Comments

A GOOD POLITICIAN IS ONE THAT STAYS BOUGHT: AN EXAMINATION OF PAYCHECK PROTECTION ACTS & THEIR IMPACT ON UNION POLITICAL CAMPAIGN SPENDING

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[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.¹

Who does not see . . . [t]hat 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?²

According to the National Labor Relations Act (NLRA),³ a union that obtains the support of a majority of workers in a bargaining unit—even if that majority is achieved through questionable means—becomes the exclusive bargaining representative for those workers.⁴ Unions that

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2. 2 WRITINGS OF JAMES MADISON 186 (Hunt ed. 1901), quoted in Abood, 431 U.S. at 235 n.31.
4. See NLRA, 29 U.S.C. § 159(a) (1994). Section 9(a) of the NLRA states, "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." 29 U.S.C. § 159(a) (1994).
achieve this broad representational power in collective bargaining have a duty of fair representation to non-union members.\(^5\) The 1947 Taft-Hartley amendments to the NLRA amended section 8(a)(3) to allow the creation of "agency shops" or "union shops\(^6\) through voluntarily negotiated union security contracts between a union and an employer.\(^7\) Congress' allowance of negotiated union security agreements was a response to concerns that "free riders\(^8\) were reaping the benefits of union representation while refusing to join the union, and thus were not contributing financially to that representation.\(^9\)

\(^5\) Although not explicitly required, a duty of fair representation has been implied for unions acting as exclusive bargaining representatives for specific bargaining units. They are required "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967) (citing Humphrey v. Moore, 374 U.S. 335 (1964)).

\(^6\) "Under an 'agency shop' arrangement, a union that acts as exclusive bargaining representative may charge non-union members, who do not have to join the union or pay union dues, a fee for acting as their bargaining representative." ROBERT GORMAN, BASIC TEXT ON LABOR LAW 642 (1976), cited with approval in Chicago Teachers Union v. Hudson, 475 U.S. 292, 303 n.10 (1986). "Under a union-shop agreement, an employee must become a member of the union within a specified period of time after hire and must as a member pay whatever union dues and fees are uniformly required." Abood, 431 U.S. at 219 n.10. Furthermore, "[u]nder both the National Labor Relations Act and the Railway Labor Act, '[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues.'" Id. at 219 (quoting NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963)). For the purposes of this article the terms "agency shop" and "union shop" are used interchangeably because the dollar amounts owed under each are usually the same. Therefore, this article refers to both union and agency shop agreements as "union security contracts" or "union security agreements." Union and agency shop fees will be referred to as "representation fees." The term "union dues" refers to those payments made by full-fledged union members who participate in union governance and other aspects of union membership.

\(^7\) See 29 U.S.C. § 158(a)(3). This section creates an exception to the prohibition against employers using discrimination in terms of employment to encourage or discourage union membership. It states "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." Id.; see also 29 U.S.C. § 164(b) (using similar language to prohibit execution of agreements requiring membership in states that prohibit them). It is interesting, however, that section 14(b) of the NLRA allows individual state legislatures to nullify section 8(a)(3) by enacting state laws outlawing union security clauses in collective bargaining agreements.

\(^8\) "Free rider" employees were considered by Congress and labor organizations to be those who obtained the benefits of the union's representation as exclusive bargaining agent while refusing to join the union and pay union dues. See International Ass'n of Machinists v. Street, 376 U.S. 740, 761 (1961) (citing a speech by George M. Harrison, spokesperson for the Railway Labor Executives Association).

Because the elimination of so-called "free rider employees" was the stated goal of Congress in amending section 8(a)(3) to allow union security agreements, the term "membership" within section 8(a)(3) has been construed narrowly by the Supreme Court, albeit over union officials' strenuous objections.\(^{10}\) This narrow construction has been driven by the Court's interpretation of section 8(a)(3) as not intending to allow unions to forcefully discharge employees under union security contracts by unions for any reason other than a refusal to pay the required representation fees.\(^{11}\)

The language of section 2, Eleventh of the Railway Labor Act\(^2\) (RLA), which allows union security agreements between parties covered by its jurisdiction, has been interpreted by the Supreme Court as materially identical to section 8(a)(3) of the NLRA.\(^{13}\) As a result, decisions in cases arising under section 2, Eleventh of the RLA have been relied upon by the Supreme Court as a guide to interpreting section 8(a)(3) of the NLRA.\(^{14}\)

Despite Supreme Court opinions that span almost thirty years on the issue,\(^{15}\) heated debate continues today over when and how a union should be allowed to use mandatory dues collected from members and non-members covered under union security agreements for non-collective bargaining activities.\(^{16}\) The participants have primarily struggled over the question of whether a union's raising and spending of money from its members for non-collective bargaining purposes should operate on an "opt in" or an "opt out" system of contributions. In an "opt in" system, the default position is that employees are not presumed to want to give money to their union for non-collective bargaining purposes, including political expenditures. They must instead affirmatively choose to contribute money to the union for those purposes. In contrast, in an "opt out" system, employees are assumed to consent to funding non-collective bargaining union activities and must instead affirmatively "opt out" of that contribution. Clearly, the default setting of the system is of extreme importance to those interested in union activism. Under an "opt in" system,
worker apathy and inertia would likely lead to a significant decrease in the amount of money available to a union for non-collective bargaining activities like political campaign expenditures. By contrast, the amount of money that would be available to the union in an "opt out" system would presumably be greater because worker apathy and inertia would minimize the number of individuals withdrawing financial support from the union's non-collective bargaining expenditures.

Today, one of the most talked about issues in the "opt in" versus "opt out" debate is the emergence of "paycheck protection" acts. Paycheck protection acts require unions to obtain written permission from workers before spending worker union dues or agency fees for political purposes.\textsuperscript{17} Perhaps the most prominent recent paycheck protection act proposal was California's Proposition 226 ballot initiative, the "Paycheck Protection Initiative"\textsuperscript{18} in 1998. The debate over Proposition 226 resulted in millions of dollars being pumped into the opposition campaign by union officials to successfully defeat the initiative.\textsuperscript{19} Because it would have established an "opt in" system for funding union political expenditures, one of the few things that both sides of the debate agreed upon during the California campaign was that the passage of Proposition 226 would significantly harm the political financing effectiveness of organized labor.\textsuperscript{20} Similar arguments have been made frequently during consideration of paycheck protection type legislation proposals in other fora.\textsuperscript{21}

All is not as it initially appears, however, in the world of paycheck protection legislation. With apologies to William Shakespeare, "Something is rotten in the state of Paycheck Protection Debate" once one examines the methods by which unions have reacted and adapted to both proposed and enacted paycheck protection style acts.\textsuperscript{22} Indeed, an examination of the behavior of labor organizations that have been forced to deal with paycheck protection style statutory limitations indicates that rather than reducing the ability of labor unions to extract money from unwilling employees for political purposes, the typical paycheck protection act will instead increase the amount of money that unions may raise from workers for political expenditures without obtaining their written consent.

\textsuperscript{17} See, e.g., H.R. 1625, 105th Cong. § 4 (1997); H.R. 3580, 104th Cong. (1996); California Proposition 226 (June 2, 1998).
\textsuperscript{18} See Unprotected Paychecks, supra note 16, at A18.
\textsuperscript{19} See id.
\textsuperscript{20} See Michael Antonucci, Paycheck Protection or Paycheck Deflection?, INVESTOR'S BUS. DAILY, July 9, 1998, at A28 (hypothesizing about what would have happened had Proposition 226 passed).
\textsuperscript{22} See WILLIAM SHAKESPEARE, HAMLET act 1, sc. 4.
Part I of this Comment traces the evolution and current status of section 2, Eleventh of the Railway Labor Act and section 8(a)(3) of the NLRA. It further examines judicial precedent which developed to interpret the appropriate limitations on the use of non-union member "representational" fees. Part II examines both the purpose of the typical paycheck protection act and the arguments usually made supporting and opposing that act. Part III utilizes available empirical information to demonstrate why both sides in the debate are almost certainly wrong in their assessment of the impact a typical paycheck protection act would have upon the average employee working under a union security contract and upon the political effectiveness of labor unions. Part IV argues why paycheck protection legislation, especially at the state level, cannot be an effective method for achieving the goals of most paycheck protection advocates.

I. AN EVOLUTION OF WORKERS' RESPONSIBILITIES UNDER UNION SECURITY CLAUSES

The two major federal labor statutes that authorize union security agreements are section 2, Eleventh of the Railway Labor Act and section 8(a)(3) of the NLRA. As noted above, section 9(a) of the NLRA provides that if a majority of the employees within a bargaining unit vote for a union, that union shall become the bargaining unit's exclusive bargaining representative. The union in turn, will have a duty to fairly represent all employees within the bargaining unit.

Although the RLA and NLRA regulate different segments of the national economy, the language by which each statute authorizes union security agreements is "in all material respects identical." Despite the fact

25. See id. § 159(a); see also Kenneth Dau-Schmidt, Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck, 27 HARV. J. ON LEGIS. 51, 59 (1990).
27. Communications Workers of Am. v. Beck, 487 U.S. 735, 745 (1988); see also 45 U.S.C. § 152, Eleventh ('Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable.
that the NLRA preceded the RLA by four years, the issue of requiring non-union members to make financial payments to their unions under a union security contract first arose under the RLA.

In Railway Employers' Department v. Hanson, respondent Hanson, a non-union member employee of the Union Pacific Railroad Company, brought suit against the railroad and various labor organizations in the Nebraska state courts to enjoin the operation of a union security clause that allegedly violated Nebraska's prohibition on union shops. The unions relied on section 2, Eleventh's provisions permitting union security agreements to defend the contested contract.

The United States Supreme Court originally found that section 2, Eleventh permitted the level of state action that would be necessary to support the plaintiff's claim in spite of previous concerns that explicit preemption of contrary state laws might undermine their position. The Supreme Court ruled that section 2, Eleventh's preemption of state laws to permit union security contracts, did not violate either the First or Fifth Amendments and was a valid exercise of Congress' power to ensure industrial peace under the commerce clause of the Constitution. The Hanson Court further noted that Congress had taken steps to protect employees' First Amendment rights by explicitly prohibiting the imposition of any conditions upon membership other than the payment of the uniform periodic dues, initiation fees, and assessments. Importantly, the Supreme Court specifically noted that its Hanson opinion neither answered nor prejudiced the question of whether union security agreements could be utilized as a way of requiring employees to financially support the union's political and other non-collective bargaining activities.

Five years later the Supreme Court was forced to revisit the question it had reserved in Hanson. In International Ass'n of Machinists v. Street, neither party contested the legality of the union security agreement authorized under section 2, Eleventh. The question at issue instead was whether union dues collected under the security agreement could be spent on political activities over an employee's objection. The initial trial court

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30. See id. at 227.
31. See id. at 228, 229.
32. See id. at 232.
33. See id. at 233, 238.
34. See id. at 238.
35. See id.
found that the union had spent portions of the dues collected under the union security agreement to further political campaigns and support political candidates whom Street opposed. The court further stated that this spending was not reasonably necessary for effective collective bargaining by the union.\textsuperscript{37} The trial court also found that under these circumstances this usage of plaintiff respondent's dues violated the First, Fifth, Ninth, and Tenth Amendments of the United States Constitution.\textsuperscript{38}

In reaching its decision in\textit{ Street}, the Court first reaffirmed its holding in\textit{ Hanson}, namely that considered alone, section 2, Eleventh's authorization of union security agreements constituted a valid exercise of Congress' authority under the commerce clause and did not violate the First or Fifth Amendments of the Constitution.\textsuperscript{39} The Court then paid homage to the doctrine that, if possible, federal statutes should be interpreted to avoid questioning their constitutionality, stating:

\begin{quote}
[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.\textsuperscript{40}
\end{quote}

The Supreme Court avoided these constitutional issues by explicitly relying on an interpretation of section 2, Eleventh that it declared to be "entirely reasonable."\textsuperscript{41}

In \textit{Street}, the Court held that by enacting section 2, Eleventh of the Railway Labor Act, Congress intended to allow compulsory unionism only insofar as it forced "employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes."\textsuperscript{42} In the Court's opinion, section 2, Eleventh was not designed by Congress as a scheme under which unions could force

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\item See id. at 746 n.2. The trial court found that:

The funds so exacted from plaintiffs... by the labor union defendants have been, and are being, used in substantial amounts by the latter to support the political campaigns of candidates for the offices of President and Vice President of the United States, and for the Senate and House of Representatives of the United States, opposed by plaintiffs.... The exaction of moneys from plaintiffs... is not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents....

\item See id at 746 n.3.

\item See id. at 749.

\item Id. (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

\item See id. at 750. Although the Court refused to explicitly base its holdings in\textit{ Street} and\textit{ Beck} upon constitutional requirements, the analysis in those decisions indicates the influence of First Amendment values. See id. at 765-70; see also Communication Workers v. Beck, 487 U.S. 735, 745-46, 755 (1988).

\item Street, 367 U.S. at 764.
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employees to provide money to help support political causes that the employees opposed. To support this interpretation of section 2, Eleventh, the Supreme Court interpreted the section's legislative history as reflecting Congress' primary concern with eliminating the problem of "free rider" employees. The Court in *Street* believed that no legislative history existed which indicated a congressional intent for section 2, Eleventh to give unions the authority to force employees working under union security agreements to provide funds for political causes they opposed.

The Court in *Street* next considered various remedies employees might have against a union engaging in the improper spending of dues and fees. The Court rejected the possibility of enjoining the enforcement of the union security agreement, or of enjoining the union from engaging in any political activity using representation fees collected under a union security agreement. The Court concluded by suggesting that two different types of acceptable remedies existed for employees who objected to financially supporting the union's political expenditures. One acceptable remedy that the *Street* Court believed might be available to a trial court included issuing a limited injunction regarding the amount of money a union could spend upon political activities. An alternative remedy would be for the trial court to order restitution to each objecting employee for the portion of his representation fees which the union had used for political expenditures despite the employee's notification of dissent.

Of special noteworthiness is the *Street* Court's implicit interpretation of section 2, Eleventh as establishing an "opt out" system for employee

43. See id.
44. See id. at 761-64. Also note that if section 2, Eleventh of the RLA is properly interpreted as a justifiable effort by Congress to eliminate "free riders" it becomes apparent that neither Congress nor the Court was concerned by the fact that requiring dissenting employees to financially support a union against their will creates the opposite but presumably morally equal problem of "forced riders."
45. See id. at 764-69.
46. See id. at 771.
47. The Court believed that such an injunction would have the effect of stifling the First Amendment rights of the union and those union members and non-members who agreed with the political activities of the union. See id. at 772, 773.
48. The Court held that these remedies could only be given to those employees who affirmatively objected to the union's political expenditures stating: "[T]he safeguards of [section] 2, Eleventh were added for the protection of dissenters' interests, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." Id. at 774.
49. The Court's specific language was that an injunction could be issued "against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget." Id. at 774-75.
50. See id. at 775.
funding of union political spending instead of an "opt in" system. This interpretation is explicitly shown in the Court's statement regarding union political spending that employee "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."51

The Supreme Court's 1963 opinion in NLRB v. General Motors Corp.52 primarily answered the question of whether employers had a mandatory duty to bargain over the union's proposed adoption of an agency shop in states which did not prohibit those agreements under section 14(b) of the NLRA.53 This decision, however, also provided an early indication that the Court would interpret the RLA and the NLRA in a similar manner. Part of the reasoning supporting its holding that General Motors had a mandatory duty to bargain over the contested union security agreement was that under section 8(a)(3) of the NLRA, membership in a union for employment purposes could only be conditioned upon the payment of the initiation fees and monthly dues.54 The Court's interpretation of section 8(a)(3) of the NLRA as imposing such a financial limitation upon the permissible membership requirements that must be satisfied by employees under union security agreements is reminiscent of the Court's interpretation in Hanson of the similarly worded section 2, Eleventh of the RLA.55 The Supreme Court's practice of interpreting section 2, Eleventh of the RLA and section 8(a)(3) of the NLRA in a similar manner has remained apparent throughout its subsequent opinions dealing with union security agreements.

In Railway Clerks v. Allen,56 a section 2, Eleventh RLA union security agreement case, the Supreme Court refined its view of the procedures a dissenting employee must take to enforce his right to refrain from supporting the union's ideological spending. The Court held that the dissenting employee did not need to specifically identify those political expenditures that he opposed, but could instead simply object to all political spending by the union.57 The Court in Allen also held that the union, not the dissenting employee, would have the burden of proving by a preponderance of the evidence the proportion of non-allowable union political expenditures to total union expenditures when determining the size of the remedy in a union security agreement dispute.58

51. Id. at 774.
52. 373 U.S. 734 (1963).
53. See id. at 735.
54. See id. at 742.
55. See Railway Employees' Dep't. v. Hanson, 351 U.S. 225, 238 (1956).
56. 373 U.S. 113 (1963).
57. See id. at 118. Furthermore, the Court also held that the filing of a lawsuit by a dissenting employee would serve as adequate notification of a desire not to financially support union political expenditures. See id. at 119 n.6.
58. The Court believed that "basic considerations of fairness" required this allocation of the burden of proof since the union possessed the relevant facts and spending records. See
The Supreme Court's next consideration of the constitutionality of the negotiation and enforcement of a union security agreement, was in the context of public sector employees. *Abood v. Detroit Board of Education*59 involved a challenge by Detroit public school teachers to a Michigan statute authorizing the negotiation of union security agreements for government employees.60

Abood and the other plaintiff teachers claimed that enforcement of the union security clause violated their First Amendment freedom of association.61 In reaching its decision, the Supreme Court explicitly recognized what the *Hanson* opinion had implied: although union shop agreements significantly impinged upon a dissenting employee's First Amendment association right, in certain circumstances, the strong governmental interests in ensuring labor peace outweighed that infringement.62 The Court in *Abood* then held that the infringement on a dissenting employee's First Amendment right was justified "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment."63 The Court further held that no sufficient legitimate governmental interest existed, however, that outweighed the infringement on a dissenting employee's First Amendment rights if she were required to financially support union political expenditures unrelated to collective bargaining under a union security agreement.64 The Supreme Court concluded by reaffirming its holding in *Allen* that a dissenting employee merely needs to notify his union that he opposes "ideological expenditures of any sort that are unrelated to collective bargaining" to invoke his right to refrain from financially supporting those expenditures.65

The Supreme Court's next opinion in a union security agreement

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60. The language of the Michigan statute was modeled after the language of section 2, Eleventh of the RLA and of section 8(a)(3) of the NLRA. See id. at 223-24.
61. See id. at 213. Because the employer was a governmental body, there was no question that sufficient state action existed to trigger constitutional concerns. See id. at 226.
62. See id. at 225.
63. Id. at 225-26.
64. See id. at 234-37. The Court recognized that due to the inherent nature of public sector employment and political decision making bodies, it may be difficult at times to draw the line between union activities aimed at securing a collective bargaining agreement and those aimed at promoting related ideological causes. The Court, however, felt that such a line could be drawn based on the factual circumstances of each case. See id.
65. Id. at 241. According to the Court in *Abood*, to require the dissenting employee to specifically identify those ideological expenditures which he opposes would place the employee in the position of relinquishing either his right to withhold financial support of ideological and political causes to which he objects or his right to maintain his own political beliefs without public disclosure. See id.
controversy announced a new test that broadened the realm of union expenditures which dissenting employees could not be forced to financially support. In Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, the plaintiffs challenged the adequacy of the union's procedure of rebating to dissenting employees that portion of the representation fees utilized for non-chargeable political finance expenditures. In Ellis the union had adopted a rebate program under which it collected the entire amount of the dissenting employee's representation fee, used it for allowable and non-allowable purposes, and subsequently reimbursed the dissenting employee for that portion of the representation fee that had been utilized for objectionable, i.e. non-chargeable, purposes. The plaintiffs also challenged the union's right to require dissenting employees to financially support six categories of union spending that did not appear politically motivated on their face.

In its approach to the case, the Court in Ellis first ruled that a pure rebate process of the non-chargeable portion of dissenting employees' representation fees was an inadequate response to the objections of dissenting employees. The Court held that such a rebate scheme, where the full representation fees were exacted and used before refunding the portion "that it was not allowed to exact in the first place," allowed the union to effectively charge dissenting employees for activities which were beyond the realm of the union's statutory authority. The Court also stated that even if interest was paid on the rebated representation fees, the union would obtain an "involuntary loan" for purposes opposed by the dissenting employee. The Court in Ellis concluded by holding that where acceptable alternatives to a rebate plan exist, the union "cannot be allowed to commit dissenters' funds to improper uses even temporarily."

Ellis also announced a refined test for the chargeability of challenged union expenditures. The Ellis test required challenged union expenditures to be "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the

67. See id. at 440.
68. See id. at 440-41.
69. The categories of challenged expenses included "the quadrennial Grand Lodge convention, litigation not involving the negotiation of agreements or settlement of grievances, union publications, social activities, death benefits for employees, and general organizing efforts." Id. at 440.
70. See id. at 443.
71. Id. at 444.
72. See id.
73. See id.
74. Id.
employer on labor-management issues." Using this test, the Court held that the following expenses were not reasonably relevant to the union's collective bargaining activities and thus not chargeable to dissenting employees: general organizing efforts aimed at employees of other employers, some forms of litigation involving the union, and finally, union reporting on similarly objectionable activities such as political outreach on which the union would not have been able to spend the dissenters' money anyway. Thus, dissenting employees can withhold financial contributions to union expenditures that are neither political in nature, nor reasonably incurred for collective bargaining purposes as defined and applied in Ellis.

The Supreme Court again interpreted the requirements imposed upon union security agreements authorized under section 8(a)(3) of the NLRA in the landmark opinion, Communications Workers of America v. Beck. The plaintiffs in Beck were non-union employees covered by a union security agreement between the Communications Workers of America (CWA) and the American Telephone & Telegraph Company (AT&T) and its subsidiaries. The plaintiffs' claim challenged the use of their representation fees for purposes other than collective bargaining activities, including contract administration and grievance adjustment. The plaintiffs specifically complained that the CWA violated its duty of fair representation under section 8(a)(3) of the NLRA by utilizing representation fees to organize employees of other employers, to lobby for legislation, and to participate in assorted social, charitable, and political events.

In Beck the Court stated that NLRA section 8(a)(3) allowed for the negotiation of union security agreements between employers and collective bargaining representatives so long as the "membership required" as a

75. Id. at 448. Union expenditures upheld as authorized by section 2, Eleventh or section 8(a)(3) under the Ellis test as "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" would become known as expenses that were "germane to collective bargaining activity." Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991).

76. See Ellis, 466 U.S. at 450-53. The Court believed that although organization of the employees of other employers by a union could ultimately have a positive impact upon members of a bargaining unit, this impact would be too attenuated to sustain forced financial support. See id. at 451-53. The Court's view regarding organization of other employers' employees as an objectionable, and therefore non-chargeable activity, has been criticized as not fully recognizing the role of unions and how a union's success or failure affects its members. See Christopher David Ruiz Cameron, The Wages of Syntax: Why the Cost of Organizing a Union Firm's Non-Union Competition Should Be Charged to "Financial Core" Employees, 47 CATH. U. L. REV. 979, 988 (1998).


78. See id. at 739.

79. See id.
condition of employment had been "whittled down to its financial core." With that legal framework in mind, the Court viewed the question before it in *Beck* as whether Congress intended for section 8(a)(3) of the NLRA to include an obligation upon dissenting employees "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment" that together constitute the "financial core" of union membership.

The Court then, as it had hinted at in *NLRB v. General Motors Corp.*, applied section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA in a similar manner to questions arising under them. The *Beck* Court analyzed the legislative history surrounding the enactment of section 2, Eleventh before reaching the conclusion that Congress had intended section 2, Eleventh and section 8(a)(3) to be interpreted in an identical manner. This was despite the fact that the enactment of section 8(a)(3) predated section 2, Eleventh by four years. The Supreme Court majority held that it was justified in applying its judicial precedent interpreting section 2, Eleventh of the Railway Labor Act to controversies arising under section 8(a)(3) of the National Labor Relations Act since the two statutory sections "are in all material respects identical."

Indeed, the Court held in *Beck* that the *Street* and *Ellis* decisions interpreting section 2, Eleventh of the RLA had answered the exact same question presented before the Court and therefore controlled how NLRA section 8(a)(3) was to be interpreted in the present controversy. In light of those decisions, and the Court's analysis of the legislative history of section 2, Eleventh, the *Beck* Court held that "[section] 8(a)(3), like its statutory equivalent, [section] 2, Eleventh of the RLA" authorizes the exaction of only those representation fees and dues "necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."

The most important result of the *Beck* decision was that the rule

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80. *Id.* at 745 (quoting NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963)).
81. *Id.* at 745.
82. See *id.*
83. The Court relies on legislative history passages that include congressional statements to the effect that section 2, Eleventh was intended to extend "to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act." *Id.* at 746 & n.4 (quoting 96 CONG. REC. H17055 daily ed. Jan. 1, 1951) (statement of Rep. Brown and statements by members of the Senate)). The Court viewed the two statutory sections as sharing the purpose of eliminating free rider employees. See *id.* at 752-53.
84. The Court read footnote 13 of its previous *Ellis* decision as describing section 2, Eleventh and section 8(a)(3) as statutory equivalents. See *id.* at 745-46 (citing Ellis v. BRAC, 466 U.S. 435, 452 n.13. (1984)).
85. See *id.* at 745.
86. *Id.* at 762.
87. *Id.* at 762-63 (quoting *Ellis*, 446 U.S. at 448).
prohibiting unions from requiring a dissenting employee to financially support non-collective bargaining activities announced in Street and expanded in Abood was finally applied to all private sector unions under the NLRA's jurisdiction. By treating Street as controlling, the Court in Beck also implicitly accepted and applied Street's "opt out" interpretation for section 2, Eleventh to section 8(a)(3) of the NLRA. Thus, Beck provided a strong indication that previous and future Court decisions dealing with union security agreements under section 2, Eleventh of the RLA or section 8(a)(3) of the NLRA would be considered binding precedent for either statutory section.

In the only Supreme Court opinion on point under either section 2, Eleventh or section 8(a)(3) handed down after the Beck decision, the Court in Lehnert v. Ferris Faculty Ass'n announced a three-pronged judicial test for deciding which expenses a union may legitimately require dissenting employees to support. Under the Lehnert test, financially chargeable union expenditures must:

1) be 'germane' to collective-bargaining activity;

2) be justified by the government's vital policy interest in labor peace and avoiding 'free rider' employees; and

3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

The Court in Lehnert held that a public sector union "may not compel its employees to subsidize legislative lobbying outside the limited context of contract ratification or implementation." The Court, however, did permit the union local to charge the dissenting employees for their pro rata share of costs associated with chargeable activities of its state and national affiliates so long as the subsidized services may reasonably inure to the benefit of the members of the union local.

For the purposes of this Comment, the most important question remaining unanswered after the Supreme Court's opinions in Street, Abood, Beck, and Lehnert was whether an employee who wished to pay only for collective bargaining was entitled to remain a full member of the union. The Fourth Circuit was the first Circuit Court of Appeals to address this question directly in Kidwell v. Transportation Communications International Union. The plaintiff in Kidwell argued that her rights under the RLA as announced by the Supreme Court, prevented a union from

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89. Id. at 519.
90. Id. at 522.
91. See id. at 524.
92. 946 F.2d 283 (4th Cir. 1991).
instituting rules requiring employees to resign from the union if they refused to support financially non-collective bargaining-related union expenditures. The Fourth Circuit held that neither the RLA nor the judicial precedent establishing the right of employees to refuse financial support of union political expenditures entitled objecting employees to retain full union membership with all of its privileges and responsibilities. According to the Kidwell Court, the RLA permitted a union to offer every employee two choices:

1) union membership, and with it, if the union is elected collective bargaining representative, a right to vote on the internal delegation of collective bargaining power, the ratification of the negotiated agreement, and any political or other cause in which the union by majority vote decides to participate but with the responsibility for paying complete dues or

2) a non-membership with the right to vote on whether the union should be the collective bargaining representative and responsible, if the union is so elected, for paying only the portion of the dues related to collective bargaining activities.

Because Beck announced the proposition that section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA are statutory equivalents, it is likely that the judicial system would reach the same conclusion if an employee challenged a union under the jurisdiction of the NLRA.

It is clear, therefore, that under the evolving interpretations of section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA, a dissenting employee working under a union security agreement may refuse to provide financial support not only to union political expenditures, but also to a wide variety of activities not germane to collective bargaining that satisfy the criteria existing in the Street/Beck/Lehnert test. These employee rights will be referred to as Beck rights in this Comment because the Beck decision applies to the greatest range of employees.

II. PAYCHECK PROTECTION ACTS: PURPOSE, PROS, AND CONS

One of the most interesting and controversial developments in current labor law has been the issue of what are called "paycheck protection" acts. Practically unheard of prior to the Court's decision in Beck, in its wake these initiatives appeared on the state and federal political scene.
Although these bills vary somewhat in language and in specific details between jurisdictions, they share the common purpose of requiring unions to obtain written permission from employees prior to using non-union member representation fees or union member dues for political purposes. Paycheck protection bills thus attempt to reverse the situation created by the Supreme Court's statutory interpretation of the RLA and NLRA in *Street* and *Beck*. Paycheck protection acts abolish "opt out" union funding schemes in which "dissent is not . . . presumed" in favor of the creation of "opt in" systems where employees must affirmatively consent to funding non-collective bargaining union expenditures.

Union officials rely upon three primary arguments to oppose paycheck protection acts. First, since the Supreme Court's opinions in *Street*, *Abood*, and *Beck*, employees that object to financially supporting union political activity already have the legal right to opt out of whatever union dues or representation fees would be utilized for political expenditures. The clear implication of this claim is that because employees already have the right to opt out of financially supporting union expenditures, a paycheck protection act is unnecessary to prevent labor unions from improperly spending employee dues. Second, paycheck protection opponents claim that the procedural requirement of obtaining written consent from employees before spending their union dues or representation fees on political activities will needlessly impose significant bookkeeping costs that will hamper union political activities. Union supporters claim that these administrative costs are excessive because only a "negligible" number of employees will object to union political spending. Supporters further suggest that unions already behave responsively when an employee notifies them of an objection to financially supporting union political expenditures in order to comply with *Street*, *Abood*, and *Beck*. Finally, union officials

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and their allies contend that paycheck protection acts are nothing more than
disguised attempts to "punish labor for being politically effective in recent
elections." 103

Supporters of paycheck protection acts respond with numerous
counter-arguments. They claim that independent polls prove that a vast
majority of workers are unaware of their rights under the Supreme Court's
decisions in *Street, Abood,* and *Beck.* 104 Advocates for paycheck protection
type legislation also point out that polls consistently indicate that most
employees support requiring labor organizations to obtain written consent
prior to spending union dues and representation fees on non-collective
bargaining expenditures. 105

Many supporters of legislation that would ensconce paycheck
protection privileges in the law argue passionately that basic principles
compel the conclusion that it is morally wrong to allow a union to spend an
employee's agency fees or union dues on political activities without the
employee's voluntary, written consent. 106 In addition to basic principles of
fairness, many advocates for paycheck protection legislation rely on
observations about political philosophy stated by American luminaries such
as Thomas Jefferson. 107 Paycheck protection proponents believe that the
moral principles at issue are especially offended by union political
expenditures and activity aimed almost exclusively against Republican

by union representatives against employees refusing to financially support union political
activities).

(labeling H.R. 2608, 105th Cong. (1997) a proposed federal paycheck protection style act,
the "Worker Gag Rule"); see also Ralph Z. Hallow, *Unions Set to Kill Consent Initiative:
Oppose Ballot on Use of Dues,* WASH. TIMES, Nov. 12, 1997, at A4 (quoting, Judith Barish,
communications director for the California Labor Federation, the state subsidiary of the
AFL-CIO, regarding California's Proposition 226 paycheck protection act proposal).

Fawell) (stating that in a recent poll 78% of union members were not aware of their rights
under *Beck*); see also D. Mark Wilson, *The Worker Paycheck Fairness Act: Ending the
Involuntary Use of Union Dues,* HERITAGE FOUNDATION BACKGROUNDER, Feb. 12, 1998, at
1 n.3 (citing a survey indicating that 67% of union members were not aware of the *Beck*
decision) (on file with the author).

(citing poll numbers that 80% of union households and 90% of non-union households
support requiring labor organizations to obtain written consent before using union dues and
representation fees for political purposes).

(stating that basic fairness should not allow the automatic deduction of money from an
employee's paycheck to support political causes the employee opposes).

("To compel a man to furnish contributions of money for the propagation of opinions which
he disbelieves both sinful and tyrannical" (quoting Thomas Jefferson)); see also Cathleen
A4 (discussing potential implications of Proposition 226).
party candidates when almost thirty percent of union members consider themselves Republicans and another ten percent of union members identify themselves as political independents.

Finally, supporters of paycheck protection acts frequently claim that the results of paycheck protection legislation enacted in Washington in 1992 provide empirical support for the assertion that when given a choice, most employees choose not to financially support union political expenditures.

III. WHAT DO THE REAL WORLD NUMBERS SAY ABOUT THE ARGUMENTS?

The arguments made by supporters and opponents of the acts indicate that both sides believe that such legislation would almost certainly result in a reduction in the amount of political monies a union could raise and spend from union member dues. However, union behavior in both California and Washington indicates that paycheck protection legislation, at its best, will have only a minimal effect upon the amount of union dues and representation fees available for union political expenditures. At its worst for employees, the average paycheck protection law will allow unions to increase the amount of money from union dues and representation fees that is available for legal political expenditures by a union without employees' consent.

A. Strike One Against Paycheck Protection Acts: The Failure of the Washington State Paycheck Protection Ballot Initiative

In a 1992 ballot referendum, seventy-three percent of Washington State voters approved legislation titled "Initiative 134" that attempted to establish a state level "opt in" system requiring written consent prior to union political spending of employee dues and representation fees. Due

108. See Paycheck Protection: Unions Need Permission to Use Dues for Politics, SAN DIEGO UNION-TRIB., Apr. 23, 1998, at B10 ("During the 1995-1996 election cycle, unions gave $54 million to Democrats and $4 million to Republicans, according to the Center for Responsive Politics") [hereinafter Paycheck Protection]; see also Knollenberg, supra note 102, at 350 nn.17-18 (discussing Republican push for Beck legislation).


110. See sources cited supra note 21.


112. See id.; see also Clay, supra note 99.

to Washington's previously enacted statutory definition of the term "contribution," the initiative automatically excluded from its coverage "soft" political expenditures such as internal political communications published by labor organizations and the printing of political messages on banners and signs for display on private property. 114

For several years prior to the passage of Initiative 134, the Washington Education Association ("WEA") operated a registered political committee named Political Unity of Leaders in State Education ("PULSE"). 115 PULSE was supported by the automatic annual deduction of thirteen dollars from the wages of union members. This was a voluntary authorization that continued indefinitely until revoked. 116 Non-union member agency fee contributors did not pay the thirteen-dollar fee to PULSE. Moreover, each agency fee contributor received an annual rebate of about $150, as compared to union members paying full union dues. 117

In 1993, the WEA created a group named the "Life After 134 Task Force" ("Task Force"). The purpose of this group was to make policy recommendations in reaction to Initiative 134's requirement that employees annually reauthorize wage deductions utilized for "hard" money contributions given directly to political candidates. 118 As a result of the Task Force's recommendations, the WEA voted in April 1994 to disband the PULSE committee as well as all locally registered political committees and to create a single new registered political committee that would be known as "WEA-PAC." 119 At the same time, the WEA voted to create a revised code as RCW 42.17.680 and in relevant portion states:

No employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee. The request must be made on a form prescribed by the commission informing the employee of the prohibition against employer and labor organization discrimination described in subsection (2) of this section. The request is valid for no more than twelve months from the date it is made by the employee.

WASH. REV. CODE ANN. § 42.17.640(3) (West 1998). It is important to note that Initiative 134 also contained numerous campaign regulations affecting a number of areas unrelated to union dues and the thesis of this Comment.

114. See WASH. REV. CODE ANN. § 42.17.020(14) (West 1998) (providing the statutory definition of "contribution," including interpretative examples that apply to the language of section 42.17.680 of the Washington Revised Code).


117. See Interview with Milton L. Chappell, member of Maryland & District of Columbia Bar Associations (Sept. 9, 1998) [hereinafter Chappell interview].

118. See Settlement Agreement, supra note 116, factual paras. 7, 12.

119. See id. factual para. 9.
Community Outreach Program ("COP") which did not qualify under Washington law as a "political committee" despite its dedication to "political education."\(^{120}\) The political activities of the original PULSE committee were then divided between WEA-PAC and COP in order to continue the union's political activities in a manner similar to that before Initiative 134's enactment.

WEA-PAC restricted its political behavior to what had been PULSE's "hard" money political expenditures, such as direct union contributions to candidates, expenditures supporting or opposing specific ballot measures, etc.\(^{121}\) Because WEA-PAC was a registered political committee, Initiative 134 required those WEA union members wishing to help fund WEA-PAC through paycheck deductions to annually authorize those deductions. The voluntary dues sought from members in support of WEA-PAC consisted of an additional twelve dollars annually, above and beyond the normal WEA member union dues.\(^{122}\)

Expenditures by COP involved the continuation of activities that could be described as the "soft" money expenditures of PULSE.\(^{123}\) The principle distinction between the "hard" money expenditures of WEA-PAC and the "soft" money political expenditures of COP is that "hard" money is spent so that it directly benefits a particular candidate or group and may be spent under the direction of the beneficiary. "Soft" money, in contrast, is money spent on activities that indirectly benefit a candidate or political organization and is not spent under the guidance of the intended beneficiary. However, anyone familiar with the recurring congressional debates over proposed federal campaign finance reforms is well aware of the fact that in practice the line between "hard" money and "soft" money political expenditures is extremely fuzzy. Examples of the "soft" money political expenditures that COP could legally carry out without running

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120. See id. factual para. 13; see also National Right to Work Legal Defense Foundation, supra note 113.

121. See Chappell interview, supra note 117; see also Settlement Agreement, supra note 116, factual para. 14.

122. See Settlement Agreement, supra note 116, factual para. 11.

123. Several of COP's initial expenditures were challenged in a complaint against the WEA by the Washington State Attorney. See id. at intro. Some of the challenged COP expenditures included paying the overhead, fundraising, and other administrative costs of WEA-PAC. Those expenditures were later determined to be improper "contributions" without the consent of union members in the settlement agreement between the WEA and Washington State. See id. conclusory paras. 4, 6. However, other challenged COP political expenditures were held by the settlement agreement to not meet the statutory definition of "contributions" requiring the prior written consent of WEA union members. These expenditures included funding a union newsletter dealing with politics, lobbying of governmental officials on legislation, and producing and airing what have become known as "issue ads" with COP funds for direct communication to the public unrelated to a particular election campaign. See id. conclusory para. 3, Exhibit A Guidelines.
afoul of Initiative 134 included activities such as issue advertising, political coverage, editorials in union newspapers, voter turnout drives, and issue lobbying. These COP political expenditures were funded by a mandatory assessment of an additional twelve dollars in WEA union member dues.124

The financial results of this legal maneuvering by the WEA are easily calculated. Prior to the disbandment of the PULSE committee, between 48,000 and 49,000 out of a total of 65,000125 WEA union members authorized the ongoing automatic annual deduction of thirteen dollars, earmarked for the PULSE committee from their paychecks.126 The WEA therefore collected a total of approximately $630,000 in 1993 for PULSE political expenditures of both "hard" and "soft" campaign funds before the enactment of Initiative 134.127 After voter approval of Initiative 134 and the replacement of the PULSE committee with WEA-PAC and COP, approximately 8,000 WEA members chose to contribute to WEA-PAC.128

It is that alleged drop (from approximately 48,000 supporters to approximately 8,000) in the WEA's ability to spend member dues and fees for union political expenditures, that advocates for both sides in the paycheck protection debate point to as evidence supporting their position.129 After all, if the WEA could only draw upon the dues of the 8,000 members who contributed to WEA-PAC, simple math indicates that the WEA would only be able to spend approximately $96,000 on political expenditures.

Both sides fail to take into account, however, the fact that each of the approximately 65,000 WEA members continues to pay an additional twelve dollars a year in mandatory union dues to fund COP, which may use those dues to engage in "soft" money political activity.130 If one assumes that there are approximately 65,000 WEA members who each pay twelve dollars in mandatory union dues to COP annually, the total amount of

124. At the meeting approving the creation of COP, the WEA Representative Assembly amended the WEA bylaws to adopt Article II, section 2, which provides in relevant part: "The annual dues of an active member shall include an additional twelve dollars ($12) annually dedicated to the political education component of the Washington Education Association." Settlement Agreement, supra note 116, factual para. 11. Thus, the WEA was able to convert almost all the money it had collected for PULSE as voluntary paycheck deductions into required payments by mandatory fiat despite Initiative 134.
125. See Settlement Agreement, supra note 116; see also Chappell interview, supra note 117.
126. See Settlement Agreement, supra note 116, factual paras. 2, 3.
127. See id.
128. See Schaffer Statement, supra note 111 (citing this statistic as proof that paycheck protection acts result in a reduction in the amount of money available for union political expenditures from union dues and representation fees).
129. See Schaffer Statement, supra note 111; Clay Statement, supra note 99; see also Chappell interview, supra note 117.
130. See sources cited supra notes 111-12; see also Chappell interview, supra note 117.
union dues available for political spending by COP is approximately $780,000. This COP "soft" political money is in addition to the minimum of $96,000 in union dues available as additional voluntary contributions by WEA members to WEA-PAC. At a minimum, the WEA may now spend $876,000 of union member dues for various political expenditures as opposed to approximately $630,000 under the PULSE regime. Moreover, because the union retains all of its statutorily granted power to collect agency dues from dissenting employees, nothing prevents the union from legally increasing dues to virtually any level it pleases. Thus, instead of decreasing the amount of union dues available for political expenditures, paycheck protection as embodied in Initiative 134 resulted in at least one major union successfully increasing the amount of money it can spend on political support without obtaining the consent of its members from approximately $630,000 to approximately $780,000.

If the empirical results cited above did not utterly discredit arguments that Initiative 134's paycheck protection legislation has succeeded in increasing the amount of control union members have over the use of their union dues for political purposes by their union, then the guidelines that accompany the settlement agreement prove the ineffectiveness of Initiative 134 beyond a reasonable doubt. The settlement agreement claims that its accompanying guidelines accurately reflect the view of Washington with regard to the applicability of Initiative 134 to the use of a union's general treasury funds for both "hard" and "soft" political activity. The settlement guidelines in relevant portion state:

The PDC [Public Disclosure Commission] is aware that membership organizations, such as the WEA, collect dues from their members that go to their general treasury. Such dues are not collected for specific purposes, are not predesignated and are intended to generally provide support for the organization .... Such general treasury funds may be expended as contributions to candidates and political committees, including affiliated political committees such as WEA-PAC without creating a political committee. The PDC interpretation of RCW 42.17.680(3) [Initiative 134] is that it does not apply to the dues deductions that generate WEA's general treasury funds because as presently constituted the WEA is not a political committee .... The membership organization itself becomes a political committee only when the pattern of such discretionary expenditures from the general treasury demonstrate that it has become a primary purpose of the organization to make contributions, as defined in

131. In the 1998-1999 budget, for example, the WEA union increased its membership dues by approximately twelve dollars per person across the board. See Chappell interview, supra note 117.

132. See Settlement Agreement, supra note 116, conclusory paras. 2-3.
RCW 42.17.020(14), intended to affect the outcome of political campaigns.\textsuperscript{133}

The conclusion to be drawn from a plain reading of the settlement guidelines is that Initiative 134 did not even succeed in preventing union officials from making "hard" money political expenditures of general union dues and agency fees directly to political candidates without first obtaining the written approval of employees. Far from being the destructive force union officials claimed it would be, Initiative 134 has thoroughly failed to prevent the unauthorized political expenditure of union dues and representation fees. Unfortunately, the reasons for Initiative 134's ineffectiveness are endemic to all paycheck protection acts.

B. \textit{Strike Two: It's the Principle, Not the Jurisdiction or Statutory Language}

Proponents of paycheck protection acts may rightly claim that if the language of Initiative 134 had been drafted more clearly, it might have achieved its goal of granting workers more control over how a union may spend their union dues or representation fees. For example, the language of Initiative 134 only expressly applied to those responsible for disbursing an employee's wages or salaries—the employers\textsuperscript{134}. Indeed, Washington's Public Disclosure Commission's decision holding Initiative 134 inapplicable to political expenditures of general union treasury funds can be rationalized since Initiative 134 did not expressly forbid unions from utilizing any portion of union dues or representation fees for political expenditures without the consent of employees. Unfortunately, for proponents of paycheck protection acts, the empirical evidence available from 1998 and the Proposition 226 campaign in California indicates that even finely tuned legislative language will not succeed in achieving the goals of paycheck protection advocates.

On June 2, 1998, Californians rejected proposed paycheck protection ballot initiative, "Proposition 226."\textsuperscript{135} Empirical evidence from one of the proposal's strongest opponents, the California Teachers Association ("CTA"), strongly intimates, however, that like Initiative 134, Proposition 226 would have had only a minimal effect, if any, upon unions wishing to spend union dues or representation fees for political purposes without employees' consent. Of course, it is impossible to say with certainty what Proposition 226 would have accomplished if adopted. This evidence indicates, however, that labor organization officials can circumvent any


\textsuperscript{134} See WASH. REV. CODE ANN. § 42.17.680(3) (West 1998).

\textsuperscript{135} See Unprotected Paychecks, supra note 16.
state level paycheck protection act that might be passed in California.

Proposition 226, like Washington's Initiative 134 and other proposed paycheck protection acts, was promoted by supporters as an attempt to guarantee a worker's right to make his or her own decision as to which political ideals he would grant financial support, i.e. an "opt in" system of funding. On the surface, Proposition 226, dubbed the "Campaign Reform Initiative" ("CRI"), appeared to avoid what was probably Initiative 134's greatest textual weakness by specifically prohibiting both employers and labor organizations from using any portion of an employee's paycheck, union dues, or representation fees for political contributions without obtaining that employee's voluntary written consent. Unfortunately for the advocates of the principles underlying the concept of paycheck protection acts, Proposition 226 retained numerous flaws and loopholes for labor organizations to exploit.

The first pro-union loophole within Proposition 226 was that the proposed legislation did nothing to alter California's statutory definitions of "political contributions" or "political expenditures." California's unaltered statutory definitions of "contributions" or "expenditures" do not include activities arguably 'nonpartisan' in nature such as voter registration (even if the union aims a voter registration drive or a "get out the vote" effort solely at voters who, rightly or wrongly, are believed to be sympathetic to the union's political positions), issue advertising, and issue lobbying. Second, California's statutory definitions do not consider political expenditures of dues received by unions who have a primary purpose other than supporting candidates or ballot proposals, e.g. negotiating collective bargaining contracts, to be political "contributions" unless the union member knows or has reason to know that the dues will be dedicated to

136. See Ferraro, supra note 107.

137. Chapter 5.9 of the California Government Code would have been amended by the addition of section 85990 which closely tracked the language of WASH. REV. CODE ANN. section 42.17.680(3) (Initiative 134), prohibiting employers from deducting money from an employee's paycheck for political purposes without the employee's consent. More importantly, section 85991 would also have been added to Chapter 5.9 of the California Government Code to prohibit labor organizations from using union dues or representation fees for political contributions without a member's written consent. In its relevant part, section 85991 stated:

(a) No labor organization shall use any portion of dues, agency shop fees, or any other fees paid by members of the labor organization, or individuals who are not members, to make contributions or expenditures except upon the written authorization of the member, or individual who is not a member, received within the previous 12 months ....

California Proposition 226 (proposed June 2, 1998) (emphasis added) (on file with the author).

138. See Chappell interview, supra note 117.
making political contributions or expenditures. Of course, any expenditure of union dues and agency fees for activities that did not fall within the statutory definitions of political contributions and political expenditures would necessarily have been free of Proposition 226's employee consent requirement.

Evidence that California unions planned on taking advantage of these textual loopholes to sustain their political involvement while at the same time vehemently arguing that Proposition 226 would destroy the ability of labor organizations to remain politically involved surfaced soon after voters rejected Proposition 226. Perhaps the CTA provided the clearest evidence of this type of planned union behavior. Prior to the election, the CTA spent $6.4 million dollars opposing the passage of Proposition 226 as anti-worker. However, copies of tentative CTA budgets obtained and publicized by Michael Antonucci of the California-based Education Intelligence Agency demonstrate that during its public campaign against Proposition 226, the CTA prepared two different budgets. The CTA apparently prepared one budget for adoption if voters approved Proposition 226, however, if Proposition 226 failed the alternate budget would be adopted. Surprisingly, the financial contents of the alternate budgets were not what one would expect in light of the CTA's vigorous campaign against the enactment of Proposition 226.

The CTA spent millions of dollars opposing Proposition 226 because of the negative effect it would allegedly have upon the ability of unions to participate effectively in politics. An observer would therefore reasonably expect the final income and expenditure amounts of the draft CTA budget prepared with Proposition 226's passage in mind to be lower than the draft CTA budget prepared under the assumption that Proposition 226 would fail. This difference in the final income and expenditure amounts should be expected if the enactment of Proposition 226 would actually have the negative impact on union political finances predicted by labor unions including the CTA. Such an expectation would have been incorrect, however, since oddly enough the final amount of budgeted expenditures in the alternate CTA draft budgets turned out to be identical!

139. See id.
141. See Antonucci, supra note 20; see also Jeff Jacoby, Labor Deceit on Prop. 226, BOSTON GLOBE, July 9, 1998, at A15.
142. See Ferraro, supra note 107.
143. Both alternate draft CTA budgets expected the union to spend $97,394,400 in the 1998-1999 fiscal year. See California Teachers Association Budget 1998-1999(1) at 5 (on file with the author); California Teachers Association Budget 1998-1999(2) at 5 (on file
The sole relevant difference between the two draft CTA budgets was in their treatment of funds originally budgeted for political expenditures.\textsuperscript{144} The budget prepared with the defeat of Proposition 226 appropriated $7,081,056 for two political action committees involved in supporting candidates and legislation.\textsuperscript{145} In contrast, the budget drafted to comply with the constraints of Proposition 226 did not budget any funding for political action committees.\textsuperscript{146} However, the "Proposition 226 passes" draft budget contained a new item called the "Public Policy Center" which was tentatively scheduled to receive $7,081,056.\textsuperscript{147} The Public Policy Center was described within the budget as, "engaging in the development of public policies which foster and promote the Association's mission, goals, and objectives. In doing so, the Center provides funds... to engage in organizational outreach to other interested groups with common goals and objectives to obtain visibility and coordinated advocacy on educational issues..."\textsuperscript{148} One commentator has suggested that the appropriate translation of this flowery language would be that the CTA intended to use this Public Policy Center to engage in politics to develop "public policies" and to "funnel its members' money to other liberal groups and let them make the political contributions,"\textsuperscript{149} instead of contributing directly to political campaigns. Because the Public Policy Center would be expending money on items that did not fall within the statutory definition of a political "contribution" or "expenditure," Proposition 226 would likely be just as inapplicable to CTA expenditures on the Center's behalf as Initiative 134 was held to be to general union treasury funds.

It appears that even while spending millions of dollars to oppose Proposition 226, the CTA successfully prepared to nullify or significantly minimize Proposition 226's effect. Indeed, under Proposition 226 the CTA could also have followed the example of the WEA to actually increase its supply of union dues and representation fees available for political spending without first obtaining employees' written consent. To do so, the CTA would merely have needed to create a political committee covered by Proposition 226 to collect voluntary union member contributions. At the same time, it would mandate that dues from union members support the Public Policy Center's "soft" money expenditures.\textsuperscript{150}

From this information about the CTA's plans to negate the effects of prototypical paycheck protection legislation, one can legitimately conclude with the author).

\textsuperscript{144} See id.
\textsuperscript{145} See California Teachers Association Budget 1998-1999(1) at 5 (on file with author).
\textsuperscript{146} See California Teachers Association Budget 1998-1999(2) at 5 (on file with author).
\textsuperscript{147} See id.
\textsuperscript{148} Id. at 28.
\textsuperscript{149} Jacoby, supra note 141.
\textsuperscript{150} See Chappell interview, supra note 117.
that the goals of paycheck protection advocates will be just as frustrated under a well drafted paycheck protection act as they have been by Washington unions.

C. Strike Three, You're Out: Paycheck Protection Acts Cannot Succeed for Practical Reasons

There are four broader practical arguments as to why paycheck protection legislation, while appealing on its face to those who value worker liberty, is not the best method by which to secure such liberty. First, paycheck protection legislation at the state level cannot prevent the unions from utilizing members' union dues and non-members representation fees to influence federal elections without their consent. The adoption of the guidelines cited above interpreting Initiative 134 by the Washington Attorney General provides insight into the second reason why legislation that merely attempts to prevent the use of union dues or representation fees for political expenses without the consent of employees can never achieve these goals. Under any such paycheck protection legislation, it is possible that the enforcement mechanism may be vulnerable to manipulation by labor organizations. This is especially true where union officials have significant influence either directly or indirectly over the body selected to enforce the paycheck protection legislation. For example, one may theorize that the interpretation of RCW section 42.17.680(3) adopted by the Public Disclosure Commission ("PDC") and the Washington Attorney General, which functionally gutted Initiative 134's effectiveness, was the result of union officials potentially having a disproportionate amount of influence in Washington's political environment. Under the PDC's interpretation of the reach and intent of RCW section 42.17.680(3), unions will no longer even have to deal with the procedural inconveniences incurred by the WEA in its attempt to circumvent Initiative 134. Indeed, Washington unions will be free to spend general treasury funds on political expenditures without obtaining written consent for the expenditures from their members. The Washington government's interpretation and planned limited enforcement of RCW 42.17.680(3) could result in effectively repealing much of Initiative 134 sub silentio. The third practical problem facing paycheck protection legislation is that enforcement would involve the costs and problems identified by Justice Black in his dissent in Street.¹⁵²

¹⁵¹. In 1974 the Federal Election Campaign Act was amended to add section 453, a broad preemption provision to prevent state law from entering the arena of elections to federal office. See 2 U.S.C. § 453 (1994).
¹⁵². Part of Justice Black's dissent in Street argued that the partial refund formula adopted by the Street majority would be too unwieldy to effectively protect dissenting
The fourth and most important reason why paycheck protection acts are not the most effective method for achieving the goals of their advocates is that they can confuse dissenting employees into thinking that they are entitled to less of a reduction in union dues or representation fees than the reduction required under Street, Beck, and their progeny. This is especially true if one remembers that paycheck protection acts usually focus exclusively on preventing the expenditure of union dues and representation fees for political purposes without the employee's consent. The Ellis/Lehnert and Beck line of cases, however, allow dissenting employees to refuse to provide financial support to all union expenditures that are unrelated to collective bargaining regardless of whether they are political expenditures or not. Because the judicial precedent allows dissenting employees to refuse to provide financial support for some nonpolitical but non-collective bargaining union expenditures, it is almost certain that refunds claimed under Beck will exceed those available under the prototypical paycheck protection act. The enactment of paycheck protection acts will therefore provide a plausible basis for unscrupulous union representatives to confuse workers attempting to assert Beck rights into settling for only that portion of the Beck remedy covered by the paycheck protection act.

IV. CONCLUSION

It is clear now that after almost thirty years of judicial and legislative attempts to regulate the negative effects of compulsory unionism's "forced ridership" upon workers' First Amendment rights, the current reality remains bleak for the employee who does not wish to financially subsidize his or her union's political views. Proponents of paycheck protection acts

employees' First Amendment rights. Justice Black's dissent stated:

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

Undoubtedly, at the conclusion of this long exploration of accounting intricacies, many courts could with plausibility dismiss the workers' claims as de minimis when measured only in dollars and cents.


153. See sources cited supra note 97.
154. See sources cited supra notes 76, 84-87.
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may sincerely believe that they have finally found an effective method to guarantee workers their full First Amendment privileges by creating an "opt in" system in place of the Supreme Court's "opt out" system. Sadly, they are mistaken in their beliefs.

In contrast, union officials are willing to play along with paycheck proponents' theory of how such acts will affect union political spending. Cynically perceived, this behavior by union officials may be an attempt to energize the militant wings of the union. Those same union officials are well aware that such paycheck protection acts are at most a minor inconvenience to active union financial involvement in domestic politics.

Overall, the empirical evidence from Washington and California demonstrates that paycheck protection acts frequently do not succeed in achieving their goals. Moreover, significant practical arguments indicate why paycheck protection acts are not necessarily the best method of maximizing worker control over their paychecks when it comes to union political spending. Together, the empirical results and practical realities above leads to the inevitable conclusion that paycheck protection advocates would do more to assist workers by supporting litigation enforcing the entire Beck decision instead of merely attempting to protect workers with ineffective paycheck protection acts.

If, however, a legislative route is sought, the only practical and principled solution would be to deprive union officials of their legislatively granted power to compel the payment of any dues as a condition of employment. Such an approach would eliminate compulsory unionism and therefore the need to implement demonstrably ineffective government schemes to regulate the negative effects of compulsory unionism while retaining the full availability of truly volunteer unionism. Indeed, twenty-one states have followed this approach under section 14(b) of the NLRA by enacting "right to work" laws. These states have seen not only the elimination of the need to regulate the negative effects of compulsory unionism but have also seen significant economic growth in both the number of jobs and faster increases in personal income than states that have not exercised their rights under section 14(b) of the NLRA.
