

tion 8(a)(3)'s authorization of agency shop agreements is contingent not only upon the whim of the employer and union to adopt an agency shop agreement, but also upon the discretion of the particular state to decline to proscribe agency shop agreements.⁷⁸

Section 8(d)⁷⁹ of the NLRA also illustrates section 8(a)(3)'s permissiveness. Section 8(d) announces the NLRA's neutrality with respect to the contents of collective bargaining agreements.⁸⁰ The NLRA does not mandate the existence or content of any provision of a collective bargaining agreement, including an agency shop clause. The employer and union are free to include or omit an agency shop clause from their collective bargaining agreement, again subject only to the discretion of the

78. In addition to demonstrating the permissive nature of § 8(a)(3), § 14(b) provides the crucial distinction between § 8(a)(3) and its parallel provision, § 2, Eleventh of the Railway Labor Act. In *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), the Court held that the RLA's authorization of agency shop agreements involved government action, *id.* at 232, basing its decision solely upon § 2, Eleventh's preemption of state law prohibiting agency shop agreements. See *id.* This same basis for finding government action does not appear in the NLRA, however, because NLRA § 14(b) mandates that the statute's authorization of agency shop agreements yield to contrary state law. The notion underlying *Hanson* that the federal law, by overriding conflicting state laws, became the "source of the power and authority" for agency shop agreements is absent in the context of the NLRA. As one court phrased it:

By authorizing the inclusion of [agency] shop clauses subject to the whim of the states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA. The RLA, on the other hand, goes further and creates a federal right or privilege that enables private parties to override state . . . laws.

Price v. International Union, 795 F.2d 1128, 1133 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988); *accord Beck v. Communications Workers*, 776 F.2d 1187, 1223-24 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); *Kolinske v. Lubbers*, 712 F.2d 471, 476 (D.C. Cir. 1983). The Supreme Court itself has noted the absence of this preemption feature from the NLRA. See *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232 n.5 (1956).

Courts and commentators, however, do not agree that this is a distinction with a difference for state action purposes. Compare, e.g., *Price*, 795 F.2d at 1132-33 (holding that § 14(b) distinguishes NLRA from RLA and renders *Hanson* inapplicable) and *Beck*, 776 F.2d at 1224 (Winter, C.J., dissenting) (same) and *Kolinske*, 712 F.2d at 476 (same) and *Hovan v. United Bhd. of Carpenters*, 704 F.2d 641, 643 (1st Cir. 1983) (same) and *T. Haggard, supra* note 3, at 241 (regarding state action issue in relation to NLRA, "the *Hanson* theory would appear to be inapplicable") with *Beck*, 776 F.2d at 1206 (difference has no relevance) and *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16 (1st Cir. 1971) (same) and *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003 (9th Cir. 1970) (assuming *Hanson* applies to NLRA) and *Havas v. Communications Workers*, 509 F. Supp. 144, 148-49 (N.D.N.Y. 1981) (holding *Hanson* applies to NLRA) and *Reilly, supra* note 2, at 561-63 (assuming *Hanson* applies to NLRA).

79. 29 U.S.C. § 158(d) (1982).

80. Section 8(d) states in pertinent part:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession
29 U.S.C. § 158(d) (1982).

state.⁸¹ Taken together, sections 8(a)(3), 14(b) and 8(d) of the NLRA reveal that the Act merely provides federal authorization of private conduct in negotiating and enforcing agency shop agreements. It is well settled by the Supreme Court, however, that the government's authorization of private conduct, without anything more, is not sufficient to constitute state action.⁸² Thus, the NLRA's authorization of agency shop agreements does not convert the adoption of an agency shop agreement by private parties into state action.⁸³

Although the agency shop agreement is entered into by private parties, some courts⁸⁴ and commentators⁸⁵ argue that one of the private parties—the union—does not act in a private capacity. This theory⁸⁶ for finding state action in agency shop agreements stems from *Steele v. Louisville & Nashville R.R. Co.*,⁸⁷ which is often cited in support of the theory: "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents"⁸⁸

According to this theory, a union's ability to collect dues from employees who are not, and do not wish to become, union members flows from Congress' grant to unions of the right of exclusive representation in sec-

81. In this respect, the NLRA's policy of neutrality regarding the contents of collective bargaining agreements distinguishes it from public sector collective bargaining, and, therefore, from *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The *Abood* Court, in a plurality opinion, found without discussion that an agency shop agreement contained in a public employment contract involved state action. See *id.* at 226 n.23. The Court's brevity is not surprising, however, because all aspects of public employment necessarily involve government action; the employer is the government. Accordingly, *Abood's* finding of state action in a public sector agency shop agreement has no relevance to the private sector and the NLRA. See *Beck v. Communications Workers*, 776 F.2d 1187, 1225 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); *Kolinske v. Lubbers*, 712 F.2d 471, 476 (D.C. Cir. 1983).

82. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974).

83. See *Price v. International Union*, 795 F.2d 1128, 1133 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988); *Beck*, 776 F.2d at 1222 (Winter, C.J., dissenting); *Kolinske*, 712 F.2d at 478.

84. See *Buckley v. American Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1094-95 (1974) (Douglas, J., dissenting from denial of certiorari); *Beck*, 776 F.2d at 1207.

85. See T. Haggard, *supra* note 3, at 247 ("[a]rguably, . . . the statutory grant of the right of exclusive representation . . . necessarily involves the exercise of powers normally reserved to the sovereign; that whenever, pursuant to this delegation of authority, the union acts in its representative capacity, this is 'state action'"); Summers, *Union Powers and Workers' Rights*, 49 Mich. L. Rev. 805, 811 (1951).

86. This theory is considered "the leading theoretical justification for raising constitutional issues within the context of ostensibly private collective bargaining agreements." T. Haggard, *supra* note 3, at 247.

87. 323 U.S. 192 (1944).

88. *Id.* at 202 (citation omitted). Although *Steele* dealt with the Railway Labor Act, 45 U.S.C. § 151-64 (1982), its imposition of the duty of fair representation upon railway unions has been extended to unions subject to the NLRA. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

tion 9(a) of the NLRA.⁸⁹ Section 9(a) gives a union receiving a majority of votes from within a proper bargaining unit the right to make a collective bargaining agreement with the employer that is binding on all employees, including those who did not vote for the union.⁹⁰ Thus, the NLRA "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."⁹¹ Proponents of this theory argue that section 9(a)'s grant of exclusive representation and section 8(a)(3)'s authorization of agency shop agreements, taken together, transform the union into a state actor.⁹²

This theory⁹³ has a superficial appeal, in view of the extensive federal regulation of labor unions.⁹⁴ While the federal government's grant of exclusive representation and requirement that employers bargain over union security agreements⁹⁵ might make it easier for unions to secure

89. Section 9(a) states in pertinent part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

29 U.S.C. § 159(a) (1982).

90. See *id.*

91. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

92. See, e.g., *Beck v. Communications Workers*, 776 F.2d 1187, 1207 (4th Cir. 1985), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); *Reilly*, *supra* note 2, at 563.

93. The essence of the theory is that state action exists because exclusive representation is akin to a governmental grant of monopoly power. Yet in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Supreme Court held that even government-conferred monopoly power is insufficient to create state action. See *id.* at 358. Many courts that find no state action in § 8(a)(3) correctly cite *Jackson* for that proposition. See, e.g., *Price v. International Union*, 795 F.2d 1128, 1133 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988); *Beck*, 776 F.2d at 1222 (Winter, C.J., dissenting); *Kolinske v. Lubbers*, 712 F.2d 471, 478 (D.C. Cir. 1983).

94. Those who would transform the union into a state actor also point to the extensive federal regulation of labor unions, including the federal labor contract enforcement machinery in § 301 of the LMRA, 29 U.S.C. § 185(a) (1982). However, it is well settled that federal regulation of a private entity does not, in and of itself, create state action. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841-42 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950); *Kolinske v. Lubbers*, 712 F.2d 471, 478 (D.C. Cir. 1983). Nor does the federal labor contract enforcement machinery create state action. See *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979).

95. Some proponents of this theory additionally cite the inclusion of union security within the mandatory subjects of bargaining listed in § 8(d), 29 U.S.C. § 158(d) (1982), as creating state action. See *Reilly*, *supra* note 2, at 563. Under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1982), employers are required to bargain with unions over mandatory subjects of bargaining. The argument is that this bargaining requirement in reality requires the inclusion of a union security provision in the collective bargaining agreement. See *Reilly*, *supra* note 2, at 563. However, as noted above, the NLRA is neutral with respect to the contents of collective bargaining agreements. The NLRA does not man-

agency shop agreements and thus nonmembers' dues,⁹⁶ this is not sufficient to label the union a state actor. The theory is fatally overbroad. Congress' conferral of exclusive representation to unions underlies most provisions in a collective bargaining agreement. Yet the Constitution does not apply to the terms of labor contracts.⁹⁷

Moreover, the principle of exclusive representation is implicated in virtually all interaction between the union and the nonmember employees it represents. Therefore, if exclusive representation transformed the union into a state actor, many union rules would be subject to constitutional scrutiny. Yet this is not the case. The Supreme Court has repeatedly held that union rules governed by the NLRA do not involve state action.⁹⁸ Congress' passage of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"),⁹⁹ which contained a "Bill of Rights" for union members,¹⁰⁰ also proves that union rules are not subject to constitutional scrutiny. Congress apparently believed that neither unions nor their rules were subject to constitutional scrutiny—to the contrary, Congress believed the LMRDA necessary to impose the obligations it contains.¹⁰¹

Furthermore, if a union's expenditure of agency fees on political activities involved state action, all unions would be state actors and their every move would be subject to constitutional scrutiny.¹⁰² This road is paved with economic and political hazards¹⁰³ that Congress and the Supreme Court have wisely avoided traveling.

CONCLUSION

Section 8(a)(3) of the NLRA authorizes unions to charge nonmembers the equivalent of regular union dues and initiation fees for union representation. Congress did not place any limits on the uses to which unions may put those dues. The Supreme Court's decision in *Communications Workers v. Beck*, which construed section 8(a)(3) as prohibiting unions from expending agency fees on non-collective bargaining activities, is both erroneous and unnecessary. It is erroneous because there is no support in the language or legislative history of section 8(a)(3) for the Court's reading of that statute, and unnecessary because the absence of state action renders moot the first amendment claims of the objecting nonmembers. Thus, *Beck* incorrectly impinges upon unions' efforts to obtain job-related benefits through legislative lobbying and financial support of pro-labor candidates—efforts that are essential to effective representation in this country's government-regulated employment industry.

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date that a union security agreement be included in collective bargaining agreements, only that the parties bargain over it in good faith.

96. See *Beck v. Communications Workers*, 776 F.2d 1187, 1222 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); T. Haggard, *supra* note 3, at 242; Reilly, *supra* note 2, at 563.

97. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 250 (1977) (Powell, J., concurring); see also *Aldridge v. Boys*, 98 Ill. App. 3d 803, 808, 424 N.E.2d 886, 889-90 (1981); T. Haggard, *supra* note 3, at 247.

98. See, e.g., *United Steelworkers v. Sadlowski*, 457 U.S. 102, 111 (1982); *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979); *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950).

99. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. § 401-531 (1982 & Supp. V 1986)).

100. Among those rights is § 101(a)(2), which "restate[s] a principal First Amendment value—the right to speak one's mind without fear of reprisal." *United Steelworkers v. Sadlowski*, 457 U.S. 102, 111 (1982).

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

102. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 252 n.7 (1977) (Powell, J., concurring) ("If collective-bargaining agreements were subjected to the same constitutional constraints as federal rules and regulations, it would be difficult to find any stopping place in the constitutionalization of regulated private conduct.")

103. See *id.*; *Hovan v. United Bhd. of Carpenters*, 704 F.2d 641, 642-43 (1st Cir. 1983); Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 620 (1959); Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 Yale L.J. 345, 348-49 (1961).

Political Quotations

RELIGION AND THE STATE

3128. Nonviolent action, the Negro saw, was the way to supplement, not replace, the process of change. It was the way to divest himself of passivity without arraying himself in vindictive force. —Martin Luther King Jr., *Why We Can't Wait*, 1964

3129. To give up the task of reforming society is to give up one's responsibility as a free man. —Alan Paton, "The Challenge of Fear", *Saturday Review*, Sep 9, 1967

3130. To achieve reforms, you have sometimes to try to make the revolution. —Anonymous, quoting a student at the University of Nanterre, France, following 1968 upheaval, *The Economist*, May 14, 1988

3131. Personally, I am not nonviolent, but I'm not a fool either. I can count. —Whitney Moore Young Jr., recalled on his death, Mar 11, 1971

3132. Should I ... stand on 125th Street cussing out Whitey to show I am tough? Or should I go downtown and talk to an executive of General Motors about 20,000 jobs for unemployed Negroes? —Whitney Moore Young Jr., recalled on his death, Mar 11, 1971

3133. Many middle-class reformers will find to their surprise, that the populace is going to be quick to bite the hand that aims to feed it. The populace doesn't want to be fed; it wants more freedom to graze on its own. —Irving Kristol, *Esquire*, May 23, 1978

3134. If you fear making anyone mad, then you ultimately probe for the lowest common denominator of human achievement. —Jimmy Carter, speech to the Future Farmers of America in Kansas City, Nov 9, 1978

RELIGION AND THE STATE

3135. If men think that a ruler is religious and has a reverence for the Gods, they are less afraid of suffering injustice at his hands. —Aristotle, *Politics*, 343 B.C.

3136. Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's. —Bible, *Matthew*, ca. 90

3137. The doctrine of persecution for cause of conscience is most evidently and lamentably contrary to the doctrine of Christ Jesus the Prince of Peace. —Roger Williams, *The Bloudy Tenant of Persecution for Cause of Conscience*, 1644

3138. A sanctimonious man is one who under an atheist king would be atheist. [*Un dévot est celui qui sous un roi athée serait athée.*] —Jean de La Bruyère, "De la mode", *Les Caractères*, 1688

3139. All religions must be tolerated...every man must go to heaven in his own way. [*Die Religionen müssen alle toleriert werden ... denn hier muss ein jeder nach seiner Fassung selig werden.*] —Frederick the Great, note to the Religious Department, Jun 22, 1740

3140. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience. —Patrick Henry, *Virginia Bill of Rights*, Jun 12, 1776

3141. That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical. —Thomas Jefferson, "A Bill for Establishing Religious Freedom", 1779

3142. It does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg. —Thomas Jefferson, *Notes on the State of Virginia*, 1782

3143. It behoves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own. —Thomas Jefferson, letter to Benjamin Rush, Apr 21, 1803

public libraries later assumed. This Bill was the third part of his general system of education, and the function of TJ's "public library" is to be explained in that context. In his Autobiography TJ stated that the three grades of education that he proposed were (1) schools for elementary purposes; (2) "Colleges for a middle degree of instruction"; and (3) "an ultimate grade for teaching the sciences generally, and in their highest degree"—this third grade being provided for in a Bill "for the establishment of a library" (Ford, I, 66-7). In a more nearly contemporary account, TJ stated that this Bill "proposed . . . to begin a public

library and gallery, by laying out a certain sum annually in books, paintings, and statues (*Notes on Virginia*, Ford, III, 255); however, the Bill provides only for the purchase of books and maps, making no mention of the acquisition of objects suitable to an art museum. The real object of his library was that "of indulging the researches of the learned and curious." It was obviously not intended for the whole reading public or to meet the general reading requirements of the entire community, but to enable those of superior talent to give freer rein to their particular geniuses (see notes to Bill No. 79, above).

82. A Bill for Establishing Religious Freedom

Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that¹ Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint;² that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion,³ who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone;⁴ that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors,⁴ is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those temporary⁵ rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence

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on our religious opinions, any more than⁶ our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends also⁷ to corrupt the principles of that *very*⁸ religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; *that the opinions of men are not the object of civil government, nor under its jurisdiction;*⁹ that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

*We the General Assembly of Virginia do enact*¹⁰ that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act¹¹ irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural

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rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.

Report, p. 58-9. No MS copy of this famous Bill has been found. Text of Act as adopted in 1785 is in Hening, XII, 84-6. The engrossed MS copy of the Act, on parchment, is in Vi (photostat in TJ Editorial Files); the text in Hening agrees with this authoritative text and also with the text of the official printing in the session laws of Oct. 1785 (*Acts passed at a General Assembly of the Commonwealth of Virginia*, Richmond: Dunlap and Hayes [1786], p. 26-7). For various contemporary printed texts, see note below. Since the printed text of 1779 is reproduced in facsimile in this volume, the text of the *Report* has been followed here so that the slight variations in punctuation and spelling can be noted. The texts of both the 1779 broadside and the 1784 *Report* are obviously different from the MS as TJ would normally have written it, the former employing such spellings as "honours," "labour," &c., and the latter being punctuated in an erratic manner. These variations may be attributed to copyists' or printers' errors. These two texts are the closest we can get to TJ's original, but there is little to choose between them: the most that can be said is that the 1779 broadside is the earliest known text. *Those parts of the Bill that were deleted by amendment are printed in italic type*; it is important to note that this device is employed only as a graphic means of showing at a glance the changes made by the General Assembly and that the text as printed in *Report*, p. 58-9, is entirely in roman type and should, for ordinary purposes, be so quoted.

For a good summary and background of TJ's attitude toward the established Church, dissenting groups, and the relationship of church and state, see Malone, *Jefferson*, I, 274-80. This Bill, which TJ ranked with the Declaration of Independence, might indeed be considered as a necessary consequence of it: as the Declaration of Independence asserted the natural right of a people to choose any form of government conducive to their safety and happiness, so the Bill for Establishing Religious Freedom asserted the natural right of a person to choose his beliefs and opinions free of compulsion. In this sense the

famous preamble to TJ's Bill provided philosophical justification, as of natural right, not merely for the ideas of religious toleration and separation of state and church but also for the right of the individual to complete intellectual liberty—"the opinions of men are not the object of civil government, nor under its jurisdiction." TJ later asserted that the effort to disestablish the Church of England in Virginia and to establish religious freedom brought on "the severest contests" in which he had ever been engaged (see Notes and Proceedings on Discontinuing the Establishment of the Church of England, 11 Oct. to 9 Dec. 1776). The effort had resulted in 1776 in a compromise: TJ and his colleagues had failed to obtain repeal of all laws interfering with religious worship and, instead of disestablishing the Church, had only succeeded in exempting dissenters from levies made in behalf of the establishment. From 1776 to 1779 the General Assembly was assailed with petitions for and against further reform. The particular issue was whether the maintenance of churches should be left to voluntary contributions or whether "a general assessment should not be established by law, on every one, to the support of the pastor of his choice" (Autobiography, Ford, I, 54). The Bill for Establishing Religious Freedom, though TJ declared he had drawn it in 1777, was probably not brought forward in these years from 1776 to 1779 because the intense fight over the question of a general assessment made it difficult enough to hold the position that had been gained. However, on 4 June 1779, after TJ had been elected governor, the House ordered Harvie, Mason, and Baker to bring in a bill on this subject. TJ's Bill was presented by Harvie on 12 June, the next day it passed the second reading, and the third reading was postponed to 1 Aug., which killed it for that session (JHD, May 1779, 1827 edn., p. 34, 36, 44, 46).

There is no reference in the Journals of the House of Delegates to the printing of TJ's Bill as introduced at the May 1779 session, but, though attributed to the year 1785 in the bibliographies of Sabin and others, it was printed in the

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summer of 1779 as a broadside under the title: "A BILL for establishing RELIGIOUS FREEDOM, printed for the consideration of the PEOPLE" (see facsimile reprint in this volume; see also Mazzei to TJ, 19 Mch. 1780). Whether this was done under the authority of the General Assembly or privately by TJ and other supporters of the Bill is not certain, but, though the General Assembly from time to time did print bills that were held over from one session to another so that they could be discussed by the people (e.g., see Bill for Giving the Members of the General Assembly an Adequate Allowance, 12 Dec. 1778), the available evidence seems to support the supposition that it was privately issued. For, if the General Assembly had authorized publication, there would seem to be no reason why such authorization should not have appeared in the Journals, as other similar authorizations did. Also, at the Oct. 1779 session there were several petitions for and against this particular Bill and two of them express doubt as to whether the publication was authorized by the General Assembly or not. A petition from Augusta county expressed approval of "the bill presented to the last Assembly, (and published, as they suppose, for the Consideration of the people) 'for establishing religious freedom'" and prayed that it be enacted into law. Another petition from dissenters in Lunenburg county asserted that they had seen "a bill which they suppose was published by order of the last Assembly, 'for establishing religious freedom'" (this petition, incidentally, supports TJ's assertion that some of the dissenting groups, having gained their point in 1776, went over to the opposition and supported the idea of a general assessment; for the petition of the Lunenburg dissenters approved the Bill and at the same time prayed for the enactment of a general assessment). Other petitions from Essex and Amherst concerned the Bill but did not refer to the fact or the method of its being printed (JHD, Oct. 1779, 1827 edn., p. 20, 27, 32, 37). It seems obvious that, if this Bill had been printed under public authority, that fact would have been known to the petitioners and their memorials to the General Assembly would not, therefore, have expressed doubt on the point. For if the broadside had been printed by public authorization, it would no doubt have been transmitted as such by the clerk of the House or by the executive

department. When the printing of *The Report of the Committee of Revisors* was authorized by the General Assembly in 1784, the resolution specifically directed that the pamphlet "be distributed throughout the several counties by the Executive, in such manner as they shall judge most conducive to the end proposed." It is difficult to imagine what motive could have persuaded, or what means could have been employed by, the General Assembly to conceal its authorization of the printing of the broadside if, as on this and other occasions, its object was to have the Bill "printed for the consideration of the people."

The effort to have Bill No. 82 passed separately at the May and Oct. sessions in 1779 was not successful. But in Oct. 1785 this Bill was one of two in the second half of the revisal brought up for consideration and the only one of these adopted (the other was Bill No. 79). Madison reported to Monroe on the day the Bill passed the House: "The Bill proportioning crimes and punishments was the one at which we stuck after wading thro' the most difficult parts of it. A few subsequent bills however were excepted from the postponement. Among these was the Bill for establishing Religious freedom, which has got thro' the H. of Delegates without alteration, though not without warm opposition. Mr. Mercer and Mr. Corbin were the principal Combatants against it" (Madison to Monroe, 17 Dec. 1785, *Writings*, ed. Hunt, II, 205). This was something of an understatement. The Bill was introduced by Madison 31 Oct. 1785, read twice, and referred to the committee of the whole. It was debated and amended by the committee on 15 Dec., and this amendment, which has not been identified, was approved by the House the next day. At the same time another amendment was proposed—that is, that the whole of TJ's preamble be struck out and the following substituted therefor: "Whereas, it is declared by the Bill of Rights, 'that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and it is the mutual duty of all to practice christian forbearance, love and charity towards each other'" (JHD, Oct. 1785, 1828 edn., p. 12-15, 93, 94, 95). When Madison reported on this

ent. When the printing of *The Committee of Revisors* was by the General Assembly in a resolution specifically directed the pamphlet "be distributed at the several counties by the in such manner as they shall be conducive to the end proposed is difficult to imagine what could have persuaded, or what could have been employed by, the assembly to conceal its author, the printing of the broadside and other occasions, its object have the Bill "printed for the use of the people."

It is reported to have Bill No. 82 passed at the May and Oct. sessions is not successful. But in Oct. Bill was one of two in the of the revision brought up for ratification and the only one of which the other was Bill No. 81. It is reported to Monroe on the passed the House: "The Bill of crimes and punishments at which we stuck after the most difficult parts of the subsequent bills however were in the postponement. Among the Bill for establishing Religion, which has got through without alteration, without warm opposition, and Mr. Corbin were the opponents against it" (Madison, 17 Dec. 1785, *Writings*, 205). This was something of a statement. The Bill was in Madison 31 Oct. 1785, read over to the committee of which was debated and amended on 15 Dec., and this which has not been identified by the House the same time another is proposed—that is, that TJ's preamble be struck following substituted there. It is declared by the Bill of religion, or the duty to our Creator, and the arguing it, can be directed and conviction, not by ; and therefore, all men according to the free exercise according to the dictates of it is the mutual duty of Christian forbearance, love towards each other" (JHD, edn., p. 12-15, 93, 94, Madison reported on this

III. BILL NO. 82

Bill to TJ, 22 Jan. 1786, q.v., he mentioned the Senate's effort to accomplish the same amendment, but did not refer to that attempted earlier in the House. As an indication of the importance attached to this whole question, it is worth noting that the ayes and noes on this amendment were recorded in the Journals. The amendment failed by a vote of 38 to 66.

On 17 Dec. a motion was made to postpone the third reading of the engrossed Bill until the Oct. session 1786, but this was defeated. The Bill was thereupon read the third time, put to a vote, passed by a majority of 74 to 20, and transmitted to the Senate. The ayes and noes were ordered to be recorded. Those voting in favor of the Bill were: Joshua Fry, Wilson Cary Nicholas, Joseph Eggleston, Samuel Jordan Cabell, Zachariah Johnston, Michael Bowyer, John Trigg, Robert Clark, George Hancock, Archibald Stuart, William Anderson, Hickerson Barksdale, John Clarke (Campbell), Samuel Hawes, Anthony New, John Daniel, Henry Southall, French Strother, Henry Fry, William Gatewood, Meriwether Smith, Charles Simms, David Stuart, William Pickett, Thomas Helm, Christopher Greenup, James Garrard, George Thomson, Alexander White, Charles Thruston, Thomas Smith, George Clendennin, John Lucas, Jeremiah Pate, Ralph Humphreys, Isaac Vanmeter, George Jackson, Nathaniel Wilkinson, John Mayo, Jr., John Rentfro, William Norvell, John Roberts, William Dudley, Thomas Moore, Carter Braxton, Benjamin Temple, Francis Peyton, Christopher Robertson, Samuel Garland, Benjamin Logan, David Scott, William Pettijohn, Robert Sayres, Daniel Trigg, William Hartwell Macon, Griffin Stith, David Bradford, James Madison, Charles Porter, William Harrison, Benjamin Lankford, John Clarke (Prince Edward), Richard Bibb, Cuthbert Bullitt, Daniel Carroll Brent, William Ball, Andrew Moore, John Hopkins, Gawin Hamilton, Isaac Zane, John Tayloe, John Whittaker Willis, Andrew Kincannon, and James Innes.

Those who voted against the Bill were: Thomas Claiborne, Miles King, Worlich Westwood, John Page, Garland Anderson, Elias Wills, William Thornton, Francis Corbin, Willis Riddick, Daniel Sandford, John Gordon, Edward Bland, Anthony Walke, George Lee Turberville, William Garrard, John Francis Mercer, Carter Bassett Harrison,

Richard Cary, Jr., Wilson Cary, and Richard Lee.

The Senate amended the Bill and returned it to the House on 29 Dec.; this was precisely the same amendment that had been offered in the House two weeks earlier. This time the amendment failed of adoption by a vote of 35 to 56, a vote that, like the earlier one, reflected opposition to the preamble rather than to the Bill; for the vote in favor of the Bill on 17 Dec. included some (e.g., such a conservative as Carter Braxton) who voted in favor of the amendment on 29 Dec. There was, on the other hand, almost no shifting of position among those whose names are recorded as voting on the amendment on both 16 Dec. and 29 Dec.: Francis Peyton voted in favor of it on the former date and against it on the latter; Anthony New and John Prunty voted against it at first and then for it.

The Senate on 9 Jan. 1786 insisted on its amendment and requested a free conference on the subject of its amendment, to which the House agreed. The managers met on 12 Jan. 1786. The Senate's "objections [to the preamble]," wrote Madison, "were frivolous indeed. In order to remove them as they were understood by the Managers of the H. of D. the preamble was sent up again from the H. of D. [on 13 Jan.] with one or two verbal alterations. As an amendment to these the Senate sent down a few others, which as they did not affect the substance though they somewhat defaced the composition, it was thought better to agree to than to run further risks, especially as it was getting late in the Session and the House growing thin. The enacting clauses past without a single alteration, and I flatter myself have in this country extinguished forever the ambitious hope of making laws for the human mind" (Madison to TJ, 22 Jan. 1786; JHD, Oct. 1785, 1828 edn., p. 12-15, 93, 94, 95, 96, 115, 117, 134, 135, 138, 139, 143-4, 148). The amendments offered by the Senate, and agreed to by the House on 16 Jan. 1786, are indicated in notes 1, 2, and 4; other amendments made either in the House or Senate are indicated in notes 7, 8, 9, and 11.

Madison and others thought these amendments rendered "the style less elegant, though the sense is not affected" (Hening, XII, 84). But Malone (I, 279) is quite correct in saying that these amendments deleted "some of the more sweeping statements about the suprem-

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acy and illimitability of reason; and, as a result, the statute did not rest on quite so broad a base as the one its author had designed."

Ironically, due to TJ himself, it was the text neither of the Bill as originally submitted nor of the Act as finally adopted that was in his day and subsequently most generally accepted as "The Act for Establishing Religious Freedom." In 1776 TJ had revealed his desire to have the world, or at least some of his friends and political associates, know the text of the Declaration of Independence as he had drafted it, and he had sent out several copies that he had laboriously copied by hand. But his pristine text was not printed at all until more than a quarter of a century had elapsed and it never came close to achieving the popularity enjoyed by the text as adopted by Congress. But the Bill for Establishing Religious Freedom fared differently: its full text as drafted by TJ was put into type six years before its altered version was enacted into law. What was more important, TJ, being in France at the time his Bill was adopted, saw to it that the famous declaration was widely distributed. It was not mere pride of authorship but pride of country as well that led him to obtain publication in Europe: "it is honorable for us," he wrote Madison, "to have produced the first legislature who has had the courage to declare that the reason of man may be trusted with the formation of his own opinions" (TJ to Madison, 16 Dec. 1786); in the same letter TJ reported that the Act "has been received with infinite approbation in Europe and propagated with enthusiasm"; that it had been translated into French and Italian, had been sent to most of the courts of Europe, had been inserted in the *Encyclopédie méthodique*, was appearing in most of the publications respecting America, such as those of Brissot, Clavière, and Mazzei; and that it had "been the best evidence of the falshood of those reports which stated us to be in anarchy." Though his motive in promoting publication in Europe was elevated, TJ nevertheless took unwarranted liberties with the authoritative text of this immortal statute, as the following facts clearly prove.

Facsimiles of what TJ in the epitaph that he later drew up referred to as "the Statute of Virginia for religious freedom" are to be found in TJ Editorial Files: (1) *A BILL for establishing RE-*

*LIGIOUS FREEDOM, / printed for the consideration of the PEOPLE. [Williamsburg, 1779]. Broadside, Boston Public Library, Evans 19350, Swem, "Va. Bibliog.," 7476, and Sabin 100041. (All three bibliographies, apparently assuming that the Bill was published under public authority in the fall of 1785 when the Bill was being debated, assign that date, the place as Richmond, and James Hayes, the public printer, as the printer. Since the Bill was undoubtedly printed in 1779, and was probably issued privately, this assignment should be changed as to place, printer and date, and probably as to publisher); (2) *AN ACT for establishing RELIGIOUS FREEDOM, / passed in the assembly of Virginia in the beginning / of the year 1786. [Paris, 1786]. Four-page pamphlet. Copy in PHI; another that TJ sent to Van Hogendorp was found by Dr. Howard C. Rice, Jr., in the Van Hogendorp papers, Rijksarchief, The Hague, Sabin 100342. This text, which was sent to various persons by TJ as a separate pamphlet, was also bound in as an appendix to some copies of the first edition of *Notes on Virginia*. It was later included as an appendix to the 1787 Stockdale edition, the 1788 (first American) edition printed in Philadelphia by Prichard and Hall, and in subsequent editions of the *Notes*. The text of (5) below derives from one of these editions. (3) *Acte de la République de VIRGINIE, / qui établit la liberté de Religion. [Paris, 1786]. Four-page pamphlet, probably printed by Philippe-Denys Pierres (see Ford, II, 237). Copy in NN; another found by Dr. Rice in Van Hogendorp papers, Rijksarchief, The Hague, Sabin 100342. (4) *AN ACT for establishing RELIGIOUS / FREEDOM, passed in the Assembly / of Virginia in the beginning of the year 1786 / [rule] / Acte de la République de VIRGINIE, / qui établit la liberté de Religion, passé à l'Assemblée de la Virginie au commencement de l'année 1786. [Paris, 1786]. Eight-page pamphlet found by Dr. Rice, in the Bibliothèque de l'Institut de France, Paris, Sabin 100344; (5) *REPUBLICAN NOTES / ON / RELIGION; / AND, / AN ACT ESTABLISHING RELIGIOUS FREE- / DOM, PASSED IN THE ASSEMBLY OF / VIRGINIA, IN THE YEAR 1786. / [rule] / BY THOMAS JEFFERSON, ESQUIRE, / PRESIDENT OF THE UNITED STATES. / [rule] / [ornament] / DANBURY: / PRINTED*****

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the PEOPLE. [Wil-
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176, and Sabin 100041,
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URY: / PRINTED

BY THOMAS ROWE. / 1803. Twelve-
page pamphlet containing extracts from
Query xvii, *Notes on Virginia* and (p.
9-11) the text of "An ACT for establish-
ing RELIGIOUS FREEDOM, / passed
in the Assembly of Virginia, in the be-
ginning / of the Year 1786," Sabin
35914. This text, as well as the title,
obviously derives from that described
under (2) above. These various con-
temporary versions are referred to in the
notes below as Text (1), Text (2), &c.

A glance at Texts (2) to (5) above
is sufficient to show that they are not
derived from the broadside of 1779, or
from the *Report* of 1784, or even from
the printed session laws of 1785. They
are, in the points noted below, at vari-
ance with both the Bill and the Act. All
of the English texts described above,
excluding Text (1) of course, agree.
All of the French texts, which vary from
the English texts in one important par-
ticular but possibly were derived from
one of them, agree with each other.
Clearly TJ had before him a copy of the
Act as adopted when he prepared this
English version of 1786; it is equally
clear that he also had at hand a copy of
the Bill when he produced this curious
hybrid text whose stemma embraced
those of both Bill and Act. The following
variations are to be noted. First, Eng-
lish Texts (2), (4), (5) do not begin,
as the Act does, with the phrase "Where-
as Almighty God hath created the mind
free" but, as the amended Bill does, with
the words "Well aware that Almighty
God hath created the mind free." This
incorporates part of the amendment in-
dicated in note 1, below, but also restores
part of the deleted initial phrase of the
Bill. The French texts agree with the
English in this variant reading. Second,
the deletions made by amendments to
the Bill as described in notes 2, 4, and
9 below are all followed in English and
French Texts (2) to (5), since none of
these texts contains any of the words or
clauses deleted in these places or their
equivalent. Third, English Texts (2),
(4), (5) agree with the Bill rather than
the Act as adopted by including the
word "very" at the point indicated in
note 8, below. Finally and curiously,
French Texts (3) and (4) agree with
the Bill rather than with the Act in the
phraseology of the enacting clause (see
note 10, below), reading: "Nous, l'As-
semblée générale de Virginie, établis-
sons pour loi. . . ." The English Texts
(2), (4), and (5), however, read as

follows: "*Be it therefore enacted by the
General Assembly . . .*" which is neither
the text of the Bill nor that of the Act
as adopted (the latter does not contain
the word "therefore"). Ironically, TJ
himself, by accepting in part the enact-
ing clause agreed upon by the General
Assembly and by retaining the opening
words ("Well aware that") of his Bill,
did grammatical and structural violence
to his great declaration of intellectual
and spiritual freedom. It is inexplicable
that the English Texts (2), (4), and
(5) should have had this fault, and that
the French Texts (3) and (4) should
not have. The long French preamble be-
ginning "Convaincus que le Dieu tout
puissant a créé libre l'esprit de l'homme"
is made grammatically and structurally
sound when the enacting clause follow-
ing it reads: "Nous, l'Assemblée gé-
nérale de Virginie, établissons pour loi.
. . ." But the preamble of English Texts
(2), (4), and (5) which begins "Well
aware that Almighty God hath created
the mind free . . ." is left dangling in
mid-air, without a noun or pronoun to
depend on, when its enacting clause, in-
stead of following the Bill as TJ drew it
with its stately "We the General As-
sembly do enact," reads "*Be it therefore
enacted by the General Assembly.*"

TJ's hybrid English version of 1786,
which is neither precisely that of the
Bill nor that of the Act, unfortunately
triumphed over the more elevated style
of the former and over the legally more
correct form of the latter. This version,
with its unhappily dangling preamble,
became established in America by the
1788 edition of the *Notes on Virginia*.
The H. A. Washington edition of TJ's
Writings unfortunately carried the hy-
brid text, and even the title given it in
1786—"An Act for establishing Reli-
gious Freedom, passed in the Assembly
of Virginia in the beginning of the year
1786." The Commonwealth of Virginia
could go on publishing the authoritative
version (e.g., *The Code of Virginia*,
Richmond, 1849, p. 358-60); and Ford
(II, 237-9) could print the Bill as it was
in the 1784 *Report*; but when the most
widely used edition of TJ's papers (L &
B) repeated the incorrect text used in
the Washington edition, that form be-
came so firmly established that the au-
thoritative or the original versions could
never hope to displace it. Even scholarly
editors of modern texts, such as Adrienne
Koch and William Peden (*The Life and
Writings of Thomas Jefferson*, New

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York, 1944, p. 311-13), continue to repeat the unhappy hybridization of errors that TJ propagated in 1786.

¹ The preceding words in italics were deleted by Senate amendment on 16 Jan. 1786. The beginning of the Act as adopted reads: "Whereas, Almighty God hath. . ."

² The preceding words in italic were deleted by Senate amendment on 16 Jan. 1786.

³ In his Autobiography TJ wrote: "Where the preamble declares that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word 'Jesus Christ,' so that it should read, 'a departure from the plan of Jesus Christ, the holy author of our religion' the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination" (Ford, I, 62). There is no record in the Journals of this particular amendment.

⁴ The preceding words in italic were deleted by Senate amendment on 16 Jan. 1786.

⁵ Text (1) reads "temporal," which is clearly what TJ intended. The clerk's or printer's error which caused the *Report* to read "temporary" was repeated in the Act as adopted, thus giving legal sanction to an incorrect usage that TJ could not tolerate. Accordingly in 1786 he restored "temporal" to Text (2), a reading which was followed by the derivatives of that text. The various revisions and codifications of Virginia laws, however, have adhered to the legally correct but otherwise improper "temporary."

⁶ Text (1) reads: "any more than on our opinions in physicks or geometry." The error of the clerk or printer in omitting "on" in the *Report* was repeated in the Act as adopted. TJ in 1786 restored the preposition to Text (2), but at the same time the word "any" at the beginning of the clause quoted was omitted, a reading followed by the derivatives of that text. It is quite possible that this omission of the word "any" may have been made by the printer of Text (2) for no better reason than that of justifying his lines. While TJ's alterations in the text of the Act were, with this one possible exception, obviously intentional, other contemporaneous texts

departed from the wording of the Act with engaging innocence either of a regard for accuracy or of respect for exact legal phraseology. The Act as printed, for example, in the *Virginia Gazette*, or *American Advertiser* (Richmond: James Hayes) for 22 Feb. 1786 dropped a conjunction, altered spellings, and substituted new words, such as "preacher" for "teacher," "suspicion" for "supposition," "minister" for "ministry," "habet" for "bait," "have" for "hath," and "physic" for "physics." This particular printing is possibly the one that was sent to TJ, though the Act may also have appeared in the *Virginia Gazette* and *Independent Chronicle* (Richmond: Dixon & Holt) and the *Virginia Gazette & Weekly Advertiser* (Richmond: Thomas Nicholson) and may have been sent to TJ from one of these sources. Certainly the text that was printed by Isaiah Thomas as "from the *Virginia Gazette*" in Madison's *A Memorial and Remonstrance* (Worcester, 1786) would seem to be derived from another text than that presented in James Hayes' *Virginia Gazette*; for Thomas' text repeats only three of its many vagaries—"preacher," "minister," and "physic." The text that appeared in Hayes' newspaper bore the attestation of John Beckley, clerk of the House, and of H. Brooke, clerk of the Senate. It is quite probable, therefore, that the words "preacher," "minister," and "physic" (as well as the variation indicated in note 10, below) were clerks' errors, just as Beckley's supervision of the printing of the *Report of the Committee of Revisors* had perpetuated such errors as those pointed out in this and the preceding note.

It was Dr. Richard Price, distinguished zealot for the American cause who surpassed clerks, printers, and even TJ himself in taking liberties with the wording of a Virginia statute. In 1786 Dr. Price distributed copies of the Act in a broadside circular as "an example of legislative wisdom and liberality never before known" (London, 1786; Sabin 100343). This printing was undoubtedly based on Text (2), though the copy of the first edition of *Notes on Virginia* that TJ inscribed and presented to Dr. Price (Paris: privately printed, 1785; this copy now in NJP) does not contain that text. Thus, taking TJ's hybrid version of the Act as his starting point, Dr. Price produced a more extensively altered text than no one, fortunately

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seems to have followed. Whatever Dr. Price may have felt about the wisdom and liberality of the legislature that adopted the Act, he indubitably thought that he could improve upon the style of the law. He therefore freely struck out words and phrases, altered others, and provided many variant readings; some of these were indubitable improvements, such as his excision of the word "bait" in an otherwise exalted passage.

⁷ The word "also" was deleted by amendment in the House or Senate and "only" substituted for it, which is the reading of the Act as adopted. TJ, however, restored the original reading in Text (2), and this reading was followed by the derivatives of that text.

⁸ The word "very" is not in the Act; it may be the amendment made by the House on 16 Dec. or one of those made on 13 Jan.

⁹ The preceding words in italic are not in the Act and were probably deleted by the House on 16 Dec. or 13 Jan.

¹⁰ In employing this phraseology, TJ departed from the usual form for the enacting clause. "We the General Assembly of Virginia do enact" is certainly

more suited to the elevated style of the Bill than "Be it enacted by the General Assembly"; but, despite Madison's statement that no alterations were made in the enacting clause, the latter is the form that was adopted. Whether this was by amendment in the House or in the Senate is not certain. As noted above, TJ caused Text (2) to read: "Be it therefore enacted . . ." This does not conform to the text of the Act as adopted, which omits "therefore"; but it does conform to the attested copy of the Act as printed in Hayes' *Virginia Gazette* for 22 Feb. 1786. This seems to confirm the suggestion advanced in note 6, above, that TJ made use of a newspaper text of the Act as he was engaged in preparing Text (2).

¹¹ The Act reads: "to declare this Act to be irrevocable . . ."; all other texts, except those appearing in revisions and codifications of Virginia law, omit the words "to be." These two words were apparently inserted by amendment, but were deleted by TJ when he prepared Text (2) and are not to be found in any of the derivatives of that text.

83. A Bill for Saving the Property of the Church Heretofore by Law Established

Be it enacted by the General Assembly, that the several tracts of Glebe land, the churches, and chapels, the books, vestments, plate and ornaments, all arrears of money and tobacco, and all property real and personal of private donation, which on the seventh day of October, in the year one thousand seven hundred and seventy six, were vested in any persons whatever for the use of the English church till then established by law, or were due or contracted for, bona fide, on that day, or which since that time have legally become so vested, due, or contracted for, shall be saved in all time to come to the members of the said English church, by whatever denomination they shall henceforth call themselves, who shall be resident within the several parishes as they stood distinguished by metes and bounds on the same day, those of each parish to have the separate and legal property of the said articles belonging to their respective parishes, and to apply them from year to year, by themselves, or by agents to be appointed by themselves as they shall hereafter agree, for and towards the support of their ministry; and

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

April 13, 1992

REMARKS BY THE PRESIDENT
IN SIGNING CEREMONY FOR BECK EXECUTIVE ORDER

The Rose Garden

11:00 A.M. EDT

THE PRESIDENT: Please be seated. And may I just say that we are delighted to see all of you here on this crisp, cool day in the Rose Garden. Before I begin, I'd like to recognize two members of the Cabinet here: Secretary Lynn Martin over here, Secretary of Labor; and then Attorney General Bill Barr sitting over here in the front. (Applause.) I also want to single out two congressmen with us today, Bob Walker and Tom DeLay -- thank them for being here. Mr. James Stephens the Chairman of the National Labor Relations Board. And also a very special welcome to Harry Beck and his wife Karan. (Applause.) And fresh from parting the Red Sea yet again on TV last night -- (laughter) -- our old friend Charlton Heston. And I'll have more to say about him in a minute. But thank you for coming all this way. (Applause.)

Today happens to be a very special anniversary. Two hundred and forty nine years ago today, Thomas Jefferson was born. And there is a renewed spirit of Jeffersonian reform sweeping through this nation today. It is therefore a fitting occasion for putting into effect new reforms that will protect American's fundamental rights against political abuse by special interest groups.

For brilliance, for courage, for passion in the cause of freedom and democracy, no one has ever surpassed Thomas Jefferson. He eloquently stated a principle of fundamental fairness in 1779 when he declared, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical."

Now not long ago in Philadelphia, I spoke of the wisdom of the founders on the subject of government reform. It is this Jeffersonian insight that we reaffirm today with reforms to strengthen the political rights of American workers.

In the Executive Order I will sign in just a few minutes, I am directing that companies performing federal contract work must inform their employees in the clearest possible terms of their legal rights as affirmed in the Supreme Court's landmark Beck decision. (Applause.)

This placard displayed here today represents the exact words of the notice that will be placed in workplaces around the nation. And while this order will directly effect American workers employed by federal contractors, I want to emphasize that the principles affirmed by the Beck decision are precious to all Americans.

The Beck decision is one of a series of cases protecting American workers from being compelled against their will to pay union or agency dues in excess of what is actually used for collective bargaining purposes and contract administration. Full implementation of this principle will guarantee that no American will have his job or livelihood threatened for refusing to contribute to political activities against his will.

MORE

The Executive Order that I sign today will make it easier for employees of federal contractors to understand and then exercise their political rights.

The Secretary of Labor is separately proposing a rule clarifying and then bringing up to date requirements for labor organizations to account for how workers dues are spent. This rule aims to foster union democracy and it also will have the effect of helping employees protect their Beck rights.

The trial court in the Beck case found, for instance, that in plaintiff Beck's workplace -- Harry Beck's workplace -- 79 percent of the compulsory dues collected went to purposes unrelated to collective bargaining and contract administration. Our new rule will assist union members in discovering how their dues are being spent. And perhaps most important of all, I expect the NLRB, the National Labor Relations Board, to carry out its responsibilities to enforce the principles of the Beck decision. (Applause.)

One of America's most intrepid fighters for individual rights is Charlton Heston. He's been a member of four different labor organizations, and like my predecessor, President Reagan, a president of the Screen Actors Guild. He's given much of himself to put collective bargaining rights into practice. And he's been equally committed to seeing that no company or organization may infringe a worker's individual freedom of conscience. And we are very honored, sir, that you came here today, traveled all across the country as a crusader for individual rights. You are most welcome. (Applause.)

Our new actions to protect individual liberties are important efforts in a larger crusade that I'm waging to reform our system of politics in government. Institutions of public life, whether the government, corporations or unions, should be accountable to their constituents to produce results and then respond to their needs. Working Americans should have the right to decide whether contributing to political parties or candidates, at odds with their beliefs, fulfill that principle and represent the institutional responsibility that we rightfully expect.

In pursuit of the very same principles, accountability and responsibility, I am asking Congress to enact a sweeping reform of campaign financing. And I'm fighting to eliminate, not restrict, but eliminate the special interest PACs which will stop the millions of dollars in administrative subsidies that corporations and labor organizations now are allowed to channel into their own PACs. (Applause.)

Time and time again -- time and time again over our constitutional history, protecting universal rights has demanded the lonely courage of individual citizens standing up against powerful organized interests. And I'm especially honored that we have here today such an individual.

It took this man 12 years of patient effort to carry his case to vindication in the highest court of the land. And it is his crusade that brings us together today. So, Harry Beck, thank you, sir, for all that you have done. And I am proud to have you stand with me as I sign this Executive Order. Welcome and well done. (Applause.)

(The Executive Order is signed.)

END

11:11 A.M. EDT