

## Cato Institute Policy Analysis No. 174: The Permissible Uses of Forced Union Dues: From *Hanson to Beck*

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### Executive Summary

On April 13, 1992, in what many consider to be nothing more than an act of political opportunism, President Bush issued Executive Order 12800, which requires all federal contractors to inform their employees of their "*Beck* rights." The order stems from a 1988 U.S. Supreme Court opinion, *Communications Workers of America v. Beck*, in which the Court declared that employees forced to pay union dues under the National Labor Relations Act (NLRA) do not have to contribute to a union's partisan political activities. The Communications Workers of America had been using as much as 79 percent of Harry Beck's dues for such activities, almost all in support of Democratic party candidates.

In his April 13 public comments announcing the executive order, the president also announced that he had instructed Secretary of Labor Lynn Martin to propose changes in the financial disclosure forms that unions must file under the 1959 Landrum-Griffin Act. The changes she has since published in the *Federal Register* for public discussion will, if they are adopted, require unions to disclose their expenditures by category, which will better enable the Department of Labor, the National Labor Relations Board (NLRB), employees, and employers to enforce *Beck* rights. The president also publicly urged the NLRB to begin to do a better job of enforcing workers' *Beck* rights.

Those who charge the president with political opportunism have a point. After all, the *Beck* decision was handed down on June 29, 1988. In the almost four years between then and April 13, 1992, President Bush did almost nothing to enforce the decision. As we will see below, there were two failed attempts in Congress to codify *Beck* rights, but the president did little to help in the effort. Those rights simply did not seem to be important to him. But this is an election year, and labor unions have a long history of using forced dues to support Democratic presidential and congressional candidates. President Bush has publicly stated that he will do anything it takes to get reelected. He apparently thinks that enforcing *Beck* is one of those things. While I applaud his April 13 actions and wish he had done more, his timing suggests that he is more concerned with his own reelection than with workers' rights.

Bill Clinton, governor of Arkansas and the probable 1992 Democratic presidential nominee, responded to President Bush's announcements by calling *Beck* a "fair decision." He too noted, however, that the decision was four years old and added, "President Bush could have signed this order at any time since the decision was handed down. The fact that he waited until now is clear evidence that President Bush is playing politics with labor instead of providing real leadership for our workers."

Lane Kirkland, president of the AFL-CIO, was not happy about President Bush's April 13 announcements. "By this obsequious pandering to the ultra-right special interests of his party, the president has given hypocrisy a bad name,"

said Kirkland. Inasmuch as the *Beck* decision was written by Justice William Brennan, with dissents from Justices Scalia, O'Connor, and Blackmun, Kirkland himself could well be accused of hypocrisy. At bottom, however, the issue has nothing to do with ultra-right (or left) politics. It is about basic human rights for all workers.

Market liberals who might be tempted to argue that the decision improperly imposes government regulation on purely private contractual relationships must realize that no collective-bargaining contract under the NLRA can rightly be considered a private voluntary exchange relationship. Indeed, under that statute, government coercion pervades the entire collective-bargaining process. What the *Beck* decision does, in fact, is mitigate an otherwise intolerable situation brought about by government in the first place. In a nutshell, it enables a worker, already compelled to pay dues to a union as a condition of continued employment, to withhold that portion of his dues that the union would otherwise spend for purposes of which he may disapprove, such as partisan political activities.

To illustrate those points, I will begin by examining the three principles embodied in the NLRA--exclusive representation, union security, and mandatory bargaining in "good faith"--on which coerced payment of union dues is based. Second, I will discuss whether there is government action in union security arrangements. Third, I will suggest a taxonomy of union expenditures that helps to clarify the issues raised in the series of Supreme Court cases that culminated in *Beck*. Fourth, I will review the case history, starting with the 1956 *Hanson* decision. While *Beck* involved private-sector employment under the NLRA, all the preceding cases involved either employment under the Railway Labor Act (RLA) or public-sector employment. As we will see in the case history, there can be no doubt that the statute-based restrictions in the RLA cases apply to comparable questions under the NLRA. The Court said so in *Beck* on the grounds that the relevant statutory provisions of the two acts are almost identical. However, it is arguable that the Court will not apply the constitutional restrictions it imposed in the public-sector cases to forced dues disputes under the NLRA. It was silent on constitutional questions in *Beck*. I will explain why I think there is sufficient government action in the NLRA to apply the constitutional restrictions imposed in the public-sector cases to NLRA cases. Then I will report on problems that have emerged in the enforcement of *Beck*, Congress's two failed attempts to codify the decision, and the details of President Bush's April 13 measures. In conclusion, I will offer some conjectures about the impact of the *Beck* ruling on unions and discuss the responsibilities of the Department of Labor and the NLRB.

### **Three Key Statutory Unionist Principles**

The relevant unionist statutes are the RLA, first enacted in 1926 and amended in 1934 and 1951; the NLRA, first enacted in 1935 and amended in 1947 and 1959; and individual state statutes that regulate unionism in state and local government employment. The state public-sector statutes are modeled on the two federal private-sector statutes, which are very similar to each other. The RLA covers employment in the railroad and airline industries, and the NLRA covers all other private-sector employment.

### **Exclusive Representation**

Section 9(a) of the NLRA and Section 2, Fourth of the RLA stipulate that a union that receives a majority of votes in a certification or representation election becomes the "exclusive bargaining agent" for all the workers who were eligible to vote in the election. Eligible voters constitute a "bargaining unit." Such an election is held when a union (or unions) gets at least 30 percent of the eligible employees of an enterprise to sign cards authorizing the union to represent them. A union certified by that process represents all the workers who voted for it, all the workers who voted against it, and all the workers who did not vote. It is a winner-take-all election system patterned after the rules for electing members of Congress. Where there is a certified union, individual employees are prohibited from representing themselves in matters having to do with wages and salaries and other terms and conditions of employment (the matters that come under "the scope of collective bargaining").

It is important to recognize that under the principle of exclusive representation, created by federal statute, the minority (all workers who do not vote in favor of the winning union) are put to a choice between submitting to the will of the majority regarding the sale of their individual services or losing their jobs. That is governmentally imposed coercion, pure and simple. The fact that workers can opt out of the unwanted representation services of a certified union by quitting their jobs does not mitigate the coercion. If an individual owns his own labor, and has a further right to enter

into contracts with any willing buyer of that labor on terms that are mutually acceptable, then exclusive representation overrides those rights. Such an arrangement sacrifices individual rights to group rights, much like the present constitution of South Africa does. And since exclusive representation exists solely by virtue of federal statute, the federal government, not any private party, is the source of the coercion. On its face, this is government action: government gives powers to the majority that they otherwise would not have.

The constitutionality of the NLRA was upheld in 1937 by a five-to-four vote of the Supreme Court in *NLRB v. Jones & Laughlin Steel Corporation*. The Court did not even try to address the inconsistency of exclusive representation and individual freedom of contract. On the contrary, it actually asserted that under exclusive representation any individual employee could enter into an independent employment contract with the employer.<sup>[4]</sup> Notwithstanding that, in 1944, in *J. I. Case Co. v. NLRB*, the Court held that exclusive representation precluded individual contracting,<sup>[5]</sup> and it did so without any mention, much less explanation, of its earlier assertion in *Jones & Laughlin*.<sup>[6]</sup>

Unionists defend exclusive representation by analogy with congressional elections. An elected member of the House of Representatives represents all the people in his congressional district, including those who did not vote for him. That is democracy--majority rule. If it is all right in congressional elections, it must also be all right in union certification elections.

But it is *not* all right. Majority-rule democracy is the constitutionally mandated decision rule for governmental matters, not private affairs. In the sphere of private human action the ordinary decision rule is individual free choice. Individuals associate on terms that are mutually acceptable--and on those terms alone. An individual may choose to join a private organization (e.g., a travel club) that makes some decisions by majority rule, but he is free to drop out of such organizations without penalty. There is no governmental coercion involved. In the case of a union, a penalty is assessed against a person who refuses to accept the representation services of an exclusive bargaining agent--that person loses his job as the result of a governmentally imposed rule. If the contract between the union and the employer were a private, voluntary exchange agreement, there would be no government coercion. But under the NLRA, collective-bargaining contracts are not private, voluntary exchange agreements.

The sale of one's own labor is a private, not a governmental, matter. Unions are private organizations, not governments. Exclusive representation is an unconstitutional grant of power to a private group. In the words of Justice Murphy, in his 1944 concurring opinion in *Steele v. Louisville & Nashville R.R. Co.*:

The constitutional problem inherent in [exclusive representation] is clear. Congress . . . has conferred upon the union selected by a majority . . . the power to represent [all members of a bargaining unit] in all collective bargaining matters. While such a union is essentially a private organization, its power to represent members of [a bargaining unit] is derived solely from Congress.<sup>[7]</sup>

In the same case the Court noted that, as an exclusive bargaining agent, a union "is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power. . . ."<sup>[8]</sup>

Under our Constitution, as originally conceived, Congress itself has no legitimate power to intervene in the formation and execution of private, voluntary exchange contracts. Congress has usurped that power, with the blessing of the U.S. Supreme Court, mainly on the basis of an illegitimate reading of the commerce clause of the U.S. Constitution. That clause was originally intended to enable Congress to prevent state governments from interfering in interstate commerce. Especially during the late 1930s, however, it became an excuse for the federal government to interfere in almost all private contractual agreements. According to the Court, Congress has the power to set prices and regulate terms and conditions of private employment contracts. The NLRA, however, goes even further. It delegates the power that Congress usurped to private groups--labor unions.

The issue of unconstitutional grants of coercive power to private groups was specifically addressed in 1935 by the Supreme Court in *Schechter Poultry Corp. v. United States*<sup>[9]</sup> and again in 1936 in *Carter v. Carter Coal Co.* In *Schechter* a unanimous Court threw out the 1933 National Industrial Recovery Act (NIRA), which permitted private producers in any industry to set minimum prices for the products they produced for sale. Those minimum prices, called "codes of fair competition," were enforced by the National Recovery Administration, the federal agency created to administer the NIRA. The Court declared that it was unconstitutional for Congress to grant the power to set

minimum prices to private producers.

The *Carter* case is particularly germane to exclusive representation because the Court, by a six-to-three vote, declared that the Bituminous Coal Conservation Act (BCCA) of 1935 was unconstitutional because of its labor provisions. Subdivision (g) of Part III of the BCCA stipulated:

Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year and the [union] representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any [coal] district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of each district . . . in the preceding calendar year . . . and [union] representatives of the majority of the mine workers therein . . . shall be accepted as minimum wages for the various classifications of labor by the code members operating in such district or group of districts.[\[10\]](#)

In other words, if the producers of more than two-thirds of the coal and the unions representing one-half of the mine workers reached agreement about maximum working hours and minimum wages, the terms of that agreement could be imposed, by force of federal law, on other private coal producers and mine workers. That, the Court said, was precisely the same kind of grant of coercive authority to private groups that was declared unconstitutional in *Schechter*:

The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the . . . enforcement of the drastic compulsory provisions of the act. . . . To "accept" in these circumstances, is not to exercise a choice, but to surrender to force.

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body . . . , but to private persons. . . . [A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.[\[11\]](#) [*Schechter* was the first such case cited.]

Note that the *Carter* Court referred to a "legislative delegation" of coercive power to private persons. That implies that Congress had the power to delegate in the first place. As I stated above, if Congress has such a power, it is the result of an illegitimate reading of the commerce clause. The Court's objection, however, was not that Congress had no such power; it was that Congress illegitimately gave that power to private parties. The Court used the commerce clause in this case as an additional reason to declare the BCCA unconstitutional. It said that the commerce clause grants Congress the power to regulate only interstate commerce. Because the production of coal, as distinct from its shipment, is local activity, it does not involve interstate commerce; and so, the Court held, Congress could not regulate it.

A year later in *Jones & Laughlin* the same justices upheld the constitutionality of exclusive representation in the NLRA by a five-to-four vote. The reason for the switch is well understood and very instructive. It had nothing to do with the discovery of a new constitutional principle or the correction of past error. It had to do with power politics. After the *Schechter* decision in 1935, President Franklin D. Roosevelt attacked the Court for standing in the way of his New Deal attempts to cope with the Great Depression. He reminded everyone that the Constitution does not specify the number of justices on the Supreme Court: the actual number is left up to Congress with the concurrence of the president. He opined that if the "tired old men" on the Court did not change their tune and stop blocking New Deal legislation, he would be tempted to expand the Court to 15 justices. He could thus see to it that "right thinking" justices would be in the majority. President Roosevelt delivered a national radio address on the issue between the announcement of the *Carter* decision and the day the Court heard oral arguments in *Jones & Laughlin*.

The majority in *Carter* consisted of Justices Butler, Roberts, McReynolds, Sutherland, and Van Devanter along with Chief Justice Hughes, who filed a concurring opinion. The minority, who favored upholding all of the BCCA, consisted of Justices Brandeis, Cardozo, and Stone. Chief Justice Hughes concurred with the majority on what it called the legislative delegation issue but dissented from its commerce clause analysis insofar as it applied to the nonlabor portions of the BCCA. The majority in *Jones & Laughlin* included Chief Justice Hughes and Justice Roberts along with the three Carter dissenters. Hughes and Roberts, it is widely believed, were sufficiently intimidated by Roosevelt's Court-packing threat to switch their votes. That has ever since been known as "the switch in time that saved nine."

However that may be, one searches in vain in the majority opinion in *Jones & Laughlin* for an analysis of the problem of granting coercive powers (or, as the Court would put it, delegating legislative powers) to private groups. The issue was dismissed with no explanation.

In the Carter Case [and in *Schechter*] . . . the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds--that there was improper delegation of legislative power and . . . requirements [that] were also inconsistent with due process. These cases are not controlling here.[\[12\]](#)

Even the minority ignored the issue of the private use of coercive powers. They rested their dissent on their interpretation of the commerce clause, which precluded regulation of local production even if what was produced locally was later shipped in interstate commerce. The dissent included only a brief reference to due process rights of contract in the context of Sections 8(1) and 8(3) of the original NLRA, which made it an unfair labor practice for an employer to fire a worker for union activities.

The right to contract is fundamental and includes the privilege of selecting those with whom one is willing to assume contractual relations. This right is unduly abridged by the Act now upheld. A private owner is deprived of power to manage his own property by freely selecting those to whom its manufacturing operations are to be entrusted. We think this cannot lawfully be done in circumstances like those here disclosed.[\[13\]](#)

It is certainly true that, as a practical matter, the Constitution means whatever a majority of sitting Supreme Court justices say it means. However, any disinterested reading of the Constitution, and of Court decisions that predated *Jones & Laughlin*, would clearly indicate that that case was wrongly decided and should be overturned--however unlikely that may be, given today's special interest politics. For purposes of this study, however, it is important to be clear that there is government coercion behind all collective-bargaining agreements reached under the NLRA. That coercive government action gives rise to constitutional questions addressed later in this study.

## **Union Security**

Section 8(a)3 of the NLRA and Section 2, Eleventh of the RLA provide that a union that is the certified exclusive bargaining agent for a group of workers, together with the employer of those workers, *may* include a "union security" clause in their collective-bargaining agreement. Such clauses are not mandated, but they are permitted. Under such a clause, all the workers who are represented by an exclusive bargaining agent must either (a) become members of the union at the end of their probationary period (usually 30 days after being hired under the NLRA and 60 days after being hired under the RLA) or (b) pay representation fees to the union. The former arrangement constitutes a union shop, the latter an agency shop.

The purpose of such clauses is to provide certified unions with security against "free riders"--workers who receive the benefits of a union's representation services without paying for them. Unionists argue that since, under the principle of exclusive representation, a certified union must represent all the workers in a bargaining unit, it is only fair that all such workers pay their fair share of the union's costs of doing so. In a later section of this study we will see that the Court justifies union security solely on the basis of the free-rider argument.

Union security is at the heart of *Beck* and related decisions. The term "forced union dues" refers to moneys exacted from workers who are not voluntary union members but who, under either a union shop or an agency shop, must pay money to a union as a condition of continued employment. They pay or they are fired. *Beck* and related cases are all



about what the unions that receive money from involuntary payers are permitted to do with that money. If there were no union security the whole issue would be moot; there would be no forced dues about which to litigate. In fact, in the 21 right-to-work states, where union security is prohibited, the *Beck* decision is irrelevant. (Under Section 14(b) of the NLRA, which was added in 1947, states may prohibit unions and employers from including union security clauses in their collective-bargaining contracts.) Under the RLA, however, states cannot adopt right-to-work laws. Thus, railroad and airline employees who are based in states that have right-to-work laws under the NLRA may be forced to pay union dues as a condition of continued employment.

In 1963, in *NLRB v. General Motors Corp.*, the Supreme Court effectively outlawed the union shop, holding that workers who do not want to become regular, full union members participating in union activities and responsibilities do not have to. All they have to do is pay the uniform dues and initiation fees that ordinary union members pay. There are still union security agreements that are called union shops, but, under *General Motors*, the union "membership" required by such agreements has been "whittled down to its financial core." [14] Thus, for the purposes of this analysis, there are no significant differences between an agency shop nonmember and a union shop "financial core" member.

Yet even that correction leaves the basic problem untouched. For although an unwilling worker need no longer be a union "member," he still must associate with the union through forced dues. On its face such forced affiliation is an infringement of the employee's right of free association. After all, freedom of association logically implies the freedom to choose with whom to associate. It also implies the freedom to choose not to associate with X and instead associate with Y, or not associate with anyone. But, as a constitutional right, freedom of association restricts *government*. It prohibits government from forcing people, or forbidding people, to associate with whomever they wish. Private groups, such as churches, are free to regulate the association of their members as a condition of continued membership in the group. If members do not like it they can always leave the group. Unionists argue that since union security arrangements are merely permitted, not mandated, by the law, the constitutional freedom of association is not affected by union security in private-sector employment. Government, unionists argue, is not involved. There is no government action to give rise to a constitutional claim. We will examine that question later. In the third section of this study we will see that the issue was important in all of the forced dues Supreme Court cases from *Hanson* to *Beck*.

At this point, however, we should note that the free-rider argument does not justify forcing workers to join or pay dues to unions. First, it is disingenuous for unionists to argue that since the principle of exclusive representation forces unions to bargain for all workers in a bargaining unit, unions ought to be able to force workers to pay for the representation services. It was the unions themselves who, before the passage of the original NLRA, energetically argued, lobbied, and begged to get exclusive representation written into the law. Before 1934 there was no exclusive representation in the RLA, and exclusive representation was unheard of in the rest of the private sector. Now that unions have the exclusive representation privilege, they complain about having to represent workers who choose not to join them. If there were no exclusive representation, unions would bargain only for their voluntary members. There would be no free riders. [15] Congress and the unions created the free-rider problem by establishing exclusive representation, and to address the free-rider problem that *they created*, they coerce workers who wish to remain union free.

Second, it is impossible for any third party to determine whether a union that represents a nonmember confers net benefits or net harms on that person. Benefits and costs are subjectively evaluated by each person, and subjective evaluations cannot be measured, reported, or recorded on any objective scale. Even if union representation increases the monetary income of a nonmember, the psychic costs of being forced to let the union speak for his interests could well outweigh the monetary gain on the nonmember's subjective value scale. If that nonmember were forced to pay for the representation services, he would be forced to pay for net harms (i.e., he would be a "forced rider"). Compulsory payments are just as likely to imprison forced riders as to catch free riders. It is simply impossible to tell in any individual instance which is the case.

### **Mandatory Bargaining in Good Faith**

Sections 8(a)5 and 8(d) of the NLRA and Sections 2, First and Second of the RLA impose upon employers a duty to bargain in good faith with certified exclusive bargaining agents. In *NLRB v. Borg-Warner Corp.* (1958), [16] the Supreme Court held that there are three categories of bargaining topics: mandatory, voluntary, and illegal. A mandatory

subject of bargaining is one about which, if either the union or the employer wishes to bargain, the other *must* bargain. Union security is a mandatory subject of bargaining. If a union says that it wants to bargain with an employer about union security, the employer cannot refuse to do so. A voluntary subject of bargaining is one about which either party is free to refuse to bargain even if the other party wishes to do so. An example is whether a union must take a vote of workers before calling a strike. An employer (or a union) can refuse to bargain about that issue, and the other party can do nothing about it. An illegal subject of bargaining is one about which both the employer and the union are forbidden to bargain. An example is a clause requiring employers to deduct workers' union dues from their paychecks even if workers object to such deductions.

Bargaining about mandatory subjects must be done in good faith. In practice, that means that neither side can merely assert a position and stick to it. Each has to demonstrate an honest effort to reach agreement. The best defense against an allegation of failure to bargain in good faith is a record of compromises. Not only does the law require bargaining, it gives each side property rights to concessions from the other.

Now, private, voluntary contracts are reached by people who choose to bargain with each other and are free to stick to their original terms if they want to, even though that may mean that no agreement is reached. Here again, collective-bargaining contracts under the NLRA and the RLA are very different from private, voluntary exchange contracts.

### **Government Action in Union Security**

In view of the foregoing considerations, government action is plainly behind all union security arrangements under the NLRA. Only certified exclusive bargaining agents are permitted to enter into union security agreements with employers, and government action is clearly involved in the creation of exclusive bargaining agents. As we saw above, Section 9(a) of the NLRA and Section 2, Fourth of the RLA mandate that employers recognize certified unions as exclusive bargaining agents. Without those statutory sections, there could be no exclusive bargaining agents unless employers voluntarily chose to recognize such agents. Moreover, as we saw above, the statutes force employers to bargain in "good faith" with exclusive bargaining agents. The bargaining is not voluntary, as it is in genuinely private affairs. Any agreement reached in collective bargaining is a creature of government coercion. It is not a truly private, voluntary contract.

In the absence of governmentally mandated exclusive bargaining agents and forced bargaining, any union shop or agency shop agreement between an employer and a union made up of wholly voluntary members would be a private, voluntary agreement with which the government would have no legitimate right to interfere. With exclusive representation and forced bargaining, government action is behind *every* union security agreement. We will return to that issue in the section on constitutional rights and the NLRA.

### **A Taxonomy of Union Expenditures**

Many popular and journalistic discussions of the permissible uses of forced union dues imply that there are only two categories of union expenditures: (1) those for the narrow purposes of collective bargaining, contract administration, and grievance resolution (hereinafter, collective bargaining) and (2) those for partisan political or ideological advocacy, or both (hereinafter, political advocacy). Indeed, as we shall see below, the Supreme Court seemed to adopt that two-category taxonomy until the 1980s. Clearly, however, that taxonomy is incomplete. There are union expenditures for activities that involve neither collective bargaining nor political advocacy, and there are union expenditures for activities that involve a mix of both.<sup>[17]</sup> Union activities for which expenditures are made fall into one of the four boxes shown in Figure 1. The two-category taxonomy of popular, and pre-1980s Court, discussion involves just the second (purely political) and third (purely collective-bargaining) boxes. At least since the 1984 *Ellis* decision, the Court has included Boxes 1 and 4 in the debate.

Examples of Box 1 activities are unions' national conventions, at which there is discussion of collective-bargaining goals and strategies as well as speeches from candidates for political office, and union publications that address both collective bargaining and political matters. Examples of Box 2 activities are union-operated telephone banks, designed to identify and assist voters who are

Figure 1: Taxonomy of Union Expenditures

(Graph Omitted)

friendly to political candidates endorsed by the union, and political lobbying unrelated to collective-bargaining contracts, such as lobbying on abortion or gun control. Box 3 includes such activities as negotiating with employers about the terms of a union-management collective-bargaining contract and settling disputes about the interpretation of a collective-bargaining contract. Box 4 includes such activities as legal defense of union officers against charges of corruption, union attempts to organize hitherto unorganized workers who work for nonunion employers, and union contributions to charitable causes such as the United Way.

The taxonomy of union expenditures will be helpful as we discuss the case history from *Hanson* to *Beck*. In brief, before 1961 unions used forced dues to finance activities in all four boxes. The early cases explicitly ruled out forcing unwilling workers to pay for Box 2 activities and explicitly ruled in forcing them to pay for Box 3 activities. In three cases in the 1980s culminating with *Beck*, as well as one in 1991, activities in the other two boxes entered the debate.

## The Case History

### *Railway Employees' (sic) Dept. v. Hanson*

In 1951 Congress amended the RLA to permit certified unions and carriers (railroads and airlines) to include union security clauses in their collective-bargaining contracts. Until 1951 the tradition, in the railroads at least, was voluntary unionism in which, although exclusive bargaining agents were certified, no worker could be forced to join or support the unions. In this case, Hanson and other nonunion employees of Union Pacific Railroad Co. brought suit in Nebraska courts to enjoin the union and Union Pacific from enforcing their union security agreement. In 1956 the nonunion workers claimed that union security was unconstitutional because it impaired their First Amendment freedom of association and denied them the due process protections of the Fifth Amendment. They also claimed that the union shop agreement violated Nebraska's state constitution. Under Section 14(b) of the NLRA, Nebraska had adopted provisions in its state constitution that outlawed union security clauses in collective-bargaining contracts.

The Nebraska courts agreed with Hanson and his fellow dissenting workers on both points and threw out the union security agreement. In 1956 the U.S. Supreme Court over-ruled the state courts on both points.

First, Section 2, Eleventh of the RLA overrides Section 14(b) of the NLRA. The RLA states:

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 [to include union security clauses in their collective bargaining agreements].[\[18\]](#)

Nonunion railroad and airline workers cannot be protected by state right-to-work laws.

Second, the Court conceded that inasmuch as the RLA explicitly denies states the right to adopt right-to-work protections for railroad and airline employees, RLA union security clauses involve the government action necessary to give rise to questions under the U.S. Constitution.

If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded . . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed . . . . The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.[\[19\]](#)

The Court also agreed that union security arrangements could impair constitutional rights. Nevertheless, Congress has the power, the Court held, to regulate the labor relations of interstate carriers under the commerce clause. Moreover, there is an important government interest in maintaining industrial peace that justifies some interference with freedom of association and due process. The Court held that union security per se did not violate either the First or the Fifth



Amendment. Congress decided that industrial peace would be promoted by the union shop because workers who receive the benefits of collective bargaining without paying their fair share of the costs unions incur in providing them cause disharmony and instability. (The term "free rider" was not used in the decision.) In the words of the Court:

Congress has authority to adopt all appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." . . . These measures include provisions that will encourage the settlement of disputes "by inducing collective bargaining with the true representative of the employees . . . ." Industrial peace along the arteries of commerce is a legitimate objective; and Congress has a great deal of latitude in choosing the methods by which it is to be obtained. The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one. [\[20\]](#)

In a curious use of the term "right to work," apparently referring to the beliefs that strikes impair work and that unions are less likely to strike if they get what they want, the Court declared:

One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work. . . . To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. [\[21\]](#)

In other words, forcing workers to pay money to a union in order to be able to work actually protects workers' right to work because a happy union will not try to prevent people from working. As Alice discovered in Wonderland, those in authority can make words mean whatever they want them to mean.

Up to this point in the opinion, the union side got all it wanted. The constitutionality of union security was upheld on the grounds that Congress has the authority to regulate interstate commerce and the government has an interest in labor peace and harmony. Moreover, the RLA was held to override state right-to-work laws. But then came the following statements:

The only conditions to union membership authorized by Section 2, Eleventh of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments." . . . The financial support required relates, therefore, to the work of the union *in the realm of collective bargaining*. [\[22\]](#)

. . . It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, and assessments." If other conditions are in fact imposed, *or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case*. For we pass narrowly on Section 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support *of the collective bargaining agency by all who receive the benefits of its work* is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement. [\[23\]](#)

Hanson and the other nonunion workers who brought suit in this case attacked union security agreements per se. They made no attempt to show that unions used forced dues for political and ideological purposes. The Court upheld union security, but only to the extent that forced membership was for the purpose of collective bargaining. In so deciding, the Court practically invited a future case in which collective-bargaining activities could be distinguished from non-collective-bargaining activities. It got such a case five years later.

### ***Machinists v. Street***

*Machinists v. Street* was originally brought in the state courts of Georgia. The union security agreement was between the International Association of Machinists and a group of carriers called the Southern Railway System. The dissenting

workers were forced to pay 100 percent of the regular union dues as a condition of continued employment. They presented a carefully documented record that proved that a "substantial part" of the union dues exacted from them was used to pay for partisan political activities. They asked to have the whole union security agreement thrown out on constitutional grounds. The trial court and the Georgia Supreme Court agreed with the complaining workers. The 1961 U.S. Supreme Court decision was written by Justice Brennan, who would also write the *Beck* decision 27 years later.

The union argued that the Court had cleared union security agreements in the *Hanson* case, so the dissenting workers had no case. The Court, however, did not buy that argument in its entirety:

[A]ll that was held in *Hanson* was that Section 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give "financial support" to unions legally authorized to act as their collective bargaining agents. We sustained this requirement--and only this requirement. . . . Clearly we passed neither upon forced association in any other aspect nor upon the issue of the exacted money for political causes which were opposed by the employees. [\[24\]](#)

*Hanson* had allowed forced dues to be used for Box 3 (collective-bargaining) expenditures of the taxonomy of expenditures set forth above and suggested that there might be difficulties associated with using forced dues for Box 2 (political advocacy) expenditures. "Forced association in any other aspect" could be interpreted to refer to expenditures in the other two boxes, but the Court did not analyze such expenditures in either *Hanson* or *Street*.

The *Street* Court agreed with the dissenting workers that using exacted money for political purposes raised constitutional "questions of the utmost gravity," but it also reiterated its long-standing position that "Federal statutes are to be so construed as to avoid serious doubt of their constitutionality." [\[25\]](#) If Section 2, Eleventh could be interpreted, on its own terms, as forbidding unions to use money exacted from dissenting workers for political purposes, the First Amendment questions of free speech and association would not have to be addressed. The constitutional questions would have to be faced only if Section 2, Eleventh permitted forced dues to be used for politics.

After reviewing the history of union security in the railroad industry and the legislative history of the RLA, especially Section 2, Eleventh, the Court did indeed interpret that section narrowly to permit the exaction of forced dues from dissenting workers only for the limited purpose of avoiding the free-rider problem. The only justification of union security advanced by the unions and by Congress was the capture of free riders. In the words of the Court:

The conclusion to which this history clearly points is that Section 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant in Section 2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose. [\[26\]](#)

. . . Congress did not completely abandon the policy of full freedom of choice in the [RLA prior to the 1951 amendments], but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." [\[27\]](#)

Thus, the Court bought the unions' free-rider argument in support of forced dues, but it did so very narrowly. The free rider of concern is one who gets the benefits of the collective-bargaining services of an exclusive representative and otherwise would escape paying for such benefits. According to the Court, forced dues, at least under the RLA, are not authorized on any other grounds.

The Court did not grant the dissenting workers everything they had asked for. The union security agreement at issue was not declared unconstitutional. It could stand as long as the forced dues were used for collective-bargaining purposes, not for political purposes. How about Box 1 and Box 4 activities of unions? Are forced dues for Box 1 activities permitted because they are for collective bargaining or prohibited because they are for political purposes? Are forced dues for Box 4 activities permitted because they are not for political purposes or prohibited because they are not for collective bargaining? The Court demurred:

We have before us only the question whether the power [to expend forced dues] is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes. . . .

We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes. . . . We do not understand . . . that there is before us the matter of expenditures for activities in the area between the costs which led directly to the complaint as to "free riders," and the expenditures to support union political activities.[\[28\]](#)

It was not until 1984, in the *Ellis* case, that such expenditures would be examined by the Court.

The majority opinion in *Street* concluded by giving some suggestions and guidelines for an "appropriate remedy" for the political use of forced dues. Unions were to be permitted to collect full union dues from workers who did not object to the unions' political activities, and they were to be permitted to collect dues for collective-bargaining purposes from dissenting workers. But forced dues would have to be less than regular dues. The union could not collect full dues from dissenters and then use all those forced dues for collective-bargaining purposes. That would permit the union to use for political purposes more of the dues collected from voluntary payers than it otherwise could have. In effect, the dissenters would still be subsidizing political expenditures. The Court suggested that one possible remedy

would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed. . . . [T]he portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.[\[29\]](#)

Three points in the Court's suggestions for remedy played a role in subsequent cases. First, each individual dissenter had to file a complaint referring to specific political expenditures to which he objected. No class action was possible. Moreover, a worker could not opt out of all political expenditures as a general category. He had to object to specific political expenditures. Second, a rebate scheme was all right. That is, a union could exact full union dues and then later give a refund to any individual dissenter. There was no mention of interest to be paid on the refunded money. Third, the amount of the refund could be determined by a percentage reduction formula based on the percentage of the total union budget that was spent for political purposes.

The problems surrounding the first point were partially addressed in *Railway Clerks v. Allen* (1963). There the Court loosened the *Street* constraint on dissenters by permitting them to "opt out" of all political expenditures. They no longer had to object to specific political expenditures, but dissenters still had to object as individuals, not as a class. The *Allen* Court also suggested that initial reduction of dues rather than a rebate scheme would be an appropriate remedy. That was only a suggestion, however, and most unions ignored it.

The third point in the suggested remedy in *Street* proved especially important to future cases. Although the Court said that forced dues could be used only for collective-bargaining purposes, its suggested remedy did not require a union to defend the expenditures it labeled as collective-bargaining expenditures. The base line was not zero forced dues to which could be added proven collective-bargaining expenditures. Rather, the base line was full union dues from which could be subtracted expenditures that the union admitted were for political purposes.[\[30\]](#) Moreover, the unions themselves got to define all the terms and construct all the procedures within the Court's broad guidelines.

Justice Black vigorously dissented in *Street*. In his view the Court had to strain to define Section 2, Eleventh narrowly to permit the use of forced dues only for collective-bargaining purposes. He thought the Court should have decided the case purely on First Amendment grounds. The union security agreement in dispute should have been disallowed in its entirety because it was tainted by political uses of forced dues. He thought that a narrow statute that explicitly limited the use of forced dues to collective bargaining purposes would pass constitutional muster because the government's interest in maintaining industrial peace was sufficiently strong to justify the limited infringement of First Amendment rights for that purpose. However, he opined that in practice the accounting burdens involved in separating permissible

from impermissible uses should result in unions' deciding to devote all dues collected under union security agreements to collective-bargaining purposes.

In expressing his views on the First Amendment, Justice Black quoted James Madison and Thomas Jefferson.

If [using forced dues for politics] is constitutional the First Amendment is not the charter of political and religious liberties its sponsors believed it to be. James Madison, who wrote the Amendment, said . . . that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." And Thomas Jefferson said that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." These views of Madison and Jefferson authentically represent the philosophy embodied in the safeguards of the First Amendment.[\[31\]](#)

### ***Abood v. Detroit Board of Education***

*Abood v. Detroit Board of Education* (1977) was the first case involving union security agreements in government employment. In such employment the typical form of union security is the agency shop. Before *Abood* government employees did not have to become union members, but they did have to pay full union dues (or "agency fees"). The plaintiffs, *Abood et al.*, claimed that all union security agreements in government employment were unconstitutional. Their reasoning was that the First and Fourteenth Amendments bar government from discriminating for or against any citizen on the basis of his affiliation or nonaffiliation with a private group such as a union. In public employment, government is the employer. By refusing to hire any citizen who does not affiliate with a private organization called a labor union by paying money to it, a government would be directly interfering with that citizen's freedom of association. Unlike the private-sector employment cases, in this case there can be no question about government action because the government itself is a party to the union security agreement. Moreover, the specific Michigan statute in question explicitly permitted the use of forced dues for political purposes.

The Court decided against *Abood* and his coplaintiffs on the question of whether union security agreements are illegal per se in government employment. It recognized that there was a legitimate constitutional question, but it said that the government's interest in maintaining labor peace was sufficiently compelling to justify limited infringement of freedom of association. The limit was set at compelling government employees to pay only for the collective-bargaining services of exclusive representatives.

In *Street* there was no need to worry about a *constitutionally* justified limit because Section 2, Eleventh was interpreted narrowly to permit the Court to avoid constitutional questions. In that case, if the statute had permitted forced dues to be used for political purposes, it would have been necessary for the Court to decide a *constitutional* limit to the permissible uses of such dues. But the statute was held not to permit such uses, so the Court did not have to set such a limit. In *Abood*, however, the constitutional issue could not be avoided. Still, the Court asserted that the government's interest in achieving labor peace was sufficient to justify the limited infringement of constitutional rights in the Michigan statute. But the part of that statute that permitted forced dues to be used for political purposes was held to be unconstitutional.

Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. . . .[\[32\]](#)

These principles prohibit a State from compelling any individual to affirm his belief in God . . . or to associate with a political party . . . as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the [union] from requiring [any government employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.[\[33\]](#)

In denying plaintiffs' claim that the entire union security agreement was unconstitutional, the Court said:

To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. . . . To be required to help finance the union as a collective bargaining

agent might well be thought . . . to interfere in some way with an employee's freedom to associate. . . . But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. . . .[\[34\]](#)

The government interests advanced by the agency shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law. . . . The desirability of labor peace is no less important in the public sector, nor is the risk of "free riders" any smaller. . . .[\[35\]](#)

The very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees. . . .[\[36\]](#)

The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.[\[37\]](#)

In *Abood*, as in *Hanson* and *Street*, the Court asserted that the Constitution, because of the governmental interest in industrial peace, permits the imposition of forced dues for the limited purpose of funding the collective-bargaining activities of certified unions. In that regard the First Amendment rights of private and government workers do not differ. In *Street*, Section 2, Eleventh of the RLA was interpreted as prohibiting the imposition of forced dues to fund unions' political activities. In *Abood*, however, the Constitution, not a statute, was held to prohibit the imposition of forced dues to be used for political purposes. Recall that in *Street* the Court said that if it were not for its narrow interpretation of Section 2, Eleventh, it would have to consider whether the Constitution would bar the use of forced dues for political purposes under the RLA. The Court found the necessary government action in the fact that the RLA prohibits state right-to-work laws. In my judgment, if it were not for its interpretation of Section 2, Eleventh, the Court would apply the same reasoning it used with regard to the use of forced dues for political purposes in *Abood* to RLA cases. Public-sector and RLA cases should be thought of as being alike. In public-sector employment it is *unconstitutional* for unions to use forced dues for political purposes. In RLA cases, if the statute permitted it, it would be unconstitutional for unions to use forced dues for political purposes. As we will see below, that is not quite as clear in NLRA cases. It ought to be, but it is not.

In *Abood* the Court again suggested some guidelines for remedies that should be available to dissenting workers. Such dissidents must complain as individuals, not as a class, and a rebate scheme based on a percentage reduction formula as in *Street* would be sufficient. It was left to the unions to work out the details.

Justice Powell wrote an opinion concurring in the judgment that reads more like a dissent. In my view, it constitutes excellent grounds for holding both exclusive representation and union security agreements in government employment unconstitutional. Powell insisted that First Amendment questions in public employment are much more significant than under the RLA. He accused the Court of constructing an invalid "two tiered" constitutional analysis[\[38\]](#)--the first tier permitting forced dues for collective-bargaining purposes and the second tier forbidding the use of forced dues for political purposes. In his view *everything* a government employee union does is political; therefore, the presumption ought to be that no form of forced affiliation with a union is constitutional in the public sector.

The ultimate objective of a union in the public sector, like that of a political party, is to influence public decisionmaking in accordance with the views and perceived interests of its membership. Whether a teachers' union is concerned with salaries and fringe benefits, teacher qualifications and in-service training, pupil-teacher ratios, length of the school day, student discipline, or the content of the high school curriculum, its objective is to bring school board policy and decisions into harmony with its own views. . . . In these respects, the public sector union is indistinguishable from the traditional political party in this country. . . .[\[39\]](#)

Nor is there any basis here for distinguishing "collective bargaining activities" from "political activities" so far as the interests protected by the First Amendment are concerned. Collective bargaining in the public sector is "political" in any meaningful sense of the word. . . .[\[40\]](#)



. . . Disassociation with a public-sector union and the expression of disagreement with its positions and objectives therefore lie at the "core of those activities protected by the First Amendment." . . . [41]

. . . For the Court to sustain the *exclusivity principle* in the public sector in the absence of a carefully documented record is to ignore, rather than respect, "the importance of avoiding unnecessary decision of constitutional questions." The same may be said of the asserted interests in eliminating the "free rider" effect and in preserving labor peace. [42]

According to Powell, the burden ought to be on the state to prove any compelling government interest that would overcome the presumption of unconstitutionality. There was no such proof offered in *Abood*. Worse, under the Court's guidelines for a remedy, the dissident worker bears the burden of bringing litigation to challenge union expenditures of his money.

Under today's decision, a nonunion employee who would vindicate his First Amendment rights . . . must initiate a proceeding to prove that the union has allocated some portion of its budget to "ideological activities unrelated to collective bargaining." . . . I would adhere to established First Amendment principles and require the state to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives. This placement of the burden of litigation, not the Court's, gives appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important. [43]

Note that Powell's recommended procedure set a zero baseline for union expenditure of forced dues. Unions would have to demonstrate the legitimacy of every category of expenditure that they wished to finance from such dues.

In the first cases just discussed, the Court did not set up firm procedural rules that unions and employers must follow to protect the rights of dissenting workers. It only suggested rules that might work. Unions were left free to structure their own "internal remedies." In practice most unions ignored the proscription against using forced dues for political purposes. They went right on collecting 100 percent dues from nonmembers and complaining members. A dissenting worker had to run the gauntlet of union-structured procedures to get any refund. The few unions that instituted procedures for initial reduction of dues set an arbitrary, small-percentage reduction from regular dues that all dissenting workers could claim if they wished. The Court, in those cases, said nothing at all about Box 1 and Box 4 expenditures. In the 1980s that all changed.

### ***Ellis v. Railway Clerks***

The dissenting workers in *Ellis v. Railway Clerks* (1984) were employees of Western Airlines. Western had entered into an agency shop agreement with the Brotherhood of Railway, Airline and Steamship Clerks (BRAC) under Section 2, Eleventh of the RLA. Notwithstanding the earlier RLA cases, the agency shop agreement explicitly called for all nonmembers to pay *full* union dues. Dissenting workers could request a refund after they paid the full dues. The plaintiffs did not challenge the agency shop *per se*, but they did challenge union expenditures of forced dues for all purposes other than collective bargaining. For the first time, Box 1 and Box 4 union expenditures were up for examination. *Ellis et al.* claimed that, on the basis of the challenged Box 1 and Box 4 expenditures, they were entitled to a refund of 40 percent of all the dues exacted from them under the agency shop agreement. In addition, they challenged the adequacy of the union's rebate scheme for purely political and ideological (Box 2) expenditures.

The dissenting workers specifically challenged six categories of expenditures: (1) the national union's quadrennial convention (Box 1), (2) litigation not involving the negotiation of agreements or settlement of grievances (Box 4), (3) union publications (Box 1), (4) union social activities (Box 4), (5) death benefits for employees (Box 1), and (6) the union's general organizing activities (Box 4).

The Court relied on its decision in *Street* and its two-tiered constitutional analysis in *Abood* in reaching its decision. It reaffirmed that Section 2, Eleventh permits forced dues to be used only for collective-bargaining purposes and then declared that if any other use of forced dues were permitted by the statute, constitutional questions like those in *Abood* would be raised. The government's interest in labor peace does not override First Amendment concerns except for the

narrow purpose of capturing free-rider beneficiaries of collective bargaining by exclusive bargaining agents.<sup>[44]</sup> In this case, however, as in *Street*, the Court did not rely on the Constitution in its evaluation of the six challenged expenditures. It relied instead on its interpretation of Section 2, Eleventh. Under the RLA,

[o]nly a union that is certified as the exclusive bargaining agent is authorized to negotiate a contract requiring all employees to become members of or to make contributions to the union. Until such a contract is executed, no dues or fees may be collected from objecting employees who are not members of the union; and by the same token, any obligatory payments required by a contract authorized by Section 2, Eleventh terminate if the union ceases to be the exclusive bargaining agent. [For future reference, note that the same things could be said in connection with the NLRA and its Section 8(a)3.] Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of representing the employees in dealing with the employer on labor-management issues.<sup>[45]</sup>

Applying that test, the Court reached the following decisions with regard to the six challenged expenditure categories. (1) Conventions. Dissenters can be charged for those expenditures because conventions are "essential to the union's discharge of its duties as bargaining agent."<sup>[46]</sup> At such conventions, "members elect officers, establish bargaining goals and priorities, and formulate overall union policy."<sup>[47]</sup> Thus, a Box 1 expenditure is treated like a Box 3 expenditure. (2) Social activities. Dissenters can also be charged for those activities since they are "formally open to nonmember employees." Although they "are not central to collective bargaining, they are sufficiently related to it to be charged to all employees."<sup>[48]</sup> Thus, a Box 4 expenditure is treated like a Box 3 expenditure. (3) Union publications. Since the union magazine "is the union's primary means of communicating information concerning collective bargaining, contract administration, and employees' rights to employees represented by BRAC," dissenting members can be charged for everything in that publication except political material.<sup>[49]</sup> Thus, a Box 1 expenditure is treated as it ought to be treated; some of it can be charged to dissenters, and some *cannot*. The collective-bargaining part, yes; the political part, no. (4) General organizing expenditures. The Court ruled that unions cannot charge dissenting workers for union attempts to organize hitherto unorganized employees of nonunion firms. "[W]here a union shop provision is in place and enforced, all employees in the relevant unit are already organized. By definition, therefore, organizing expenses are spent on employees outside the collective-bargaining unit already represented." Further, "the free rider the Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members."<sup>[50]</sup> Here a Box 4 expenditure was treated as it ought to be. It is not collective bargaining, so it should not be charged, notwithstanding that it is also not political. (5) Litigation. That is another Box 1 case that was treated as it ought to be. The Court held that if the litigation involves the negotiation or administration of a collective-bargaining agreement, it is chargeable to dissenting workers; otherwise it is not. Legal expenses to challenge "the legality of the airline industry mutual aid pact," or "litigation seeking to protect the rights of airline employees generally in bankruptcy proceedings," for example, are not chargeable.<sup>[51]</sup> (6) Death benefits. The Court held that the issue was moot because the dissenting workers were no longer covered. They were not due a refund because they had enjoyed the insurance protection while they were covered.

Justice Powell, in a decision concurring in part and dissenting in part, argued that the Court should have classified union conventions as unchargeable to dissenting workers. Taking a not uncommon example, he pointed out that at the 25th quadrennial convention of BRAC,

a number of major addresses were made by prominent politicians, including Senators Humphrey, Kennedy, Hartke, and Schweiker, the Mayor of Washington D.C., and four Congressmen. The union has not shown how this major participation of politicians contributed even remotely to collective bargaining.<sup>[52]</sup>

The two big losses for unions, among the six challenged expenditure categories, were union organizing and litigation. According to one estimate, a national union's general organizing activity amounts, on average, to one-third of its operating budget.<sup>[53]</sup> Although I have seen no estimates of non-collective-bargaining litigation expenses, it has long been common for unions to charge dissenting workers even for the costs of defending union officers against corruption charges. In 1991 in *Lehnert v. Ferris Faculty Association*,<sup>[54]</sup> the Court added political lobbying and public relations expenditures to the *Ellis* list of activities for which dissenting workers may not be charged. *Lehnert* was a public-sector

case, but the Court's frequent references to *Street* and *Ellis* in the decision leave no doubt that it considers RLA and public-sector cases to be members of the same family.

Another big loss for unions in *Ellis* was the Court's declaration that pure rebate schemes would no longer be permitted as remedies. Up until then the few unions that had paid any attention to the earlier cases had taken care of the problem by rebating dues according to a arbitrary, small-percentage formula. All workers were charged the regular dues; then, if a worker complained and if he survived the union's internal appeal processes, he got a rebate. In *Ellis* the Court put a stop to that.

[T]here is language in this Court's cases to support the validity of a rebate program. *Street* suggested "restitution to each individual employee of [a] portion of his money which the union expended. . . ." See also *Abood*. . . . Those opinions did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate.[\[55\]](#)

Notice that here the Court seems to imply that the "constitutional adequacy" question in *Abood* would apply in *Ellis* if the restrictions of Section 2, Eleventh did not exist.

The Court went on to explain that rebates of money spent on impermissible uses, even if interest is added, amount to involuntary loans from dissident workers to the union.

By exacting and using full union dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of statutory authorization. . . . The harm would be reduced were the union to pay interest on the amount refunded, but [the union in this case] did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.[\[56\]](#)

The alternative to a rebate scheme is, of course, to reduce dues at the time of collection. Under *Ellis* a complaining worker cannot be charged dues that will be used for impermissible purposes. Although the Court did not explicitly say so in this case, the only way an objector can be free of exactions for impermissible purposes is for the union, before it exacts any money from anyone, to explain to all workers (because any worker could decide to be an objector) the basis for its categorization of all its expenditures and then offer all who may then object an initial reduction of a certain percentage of regular dues. (Otherwise unions would regularly exact funds that they would have to rebate to workers after the workers discovered that the funds were used for impermissible purposes.) The Court imposed just such a procedure two years later in the *Hudson* case.

It is clear that the Court thinks that RLA and public-sector cases involving forced dues are to be treated exactly alike. First, in *Abood* the Court explicitly based its approach on *Hanson* and *Street*. Second, in *Ellis* the Court drew several parallels between RLA and public-sector cases, frequently referring to *Abood*. Thus, for railroad and airline employees as well as government employees, both the substantive decisions regarding specific expenditure categories and the procedural ban on pure rebate schemes apply.

### ***Chicago Teachers Union v. Hudson***

*Chicago Teachers Union v. Hudson* (1986) was another public-sector case. The issue was the adequacy of a procedure devised wholly by the Chicago Teachers Union in response to the Court's *Abood* decision. There was an agency shop agreement between the union and the Chicago School Board. The union had offered an advanced reduction of 5 percent of regular dues to any agency fee payer who objected to the political uses of forced union dues. The 5 percent figure was calculated by the union, using its records, without any independent audit or confirmation. Any objector automatically received the 5 percent reduction. Any teacher who wanted to claim a bigger reduction had to first pay the standard 95 percent fee and then write to the union president to explain why she wanted a rebate. The president would pass the claim on to the union's executive committee; if the claim was not settled by the executive committee, it was passed on to the union's executive board; finally, if the claim was not settled by the executive board, the union's president would pick an arbitrator who would have final say on the matter. Annie Lee Hudson and other teachers thought that procedure was less than fair. The union controlled every step of the procedure. There was no chance that

complaining teachers could get a fair hearing. Moreover, it was a rebate procedure.

The Court began by tying this case to *Ellis*:

The *Ellis* case was primarily concerned with the need "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." . . . In contrast, this case concerns the constitutionality of the procedure adopted by the Chicago Teachers Union, with the approval of the Chicago Board of Education, to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn.[\[57\]](#)

In *Hudson* the Court ruled that dissident workers have a valid First Amendment claim, and adequate procedures must be devised to address that claim.

Procedural safeguards are necessary . . . for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on non-union employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee . . . must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.[\[58\]](#)

The union's procedure was constitutionally defective for three reasons. First, as in *Ellis*, a rebate procedure is defective because it amounts to an involuntary loan to the union for impermissible expenditures. Even if the amount is small, it is still important.

For, whatever the amount, the quality of [dissident teachers'] interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In *Abood* we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves."[\[59\]](#)

Second, the dissenters were not given adequate information on which to base their decision to object.

In *Abood* we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof. . . . Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the *potential* objectors be given sufficient information to gauge the propriety of the union's [95 percent] fee. Leaving nonunion employees in the dark about the source of the figure for the agency fee--and requiring them to object in order to receive information--does not adequately protect the careful distinctions drawn in *Abood*.[\[60\]](#)

Note the implications of the foregoing passage. Before any money can be collected from *anyone*, the union must provide to all potential dissenters adequate information on which to base a decision about whether or not to dissent. Inasmuch as all union members, as well as nonmembers, are potential objectors, that means all workers represented by an exclusive bargaining agent must be given such information. After all, in an agency shop, every union member has the option of resigning membership and becoming an agency fee payer. All workers need to know the size of the reduction in dues that would result from resigning and paying only the collective-bargaining-agency fee before they can decide whether or not to do so. In an agency shop there could be nonmembers who would not object to paying for the union's non-collective-bargaining activities, but that is unlikely. Workers who endorse the full union agenda are more likely to become regular, voluntary union members.

Third, the union's procedure was biased because the union president picked the final arbitrator. A proper procedure must have an impartial arbitrator.[\[61\]](#)

After the litigation started, the union amended its procedure to include a 100 percent escrow of the money exacted from dissidents. But not even that was enough to satisfy the Court.

Although the Union's self-imposed remedy eliminates the risk that nonunion employees' contributions may

be temporarily used for impermissible purposes, the procedure remains flawed in two respects. It does not provide an explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker.[\[62\]](#)

Even with a 100 percent escrow, the Court demanded that the union give adequate information to actual and potential dissenters before any money is exacted, and it demanded that an impartial arbitrator have the final say about any disputed expenditures.

In evaluating the merits of a 100 percent escrow rule, the Court said that such a rule would deprive the union of use of some escrowed funds for expenditures that are unquestionably permissible. It pointed out that an independently audited statement explaining and quantifying a union's expenditure categories would solve that problem.

If, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories.[\[63\]](#)

The Court concluded by summarizing its view of the requirements of procedural due process in forced dues cases.

We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation for the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.[\[64\]](#)

In sum, the procedural due process requirements of the *Hudson* decision are the following.

1. A union that is an exclusive bargaining agent and has a union security agreement with an employer must provide an independently audited breakdown of its expenditures as an explanation for the fees it wishes to exact from dissenting workers. Only expenditures for collective bargaining, contract administration, and grievance adjustment, and expenditures that are very closely related to those purposes, may be used to justify such exaction. The audited breakdown and explanation of spending must be available to all actual and potential dissenters, which means it must be available to all the workers the union represents. Moreover, it must be made available to those workers before any money is exacted from them. The union may exact as large a portion of regular union dues from any nonmember (agency shop) or financial core member (union shop) as the independently audited statement justifies.
3. If any nonmember or financial core member wishes to dispute any portion of the fee the union tries to exact from him, and if the amount in dispute is not obviously chargeable, the union must escrow the disputed amount in an interest-bearing account.
5. The dispute must be promptly settled by an impartial arbitrator. The independent auditor who examines the union's expenditures and explanations of its proposed dissenters' fee and the impartial arbitrator who settles a dispute are different people with different tasks. Neither the union nor the dissenters can unilaterally pick either of them.

Edwin Vieira, Jr., the attorney who represented the dissenting teachers in *Hudson*, argues that since a union must provide an audited adequate explanation of its proposed dissenters' fee before it can exact any money, the Court effectively reversed its earlier view (in *Street*) that only individual workers can complain. The procedural rules in *Hudson* entitle all potential dissenters to adequate information on which to base a decision to dissent. If that information is not provided, all the workers entitled to receive it would constitute a class with standing to sue.[\[65\]](#)

Vieira also points out that the *Hudson* procedures settle the question of which baseline the union must use in determining the fees it exacts from dissenters.[\[66\]](#) The union in this case started with a baseline of 100 percent of



union dues from which it deducted expenditures it determined were impermissible. The *Hudson* rules now force a union to start with a zero baseline and add each expenditure that it can adequately defend, by audited explanations, as chargeable to dissenters.<sup>[67]</sup> That is a major gain for dissenters. The burden of proof is placed squarely on the union to justify every penny it exacts from dissenters. The subtraction method employed by the Chicago Teachers Union placed the burden of proof on dissenters to show that a disputed expenditure was not sufficiently related to collective bargaining to justify charging dissenters for it.

None of the cases from *Hanson* to *Hudson* involved the NLRA. Some commentators assumed that the substantive and procedural rules in those cases would apply to NLRA forced dues cases as well, and others assumed that they would not. Two years after *Hudson*, the Court rendered its decision in *Beck*--the first, and so far the only, NLRA forced dues case it has decided.

### ***Communications Workers of America v. Beck***

*Communications Workers of America v. Beck* was initiated in a federal district court in 1976. The dispute involved an agency shop agreement between the Communications Workers of America and AT&T that required all workers to pay full union dues as a condition of continued employment. Harry Beck and other dissenting workers brought suit claiming that, as in RLA union security agreements, fees exacted from dissenters could be used only to pay for the union's collective-bargaining, contract administration, and grievance adjustment activities.

Under the NLRA, the National Labor Relations Board (NLRB) has initial jurisdiction in cases involving allegations of unfair labor practices. Union security agreements are permitted by Section 8(a)3 of the NLRA. That section makes it an unfair labor practice for an employer to discriminate for or against a worker on the basis of the worker's affiliation or nonaffiliation with a union *except* if the exclusive bargaining agent and the employer have a union security agreement. If they do, it is all right for the employer to fire any worker who decides not to affiliate with the union. Beck et al. did not complain to the NLRB but instead filed suit in federal district court. Before the Supreme Court, the union argued that the district court should not have heard the case because it did not have proper jurisdiction. In its 1988 decision the Court made short work of that argument by pointing out that the dissenting workers had alleged that, in using money exacted from non-members for non-collective-bargaining purposes, the union had breached its duty of fair representation and that district courts have original jurisdiction in cases involving the duty of fair representation. The union allegedly breached its duty of fair representation by misusing dues collected under Section 8(a)3. Therefore, the Supreme Court held, the trial court properly heard the dissenters' 8(a)3 claims. Interestingly, the trial court held that 79 percent of the money exacted from the dissenting workers would have to be refunded, with interest, because that was the percentage of dues used for impermissible purposes. That percent age was upheld throughout the litigation.

Charles Fried, President Reagan's Solicitor from 1985 to 1989, was asked by the Court for the government's position in the case. Surprisingly, Fried sided with the union. His argument had two parts.<sup>[68]</sup> First, he argued that Section 8(a)3 does not compel union security agreements; it merely permits them. Moreover, unlike Section 2, Eleventh of the RLA, the NLRA does not prohibit states from banning union security agreements within their own borders. Thus, he concluded, there is no government action behind NLRA union security agreements. Without the necessary government action, Beck et al. had no valid constitutional claim. Second, Section 8(a)3 requires workers under union security agreements to pay the "periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." In Fried's view, the clear meaning of those words is that all workers must pay full ordinary union dues. Dissenters are not entitled to pay less. There is nothing in the statute, he concluded, that even remotely implies that there are limits on what the union can do with the dues money it receives.

The Court disagreed with Fried's second point and thus did not have to address his first point. As he had in *Street*, Justice Brennan wrote the majority opinion.

Over a quarter century ago we held that Section 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes.

... Our decision in *Street* ... is far more than merely instructive here: we believe it is controlling, for Section 8(a)3 and Section 2, Eleventh are in all material respects identical. Indeed we have previously described the two provisions as "statutory equivalents," *Ellis v. Railway Clerks* ... , and with good reason,

because the 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.[\[69\]](#)

There can be no legitimate doubt that all the RLA forced dues cases apply directly to NLRB forced dues cases. Specifically, all the substantive decisions regarding the categories of expenditures challenged in *Ellis* apply to NLRA union security agreements. If the above references to *Street* and *Ellis* are not enough to settle the question, the following statement of the Court ought to be.

Given the parallel purpose, structure and language of Section 8(a)3 [to Section 2, Eleventh], we must interpret that provision in the same manner. Like Section 2, Eleventh, Section 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, and like its counterpart in the RLA, Section 8(a)3 was designed to remedy the inequities posed by the "free riders" who would otherwise unfairly profit from the Taft-Hartley [the 1947 amended version of the NLRA] 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.[\[70\]](#)

Fried could have argued, of course, that the Court misinterpreted the nearly identical language in the earlier RLA cases as well as in *Beck*. In the RLA cases, that probably would not have mattered because in *Street* the Court recognized that there is government action in the RLA sufficient to raise constitutional questions regarding the uses of forced dues. (That action, recall, is that the RLA over rides state right-to-work laws with regard to employment in the railroad and airline industries.) However, there is no such basis for declaring government action in the NLRA. As I explained in the sections on key statutory unionist principles and government actions in union security, I think there is sufficient government action in the NLRA to raise constitutional questions, but the Court has never spoken to the question.

Nevertheless, it is clear that the *Beck* decision, as it stands, protects all nonmembers (in agency shops) and financial core members (in union shops) from having to pay fees to unions other than for the purposes of collective bargaining, contract administration, and grievance adjustment. Moreover, under *Pattern Makers v. NLRB* (1985),[\[71\]](#) any regular member of a union may resign at any time without notice. Thus, all workers under NLRA union security agreements can become nonmembers or financial core members at will and save a large portion of the dues they otherwise would have to pay.

## **Constitutional Rights and the NLRA**

The issue of whether workers under the NLRA can receive constitutional, rather than mere statutory, protection from misuse of forced union dues is very important because the three justices who dissented in *Beck*--Justices Blackmun, O'Connor, and Scalia--agreed with the union that Section 8(a)3 was misinterpreted by the majority. Moreover, although he was on the Court at the time the decision was announced, Justice Kennedy did not participate in the case. Therefore, it is possible that in some future NLRA forced dues case a majority of justices may agree with the dissenters in this case on the interpretation of 8(a)3. If so, only the Constitution would remain to protect dissenting workers. Moreover, since the majority in *Beck* was silent on constitutional questions (the dissent was, too), there is some legitimate doubt about whether the procedural due process rules of *Hudson* apply in NLRA cases. Recall that those procedures were "tailored" to protect the constitutional rights of the dissenting workers in that case.

Edwin Vieira, the dissidents' attorney in both *Hudson* and *Beck*, has argued that it is "childishly simple" to demonstrate the necessary government action in union security agreements under the NLRA.[\[72\]](#) He does so on the grounds I outlined in the second section of this study. Only unions with exclusive representation privileges can enter Section 8(a)3 union security agreements with employers. An employer is forced to bargain in good faith with a union that is a Section 9(a) exclusive bargaining agent on the question of Section 8(a)3 union security. Both individual workers and individual employers are thus denied, by force of the NLRA, their common law contract rights. If that is not "governmental action," what is?

In short, to suggest (as did the majority opinion in *Beck*) that section 8(a)3 agreements are merely

"permissive" as against nonunion employees is to evidence willing blindness to labor law history and doctrine.[\[73\]](#)

Moreover, Vieira continues, since dissenting workers under Section 8(a)3 are made liable for the payment of fees to which they object, and that liability is a "*duty*" legally "enforceable by discharge from employment," the fee amounts to a governmentally imposed tax.[\[74\]](#) That too, is clearly government action.

So clear are Vieira's arguments that the NLRA constitutes government action that he recommends a litigation strategy based on constitutional rights to thwart any union attempts to minimize the impact of *Beck*. He says that

every extension of "*agency fee*" rights that a union demands [must] meet a strict standard of constitutionality applied to *exclusive representation*. For every expenditure that a union claims may be coercively subsidized with "agency fees," nonunion employees must argue that:

- The activity generating the expenditure is not within the applicable statutory definition of "collective bargaining" for which the union is certified as their exclusive representative. And,
- If the activity is held to be part of such statutory "collective bargaining," then the statutory requirement that employees accept a union as their representative for the purpose of engaging in that activity is unconstitutional under the First and Fifth Amendments (national level) or the First and Fourteenth Amendments (state and local levels).

This approach will reduce every "agency fee" case to a challenge to exclusive representation--a challenge the partisans of compulsory unionism know they cannot win, and, therefore, dare not openly face.[\[75\]](#)

According to Vieira, the First Amendment question in forced dues cases concerns freedom of association, and forced dues cases involve the Fifth and Fourteenth Amendments because of due process questions. Although I agree with Vieira that exclusive representation and union security should be challenged on those grounds, I am less optimistic than he appears to be about the outcome of such litigation.

Apart from the question of whether there is sufficient government action in the NLRA to raise questions of the constitutional rights of dissenting workers, a reasonable argument can be made that the *Hudson* procedural due process requirements apply to NLRA forced dues cases merely on the basis of the case history from *Hanson* to *Beck*. As we have already seen, the Court relied on *Hanson* and *Street* in reaching its decision in *Abood*; it relied on *Abood*, *Hanson*, and *Street* in reaching its decision in *Ellis*; it relied on those same three cases in reaching its decision in *Hudson*; and, finally, it relied on *Street* and *Ellis* in reaching its decision in *Beck*. It is clear to me that the Court considers all those cases to be in the same family. It also seems clear that the Court intends the *Hudson* procedures to apply in NLRA cases as they plainly do in RLA cases.

### **Enforcement and Codification of *Beck***

Supreme Court decisions do not enforce themselves. Absent congressional codification of *Beck*, it is up to the Department of Labor and the NLRB to enforce the decision, and, at least until President Bush's April 13 announcements, they had been dragging their enforcement feet. Bush's executive order, however, covers only federal contractors. It is up to the Department of Labor and the NLRB to enforce the decision in other situations. The president's announcement that he had instructed the Department of Labor to propose changes in the annual financial disclosure forms unions are required to file under the 1959 Landrum-Griffin Act, as well as his announcement that he had called on the NLRB to begin to get serious about enforcing *Beck*, may mean that, at long last, workers will begin to get some relief. I now turn to the issues of enforcement and codification.

### **Enforcement**

Under the NLRA, a complaint from an employee to the NLRB first goes to the board's general counsel, who decides whether or not to pursue the complaint. If the general counsel decides to proceed, the complaint is heard by an

administrative law judge (ALJ). If the parties are not satisfied by the decision of the ALJ, the case is heard by the five-member NLRB. Since he took office in 1990, the current general counsel of the NLRB, Jerry Hunter, has delayed action on complaints to such an extent that in early 1991 National Right to Work Legal Defense Foundation attorneys filed a mandamus petition (a request for a court to order an official to carry out his duties) on behalf of Alan Strange in the U.S. Court of Appeals for the D.C. Circuit. Immediately thereafter, Hunter began to issue decisions on complaints and consolidate cases to facilitate resolution. As of this writing (June 1992) there are approximately 300 cases pending. None have been heard by the NLRB itself.[\[76\]](#)

Perhaps none of the cases will be heard, for on May 4, 1992, the NLRB announced that, rather than settle *Beck* questions in its usual case-by-case fashion, it would promulgate substantive and procedural rules that all parties would have to follow.[\[77\]](#) The only other time the NLRB did that was in 1988 when it standardized eight bargaining unit definitions for hospitals. Ordinarily, the NLRB determines whether or not a bargaining unit proposed in a certification election is appropriate on a case-by-case basis. The Supreme Court upheld the NLRB's rule making for hospital bargaining units in 1991.[\[78\]](#) It seems likely that it would do so again with regard to *Beck*.

Unions are not eager, of course, to abide by the *Beck* decision. Their first line of resistance has been to assert that neither the substantive nor the procedural rules developed in the earlier cases are applicable to the NLRA. Apparently they want to start at square one and develop substantive and procedural rules on a case-by-case basis before the NLRB and the courts. For example, on February 18, 1992, the *San Francisco Chronicle* ran the story of one John Nosek, an employee of the Lucky supermarket chain in Thousand Oaks, California. Lucky and its exclusive bargaining agent have a union shop agreement under which Nosek was forced to pay full union dues. After hearing about the *Beck* case, he asked the union to reduce his dues. He was told to pay the full dues or be fired. He then filed a complaint, which is still pending, with the NLRB. In the same article the *Chronicle* reported that

union lawyers contend that the rules are far from clear. Much of the legal battle concerns whether a worker should be forced to pay the costs of recruiting, organizing workers at another location or negotiating contracts at other bargaining units.

. . . "Unions do what they think they are supposed to do, and then they are told to do something else. . . . They just want to get it right," said San Francisco labor attorney Marsha Berzon.[\[79\]](#)

It appears to me that the "union lawyers" mentioned in the *Chronicle* article either are not familiar with the case history or have chosen to ignore it. After *Ellis*, for example, there can be no legitimate question about "recruiting, organizing workers at another location or negotiating contracts at other bargaining units." Those are clearly impermissible uses of forced union dues.

Labor attorneys are not the only people who do not, or may not want to, understand the *Beck* decision. Many of the regional offices of the NLRB have staff who act as if they have never heard of *Beck*. The National Right to Work Committee (NRTWC) hired a private investigative firm, Associated Investigators, Inc., to call NLRB offices across the country, pose as workers covered by union security agreements, and ask for advice on the rules governing union membership and forced union dues. On July 31, 1989, Frank Crumbley, the investigator in charge of the case, issued a report of the investigation that has been published, together with other related material, by the NRTWC.[\[80\]](#) Crumbley and his staff contacted 48 NLRB regional and resident offices across the country. In states with right-to-work laws, of course, the forced membership and forced dues issues are moot. Nevertheless, some NLRB offices in those states were called along with offices in non-right-to-work states. In the latter, 55.9 percent of the offices contacted incorrectly asserted that workers can be forced to be regular union members; 72.4 percent of the offices in non-right-to-work states gave inaccurate information about the amount of dues that could be exacted from dissenting workers; and 48.3 percent of offices in non-right-to-work states gave wrong information on both forced membership and forced dues. With only two exceptions, all the offices called in right-to-work states gave accurate answers to the callers' questions.[\[81\]](#)

The NLRB regularly gives out misinformation in writing as well as in answer to telephone calls. The NLRB has a model union shop clause, for example, in which it recommends language that unions and employers should incorporate in their collective-bargaining contracts. Even now, after *Beck* and related cases, the NLRB's model reads as follows:

It shall be a condition of employment that all employees of the employer covered by this agreement who are members of the union in good standing on the effective date of this agreement shall remain members in good standing and those who are not members on the effective date of this agreement shall on the thirtieth day (or such longer period as the parties may specify) following the effective date of this agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this agreement and hired on or after its effective date shall, on the thirtieth day following the beginning of such employment (or such longer period as the parties may specify) become and remain members in good standing in the Union.[\[82\]](#)

There is nothing in the model contract clause that tells workers they have the option of not being regular union members. Under *General Motors*, new workers automatically have the right to opt for financial core membership. The model strongly suggests the opposite. Further, under *Pattern Makers*, any regular member in good standing can resign and become a financial core member at will without sacrificing continued employment. Finally, there is no mention in the model of the right of workers to reduce the dues they must pay by opting out of all non-collective-bargaining activities of the union.

In a pamphlet entitled "The National Labor Relations Board and You," in a section entitled, "What Are Your Rights as an Employee under the NLRA?" the NLRB states, "[T]he union and employer, in a State where such agreements are permitted, may enter into a lawful union security clause requiring employees to join the union."[\[83\]](#) Now, if "join" is interpreted to mean "become a financial core member," the assertion is correct. But the clear implication is that workers can be forced to become regular members. They cannot.

President Bush's Executive Order 12800 specifies the language that must be used in the *Beck* notices that federal contractors must post throughout their work sites.

Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.

If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.[\[84\]](#)

The notice could be improved by adding that, under *Pattern Makers*, any worker who is already a union member can become a nonmember at will. Nevertheless, the NLRB would be well advised to incorporate the prescribed notice language in its future pamphlets and publications explaining worker rights under the NLRA.

On November 15, 1988, the general counsel of the NLRB, Rosemary Collyer, published guidelines that all NLRB regional directors, officers-in-charge, and resident officers should employ in enforcing the *Beck* decision. She included all the substantive rules of *Ellis*, added a proscription of charging for political lobbying, and outlined a modified version of the due process rules of *Hudson*. She said she assumed that the *Ellis* and *Hudson* rules would apply, although, in her mind, that would depend on future decisions of the NLRB and the courts. Her departures from *Hudson* are alarming. First, she would allow a union, on its own, to decide whether it expends funds for impermissible purposes. If it does, then it must notify nonmember employees that they may object to paying full dues. If they object, they will be charged a reduced fee calculated by the union alone. If they object to the reduced fee, the union then must offer to give a detailed audited explanation. The *Hudson* rule is that all workers must receive an audited, detailed explanation before the union exacts any money from anyone.

There is no guarantee that the guidelines will be followed. For example, on October 31, 1991, David G. Heilbrun, the ALJ in a dispute between one Peter Weissbach and the American Federation of Television and Recording Artists (AFTRA), allowed AFTRA to charge Weissbach for its organizing and political lobbying expenses.[\[85\]](#) Heilbrun



pointed out that the Court's words in *Beck* (at the conclusion of the majority opinion) were that unions could charge for activities necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[\[86\]](#) According to Heilbrun, labor-management issues include more than just collective bargaining. He completely ignored the case history leading to *Beck* and the wording of the majority opinion before the summary statement he quoted.

When the NLRB promulgates its substantive and procedural *Beck* rules, Collyer's guidelines will be superseded; and, unlike the guidelines, the rules will be binding on all ALJs. Whether that will translate into effective enforcement depends on the content of the rules and whether they are obeyed. At a minimum, the NLRB's *Beck* rules ought to include all the substantive and procedural protections spelled out by the Court in *all* of the cases from *Hanson* to *Beck*. If they do, there will be less need for Congress to codify *Beck*.

Secretary of Labor Lynn Martin's proposed changes in the annual financial disclosure forms that all unions must file under the 1959 Landrum-Griffin Act would simplify the enforcement of *Beck*. At present, those forms require that unions report such categories of expenditures as officers' salaries, office and administrative expenses, and grants. Martin would require reports on the following categories of expenditures: contract negotiation and administration, organizing, safety and health, strike activities, political activities, lobbying and promotional activities, and others.[\[87\]](#)

## Codification

There have been two unsuccessful attempts in Congress to codify the *Beck* decision. Both attempts were defeated by congressmen and senators who have long histories of supporting the political agenda of labor unions.

The first attempt was H.R. 2589, the "Workers' Political Rights Act of 1989," which was proposed as an amendment to the Federal Election Campaign Act (FECA) of 1971. Under FECA both unions and businesses are forbidden to contribute money directly to candidates for federal public office. They can form political action committees (PACs), which can make limited dollar contributions to candidates, but a PAC can be funded only by voluntary contributions. A union PAC, for example, cannot be funded with regular union dues. Each union member must voluntarily contribute money, separate from union dues, to the PAC.

But, there is an enormous loophole in the law, which unions have routinely exploited. Unions can make in-kind, rather than dollar, contributions to political campaigns, and the in-kind contributions can be paid for with union dues. For example, union-paid staff can undertake voter registration, education, and turnout campaigns that favor particular candidates. They can man telephone banks and walk the precincts on behalf of union-endorsed candidates. They "donate" their time to politics, but they continue to be paid by the union. Union dues can also be used to pay for "internal union communications" (propaganda aimed at workers represented by the union) that favor particular candidates. Moreover, the overhead costs, staff salaries, rent, utilities, and postage involved in operating union PACs can be paid for by union dues.[\[88\]](#) A large portion of union dues is paid involuntarily. If workers knew of their *Beck* rights, and if those rights were enforced, unions would have far less dues money to spend in those ways.

The Workers' Political Rights Act of 1989 would have prevented unions from using any dues money for political purposes unless they informed, and annually reminded, all the workers they represented of their *Beck* rights. The bill specified the wording that would have to be used, and it included the *Hudson* due process procedural rules. The bill was never debated on the floor of the House of Representatives because it was quashed in committee.

The second attempt to codify *Beck* took place in the U.S. Senate in July 1990. The codification was a proposed amendment to S. 137, the "Senate Election Campaign Act," which was under consideration in the Senate. The latter was itself a proposed amendment to the FECA. Sens. Orrin Hatch (R-Utah) and Mitch McConnell (R-Ky.) were the chief proponents of the codification. The provisions of their amendment were essentially the same as those of the Workers' Political Rights Act that had failed in the House a year earlier. The Hatch-McConnell amendment was defeated on July 31, 1990, by a vote of 59 to 41. The chief opponents of the amendment were Sens. Howard Metzenbaum (D-Ohio) and David Boren (D-Okla.).

Senator Boren proposed his own amendment to "codify" *Beck*, which passed by a vote of 57 to 43. In the end, the entire Senate Election Campaign Act died with the adjournment of the 101st Congress, so Senator Boren's codification

of *Beck* never became law. Nevertheless, a good sense of the resistance to true codification of *Beck* in Congress can be gained from examining Boren's proposed codification.

First, Boren would return to the 100 percent baseline method of calculating forced dues, and he would allow deductions only for political purposes. The Box 1 and Box 4 expenditures disallowed in *Ellis* and in *Lehnert* would be chargeable to dissenters. Second, Boren would allow national unions to apply uniform percentage reductions to all dissenters. That was precisely the process overturned in *Hudson*. Third, Boren would allow the union, "using such allocation methods that are recognized by independent certified public accountants as generally acceptable with respect to nonprofit organizations, taking into consideration the special problems and functions of a labor organization," to determine unilaterally the uniform percentage reduction.<sup>[89]</sup> That is a far cry from the audit by an independent certified public accountant called for in *Hudson*. Only Boren and Metzenbaum know for sure what could sneak in under the rubric "the special problems and functions of a labor organization." Fourth, Boren would compel a worker to complain before "an adequate explanation of the organization's method of calculating" the charged fee is offered.<sup>[90]</sup> In *Hudson* an *audited* adequate explanation must be given to all workers before any dues can be collected. Finally, Boren's amendment provided that

[t]he requirements of [this amendment] are in lieu of any requirements limiting the financial obligations of objecting employees under any other provisions of Federal law (including the National Labor Relations Act, as amended, and the Railway Labor Act, as amended).<sup>[91]</sup>

Boren's amendment would override the Court's interpretations of Section 2, Eleventh and Section 8(a)3. Only the ambiguous language of Boren's amendment to the FECA would remain to protect RLA and NLRB workers. Only government workers would then be protected by the case history.

The NLRB is now formulating its substantive and procedural rules for *Beck* disputes. It will be interesting to see which model it follows. Will it come up with Boren-style rules or Hatch-McConnell-style rules, or will it come up with something in between? When those rules are promulgated, will they be contested, and if they are contested, what will the Court have to say about them? We can only wait and see.

## Conclusion

How significant is the *Beck* decision? Unionists say it is insignificant, yet they act as if it is the end of their world. Their response to President Bush's April 13, 1992, executive order reflected both views. They decried the executive order, asserting that Bush was trying to destroy the union movement, yet they also claimed that the order would have little effect on their political activities. After the 1988 decision, most unionists asserted it would have little effect. Perhaps that was because they thought no one would enforce it. Robert E. Funk, associate general counsel for the United Food and Commercial Workers, for example, said in December 1989, "We're not finding any big revolt out there." Only a "handful" of requests for reduced dues had been received by his union. Moreover, he declared, those who do request a refund would get at most a 20 percent reduction in dues. He asserted that his union spends only that amount on impermissible purposes.<sup>[92]</sup> It may; I do not know. But in *Beck* the amount of impermissible expenditures was 79 percent; in *Ellis* the Box 1 and Box 4 expenditures, to say nothing of the purely political expenditures of Box 2, amounted to 40 percent of regular dues; and in *Lehnert* a 90 percent refund was granted by the trial court.

Notwithstanding his charge of hypocrisy in response to President Bush's executive order, Lane Kirkland, president of the AFL-CIO, predicted that the order would have "little or no effect on our political processes or our participation in the political process."<sup>[93]</sup> On the other hand, Reed Larson, president of the National Right to Work Committee, characterized the *Beck* decision as "Harry Beck's Earthquake."<sup>[94]</sup> The Bush administration officially estimated the impact of the executive order to be \$2.4 billion annually.<sup>[95]</sup> The actual amounts involved cannot be known until the order is enforced and actual data are collected. My guess is that the "earthquake" characterization of the decision is not far off the mark.

The expected compliance costs (accounting and legal costs, not the dollar amount of impermissible charges that might have to be refunded) that unions would have to bear if *Beck* were rigorously enforced are so huge that at least two practitioners in the field have recommended that Congress, in RLA and NLRA cases, and state legislatures, in state and local government employment cases, adopt an "85 percent solution."<sup>[96]</sup> That is, they recommend that the relevant

statutes be amended to provide a uniform reduction of 15 percent to all dissenting workers no matter what the facts of the individual case may be. At least in the public-sector cases, it is almost certain the Court would declare such a statute unconstitutional.

If the NLRB promulgates rules that rigorously enforce the *Beck* decision, incorporating the *Ellis* and *Lehnert* list of permissible and impermissible expenditures along with the *Hudson* procedural protections, I think that many unions may simply choose to drop their union shop and agency shop agreements. The compliance costs may make security agreements inefficient for the unions. If that is the eventual outcome, the long court battle, waged since 1956 by workers seeking freedom from forced dues association with unions, will have been won. Only exclusive representation would remain to deny workers their freedom to choose.

Most workers do not know the details of labor law. They rely on unions and, to a smaller extent, employers to explain their rights to them. In many cases it is not in the interest of unions (and many employers) to explain worker rights accurately. Workers under union shop agreements, for example, do not have to join the union that represents them, even as financial core members, until after their probationary period on the job (usually 30 days). Nevertheless, at NUMMI, the joint venture between General Motors and Toyota in Fremont, California, newly hired workers are charged full union dues from day one. Just as bad, each new hire is presented with a card to sign that authorizes the employer to deduct "voluntary" money contributions to the United Auto Workers' PAC fund. No explanation is given; the card is just one of several papers, forms, and cards to be unaware of the nature of the authorization they sign. Those who are aware, and who would otherwise protest, are coaxed to go along by peer pressure.

Peer pressure, and all that it entails, may make enforcing *Beck* very difficult even if the NLRB's rules, and any congressional codification, turn out to reflect accurately the Supreme Court's substantive and procedural holdings in the forced dues case history. It is easy for unionists subtly to suggest that any dissenting worker will get undesirable job assignments, be denied promotions and transfers, and be isolated and shunned. No new worker wants to begin by identifying himself as a dissident. If he does, he may not even make it through his probationary period. Under forced unionism, the probationary period is used not just for the employer to determine whether a new worker can do the job; it is also used for the union to see whether the worker will become an adversary. Short of abolishing exclusive representation, and all that goes with it, there may not be an effective way to overcome the insidious coercion of peer pressure.

Given that the federal government has created this coercive situation in the first place, it is the responsibility of the Department of Labor and the NLRB to mitigate at least some of the coercion by informing workers of their job-related rights in this complex legal context. It is also the responsibility of those agencies, and the courts, to enforce those rights. But government agencies respond to political forces. Their budgets are controlled by Congress, and agency bureaucrats are loath to antagonize their political patrons. As long as politicians of both political parties are dependent on the organized monetary and in-kind political support that unions have long been able to supply, justice will be denied dissenting workers who want simply to be left alone.

## Notes

[1] *Federal Register* 57, no. 75 (April 17, 1992): 14244-71.

[2] Bureau of National Affairs, *Labor Relations Reporter* 39 (April 20, 1992): 469.

[3] John Harwood and Albert R. Karr, "Bush Orders Curb on Unions' Political Funds," *Wall Street Journal*, April 14, 1992.

[4] *NLRB v. Jones and Laughlin Steel Corporation*, 301 U.S. 1, at 45 (1937).

[5] *J. I. Case Co. v. NLRB*, 321 U.S. 332, at 338 (1944).

[6] Dickman, Howard, *Industrial Democracy in America* (LaSalle, Ill: Open Court, 1987), pp. 279-82.

[7] *Steele v. Louisville and Nashville R. R. Co.*, 323 U.S. 192, at 208 (1944).

[8] *Ibid.*, at 198.

[9] *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[10] The Bituminous Coal Conservation Act of 1935, August 30, 1935, c.824, 1-23, 49 Stat. 991 (sections 801-827 of this title were repealed by Act of April 26, 1937, c.127, 20(a), 50 Stat. 90).

[11] *Carter v. Carter Coal Co.*, 298 U.S. 238, at 311 (1936).

[12] *Jones & Laughlin*, at 41.

[13] *Ibid.*, at 103.

[14] *NLRB v. General Motors Corp.*, 373 U.S. 734, at 742 (1963).

[15] It is not only free riding that concerns the unions, of course, but the possibility that, absent compulsory representation, employers might bargain more favorably with nonunion than with union members--perhaps to "divide and conquer." Other provisions of the NLRA forbid that practice, however.

[16] *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

[17] Anna DuVal Smith and John E. Drotning, "Fair Share Fees: Theory, Law and Implementation," *Labor Law Journal* 39, no. 8 (August 1988): 464-70.

[18] 45 U.S.C. 152 (1988), at 651.

[19] *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, at 232 (1956).

[20] *Ibid.*, at 233.

[21] *Ibid.*, at 235.

[22] *Ibid.*

[23] *Ibid.*, at 238. Emphasis added.

[24] *Machinists v. Street*, 367 U.S. 740, at 749 (1961).

[25] *Ibid.*

[26] *Ibid.*, at 763-64.

[27] *Ibid.*, at 767.

[28] *Ibid.*, at 768-70.

[29] *Ibid.*, at 775.

[30] On the appropriate method of calculating permissible forced dues, see Edwin Vieira, Jr., "From the Oracles of the Temple of Janus: *Chicago Teachers Union v. Hudson*," *Government Union Review* 7, no. 3 (Summer 1986): 1-37; and Edwin Vieira, Jr., "*Communications Workers of America v. Beck*: A Victory for Nonunion Workers Already under Attack," *Government Union Review* 11, no. 2 (Spring 1990): 1-29.

[31] *Street*, at 790.

[32] *Abood v. Detroit Board of Education*, 431 U.S. 209, at 233 (1977).

[33] *Ibid.*, at 235.

[34] *Ibid.*, at 222.

[35] *Ibid.*, at 224.

[36] *Ibid.*, at 230.

[37] *Ibid.*, at 232.

[38] *Ibid.*, at 254.

[39] *Ibid.*, at 256-57.

[40] *Ibid.*, at 257.

[41] *Ibid.*, at 258.

[42] *Ibid.*, at 262. Emphasis added.

[43] *Ibid.*, at 263-64.

[44] *Ellis v. Railway Clerks*, 466 U.S. 435, at 447 (1984).

[45] *Ibid.*, at 447-48.

[46] *Ibid.*, at 449.

[47] *Ibid.*, at 488.

[48] *Ibid.*, at 449.

[49] *Ibid.*, at 450.

[50] *Ibid.*, at 452.

[51] *Ibid.*, at 453.

[52] *Ibid.*, at 459.

[53] Jan W. Henkel and Norman J. Wood, "Limitations on the Uses of Union Shop Funds after *Ellis*: What Activities Are 'Germane' to Collective Bargaining?" *Labor Law Journal* 35, no. 12 (December 1984): 744.

[54] *Lehnert v. Ferris Faculty Association*, 111 S.Ct. 1950 (1991).

[55] *Ellis*, at 443.

[56] *Ibid.*, at 444.

[57] *Chicago Teachers Union v. Hudson*, 475 U.S. 292, at 294 (1986).

[58] *Ibid.*, at 302-3.

[59] *Ibid.*, at 305.

[60] *Ibid.*, at 306. Emphasis added.



[61] *Ibid.*, at 307.

[62] *Ibid.*, at 309.

[63] *Ibid.*, at 310.

[64] *Ibid.*

[65] Vieira, p. 7.

[66] *Ibid.*, pp. 8-11.

[67] Although the rules are clear, it is not clear that they are being enforced. The relevant state agencies appear to have been as reluctant to enforce *Hudson* as the NLRB has been to enforce *Beck*.

[68] Charles Fried, *Order and Law* (New York: Simon & Schuster, 1990), pp. 175-82.

[69] *Communications Workers of America v. Beck*, 487 U.S. 7435, AT 745-56 (1988).

[70] *Ibid.*, at 752-54.

[71] *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

[72] Vieira, "*Communications Workers*," p. 24.

[73] *Ibid.*, p. 26.

[74] *Ibid.*, pp. 13, 23.

[75] *Ibid.*, pp. 28-29. Emphasis in the original.

[76] 139 LRR 466 (4-20-92).

[77] 140 LRR 45 (5-11-92).

[78] *American Hospital Association v. NLRB*, 111 S.Ct. 1539 (1991).

[79] Reynolds Holding, "Teenager Balks at Paying Union Dues," *San Francisco Chronicle*, February 18, 1992.

[80] National Right to Work Committee, *An Investigation of Government Disinformation* (Springfield, Va.: NRTWC, 1989).

[81] *Ibid.*, p. 2.

[82] *Ibid.*, Appendix B.

[83] NLRB, "The National Labor Relations Board and You," n.d. (brochure).

[84] Office of the Press Secretary, White House, April 13, 1992, Executive Order, "Notification of Employee Rights Concerning Payment of Union Dues or Fees," pp. 1-2.

[85] Case 36--CB--1491, 1523.

[86] *Ibid.*, p. 6.

[87] 139 LRR 468 (4-20-92).

[88] *Congressional Record*, July 31, 990, p. S 11153.

[89] *Ibid.*, p. S 11157.

[90] *Ibid.*

[91] *Ibid.*

[92] 123 LRR 462 (12-11-1989).

[93] 139 LRR 469 (4-20-92).

[94] Reed Larson, "Harry Beck's Earthquake," *Policy Review* 49 (Summer 1989): 74-76.

[95] 139 LRR 467 (4-20-92).

[96] William H. Volz and David Costa, "A Public Employee's 'Fair Share' of Union Dues," *Labor Law Journal* 40, no. 3 (March 1989): 131-37.