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Communications Workers v. Beck: Supreme Court Throws Unions Out on Street

Charles R. Virginia

COMMENT

COMMUNICATIONS WORKERS V. BECK: SUPREME COURT THROWS UNIONS OUT ON *STREET*

INTRODUCTION

In 1976, twenty non-union employees of American Telephone and Telegraph Company ("AT&T") filed suit against their exclusive bargaining representative, Communications Workers of America ("CWA"), challenging CWA's use of their agency fees for non-collective bargaining purposes.[1]

As part of the collective bargaining agreement in effect between AT&T and CWA, non-union employees were required to tender to CWA initiation fees and dues in amounts equivalent to members' fees and dues[2]—an arrangement known as an agency shop.[3] The non-union employees objected to CWA's expenditure of these agency fees for purposes other than collective bargaining, such as lobbying for labor legislation, organizing the employees of other employers, and participating in social, charitable and political events.[4] They alleged that such expenditures violated section 8(a)(3) of the National Labor Relations Act ("NLRA"),[5] CWA's duty of fair representation,[6] and the first amendment.[7] The employees

1. *See* Communications Workers v. Beck, 108 S. Ct. 2641, 2645 (1988).

2. *See id.*; *see also* Reilly, *The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes*, 32 Mercer L. Rev. 561, 569 n.69 (1981) (reproducing text of agency shop agreement between CWA and AT&T).

3. The agency and union shops are different types of union security agreements. A union security agreement has been defined as a "contract[] between a labor union and an employer whereby the employer agrees to require his employees, as a condition of their employment, to affiliate with the union in some way." T. Haggard, Compulsory Unionism, the NLRB, and the Courts 4 (1977).

Under a union shop, this required affiliation takes the form of formal union membership. Under an agency shop, the affiliation is merely the payment of initiation fees and periodic dues to the union. *See id.*

4. *See Beck*, 108 S. Ct. at 2645.

5. 29 U.S.C. § 158(a)(3) (1982). Section 8(a)(3) of the National Labor Relations Act permits an employer and an exclusive bargaining representative to enter into an agency shop agreement whereby all employees in the bargaining unit must pay periodic union dues and initiation fees as a condition of continued employment, whether or not they wish to become union members. *See* NLRB v. General Motors Corp., 373 U.S. 734 (1963).

Under a 1980 addition to the NLRA, employees with religious objections to unions may make a contribution equivalent to union dues to a nonlabor, nonreligious, tax-exempt charity. *See* National Labor Relations Act Amendment of 1980, Pub. L. No. 96-593, 94 Stat. 3452 (1980) (codified at 29 U.S.C. § 169 (1982)).

6. A union's duty of fair representation is implied from § 9(a) of the NLRA, which grants unions exclusive representational status over members of the relevant bargaining unit. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 336-38 (1953). This duty requires that the union "serve the interests of all [employees] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967).

The non-union employees in *Beck* asserted that CWA breached its duty of fair repre-

sought an injunction barring CWA from collecting agency fees above those necessary to pay for collective bargaining activities.[8]

This dispute reached the United States Supreme Court in 1988. The Court, in *Communications Workers v. Beck*,[9] held that section 8(a)(3) of the NLRA authorizes unions to collect only those agency fees germane to collective bargaining activities.[10] According to this holding, section 8(a)(3) of the NLRA does not permit a union, over the objections of nonmembers, to expend funds collected from them on activities unrelated to collective bargaining. By finding a statutory limit on union expenditures, the Court avoided addressing possible limits imposed by the Constitution and by the duty of fair representation.[11]

This Comment analyzes the *Beck* decision and concludes that the Court's interpretation of section 8(a)(3) was flawed. Part I reviews the case history of *Beck* and the Supreme Court's decision, and criticizes *Beck* for failing to follow the Supreme Court's established method of statutory construction. Part I then examines the language and legislative history of section 8(a)(3). Part II examines the constitutional issue avoided by the *Beck* Court: whether union expenditure of nonmembers' agency fees for political and other non-collective bargaining purposes violates the nonmembers' freedom of speech rights. This Comment concludes that Congress did not intend section 8(a)(3) to forbid all non-collective bargaining expenditures of monies collected pursuant to union security agreements authorized by that statute, and that the absence of state action in an agency shop agreement renders invalid the first amendment claims of objecting nonmembers.

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sentation by spending compelled agency fees for purposes that the employees found objectionable. *See Beck*, 108 S. Ct. at 2645.

No breach of the duty of fair representation occurs when a union expends agency fees on political activities. *See* Price v. International Union, 795 F.2d 1128, 1135 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988) (vacated and remanded in light of *Beck*). *But see* Beck v. Communications Workers, 800 F.2d 1280, 1286-88 (4th Cir. 1986) (en banc) (Murnaghan, J., concurring) (expenditure of agency fees on political activities breaches duty), *aff'd*, 108 S. Ct. 2641 (1988). First, a union's expenditure of agency fees on political activities does not necessarily involve arbitrary or dishonest conduct by the union. Second, expenditures on political activities may benefit nonmembers and members alike. *See infra* notes 52-54 and accompanying text. Indeed, in § 8(a)(3), Congress fixed the nonmembers' fee for union representation as the equivalent of regular union dues—fully cognizant of the union practice of using those dues for non-collective bargaining activities. *See* Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61, 80 (1983). The duty of fair representation reflects the notion that the exclusive bargaining representative should "exercise [its] power in [the represented employees'] interest and behalf." Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944). A union's expenditure of agency fees on political activities fits this description.

7. *See infra* notes 65-66 and accompanying text.

8. *See Beck*, 108 S. Ct. at 2645.

9. 108 S. Ct. 2641 (1988).

10. *See id.* at 2657.

11. *See id.* at 2656-57.

I. COMMUNICATIONS WORKERS V. BECK

A. The Circuitous Path to the Supreme Court

The district court decided *Beck* on constitutional grounds. Although the opinion contained no analysis or explanation, the court found that CWA's collection of agency fees for non-collective bargaining purposes violated the first amendment[12] rights of the objecting nonmembers.[13] The Court of Appeals for the Fourth Circuit affirmed, concluding that CWA's expenditure of agency fees for purposes unrelated to collective bargaining violated both NLRA section 8(a)(3) and the union's duty of fair representation.[14] Though it rested its decision on statutory grounds, thereby removing any constitutional implications, the court opined in dictum that sufficient government action existed to give rise to first amendment claims.[15] In a better reasoned analysis, however, Chief Judge Winter dissented, concluding that section 8(a)(3) of the NLRA authorized the collection of agency fees from nonmembers in amounts equivalent to full union dues.[16] Judge Winter further noted that because agency shop agreements involve only private conduct, they are incapable of violating the first amendment rights of objecting nonmembers.[17]

B. The Supreme Court Decision

When *Beck* reached the Supreme Court, Justice Brennan, writing for the majority, relied on a curious method of statutory interpretation to reach the conclusion that section 8(a)(3) limits the uses to which a union may put its agency fees. The Supreme Court's well settled method of statutory construction entails examining, in order, first the language and then the legislative history of the statute.[18] In *Beck*, however, the Court looked outside the statute entirely. The Court worked backwards: instead of beginning with the Labor-Management Relations Act of 1947 ("LMRA"),[19] which added section 8(a)(3) to the NLRA, the Court began its analysis with the 1951 amendments of the Railway Labor Act ("RLA"),[20] which governs labor relations in the railroad and airline in-

12. *See infra* notes 65-66 and accompanying text.

13. *See* Beck v. Communications Workers, 468 F. Supp. 93 (D. Md. 1979), *aff'd on other grounds*, 776 F.2d 1187 (4th Cir. 1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988).

14. *Beck*, 776 F.2d at 1209.

15. *See id.* at 1205. On rehearing en banc, the court, in a short per curiam opinion, voted six-to-four to sustain federal jurisdiction, and affirmed the majority panel opinion below. *See id.* at 1280.

16. *See id.* at 1214-15 (Winter, C.J., dissenting).

17. *See id.* at 1214.

18. *See, e.g.*, Russello v. United States, 464 U.S. 16, 20 (1983); Dickerson v. New Banner Institute, 460 U.S. 103, 110 (1983); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

19. Ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 151-169 (1982)).

20. Ch. 1220, 64 Stat. 1238, 1238-39 (1951) (codified at 45 U.S.C. § 152 (1982)).

dustries, and worked its way back to the statute under consideration, section 8(a)(3) of the NLRA.

Specifically, the Court concluded that *International Association of Machinists v. Street*,[21] which interpreted section 2, Eleventh of the RLA,[22] controlled the interpretation of NLRA section 8(a)(3) since both provisions are "in all material respects identical."[23] The Court reasoned that because *Street* had interpreted section 2, Eleventh of the RLA as prohibiting a union from expending agency fees on political causes,[24] and because Congress, when it amended the RLA in 1951, intended to give railroad employees the same rights that industrial employees enjoyed under section 8(a)(3), Congress in 1947 must have intended section 8(a)(3) to authorize the assessment of only those agency fees germane to collective bargaining.[25]

Using this contorted reasoning, the Court was able to interpret section 8(a)(3) without analyzing its language or legislative history. The real issue, however, is the language and legislative history of section 8(a)(3)—what the Eightieth Congress intended that statute to mean. What the Eighty-first Congress intended in section 2, Eleventh of the RLA or what it thought the Eightieth Congress intended in enacting section 8(a)(3) is largely irrelevant.[26] As Justice Blackmun stated in his dissent to *Beck*,

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21. 367 U.S. 740 (1961).

22. Section 2, Eleventh of the RLA provides in pertinent part:

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

45 U.S.C. § 152 (1982).

23. Communications Workers v. Beck, 108 S. Ct. 2641, 2648 (1988).

24. *See id.* at 2648-49 (citing International Ass'n of Machinists v. Street, 367 U.S. 740, 770 (1961)).

25. *Id.*

26. *See* Russello v. United States, 464 U.S. 16, 26 (1983) ("it is well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one' ") (quoting Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 165 n.27 (1983)).

Furthermore, the language and legislative history of § 2, Eleventh do not clearly support *Street*'s holding that the statute prohibits union expenditures of agency fees on political causes. *See* Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L. Rev. 3, 41-44 (1983); Cantor, *supra* note 6, at 75. As Justice Brennan himself admitted in an earlier decision, "*Street* embraced an interpretation of the [RLA] *not without its difficulties* precisely to avoid

"[w]ithout the decision in *Machinists v. Street* . . . the Court could not reach the result it does today. Our accepted mode of resolving statutory questions would not lead to a construction of § 8(a)(3) so foreign to that section's express language and legislative history . . . ."[27] An examination of the language and legislative history of section 8(a)(3) reveals that Congress did not intend to limit either the amount of agency fees a union may collect or the uses to which a union may put such funds.

C. *Statutory and Legislative History Analysis of Section 8(a)(3)*

In 1947, the Labor-Management Relations Act added section 8(a)(3) to the NLRA.[28] Section 8(a)(3) replaced the original section 8(3) of the NLRA,[29] which had permitted unions and employers to enter into closed shop agreements requiring employers to hire only persons who were already union members.[30]

Section 8(a)(3) embodies a twofold congressional purpose. First, Congress intended to end the abuses associated with compulsory unionism by eliminating unions' power over entry into the job market, and by insulating job status against changes in union membership status.[31] Second, Congress sought to avoid the "free-rider" problem: in the absence of a union security agreement, the non-union employees reap the benefits of union representation without sharing in its cost.[32]

Two provisos of section 8(a)(3) are relevant.[33] The first authorizes em-

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facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes . . . ." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977) (emphasis added) (citations omitted).

27. *Beck*, 108 S. Ct. at 2657-58 (Blackmun, J., dissenting) (citations omitted).

28. Ch. 120, 61 Stat. 136, 140-41 (1947) (codified at 29 U.S.C. § 158(a)(3) (1982)).

29. The original section 8(3) provided in pertinent part:

> [N]othing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees . . . in the appropriate collective bargaining unit covered by such agreement when made.

NLRA, ch. 372, 49 Stat. 449, 452 (1935) (repealed 1947).

30. *See* Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949).

31. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act of 1947, at 407, 412-13 (1985) [hereinafter 1 NLRB]; 93 Cong. Rec. 1891, 4558-59, 5086-87 (1947), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Relations Act of 1947, at 952-53, 1199, 1417, 1419-20 (1985) [hereinafter 2 NLRB].

Prior to 1947, unions abused closed shop agreements by arbitrarily preventing individuals from obtaining employment by refusing union membership, as well as causing workers to lose their jobs by expelling them from the union without justification. *See* T. Haggard, *supra* note 3, at 36.

32. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 6, 7 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 412-13; 93 Cong. Rec. 4887 (1947) (remarks of Sen. Taft); *see also* NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963).

33. Section 8(a)(3) provides:

> It shall be an unfair labor practice for an employer—
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term

ployers and unions to enter into agreements requiring all employees to become union members within thirty days after being hired.[34] The second prohibits mandatory discharge of an employee for nonmembership if either, under Part A, membership was not available to the employee "on the same terms and conditions generally applicable to other members,"[35] or, under Part B, membership "was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."[36] Section 8(a)(3) therefore banned the closed shop, authorizing in its place a less onerous form of union security agreement.[37] The exact nature of this less onerous form of union security agreement, however, was the subject of some confusion.[38]

In 1963, the Supreme Court ended this confusion by ruling, in *NLRB v. General Motors Corp.*,[39] that section 8(a)(3) authorizes the agency shop. It reached this conclusion by construing "membership," upon which employment can be conditioned, to mean only the payment of dues, rather than formal union membership.[40] By finding that section 8(a)(3) did not authorize the union shop, the Court shifted the constitutional inquiry. After *General Motors*, it was no longer necessary to assess the constitutional implications of mandatory union membership. The question remained, however, whether union expenditure of nonmembers' agency fees for political and other non-collective bargaining purposes violates the nonmembers' freedom of speech rights.

The Court in *Beck* similarly avoided the constitutional issue. This

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or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

29 U.S.C. § 158(a)(3) (1982).

34. *See id.*

35. *Id.*

36. *Id.*

37. The requirement in § 8(a)(3) that employees affiliate with the union in some fashion was looked on as a small sacrifice necessary to the fiscal health of unions, and incidental to the achievement of job security. Senator Taft, a co-sponsor of the LMRA, reflected the view of Congress when he stated "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important. The important thing is that the man will have the job." *See* 93 Cong. Rec. 4886 (1947).

38. *See* T. Haggard, *supra* note 3, at 34.

39. 373 U.S. 734 (1963).

40. *See id.* at 740-44.

time, however, the Court stretched section 8(a)(3) beyond its breaking point—transgressing, in the process, its own doctrine that, in avoiding constitutional questions, the Court may not embrace a statutory construction that "is plainly contrary to the intent of Congress."[41] In *Beck*, the Court adopted a construction of section 8(a)(3) that is inconsistent with the congressional intent expressed in the statutory language and legislative history.

To begin with, the language[42] and legislative history[43] of section 8(a)(3) support a union security agreement more onerous than the agency shop.[44] The plain language of section 8(a)(3) requires union "membership," and the debates over the statute made no mention of the

41. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392, 1397 (1988).

42. Congress chose not to authorize explicitly the agency shop in § 8(a)(3). Indeed, § 8(a)(3) authorizes union security agreements requiring union "membership" within 30 days after being hired, *see* 29 U.S.C. § 158(a)(3) (1982), and the essence of the agency shop is that union membership is not required.

Moreover, the structure of § 8(a)(3) does not support the agency shop interpretation of that statute, for the agency shop interpretation renders part A of the second proviso redundant. Under the agency shop interpretation, the "membership" upon which employment is conditioned is merely the payment of periodic dues and initiation fees to the union. *See* NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). Part B of the second proviso prohibits mandatory discharge for nonmembership if membership is denied or terminated for reasons other than the failure of the employee to pay periodic dues and initiation fees to the union. Thus, part A of the second proviso, which prohibits mandatory discharge for nonmembership if the union abused its membership criteria, is unnecessary.

43. *See* 93 Cong. Rec. 4886 ("[u]nder [§ 8(a)(3),] the closed shop is abolished, and a man can get a job with an employer and can continue in that job if . . . he joins the union *and* pays the union dues") (remarks of Sen. Taft) (emphasis added); S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 412-13; H.R. Rep. No. 245, 80th Cong., 1st Sess. 9 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 300; Cantor, *supra* note 6, at 72; Hopfl, *The Agency Shop Question*, 49 Cornell L.Q. 478, 484 (1964). Despite hearing testimony on the agency shop, *see id.*, Congress never explicitly discussed the idea. *See* Stanner, *Legality of Agency Shop Contracts Under the National Labor Relations Act and the Effect of "Right to Work" Laws on Such Union Security Provisions*, 52 Ill. B.J. 247, 251 n.21 (1963) ("Senator Taft's comment on § 8(a)(3) is perhaps the nearest thing to a remark about the agency shop to be found in the legislative history."). To the contrary, Congress primarily focused on the problems associated with compulsory, formal union membership, *see* 93 Cong. Rec. 4858-77, 4885-87 (1947); *see also* Hopfl, *supra*, at 484. This supports the theory that Congress had some form of union shop in mind when enacting § 8(a)(3).

44. Congress apparently intended § 8(a)(3) to authorize a variation of the union shop. Congress called the union security agreement authorized in § 8(a)(3) a "union shop." *See* H.R. Rep. No. 245, 80th Cong., 1st Sess. 30 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 321; 93 Cong. Rec. 5079-80 (1947), *reprinted in* 2 NLRB, *supra* note 31, at 1405. Indeed, the first proviso of § 8(a)(3) expressly authorizes a union shop. However, part B of the second proviso insulates members who are expelled from the union against termination of employment so long as they continue to tender union dues. This transforms the union security agreement authorized in § 8(a)(3) into a variation of the traditional union shop, for in a genuine union shop a worker expelled from the union loses his job.

Under this variation, an employee must apply for membership in his exclusive bargaining representative and accept a subsequent invitation to join. Workers who are initially refused membership, and those who are accepted but subsequently expelled from the

agency shop, instead focusing on compulsory membership.[45] Therefore, it is erroneous to conclude that Congress intended section 8(a)(3) to limit the amounts of *agency* fees unions may collect and the uses to which they may put them.

Furthermore, even if one assumes that Congress intended section 8(a)(3) to authorize only the agency shop, the statutory language and legislative history of the LMRA reveal that Congress did not intend section 8(a)(3) to prevent all non-collective bargaining-related expenditures by unions of the monies collected from employees pursuant to authorized union security agreements.

1. The Statutory Language

The plain language of section 8(a)(3) authorizes union security agreements under which unions can collect from any employee the "periodic dues and initiation fees *uniformly* required as a condition of acquiring or retaining membership."[46] The statute contains no mention of lesser "dues" and "fees" that nonmember employees covered by a union security agreement may be required to pay their exclusive bargaining representative. Furthermore, as the dissent in *Beck* pointed out, section 8(a)(3) does not address the uses to which a union may put the monies collected pursuant to a union security agreement.[47]

The *Beck* Court explained away section 8(a)(3)'s silence[48] with two arguments. The Court first noted that, in *Street*, it had attached no significance to RLA section 2, Eleventh's silence concerning the permissible uses of agency fees, and now saw no reason to give greater weight to congressional silence in section 8(a)(3).[49] However, as the dissent aptly pointed out, the Court's "answer" to the absolute lack of evidence that Congress intended to regulate agency fee expenditures "is no answer at all."[50] When finding an implicit limitation in a statute, the Court's task is not to weigh silence, but to find some support for its proposition.[51]

The Court's second explanation for this silence was that explicitly

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union cannot be discharged for nonmembership by the employer so long as they tender periodic dues and initiation fees to the union. *See* T. Haggard, *supra* note 3, at 37.

45. *See* Hopfl, *supra* note 43, at 484.

46. 29 U.S.C. § 158(a)(3) (1982) (emphasis added).

47. *See* Communications Workers v. Beck, 108 S. Ct. 2641, 2660-61 (1988) (Blackmun, J., dissenting).

48. *See id.* at 2656 (opinion of the Court).

49. The Court stated:

> Congress was equally aware of the same practices by railway unions . . . yet neither in *Street* nor in any of the cases that followed it have we deemed Congress' failure in § 2, Eleventh to prohibit . . . such expenditures as an endorsement of fee collections unrelated to collective bargaining expenses. We see no reason to give greater weight to Congress' silence in the NLRA than we did in the RLA . . . .'

Id. (citations omitted).

50. *Id.* at 2661 n.7 (Blackmun, J., dissenting).

51. *See id.*

prohibiting non-collective bargaining expenditures of agency fees would have been redundant since Congress understood section 8(a)(3) "to enable unions to charge nonmembers only for those activities that actually benefit them."[52] This rationale begs the question because non-collective bargaining expenditures can benefit nonmembers. Many of the employment-related benefits provided by unions are obtained through the political arena.[53] Items secured through legislative lobbying, such as pension plans and occupational health and safety measures, all benefit dues-paying employees as much as if they had been secured from the employer.

Thus, by limiting compelled agency fees to contract negotiation and administration expenses, *Beck* resurrected the "free rider" problem that section 8(a)(3) was designed to prevent. When a union secures an employment-related benefit, all represented employees benefit. This is true whether the benefit is secured through the political arena or at the bargaining table. If a represented employee enjoys the benefit without contributing to its cost, he is a free rider. Represented employees who enjoy the benefits derived from political expenditures without contributing to their cost are no less free riders than those who fail to financially support the benefits derived from contract negotiation and administration expenses.[54]

2. The Legislative History

The legislative history of the LMRA also reveals that Congress did not intend to limit unions' use of fees. Congress was well aware of labor unions' use of the political arena to obtain workers' benefits,[55] and acknowledged that through such expenditures, the American worker "ha[d] been compelled to contribute to causes and candidates for public office to which he was opposed."[56] In response, Congress explicitly considered proposed provisions limiting labor unions' spending of dues and fees for non-collective bargaining purposes.[57] Congress, however, chose

52. *Id.* at 2656 (opinion of the Court).

53. *See* Cantor, *supra* note 6, at 75; Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C.D.L. Rev. 591, 601-02 (1981).

54. *See* Cantor, *supra* note 6, at 75; Gaebler, *supra* note 53, at 603.

55. *See* United States v. UAW, 352 U.S. 567, 579-80 (1957); H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 295.

56. H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 295.

57. For instance, the original House bill contained a "bill of rights" for workers. *See* H.R. Rep. No. 245, 80th Cong., 1st Sess. 31-33 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 322-24. Within this proposed "bill of rights" was a provision declaring that "[m]embers of any labor organization shall have the right to be free from unreasonable . . . financial demands of such organization," H.R. 3020, 80th Cong., 1st Sess. §.7(b) (1947), *reprinted in* 1 NLRB, *supra* note 31, at 49, as well as a provision that Representative Hartley described as allowing a worker "to decide for himself whether or not his money will be spent for political purposes." 93 Cong. Rec. 3425 (1947) (statement of Rep. Hartley). The Senate, despite hearing testimony on the danger of failing to limit uses of dues to be collected by unions pursuant to the union security agreements being

to add only section 304 to the LMRA.[58] Section 304 merely prohibits unions from using employees' dues for federal elections,[59] while leaving unions free to use dues for lobbying purposes and for political campaigns outside of federal elections. This Congressional refusal to place limits on the uses to which a union could put dues compels the conclusion that Congress did not intend section 8(a)(3) to forbid all non-collective bargaining expenditures of monies collected through union security agreements.

The *Beck* Court dismissed this argument as "misplaced" because these more stringent proposals did not concern the rights of nonmembers who are compelled to pay union dues, but rather applied only to union members.[60] As previously noted, however, Congress did not explicitly discuss the agency shop dues-paying nonmember; it was compulsory membership that received the greatest deliberation.[61] But even if the term "membership" in section 8(a)(3) means only the payment of dues, as the Supreme Court said it does,[62] then surely the "member" sought to be protected in the more stringent proposals included the dues-paying employee.

The House Committee on Education and Labor Report accompanying the more stringent proposals reveals this to be the case, because the Committee recognized the increased importance of the proposals in light of the authorization of union security agreements requiring union "membership."[63] If the dues-paying employee is a union "member," as the Supreme Court ruled in *General Motors*,[64] then the more stringent proposals were not limited in scope to voluntary union members, as the *Beck*

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authorized, *see* Beck v. Communications Workers, 776 F.2d 1187, 1215 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd*, 108 S. Ct. 2641 (1988), refused to agree to the House's proposed "bill of rights" provisions. *See* 93 Cong. Rec. 6436 (1947).

58. LMRA, ch. 120, 61 Stat. 136, 159-60 (1947). Section 304 was repealed by § 201(a) of the Federal Election Campaign Act Amendments, Pub. L. No. 94-283, 90 Stat. 475, 496 (1976), and replaced by § 112(2) of the Federal Election Campaign Act Amendments, Pub. L. No. 94-283, 90 Stat. 475, 486-490 (1976) (codified as amended at 2 U.S.C. § 441b (1982)). Section 441b prohibits the use of agency fees by unions in connection with federal elections. *See* 2 U.S.C. § 441b (1982).

59. *See* 93 Cong. Rec. 6440 (1947) (statement of Sen. Taft).

60. *See Beck*, 108 S. Ct. at 2655.

61. *See supra* note 45 and accompanying text.

62. *See* NLRB v. General Motors Corp., 373 U.S. 734, 743-44 (1963).

63. H.R. Rep. No. 245, 80th Cong., 1st Sess. 31 (1947), *reprinted in* 1 NLRB, *supra* note 31, at 322, provides:

> Having given to unions great power over *workers*, we now make sure that the unions will operate democratically, that they will use their powers in the interest of the *workers*, and that those that heretofore have exploited the *workers* no longer can do so. The permitting . . . of agreements between employers and labor organizations requiring union membership makes this bill of rights of even *greater importance than would be the case if union membership were, in all respects, entirely voluntary.*

Id. (emphasis added).

64. *See supra* notes 39-40 and accompanying text.

Court contended, but rather protected all employees bound by a union security agreement authorized by section 8(a)(3). Ironically, *Beck*'s revision of section 8(a)(3) was unnecessary, for the constitutional implications are rendered moot by the absence of state action.

II. ABSENCE OF STATE ACTION IN AGENCY SHOP AGREEMENTS

Because a proper interpretation of section 8(a)(3) permits unions to collect agency fees from nonmembers in amounts equal to regular union dues, and does not place any restrictions on the uses to which unions may put these fees, the statute raises the constitutional issue whether a union's expenditure of agency fees on political activities violates the first amendment rights of the objecting nonmembers.[65]

Although there is disagreement on this issue,[66] it is here suggested that such an expenditure cannot violate the objecting nonmembers' first amendment rights because an agency shop agreement by a union and an employer does not involve government action.

A. *The State Action Requirement*

By its terms, the first amendment proscribes only government action, not the action of private individuals.[67] This distinction gave rise to the "state action" doctrine: challenged conduct is subject to constitutional

65. The exact nature of the first amendment interests involved in the agency shop scenario is the subject of some confusion. It is not the freedom of association—that first amendment interest is implicated only in the closed shop and union shop situations where formal union membership is compulsory. Nor is it the traditional freedom of speech, for the objecting nonmembers claim the right not to speak.

Justice Stewart, in Abood v. Detroit Board of Education, 431 U.S. 209, 222-23 (1977), characterized the right of freedom of belief as the first amendment interest implicated when a non-union employee is compelled to financially support the union. However, some commentators disagree. *See* Cantor, *supra* note 26, at 71; Gaebler, *First Amendment Protections Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 1003 (1982).

66. *Compare* Price v. International Union, 795 F.2d 1128, 1133 (2d Cir. 1986) (no state action), *vacated*, 108 S. Ct. 2890 (1988) *and* Beck v. Communications Workers, 776 F.2d 1187, 1221-25 (4th Cir. 1985) (Winter, C.J., dissenting) (same), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988) *and* Kolinske v. Lubbers, 712 F.2d 471, 476 (D.C. Cir. 1983) (same) *and* Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410-11 (10th Cir. 1971) (same) *and* Linscott v. Millers Falls Co., 440 F.2d 14, 19-20 (1st Cir. 1971) (Coffin, J., concurring) (same) *and* Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953) (same), *aff'd*, 229 F.2d 919 (1956) *with Beck*, 776 F.2d at 1205 (finding state action) *and* Hammond v. United Papermakers, 462 F.2d 174, 175 (6th Cir.) (same), *cert. denied*, 409 U.S. 1028 (1972) *and* Linscott v. Millers Falls Co., 440 F.2d 14, 16 (1st Cir. 1971) (same) *and* Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003-04 (9th Cir. 1970) (same) *and* Lykins v. Aluminum Workers Int'l Union, 510 F. Supp. 21, 25-26 (E.D. Pa. 1980) (same) *and* Havas v. Communications Workers, 509 F. Supp. 144, 148-49 (N.D.N.Y. 1981) (same).

67. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 794 n.34 (1978); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226-27 & n.23 (1977); Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973); U.S. Const. amend. I.

scrutiny only if it entails governmental action.[68] The Supreme Court has put forth many "tests" for determining the existence of state action.[69] These state action tests, however, have virtually no analytical utility, for they contain broad language that can support both sides of a state action controversy. Thus, as the Supreme Court itself has stated, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[70]

B. *Absence of State Action in Section 8(a)(3)*

An agency shop agreement is a contract between two private parties—labor and management[71]—which, standing alone, represents the product of purely private action. Section 8(a)(3) of the NLRA is permissive,[72] and as such, does not sufficiently infuse the federal government into this private relationship to constitute state action.[73] Section 8(a)(3) simply provides that federal law does not preclude employers and their employees' bargaining representatives from entering into agency shop agreements.[74] Thus, section 8(a)(3) does not compel an employer and a union to adopt an agency shop agreement, or any other form of union security, as part of their collective bargaining agreement.

Two other provisions of the NLRA reinforce section 8(a)(3)'s permissiveness. Under section 14(b),[75] section 8(a)(3) does not preempt state laws banning the agency shop,[76] but merely authorizes agency shop agreements in the absence of state law proscriptions.[77] Accordingly, sec-

68. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978).

69. *See, e.g., Lugar*, 457 U.S. at 937; *Flagg Bros.*, 436 U.S. at 157; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970); Terry v. Adams, 345 U.S. 461 (1953).

70. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961); *accord* Kolinske v. Lubbers, 712 F.2d 471, 477 (D.C. Cir. 1983); Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 Sup. Ct. Rev. 221, 222; T. Haggard, *supra* note 3, at 244.

71. *See* T. Haggard, *supra* note 3, at 239.

72. *See* Communications Workers v. Beck, 108 S. Ct. 2641, 2644-45 (1988) (section 8(a)(3) "permits" an employer and union to enter into an agency shop agreement).

73. *See* Price v. International Union, 795 F.2d 1128, 1133 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988); Beck v. Communications Workers, 776 F.2d 1187, 1221-25 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); Kolinske v. Lubbers, 712 F.2d 471, 476 (D.C. Cir. 1983); Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410-411 (10th Cir. 1971); Linscott v. Millers Falls Co., 440 F.2d 14, 19-20 (1st Cir. 1971) (Coffin, J., concurring); Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953), *aff'd*, 229 F.2d 919 (1956).

74. *See* 29 U.S.C. §'158(a)(3) (1982).

75. 29 U.S.C. § 164(b) (1982).

76. Twenty-one states have enacted laws allowing employees to withhold payment of union dues. *See* W. Gould, A Primer on American Labor Law 50-51 (2d ed. 1986).

77. Section 14(b) states: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (1982).

tion 8(a)(3)'s authorization of agency shop agreements is contingent not only upon the whim of the employer and union to adopt an agency shop agreement, but also upon the discretion of the particular state to decline to proscribe agency shop agreements.[78]

Section 8(d)[79] of the NLRA also illustrates section 8(a)(3)'s permissiveness. Section 8(d) announces the NLRA's neutrality with respect to the contents of collective bargaining agreements.[80] The NLRA does not mandate the existence or content of any provision of a collective bargaining agreement, including an agency shop clause. The employer and union are free to include or omit an agency shop clause from their collective bargaining agreement, again subject only to the discretion of the

78. In addition to demonstrating the permissive nature of § 8(a)(3), § 14(b) provides the crucial distinction between § 8(a)(3) and its parallel provision, § 2, Eleventh of the Railway Labor Act. In Railway Employees' Department v. Hanson, 351 U.S. 225 (1956), the Court held that the RLA's authorization of agency shop agreements involved government action, *id.* at 232, basing its decision solely upon § 2, Eleventh's preemption of state law prohibiting agency shop agreements. *See id.* This same basis for finding government action does not appear in the NLRA, however, because NLRA § 14(b) mandates that the statute's authorization of agency shop agreements yield to contrary state law. The notion underlying *Hanson* that the federal law, by overriding conflicting state laws, became the "source of the power and authority" for agency shop agreements is absent in the context of the NLRA. As one court phrased it:

> By authorizing the inclusion of [agency] shop clauses subject to the whim of the states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA. The RLA, on the other hand, goes further and creates a federal right or privilege that enables private parties to override state . . . laws.

Price v. International Union, 795 F.2d 1128, 1133 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988); *accord* Beck v. Communications Workers, 776 F.2d 1187, 1223-24 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); Kolinske v. Lubbers, 712 F.2d 471, 476 (D.C. Cir. 1983). The Supreme Court itself has noted the absence of this preemption feature from the NLRA. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 218 n.12 (1977); Railway Employees' Dep't v. Hanson, 351 U.S. 225, 232 n.5 (1956).

Courts and commentators, however, do not agree that this is a distinction with a difference for state action purposes. *Compare, e.g.*, *Price*, 795 F.2d at 1132-33 (holding that § 14(b) distinguishes NLRA from RLA and renders *Hanson* inapplicable) *and Beck*, 776 F.2d at 1224 (Winter, C.J., dissenting) (same) *and Kolinske*, 712 F.2d at 476 (same) *and* Hovan v. United Bhd. of Carpenters, 704 F.2d 641, 643 (1st Cir. 1983) (same) *and* T. Haggard, *supra* note 3, at 241 (regarding state action issue in relation to NLRA, "the *Hanson* theory would appear to be inapplicable") *with Beck*, 776 F.2d at 1206 (difference has no relevance) *and* Linscott v. Millers Falls Co., 440 F.2d 14, 16 (1st Cir. 1971) (same) *and* Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003 (9th Cir. 1970) (assuming *Hanson* applies to NLRA) *and* Havas v. Communications Workers, 509 F. Supp. 144, 148-49 (N.D.N.Y. 1981) (holding *Hanson* applies to NLRA) *and* Reilly, *supra* note 2, at 561-63 (assuming *Hanson* applies to NLRA).

79. 29 U.S.C. § 158(d) (1982).

80. Section 8(d) states in pertinent part:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

29 U.S.C. § 158(d) (1982).

state.[81] Taken together, sections 8(a)(3), 14(b) and 8(d) of the NLRA reveal that the Act merely provides federal authorization of private conduct in negotiating and enforcing agency shop agreements. It is well settled by the Supreme Court, however, that the government's authorization of private conduct, without anything more, is not sufficient to constitute state action.[82] Thus, the NLRA's authorization of agency shop agreements does not convert the adoption of an agency shop agreement by private parties into state action.[83]

Although the agency shop agreement is entered into by private parties, some courts[84] and commentators[85] argue that one of the private parties—the union—does not act in a private capacity. This theory[86] for finding state action in agency shop agreements stems from *Steele v. Louisville & Nashville R.R. Co.*,[87] which is often cited in support of the theory: "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ."[88]

According to this theory, a union's ability to collect dues from employees who are not, and do not wish to become, union members flows from Congress' grant to unions of the right of exclusive representation in sec-

81. In this respect, the NLRA's policy of neutrality regarding the contents of collective bargaining agreements distinguishes it from public sector collective bargaining, and, therefore, from Abood v. Detroit Board of Education, 431 U.S. 209 (1977). The *Abood* Court, in a plurality opinion, found without discussion that an agency shop agreement contained in a public employment contract involved state action. *See id.* at 226 n.23. The Court's brevity is not surprising, however, because all aspects of public employment necessarily involve government action; the employer is the government. Accordingly, *Abood*'s finding of state action in a public sector agency shop agreement has no relevance to the private sector and the NLRA. *See* Beck v. Communications Workers, 776 F.2d 1187, 1225 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); Kolinske v. Lubbers, 712 F.2d 471, 476 (D.C. Cir. 1983).

82. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

83. *See* Price v. International Union, 795 F.2d 1128, 1133 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988); *Beck*, 776 F.2d at 1222 (Winter, C.J., dissenting); *Kolinske*, 712 F.2d at 478.

84. *See* Buckley v. American Fed'n of Television & Radio Artists, 419 U.S. 1093, 1094-95 (1974) (Douglas, J., dissenting from denial of certiorari); *Beck*, 776 F.2d at 1207.

85. *See* T. Haggard, *supra* note 3, at 247 ("[a]rguably, . . . the statutory grant of the right of exclusive representation . . . necessarily involves the exercise of powers normally reserved to the sovereign; that whenever, pursuant to this delegation of authority, the union acts in its representative capacity, this *is* 'state action' "); Summers, *Union Powers and Workers' Rights*, 49 Mich. L. Rev. 805, 811 (1951).

86. This theory is considered "the leading theoretical justification for raising constitutional issues within the context of ostensibly private collective bargaining agreements." T. Haggard, *supra* note 3, at 247.

87. 323 U.S. 192 (1944).

88. *Id.* at 202 (citation omitted). Although *Steele* dealt with the Railway Labor Act, 45 U.S.C. § 151-64 (1982), its imposition of the duty of fair representation upon railway unions has been extended to unions subject to the NLRA. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

tion 9(a) of the NLRA.[89] Section 9(a) gives a union receiving a majority of votes from within a proper bargaining unit the right to make a collective bargaining agreement with the employer that is binding on all employees, including those who did not vote for the union.[90] Thus, the NLRA "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."[91] Proponents of this theory argue that section 9(a)'s grant of exclusive representation and section 8(a)(3)'s authorization of agency shop agreements, taken together, transform the union into a state actor.[92]

This theory[93] has a superficial appeal, in view of the extensive federal regulation of labor unions.[94] While the federal government's grant of exclusive representation and requirement that employers bargain over union security agreements[95] might make it easier for unions to secure

89. Section 9(a) states in pertinent part:

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

29 U.S.C. § 159(a) (1982).

90. *See id.*

91. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

92. *See, e.g.*, Beck v. Communications Workers, 776 F.2d 1187, 1207 (4th Cir. 1985), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); Reilly, *supra* note 2, at 563.

93. The essence of the theory is that state action exists because exclusive representation is akin to a governmental grant of monopoly power. Yet in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Supreme Court held that even government-conferred monopoly power is insufficient to create state action. *See id.* at 358. Many courts that find no state action in § 8(a)(3) correctly cite *Jackson* for that proposition. *See, e.g.*, Price v. International Union, 795 F.2d 1128, 1133 (2d Cir. 1986), *vacated*, 108 S. Ct. 2890 (1988); *Beck*, 776 F.2d at 1222 (Winter, C.J., dissenting); Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983).

94. Those who would transform the union into a state actor also point to the extensive federal regulation of labor unions, including the federal labor contract enforcement machinery in § 301 of the LMRA, 29 U.S.C. § 185(a) (1982). However, it is well settled that federal regulation of a private entity does not, in and of itself, create state action. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 841-42 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950); Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983). Nor does the federal labor contract enforcement machinery create state action. *See* United Steelworkers v. Weber, 443 U.S. 193, 200 (1979).

95. Some proponents of this theory additionally cite the inclusion of union security within the mandatory subjects of bargaining listed in § 8(d), 29 U.S.C. § 158(d) (1982), as creating state action. *See* Reilly, *supra* note 2, at 563. Under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1982), employers are required to bargain with unions over mandatory subjects of bargaining. The argument is that this bargaining requirement in reality requires the inclusion of a union security provision in the collective bargaining agreement. *See* Reilly, *supra* note 2, at 563. However, as noted above, the NLRA is neutral with respect to the contents of collective bargaining agreements. The NLRA does not man-

agency shop agreements and thus nonmembers' dues,[96] this is not sufficient to label the union a state actor. The theory is fatally overbroad. Congress' conferral of exclusive representation to unions underlies most provisions in a collective bargaining agreement. Yet the Constitution does not apply to the terms of labor contracts.[97]

Moreover, the principle of exclusive representation is implicated in virtually all interaction between the union and the nonmember employees it represents. Therefore, if exclusive representation transformed the union into a state actor, many union rules would be subject to constitutional scrutiny. Yet this is not the case. The Supreme Court has repeatedly held that union rules governed by the NLRA do not involve state action.[98] Congress' passage of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"),[99] which contained a "Bill of Rights" for union members,[100] also proves that union rules are not subject to constitutional scrutiny. Congress apparently believed that neither unions nor their rules were subject to constitutional scrutiny—to the contrary, Congress believed the LMRDA necessary to impose the obligations it contains.[101]

Furthermore, if a union's expenditure of agency fees on political activities involved state action, all unions would be state actors and their every move would be subject to constitutional scrutiny.[102] This road is paved with economic and political hazards[103] that Congress and the Supreme Court have wisely avoided traveling.

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date that a union security agreement be included in collective bargaining agreements, only that the parties bargain over it in good faith.

96. *See* Beck v. Communications Workers, 776 F.2d 1187, 1222 (4th Cir. 1985) (Winter, C.J., dissenting), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), *aff'd*, 108 S. Ct. 2641 (1988); T. Haggard, *supra* note 3, at 242; Reilly, *supra* note 2, at 563.

97. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 250 (1977) (Powell, J., concurring); *see also* Aldridge v. Boys, 98 Ill. App. 3d 803, 808, 424 N.E.2d 886, 889-90 (1981); T. Haggard, *supra* note 3, at 247.

98. *See, e.g.*, United Steelworkers v. Sadlowski, 457 U.S. 102, 111 (1982); United Steelworkers v. Weber, 443 U.S. 193, 200 (1979); American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950).

99. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. § 401-531 (1982 & Supp. V 1986)).

100. Among those rights is § 101(a)(2), which "restate[s] a principal First Amendment value—the right to speak one's mind without fear of reprisal." United Steelworkers v. Sadlowski, 457 U.S. 102, 111 (1982).

101. *See* Hovan v. United Bhd. of Carpenters, 704 F.2d 641, 643 (1st Cir. 1983).

102. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 252 n.7 (1977) (Powell, J., concurring) ("If collective-bargaining agreements were subjected to the same constitutional constraints as federal rules and regulations, it would be difficult to find any stopping place in the constitutionalization of regulated private conduct.")

103. *See id.*; Hovan v. United Bhd. of Carpenters, 704 F.2d 641, 642-43 (1st Cir. 1983); Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 620 (1959); Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 Yale L.J. 345, 348-49 (1961).

CONCLUSION

Section 8(a)(3) of the NLRA authorizes unions to charge nonmembers the equivalent of regular union dues and initiation fees for union representation. Congress did not place any limits on the uses to which unions may put those dues. The Supreme Court's decision in *Communications Workers v. Beck*, which construed section 8(a)(3) as prohibiting unions from expending agency fees on non-collective bargaining activities, is both erroneous and unnecessary. It is erroneous because there is no support in the language or legislative history of section 8(a)(3) for the Court's reading of that statute, and unnecessary because the absence of state action renders moot the first amendment claims of the objecting nonmembers. Thus, *Beck* incorrectly impinges upon unions' efforts to obtain job-related benefits through legislative lobbying and financial support of pro-labor candidates—efforts that are essential to effective representation in this country's government-regulated employment industry.

Charles R. Virginia