Lehnert v. Ferris Faculty Association: Accounting to Financial Core Members: Much A-Dues About Nothing?

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Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol60/iss5/9

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INTRODUCTION

The National Labor Relations Act1 ("NLRA") and the Railway Labor Act2 ("RLA") permit union security clauses3 in private sector collective bargaining agreements.4 Public sector union security clauses are authorized pursuant to state or federal law.5 Nevertheless, both union nonmembers and financial core members6 have made first amendment

3. Union security clauses are provisions found in "federally sanctioned contracts 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).
4. Both the NLRA and the RLA make negative grants, meaning that they allow union security clauses simply by stating that they are not forbidden. The relevant language of the NLRA reads,

[N]othing 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 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.

29 U.S.C. § 158(a)(3) (1988). Similarly, the RLA states,

Notwithstanding any other provisions of this chapter, or any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers . . . and a labor organization . . . shall be permitted . . . 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.


Note that the RLA expressly preempts State law, while the NLRA does not. Consequently, a union security clause will be permitted by the NLRA if a State statute either tolerates it or does not forbid it. See 29 U.S.C. § 164(b) (1988). See also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 267 n.2 (1974) ("The NLRA, of course, permits certain union security agreements . . . except insofar as they may violate state law.") (citation omitted). Furthermore, both the NLRA and RLA require employer consent for a union security clause to become part of a collective bargaining agreement. See Communications Workers of Am. v. Beck, 487 U.S. 735, 751 n.6 (1988) (the NLRA and the RLA "confer on unions and employers authority to enter into union-security agreements").

5. See T. Haggard, Compulsory Unionism, the NLRB, and the Courts 217-31 (1977). Such union security clauses are generally modeled on the NLRA. See id.

6. A nonmember is an employee who, although not compelled to join a union or to
challenges to union security clauses. These challenges have taken two forms, claiming that union security clauses violate either the first amendment freedom of association or the first amendment right to free expression, or both.\textsuperscript{7}

Challenges based on the guarantee of freedom of association have proved unsuccessful. The Supreme Court has consistently upheld the constitutionality of union security clauses as a necessary intrusion on the first amendment.\textsuperscript{8} In contrast, challenges by dues objectors\textsuperscript{9} based on freedom of expression have been sustained by the Supreme Court.\textsuperscript{10} The Court has also found a statutory basis in the NLRA to sustain a dues objector's challenge to a union's improper use of dues money.\textsuperscript{11}

With one important question resolved—namely, that union security clauses allow unions to collect dues money from objectors only in proportion to the amount that the organization expends on activities that relate to collective bargaining—a perhaps more difficult issue took center stage. Unions, members, courts and the National Labor Relations Board

maintain union membership therein, works under an agency shop arrangement that requires the payment of an agency fee to the union. See T. Haggard, Compulsory Unionism, the NLRB, and the Courts 4-5 (1977). The Supreme Court has upheld agency shops as another valid form of unionism allowed under the NLRA. See NLRB v. General Motors Corp., 373 U.S. 734, 741-44 (1963).

Financial core members are employees working under a union security clause, who, as a condition of employment, must maintain union membership. See General Motors, 373 U.S. at 742. They become union members in name only, having "whittled down [their membership] to its financial core." \textit{Id.}

Full union membership is distinguished from the above categories by the greater privileges it grants and the responsibilities it imposes. For example, full members can vote on whether or not to strike, but only full members are subject to fines as a result of internal procedures for failing to honor a strike picket line. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 196-97 (1967).

7. See infra notes 8-11 and accompanying text.
9. The term "dues objector" will be used to describe both financial core members and nonmembers who object to a union's use of dues money for political or other purposes not related to the costs of representing the employee in collective bargaining. The distinction between a financial core member and a nonmember is discussed above. See supra note 6.
11. See Communications Workers of Am. v. Beck, 487 U.S. 735, 762-63 (1988). In \textit{Beck}, the Court held that the CWA, by using a dues objector's money for purposes other than collective bargaining, had violated its "duty of fair representation" under the NLRA. See \textit{id.} at 738. The duty of fair representation is a judge-made concept derived from court interpretations of the RLA and NLRA. It was first described, with reference to the RLA in Steele v. Louisville & Nashville R.R, 323 U.S. 192 (1944), as a "duty to exercise fairly the power conferred upon [the union] in behalf of all those for whom it acts." \textit{Id.} at 203. The Supreme Court later found the same duty incumbent upon unions authorized under the NLRA "to make an honest effort to serve the interests of all of those members, without hostility to any" that a union represents. Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). See also Vaca v. Sipes, 386 U.S. 171, 177 (1967) (a union has a "statutory obligation to serve the interests of all members without hostility or discrimination toward any").
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(“NLRB”) have grappled with the newly emerged problem of defining what activities “relate to” collective bargaining. Although the Supreme Court first attempted to answer this question in Communications Workers of America v. Beck, confusion remained after that decision as to what criteria should be used to determine what expenditures a union may or may not charge dues objectors. While interested parties anticipated that the Supreme Court would resolve this confusion in Lehnert v. Ferris Faculty Association, the Court unfortunately failed to do so.

This Case Comment will analyze the Lehnert decision by examining its historical precedents, the Court’s methodology, the utility of the Court’s holding, and the case’s likely impact. This Comment will also propose solutions to the problems posed by Lehnert. Part I discusses the legislative history and prior case law involving union security clauses, nonmembers, financial core members, and the use of union dues. Part II explores the Lehnert decision—the product of a severely divided court. In addition to delineating the Court’s holding, this Part will also analyze the decision in terms of prior Court rulings in this area and will devote particular attention to the Court’s continued use of a methodology, originally developed in Beck, that commentators have termed “curious” and that reflects the Court’s failure to “follow the usual rules of statutory construction.” Part III then analyzes the likely consequences of the Lehnert decision for unions, union security clauses, the NLRB, and the courts. Finally, this Case Comment offers possible solutions for the present debacle.

12. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977) (“There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.”).
14. See Swoboda, Union Security Clauses at Risk in Challenge to Dues, Wash. Post, May 19, 1991, at H2, col.1 (“the [C]ourt [in Beck] did not specify whether the breakdown [of dues spending] had to apply to each individual bargaining unit or whether the union could simply break down its expenses at the national level”).
18. 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, 72 (1990) [hereinafter Union Security Agreements].
I. BACKGROUND

A. Legislative History

In 1935, in the midst of the Great Depression, Congress enacted the Wagner Act, more popularly known as the National Labor Relations Act ("NLRA")\textsuperscript{20}. Stating that "[e]xperience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury,"\textsuperscript{21} Congress sought to establish and protect the right of workers to "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employ-

\textsuperscript{19} The Great Depression represents one of the great divides in the landscape of the American experience. It is essential that the reader keep in mind the grave crisis—in economic, social, and political terms—then facing the United States federal government. As one historian notes, "[d]uring the two worst years, 1932 and 1933, the number of totally unemployed was more than 12 million each year, and the average unemployment rate was over 24 percent." L. Chandler, America's Greatest Depression 1929-1941, at 6 (1970). Even those lucky enough to find work fared little better: "[o]f all employed workers, 56 percent were part-time, working an average of 59 percent of normal full time. . . . The total money income of all workers in the form of wages and salaries fell 42.5 percent from 1929 to 1933." Id. at 35. The trauma of the 1930s shook the foundations of American institutions and called into question prior unassailable fundamental principles upon which American society based itself. See K. Hill, Democracies in Crisis 2-3, 8-9 (1988). For a compilation of contemporaneous viewpoints on the meaning, causes, and remedies of the Great Depression, see R. Himmelberg, The Great Depression and American Capitalism (1968); see also T. Shachtman, The Day America Crashed 288-92 (1979) (addressing the human impact of the crisis); D. Shannon, Between the Wars: America, 1919-1941, at 116 (1965) (pointing out that, while the complete economic impact of the Great Depression can never be adequately gauged, "it is clear that the depression's impact on human beings was vast and horrible").

Prior to the Great Depression, one of the basic American liberties had been the right to contract freely, as evidenced by the Supreme Court's much criticized decision in Lochner v. New York, 198 U.S. 45 (1905). In striking down a state labor law that restricted the working hours of bakers, the Lochner Court reasoned that "[t]he freedom of master and employee [sic] to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution." Id. at 64. This hostility to nascent labor law was overcome in large measure by the harsh realities of the Great Depression and the need to create some balance between employer and employee. As demonstrated by the Wagner Act, the regard for freedom of contract was not so much supplanted as it was supplemented. Employer and employee were still free to contract, but a growing recognition took hold in Congress that employees could only realistically exercise that liberty collectively. See C. Bufford, The Wagner Act 1-5 (1941) (tracing the pre-Depression disdain of unions, the author notes that change came "[a]s a result of the business depression that swept over the country in the 30's."). Id. at 2.

In summary, the climate of the Great Depression proved hospitable to the growth of ideas previously anathema to the dominant American culture. In the efflux of the Crash, unions took their firmest root.


The new legislation, which covered employees in the private sector, contained an important provision that authorized both union security agreements and the closed shop. The latter proved immeasurably valuable to union organizing because it required employees to be union members in order to be hired, not just to maintain employment. As a consequence, union membership grew at a sharp rate.

Nevertheless, the closed shop drew criticism for creating overly powerful unions, so Congress enacted the Taft-Hartley Act in 1947 to amend the NLRA. The Taft-Hartley Act outlawed the closed shop, although it still permitted union security agreements to continue in a modified fashion. Furthermore, the 1947 amendments provided that

22. Id. at 450.
23. See supra note 3 (explaining union security clauses).
24. The closed shop is the most restrictive of union security agreements because it requires an employee to be a member of the union in order to be hired. See T. Haggard, Compulsory Unionism, the NLRB, and the Courts 4 (1977).


Importantly, the Wagner Act spoke only to national policy. States were free to pursue their own labor policy regarding union security agreements and closed shops. See Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 307-12 (1949).


The abuses of the closed shop caused such a shift in public opinion that, as one commentator observed,

[J]t was thought by many that unions had become so powerful as to menace collective bargaining itself, individuals, minority groups and the political status quo. Some union leaders had so abused their power as to cast doubt on the responsibility of the whole organized labor movement . . . . Public opinion was growing in the direction of a desire to curb unions to protect the public interest.


28. See id. § 8(a)(3), 61 Stat. at 140-41 (codified as amended at 29 U.S.C. § 158(a)(3) (1988)). In Section 8 of the Taft-Hartley Act, employees could still be required to become union members within thirty days after employment commenced. Unions could not, however, withhold membership and deny an employee work if that employee agreed to pay dues and initiation fees. See id.; see also NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963) (Taft-Hartley amendments "abolished the closed shop").

29. In 1947, the Senate Committee on Labor and Public Welfare noted that, despite the abuses of the closed shop, unions and employers should be free to "enter into agreements requiring all the employees in a given bargaining unit to become members 30 days
state law could prohibit union security clauses.\textsuperscript{30}

For employees in the railroad and airline industries, Section 2 of the Railway Labor Act ("RLA") governs union security agreements.\textsuperscript{31} Prior to 1951, union security agreements had been illegal under the RLA. In that year, however, Congress amended the RLA to match the NLRA on the matter of union security clauses—except that, in contrast to the NLRA, state laws were explicitly preempted under the RLA.\textsuperscript{32}

An examination of legislative history underscores that, while Congress permitted closed shops in 1935\textsuperscript{33} and intended to outlaw them in 1947,\textsuperscript{34} the legislators understood the essential need of unions to be able to compel the \textit{financial} support of their beneficiaries. For example, the Senate Committee on Education and Labor reported in 1947 that it had considered the argument that "[i]n the absence of [union security clauses] many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost."\textsuperscript{35}

The Taft-Hartley Act was thus an attempt to balance the competing interests of employees who wished to work in a union shop without becoming union members with the union majority's interest in avoiding "free riders."\textsuperscript{36} The balance struck by Congress permitted union security

\begin{itemize}
  \item \textsuperscript{30} See Taft-Hartley Act, supra note 27, § 14(b), 61 Stat. at 151 (codified as amended at 29 U.S.C. § 164 (b) (1988)).
  \item \textsuperscript{31} 45 U.S.C. § 152 Eleventh (1988).
  \item \textsuperscript{32} See id. State law is not preempted under the NLRA. See Taft-Hartley Act, supra note 27, § 14(b), 61 Stat. at 151 (codified as amended at 29 U.S.C. § 164 (b) (1988)). For a comparison of the union security language of the NLRA and the RLA, see supra note 4.
  \item \textsuperscript{33} See 78 Cong. Rec. S4229, 4230 (daily ed. Mar. 12, 1934) (article by Sen. Wagner), reprinted in 1 National Labor Relations Board, Legislative History of the National Labor Relations Act 1935, at 25 (1949) [hereinafter 1 Legislative History 1935] ("Congress has not intended to illegalize[e] the closed shop."). Senator Wagner also added that "the new bill makes it perfectly clear that the closed shop is not illegal."). 1 Legislative History 1935, supra at 39.
  \item \textsuperscript{34} See supra notes 26-28 and accompanying text.
  \item \textsuperscript{35} 1 Legislative History 1947, supra note 26, at 412.
  \item \textsuperscript{36} The Taft-Hartley Act evoked as much debate as did passage of the Wagner Act twelve years earlier. Some of the harsher criticisms are contained in R. Boyer & H.
agreements to continue, but also prevented unions from denying membership—and hence employment—to employees willing to “pay the same dues as other members of the union.” Specifically, the Taft-Hartley amendment outlawed the closed shop and created a thirty day “zone in which an employee could exercise” his right to join or not to join a union, “without fear of employer or union retaliation.” At the same time, however, the Act prohibited such an employee from becoming a free rider, and unions could still require the employee, under pain of job loss where a union security agreement was in effect, “to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”

While the NLRA thus permits a union to collect dues, nowhere does the legislation limit what use the union may make of those dues. The legislative history reveals a similar lack of Congressional intent to restrict a union in its use of dues money. Nevertheless, significant questions


39. 29 U.S.C. § 158(b)(2) (1988). While the concern over “free riders” was a genuine one for the Congress that enacted the Taft-Hartley Act, the primary thrust of the amendment was unquestionably to correct the abuses of the closed shop. Senator Taft stated as much, seeing the bill as ensuring “that a man can get a job without joining the union. . . . The fact that the employee will have to pay dues to the union seems to me to be much less important. The important thing is that the man will have the job.” 2 Legislative History 1947, supra note 29, at 1422.

40. Actually, the House version of the bill contained language that “[m]embers of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization.” 1 Legislative History 1947, supra note 26, at 176. This language grew out of a concern that unions were compelling members to contribute to political causes and candidates that the individual member might otherwise oppose. See id. at 295.

While the Senate declined to accept the House’s language, it did recognize the desirability of empowering the NLRB to monitor dues and initiation fees, and thereby to prevent unions from charging exorbitant fees. The final bill added a new section—8(b)(5)—that makes it an unfair labor practice for unions to require initiation fees that the NLRB “finds excessive or discriminatory under the circumstances.” Taft-Hartley Act, supra note 27, § 8(b)(5), 61 Stat. at 142 (codified as amended at 29 U.S.C. 158(b)(5) (1988)). The Senate, however, adopted the new section only after it was understood that section 8(b)(5) would not allow the NLRB to regulate union expenditures. See, e.g., 2 Legislative History 1947, supra note 29, at 1579 (wherein the Senate Committee Report points out that the NLRB should not be empowered to regulate union expenditures); id. at 1623 (Senator Taft declares as “unfounded” the fear that section 8(b)(5) will lead to outside regulation of union expenditures).

It is apparent that, if the legislature intended to impose restrictions upon the use of dues money by unions, the evidence would be found in the extensive debates. Such evidence is lacking.
arose under the Taft-Hartley amendment. What did it mean if an employee did not want to join the union where a union security agreement was in force? Did the employee qualify as a union member if she or he paid the same dues? Did such an employee even have to pay the same dues? These matters were left for the courts to sort out.

B. Case Law

In one of the earliest challenges to the efficacy of union security agreements following the Taft-Hartley amendments, Radio Officers' Union v. NLRB, the Supreme Court determined that the "legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." This decision thus defined the enforceable scope of a union security agreement. A union could not discriminate or seek to discharge dues-paying employees in order to encourage "employees to join [unions], retain membership, or stay in good standing in a union." The employee who desired neither to join a union nor to maintain good standing therein could nonetheless retain employment so long as dues were paid.

The Supreme Court elaborated on this theme in NLRB v. General Motors Corp., where it found that the Taft-Hartley Act had not only eliminated closed shops, but had also altered the basic definition of union "membership." The Court stated,

[T]he 1947 amendments not only abolished the closed shop but also made significant alterations in the meaning of 'membership' for the


42. This, of course, assumes that the collective bargaining agreement is in a state that sanctions union security clauses. Twenty-nine states have such laws, while the other twenty-one are so-called "right to work" states that forbid compulsory unionism. See United Food and Commercial Workers Union Local 1564 v. City of Clovis, 735 F. Supp. 999, 1002-03 (D. N.M. 1990); L. Troy, Union Sourcebook, Membership, Structure, Finance, Directory 7-9 (1985) [hereinafter Troy, Union Sourcebook].

43. There are financial reasons other than dues payments why employees sometimes forgo union membership. In many cases, the employee seeks to avoid union discipline in the form of fines for infractions of union by-laws, or for failure to honor the union's picket line. See, e.g., NLRB v. International Bhd. of Elec. Workers, Local 340, 481 U.S. 573, 595 (1987) ("union members have a right to resign from a union at any time and avoid imposition of union discipline") (emphasis in original); Pattern Makers' League v. NLRB, 473 U.S. 95, 100-16 (1985) (employees who resigned from the union during strike and returned to work could not be fined by the union); Radio Officers Union v. NLRB, 347 U.S. 17, 40 (1954) ("the policy of the [NLRA] is to insulate employees' jobs from their organizational rights. ... allow[ing] employees to freely exercise their rights to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood").

44. 347 U.S. 17 (1954).

45. Id. at 41.

46. Id. at 42.

47. 373 U.S. 734 (1963).
purposes of union-security contracts. . . . It 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. ‘Membership’ as a condition of employment is whittled down to its financial core.\textsuperscript{48}

The Court further stated that, while employees had the option of full membership, the employee was still required to pay “the same monetary support as [in] the union shop. Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real.”\textsuperscript{49} In this way, the Court had defined a new category of union membership—the “financial core” member. The financial core member had to pay “the same monetary support”\textsuperscript{50} as did other union members.

Through another line of cases, the Court developed the concept that dues objectors may be charged only a reduced fee that is proportional to the amount that the union expends for collective bargaining out of total union spending that includes monies for other purposes, such as political lobbying. In \textit{Railway Employes’ Department v. Hanson},\textsuperscript{51} the Supreme Court upheld the constitutionality of a union security clause, authorized by the RLA, against a first amendment challenge based on freedom of association.\textsuperscript{52} The Court declared that “the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.”\textsuperscript{53}

The Court reserved judgment, however, on the matter of whether the use of dues to “forc[e] ideological conformity” would constitute a violation of the first amendment guarantee of freedom of expression.\textsuperscript{54} That issue

\textsuperscript{48.} Id. at 742 (emphasis added).
\textsuperscript{49.} Id. at 744.
\textsuperscript{50.} Id.
\textsuperscript{51.} \textit{Id}.
\textsuperscript{52.} \textit{Id}.
\textsuperscript{53.} 351 U.S. 225 (1956).
\textsuperscript{54.} See \textit{Hanson}, 351 U.S. at 238. In this instance, the Court was interpreting a union security clause pursuant to the legislative grant found in section 2 Eleventh of the RLA. \textit{See} 45 U.S.C. § 152 Eleventh (1988). As will become evident later in this Comment, however, the Court’s decisions have reduced the distinction between the NLRA and the RLA with respect to interpretation of union security clauses and the chargeability of expenses to dues objectors. \textit{See infra} notes 128-30 and accompanying text.
was presented for consideration in *International Association of Machinists v. Street.*

In *Street*, the Supreme Court validated a union's right to compel dues payment, although it circumscribed that right by excluding those dues sought for political purposes. Once again, the Court avoided the constitutional question, relying instead on its own standard for construing statutes. The Court suggested that an appropriate remedy for an unauthorized expenditure might be "restitution to each individual employee of that portion of his money which the union expended . . . for the political causes to which he had advised the union he was opposed."

In a later case under the RLA, the Supreme Court in *Ellis v. Brotherhood of Railway Clerks* held that although preemption of state law implicated constitutional concerns, a union security clause's "interference with First Amendment rights is [nonetheless] justified by the governmental interest in industrial peace." Nevertheless, as in *Street*, the majority reaffirmed that a "union [may not] . . . spend an objecting employee's money to support political causes." After examining contested union expenditures, the *Ellis* Court found some expenses to be chargeable and other expenses not chargeable to the dues objectors. In doing so, the Court began the difficult process of delineating expenses—a process that earlier it had expressly tried to avoid.

In *Abood v. Detroit Board of Education*, the Supreme Court finally

56. See id. at 746-47. Like *Hanson*, *Street* involved interpretation of a union security clause permissible under the RLA. See supra note 53.
57. See *Street*, 367 U.S. at 770. A dissenter, however, must make his or her objections known to the union. See id. at 774.
58. See id. at 750. The Court struggled with constitutional concerns because the RLA preempts State right-to-work laws. This, in turn, implied governmental action subject to constitutional scrutiny. The Court termed the constitutional issues to be "questions of the utmost gravity." *Id.* at 749. Nevertheless, the Court took safe harbor in its doctrine that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Id.* In dissent, Justice Black argued that the constitutional matter of freedom of expression and use of union dues should be settled, and that he would find that the first amendment was violated when a union used a member's dues to support political causes that the member personally opposed. See id. at 788-91 (Black, J., dissenting).
59. *Id.* at 775. The Supreme Court reinforced its holding in *Street* in *Railway Clerks v. Allen*. See 373 U.S. 113, 122 (1963). It expanded its proposed remedy beyond a restitution of dues to include "a reduction of future . . . exactions . . . by the same proportion." *Id.* at 122.
61. *Id.*
62. *Id.* at 455-56.
63. *Id.* at 438.
64. The chargeable expenses included social activities, union publications, and convention expenses. See *id.* at 456-57.
65. These non-chargeable costs were for organizing costs and non-collective bargaining litigation expenses. See *id.* at 453, 457.
answered the question of whether it was constitutional for a union to use an objector's dues for non-collective bargaining activities. Because \textit{Abood} involved a public sector union,\footnote{68. Public sector union members are employees of federal, state and local governments who have statutory authority to belong to unions. At one time, collective bargaining by public sector employees was not only unheard of, but was illegal in most cases. In certain states, public sector unions are still legally prohibited. \textit{See} T. Haggard, \textit{Compulsory Unionism, the NLRB, and the Courts} 210-13 (1977).} the case implicated state action and the Court could no longer avoid addressing the constitutional concerns. The Court in \textit{Abood} upheld the constitutional validity of the public sector union,\footnote{69. \textit{See Abood}, 431 U.S. at 227-32.} but also found that the union's expenditure of a nonmember's dues on political activities violated that nonmember's first amendment right to freedom of expression.\footnote{70. \textit{See id.} at 235-36. The first amendment protects freedom of expression. The Supreme Court stated in \textit{New York Times v. Sullivan} that "'[o]ne main function of the first amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.'" 376 U.S. 254, 302 (1964) (Goldberg, J., concurring in result) (quoting Douglas, \textit{The Right of the People} 41 (1958)).}

In \textit{Chicago Teachers Union, Local No. 1 v. Hudson},\footnote{71. 475 U.S. 292 (1986).} also a public sector case, the Supreme Court refined its holding in \textit{Abood}. The Court announced in \textit{Hudson} that a union must follow "[p]rocedural safeguards" in order to protect a dissenter's first amendment rights as articulated in \textit{Abood}.\footnote{72. \textit{See id.} at 302.} Henceforth, unions would be required to give an accounting to nonmembers as to how the fee was determined, to provide an opportunity for the nonmember to challenge the basis of the fee before an impartial third party, and hold disputed fees in escrow while any challenge is before the decisionmaker.\footnote{73. \textit{See id.} at 310.} \textit{Hudson} is thus significant because it imposed upon unions the affirmative burden of instituting procedural safeguards to insure the protection of dues objectors' first amendment rights.

The state of the law from \textit{Hanson} to \textit{Hudson} thus reveals an evolving framework devised by the Court to address the issue of dues objectors working under union security clauses. While constitutional inquiries were proper under the RLA and in the public sector, the Court had fashioned labor law in a manner not envisioned by Congress.\footnote{74. \textit{See supra} note 40 and accompanying text.} Essentially, the Court had found that government-sanctioned union security clauses imposed a burden upon the unions that benefited from these clauses. Unions were obligated not only to refrain from using a dues objector's money for non-collective bargaining expenses, but also to insure that they did not erroneously collect money in excess of the dues objector's fair share of collective bargaining expenses. While the Court anchored its decisions on statutory rather than constitutional grounds, it is appar-
ent that the Court’s statutory interpretation was actually driven by the underlying first amendment issues.\textsuperscript{75}

If it was legitimate (although problematic in interpretation) for the Court to rely upon first amendment concerns when deciding cases under the RLA or in the public sector, the Court crossed the line when it carried over the import of those cases into the private arena governed by the NLRA. In \textit{Communications Workers of America v. Beck},\textsuperscript{76} the Supreme Court finally faced the constitutional question of freedom of expression and the use of an objector’s dues in private sector employment.\textsuperscript{77} As previously, the Court avoided addressing the constitutional questions in favor of a statutory construction. First, the Court determined that its interpretation of the RLA in \textit{International Association of Machinists v. Street}\textsuperscript{78} controlled its interpretation of the NLRA in \textit{Beck}.\textsuperscript{79} The Court justified this approach by claiming that “Congress intended the same language to have the same meaning in both statutes.”\textsuperscript{80} Next, the \textit{Beck} Court interpreted Section 8(a)(3) of the NLRA as authorizing a union to collect dues under a union security agreement only to the extent that those dues contributed to collective bargaining costs.\textsuperscript{81}

The decision in \textit{Beck} evoked vociferous criticism of the Court’s methodology.\textsuperscript{82} For instance, in determining that the \textit{Street} decision was cont-


\textsuperscript{76} 487 U.S. 735 (1988). In a note of historical irony, Justice Brennan, author of the Court’s opinion in \textit{Beck}, faced a similar situation while he served on the New Jersey Supreme Court. At issue in Citizens to Protect Pub. Funds v. Board of Educ., 13 N.J. 172, 176, 98 A.2d 673, 674-75 (1953), was the improper use by a school board of public funds to campaign for the passage of funding for school building programs. In language similar to that found in \textit{Beck} and other dues objectors cases, Brennan framed the issue as a question of “the extent to and manner in which the funds may with justice to the rights of dissenters be expended.” \textit{Id.} at 181, 98 A.2d 677. Brennan, who wrote that opinion as well, found that the school board had exceeded its implied statutory authority. \textit{See id.} at 179-80, 98 A.2d 676-77. What is strikingly parallel in this case is that Brennan preferred to use implied statutory limits, rather than constitutional concerns, in a case involving a governmental entity infringing upon the freedom of expression of citizens. It is no wonder, then, that if \textit{Citizens} did not call for a constitutional basis in Brennan’s eyes, then \textit{Beck} certainly should not have. \textit{See supra} note 11 and accompanying text.

\textsuperscript{77} See \textit{Beck}, 487 U.S. at 735. In all other cases from \textit{Hanson} to \textit{Hudson}, the Supreme Court was concerned only with cases arising under the RLA and in the public sector.

\textsuperscript{78} 367 U.S. 740 (1961).

\textsuperscript{79} \textit{See Beck}, 487 U.S. at 745.

\textsuperscript{80} \textit{Id.} at 747.

\textsuperscript{81} \textit{Id.} at 762-63.

\textsuperscript{82} See, e.g., \textit{Union Security Agreements}, supra note 18, at 54 (criticizing the Court’s interpretation of section 8(a)(3) as not being supported by the statute’s words, administrative interpretation, or legislative history); \textit{Unions Out on Street}, supra note 17, at 680 (legislative history does not support \textit{Beck} Court’s interpretation of the statute and lack of state action renders first amendment claims invalid); Comment, \textit{Section 8(a)(3) Limitations to the Union’s Use of Dues-Equivalents: The Implications of Communications Workers of America v. Beck}, 57 U. Cin. L. Rev. 1567 (1989) (criticizing \textit{Beck} Court’s
trolling, the Court worked backwards, using a 1951 amendment to the RLA to interpret a 1947 amendment of the NLRA. Furthermore, the *Beck* decision created significant uncertainty as to how to apply its holding, specifically leaving unresolved the question of how a union must determine what activities it may compel a dues objector to finance. It was thus against a background of criticism and confusion that the Supreme Court decided *Lehnert v. Ferris Faculty Association*.

II: *Lehnert v. Ferris Faculty Association*

A. Facts

The plaintiffs in *Lehnert* were six tenured members of the faculty of Ferris State College ("Ferris"). The defendant, Ferris Faculty Association ("FFA"), was an affiliate of the Michigan Educational Association ("MEA") and the National Education Association ("NEA"). Under authority of a Michigan statute, FFA served as the exclusive bargaining agent of the Ferris faculty. Membership in FFA, moreover, automatically included membership in the parent organizations, MEA and NEA.

Under the terms of the collective bargaining agreement and pursuant to Michigan state law, Ferris college deducted a yearly total of $284 from
plaintiffs' paychecks and remitted it to the union as an agency shop fee.\textsuperscript{90} Of each $284, FFA received $24.80, MEA received $211.20, and NEA received $48.00.\textsuperscript{91} The plaintiffs never joined the FFA, however; they were simply nonmembers who had to pay service fees.

Claiming violations of rights secured by the first and fourteenth amendments, the dues objectors brought an action under 42 U.S.C. Sections 1983, 1985, and 1986.\textsuperscript{92} The plaintiffs alleged that state law compelled them to pay an agency shop fee to the union, and that the union did not apply this fee exclusively to purposes related to collective bargaining activities.\textsuperscript{93} In essence, the plaintiffs demanded an accounting from FFA, and challenged its expenditures in the areas of contributions to the parent organizations, union publications, union conventions, and litigation costs.\textsuperscript{94} Finally, the plaintiffs challenged the procedures implemented by the FFA to set and collect service fees.\textsuperscript{95}

The District Court for the Western District of Michigan held that: (1) certain union expenditures were chargeable to the dissenters, including lobbying related to collective bargaining activities, union conventions, social activities, and litigation expenses;\textsuperscript{96} (2) some expenditures were not chargeable to the nonmembers as a matter of law, including organizing costs and a loan to another union for an illegal strike;\textsuperscript{97} and (3) still other expenditures were not chargeable where the FFA failed to sustain the burden of proving that those expenditures were made for chargeable activities.\textsuperscript{98}

Following a partial settlement,\textsuperscript{99} the plaintiffs made a limited appeal to the Sixth Circuit. They claimed that the district court "erred in holding that the costs of certain disputed union activities were constitutionally chargeable" to them.\textsuperscript{100} Specifically, the plaintiffs appealed their objec-

\textsuperscript{90} See \textit{Lehnert}, 643 F. Supp. at 1308-10.

\textsuperscript{91} See \textit{id}. at 1310. This monetary flow is another typical feature of American unions. As the same commentator relates, "[t]he flows of membership payments essentially reflect the structure. . . . Membership funds typically go from the local to intermediate unions and to the parent national or international to which they belong." Troy, \textit{Union Sourcebook}, \textit{supra} note 42, at 5-3.


\textsuperscript{93} See \textit{Lehnert}, 643 F. Supp. at 1307.

\textsuperscript{94} See \textit{id}. at 1307-12.

\textsuperscript{95} See \textit{id}. at 1307.


\textsuperscript{97} See \textit{id}. at 1324-25, 1327.

\textsuperscript{98} See \textit{Lehnert}, 643 F. Supp. at 1328.

\textsuperscript{99} See \textit{Lehnert} v. Ferris Faculty Ass'n, 881 F.2d 1388, 1390 (6th Cir. 1989).

\textsuperscript{100} \textit{Id}. at 1390.
tions to charges for: (1) lobbying and electoral politics; (2) bargaining, litigation, and other activities on behalf of persons not in the plaintiffs' bargaining unit; (3) public relations efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; and (6) preparations for a potentially illegal strike. The Sixth Circuit affirmed the District Court's prior holdings that the expenses were chargeable, and the Lehnert plaintiffs appealed to the United States Supreme Court. In 1990, the Supreme Court granted certiorari. The Court framed the issue as "concerning the constitutional limitations, if any, upon the payment, required as a condition of employment, of dues by a nonmember to a union in the public sector."

B. The Lehnert Decision

The Lehnert case drastically divided the Court and revealed a number of varying approaches on the part of the justices. Justice Blackmun wrote the opinion for the Court, but was joined by only Justices Rehnquist, Stevens, and White in his entire opinion. Justice Marshall wrote an opinion concurring in part and dissenting in part. Justice Scalia concurred in part in the judgment and dissented in part. Justice Scalia's opinion was joined by Justices O'Connor and Souter, and by Justice Kennedy in part. Justice Kennedy filed a separate opinion concurring in the judgment in part, concurring with Justice Scalia in part, and dissenting in part.

The majority opinion in Lehnert declared that, while a "case-by-case analysis" is warranted when "determining which activities a union constitutionally may charge to dissenting employees," several guidelines may be applied to make such determinations. As a test, Justice Blackmun explained, chargeable activities must: (1) be "'germane' to collective bargaining activity"; (2) be "justified by the government's vital policy interest in labor peace and avoiding 'free riders'"; and (3) "not significantly add to the burdening of free speech that is inherent in the allow-

101. See id. at 1391.
102. See id. at 1394.
105. See Lehnert v. Ferris Faculty Ass'n, — U.S. —, 111 S. Ct. 1950, 1954 (1991); see also Figure 1 (chart depicting the Lehnert decision). The Lehnert decision can be difficult to decipher, as one commentator has noted, see supra note 16.
108. See id. at 1975-81 (Scalia, J., concurring in the judgment in part and dissenting in part).
110. See id. at 1959.
The Court attempted to apply this new test to the facts in Lehnert, but the inconsistencies and division it produced revealed the test's inadequacy. As an initial matter, Justice Blackmun's opinion for the Court rejected the plaintiffs' argument that they may be charged only for those collective bargaining activities undertaken directly on their behalf. The Court reasoned that to require a direct correlation between expenditures and the benefit to an individual nonmember "would be to ignore the unified-membership structure under which many unions . . . operate." Therefore, the Court concluded, a union may charge a dissenter a "pro-rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit."

The Court also determined that the FFA could use a nonmember's dues to finance political lobbying aimed at achieving the legislative ratification of a collective bargaining agreement. The majority, however, did not allow a union to charge a dissenter for political lobbying to raise funds in support of public education, an activity that arguably is germane to the collective bargaining interests of a teachers' union. Furthermore, as Justice Marshall pointed out in his dissent, the Court deviated from its earlier decisions by improperly substituting "ratification" for "negotiation" as the touchstone of what lobbying would be permissible.

In a similar manner, the Court held that expenditures for public relations activities may not be charged to dissenters, while simultaneously it validated as chargeable the costs of union publications that concern the nonmember's industry or occupation generally. This distinction is untenable, as it is hard to distinguish public relations activity from germane collective bargaining activity when a public sector union is involved. Such unions necessarily depend on the public's goodwill to secure legislative contract ratification. Further, it seems difficult to discern the distinction between a public relations activity (nonchargeable), and a union publication that disseminates information on "teaching and education

111. Id.; see also Fig. 1 (chart depicting the Lehnert decision).
112. Id. at 1961.
113. Id.
115. See id. at 1963. The Supreme Court had recognized earlier in Eastex Inc. v. NLRB, 437 U.S. 556 (1978), that "[t]he 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." Id. at 565. The Lehnert decision is at odds with that stated principle.
116. As Justice Marshall stated: "The key phrase in this new standard is . . . 'ratification or implementation'... That language departs dramatically from our prior decisions, which uniformly refer to negotiation and administration as the touchstones for determining chargeability." Lehnert, — U.S. —, 111 S. Ct. at 1967 (Marshall, J., concurring in part and dissenting in part) (citations omitted) (emphasis in original).
117. See id. at 1964.
generally, . . . [and] award programs of the MEA and other miscellaneous matters” (chargeable).

The Court also allowed a union to apply a dissenter's dues towards the cost of sending delegates to state and national conventions, under the assumption that such gatherings will be germane to collective bargaining. Justice Blackmun, however, declared that a union could not benefit from a like presumption when it came to extra-unit litigation costs. In fact, despite acknowledging that some extra-unit litigation may benefit the dissenter's unit (and hence should be chargeable), Blackmun urged a strict approach that would forbid using a dissenter's dues for any litigation except that specifically related to his bargaining unit.

Finally, after distinguishing strike-related expenses for a lawful strike (chargeable) from strike-related expenses when the strike is unlawful (nonchargeable), the majority nonetheless held that all strike preparation expenses are chargeable, even if the anticipated strike would be illegal. The Court reasoned that strike preparation activity is "an effective bargaining tool" and thus is germane to collective bargaining activities.

It is again difficult to square the Court's logic here with other parts of its decision. For example, if the Court will sanction preparation for an illegal strike as germane to collective bargaining activities, on the grounds that such preparation is an effective bargaining tool, why then is legal political lobbying a less effective bargaining tool for a public sector union? Following the Court's logic, a union could charge a dues objector for strike preparation but could not charge him or her for political lobbying to pass a bill that would allow a public sector union to strike, and thus legitimize that activity.

In sum, the Supreme Court in Lehnert devised a new formula for determining what expenditures a union may permissibly charge nonmembers working in an agency shop. Applying this formula to the facts in Lehnert, the majority concluded that political lobbying, public relation activities, and expenses of an illegal strike were nonchargeable. On the other hand, and with little logical consistency, the Court sustained as chargeable any expenses related to conventions, strike preparation, and

118. Id.
120. See id. at 1963-64.
121. See id. There is some question as to whether Lehnert should be read as standing for Blackmun's declaration on litigation costs, or if this part of the opinion is dictum. A close reading of the decision would seem to indicate that Blackmun's opinion did not achieve a majority on this point. Justice Marshall dissented from this portion of the opinion. See id. at 1954. In fact, at least one union counsel reading the decision has concluded that “[t]his portion of [Blackmun's] opinion, however, did not command a majority.” Letter from Jonathan P. Hiatt, General Counsel of Service Employees [International Union] to All Union Locals and Their Attorneys (July 5, 1991) (on file at the Fordham Law Review).
123. See supra note 111 and accompanying text.
portions of union publications dealing with the nonmember's occupation or industry generally.

C. Analysis

In his dissent, Justice Scalia correctly identified the flaws inherent in the Court's new test. Specifically, Justice Scalia noted that "each one of the three 'prongs' of the test involves a substantial judgment call," such as "[w]hat is 'germane'? What is 'justified'? What is a 'significant' additional burden?"124 Thus, the test "seems calculated to perpetuate [the] give-it-a-try litigation of monetary claims that are individually insignificant."125 This means, of course, that the Court has raised more questions than it was hoped it would answer.126

The _Lehnert_ decision, even with its flawed test, follows precedent with its constitutional inquiry into union security clauses in the public sector. What is disturbing, however, is the likelihood that the Court, as it did before in _Beck_, will continue to improperly blur the distinctions between unions in different employment sectors. In _Beck_, the Court erroneously relied upon its interpretation of the RLA to interpret the NLRA.127 Yet the RLA covers railway workers and airline employees, while the NLRA pertains to private sector employees, and neither statute applies to public sector unions such as the FFA in _Lehnert_. Despite these distinctions, for the purposes of union security clauses the Court has compressed legislation from a number of contexts—the various state statutes, the NLRA and the RLA—into one body of law with no firm grounding. In the words of one commentator, what has emerged in the case law is a form of "judicial legislation with no basis in... statute or the Constitution."128


125. _Id._. Notably, Scalia's substitution of a statutory standard is not a realistic alternative. His criterion for chargeability is that "a union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged." _Id._ at 1979 (Scalia, J., dissenting).

126. The majority rightly criticizes Scalia's approach as turning "constitutional doctrine on its head." _Id._ at 1963. In other words, according to the majority, Scalia would interpret the first amendment in light of a statute and not the other way around. _See id._

127. _See_ Communication Workers of Am. v. _Beck_, 487 U.S. 735, 762-63 (1988); _see also_ _Union Security Agreements_, _supra_ note 18, at 53-55 (criticizing the _Beck_ decision for relying on interpretations of the RLA); _Unions Out On Street_, _supra_ note 17, at 667 (criticizing the _Beck_ court's reliance on the RLA as "curious"); _Implications of Beck_, _supra_ note 82, at 1588 (pointing out that the Court in _Beck_ relied solely on its interpretations of the RLA to decide how the NLRA should apply and had no independent grounds in the NLRA for doing so).

128. _Union Security Agreements_, _supra_ note 18, at 141. While the Court has found a constitutional basis for limiting union security clauses under the RLA because state law is preempted, _see supra_ notes 53-66 and accompanying text, and has reached a constitutional conclusion in public sector cases because state action is involved, _see supra_ note 67-73 and accompanying text, it has not used a constitutional basis for deciding cases under the NLRA, _see supra_ notes 76-81 and accompanying text. It is, therefore, unexplainable
Regardless of the lack of foundation for such an approach, the Court's language and posture indicate that it intends its test in *Lehnert* to be broadly applied to all unions and union security clauses, regardless of the law under which dues objections may arise. In essence, then, the Supreme Court has arrived at its own version of a unified body of labor law, built more on the development of judge-made concepts than on statutes or the first amendment. While this may not be acceptable in a field of law dominated by statute, it may be explainable.

On one hand, there exists an underlying tension between the first amendment and union security clauses that forces the Court into disjointed decisions. This results because union security clauses compel membership and thus clash with the first amendment protection of freedom of association and freedom of expression. As one commentator has remarked, "The Supreme Court's repeated efforts to reconcile the Labor Act [NLRA] to the first amendment have trailed off into unintelligibility." The result of this tension is the "judicial deconstruction" of the statutory law and the substitution of judicial legislation.

In the context of judicial deconstruction, the legislature authors text, but the judiciary is the reader. Judicial deconstruction occurs when the judiciary chooses to ignore explicit legislative intent and substitutes its own reading of what the law should be. The danger in such an approach why the Court has decided that the same constitutional standards apply to unions under the NLRA when there is no state actor and no other constitutional basis for interpreting the statute. The Court's sleight of hand was to claim that the RLA determines what the NLRA should allow on dues collections for constitutionally protected rights.

129. Others have commented on the Court's cross-fertilization of the NLRA, the RLA, and public sector law in relation to union security clauses. See Swoboda, *supra* note 14, at H2, col.1; *NLRB General Counsel Memorandum, supra* note 84; see also Pilots Against Illegal Dues v. Air Line Pilots Ass'n, 938 F.2d 1123, 1127 (10th Cir. 1991) (in quoting *Lehnert* test in a case involving the RLA, circuit court concluded that "'[t]hese same characteristics presumably are required for chargeable expenses under the Railway Labor Act") (emphasis added).

130. While this process blossomed in *Lehnert*, the Supreme Court hinted at such a process before. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) (in interpreting the Taft-Hartley Act, the Court stated that some problems "will lack express statutory sanction... [and t]he range of judicial inventiveness will be determined by the nature of the problem").

131. See *supra* notes 52, 70 and accompanying text.


133. Judicial deconstruction has been identified and criticized before in other contexts. In essence, it is based on the concept that there is no law until the judge pronounces it. See, e.g., Berger, "Original Intention" in Historical Perspective, 54 Geo. Wash. L. Rev. 296, 303 (1985) (criticizing interpretation of a statute as "judicial deconstruction of the words in disregard of the draftsmen's actual intention"); The Supreme Court, 1988 Term: Leading Cases, 103 Harv. L. Rev. 137, 340 (1989) (noting that Patterson v. McClean Credit Union, 491 U.S. 164 (1989), represents "the beginning of a dangerous period of judicial deconstruction of the major pieces of civil rights legislation—an erosion similar to that which followed Reconstruction"); Spann, Deconstructing the Legislative Veto, 68 Minn. L. Rev. 473, 536 (1984) (defining deconstruction as "the author does not 'control' the meaning of the text; meaning emanates from an interactive process between the language of the text and the particular assumptions made by the reader").
is manifest: legislative intent will take a back seat to judicial override. The effect is evident in the consequences and confusion of *Lehnert*. As noted earlier, Congress never intended courts to be involved in the regulation of union expenditures and made no provisions for them to do so. Once the Supreme Court decided that it was a proper area of judicial inquiry, however, it was inevitable that the Court would have to create the guidelines for regulating union expenditures. The confused holding in *Lehnert* shows how ill-suited the Court is to its self-appointed task.\(^{133}\)

### III: Consequences and Solutions

#### A. Unions

Attacking union security clauses by challenging union expenditures strikes at the heart of the labor movement. Indeed, as argued below, if the *Lehnert* decision is applied or extended to all cases involving dues objectors and union security arrangements it will ultimately prove to be the death knell of the union security clauses originally sanctioned by Congress in the Wagner Act.\(^{136}\) These security clauses provide labor with one of its most important tools to maintain its identity and power. Indeed, research reveals that "[m]ore than four-fifths of union contracts contain some provision for union security."\(^{137}\) The campaign against union security clauses thus threatens organized labor. As one commentator has argued, "Beneath the arguments over the union shop lies the hard fact of a power struggle."\(^{138}\) Furthermore, when speaking of an adverse decision in *Lehnert*, one union attorney predicted that it "could have a 'dramatic effect on . . . organized labor in general.'"\(^{139}\)

The reporting and accounting obligations imposed on unions by the courts and the NLRB are overly burdensome and costly. The cure, in other words, is worse than the poison. One writer has noted that the difficulty for unions with decisions like *Lehnert* arises not from lost dues money, but from the expense and headache of trying to comply with

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134. See *supra* note 40.
135. One commentator writing on *Lehnert* noted that the "Court is doomed to try to untie the Gordian knot it has created" if it does not get out of the union expenditure regulation business. See Mazurak, *supra* note 16, at 869.
138. *Id.* at 746. Looking behind lofty arguments concerning first amendment rights, Judge Posner framed the issues in perhaps more realistic terms:

Two distinct types of employee will decline to join the union . . . . The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won’t pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers.

Gilpin v. AFSCME, 875 F.2d 1310, 1313 (7th Cir. 1989).
"labyrinthine administrative procedures." Moreover, it is estimated that the cost of compliance will outweigh any lost revenues.

With the demise of union security clauses, unions will lose an important benefit expressly granted them under the NLRA, and this could well prompt a return to the labor strife that the Wagner Act was designed to relieve. The seriousness of that strife cannot be underestimated. In fact, as one scholar has pointed out, "[w]hen the President's Commission on Violence reported in 1969 that the United States 'has had the bloodiest and most violent labor history of any industrial nation in the world,' it alluded specifically to the 1930s." Unionism, already in decline in the United States, will thus suffer a telling wound if Lehnert and its


141. See Swoboda, supra note 14 at H2, col. 4.

142. As one writer observed, "When passed, the National Labor Relations (Wagner) Act was perhaps the most radical piece of legislation ever enacted. . . . Enacted in the wake of the great strikes of 1934 . . . [the Act] was essential to preserve the social order and to forestall developments toward even more radical change." Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn. L. Rev. 265, 265-66 (1978) (citations omitted).

The Supreme Court has referred to the "desirability of labor peace" as one of the reasons that Congress allowed union security clauses. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977). In the summer of 1935, just prior to the passage of the Wagner Act, over one million workers participated in 1,856 work stoppages. See Becker, Individual Rights and Collective Action: The Legal History of Trade Unions in America, 100 Harv. L. Rev. 672, 685 (1987) (citing I. Bernstein, Turbulent Years 217 (1969)). Becker's article is a review of C. Tomlin's book, The State and the Unions: Labor Relations, Law and the Organized Labor Movement in America, 1880-1960 (1985). The article presents a summary of the view that labor movements and unions are antithetical to management and capital, and that in accepting governmental assistance, unions also allowed themselves to be deradicalized. If organized labor concludes that it can no longer rely on government fair dealing, it may seek traditional recourse.


144. Unions are in serious decline in the United States. 10.2 million workers in the private sector are union members out of a total pool of 84.6 million. This represents but 12% of the private business labor force. Public sector unions add another 6.5 million members. The aggregate total of private and public sector union members reveals that unions represent only 16.1% of American workers, down from 34% in 1957 and 24% in 1973. See Silk, Worrying Over Weakened Unions, N.Y. Times, December 13, 1991, at D2, col. 1.

When posed with the possibility of an end to unions, it is natural to ask "so what?" This debate has interested other commentators and has provoked a large amount of literature on the subject. For a defense of unions as beneficial in economic cycles, see R. Freeman & J. Medoff, What Do Unions Do? (1984). These authors attempt to demonstrate "that in general productivity is higher in the presence of unionism than in its absence." Id. at 163. Another work, while not completely critical or supportive of unions, questions some of the results of the foregoing work. For instance, on the matter of increased productivity, it is argued that "the positive union productivity results . . . are a chimera." B. Hirsch & J. Addison, The Economic Analysis of Unions 215-16 (1986). For a work that is wholly critical of unions, see M. Reynolds, Power & Privilege: Labor Unions in America (1984).

More recently, former Secretary of State in the Reagan administration, George P. Shultz, spoke out about the "possible harm to American industry and society stemming
predecessors continue to be applied and continue to undercut union security clauses.

B. Courts

The Lehnert case, rather than providing guidance to the lower courts, has simply added to their uncertainty, confusion, and frustration. For example, in Pilots Against Illegal Dues v. Air Line Pilots Association, the Court of Appeals for the Tenth Circuit could not say with certainty, but had to presume, that Lehnert should apply in a case arising under the RLA. Further, in Lucid v. City and County of San Francisco, a case involving a public sector union, the district court, while applying the Lehnert formula, balked at reviewing “every little item” to determine if the union had properly categorized each as chargeable or not chargeable. The Court declared that it would “not be drawn into this micro-level of dispute resolution,” and further pointed out that this would represent a waste of federal judicial resources.

In a more recent instance, a circuit court focused on the issue of a full union member who objects to a use of dues. In Kidwell v. Transportation Communications International Union, the Court of Appeals for the Fourth Circuit distinguished Lehnert on grounds that will lead to further confusion and difficulty for the Supreme Court should it have to decide the first amendment issue raised in Kidwell. The Kidwell plaintiff, a union member, argued that she should not be required to choose between union membership and the concomitant right to vote on her working conditions, on the one hand, and her first amendment rights on the other. Because of this argument, the Kidwell case may well force the Court to rethink whether union security agreements can any longer withstand first amendment challenges, even from union members.

from the declining American labor movement.” Silk, supra at D2, col. 1. This is surprising support from a prominent figure in an administration generally regarded as strongly anti-union. Yet, Shultz described unions as necessary restraints on management in the workplace and stated that “as a society, we have a great stake in freedom and a lot of that is anchored somehow, historically,” in the labor movement.” Id.

145. 938 F.2d 1123 (10th Cir. 1991).
146. See id. at 1127. This case involved airline pilots who objected to the use of their agency fees for purposes not germane to collective bargaining. See id. at 1125. The case arose under the RLA and the court inferred that the Lehnert formula, although fashioned in a case involving a public sector union, should apply to RLA cases. See id. at 1127.
148. See id. at 1238 n.4.
149. Id. (emphasis in original).
150. 946 F.2d 283 (4th Cir. 1991).
151. See id. at 287.
152. The Kidwell case involved a union member who objected to the use of union dues for certain political activities. The implicated security clause arose under the RLA. The Court noted that the case involved a union member, not a nonmember. As such, the Court found that Lehnert did not apply, and that the union member had no right to object to the use of union dues on first amendment grounds. See id. at 299-302.

By holding that union members must pay full dues, the Fourth Circuit has raised the
In fact, given the concerns of the union member plaintiff in *Kidwell*, the case raises issues of even greater importance than those in *Lehnert*. If the Court reverses *Kidwell* and holds that union members can object to (and hence pay less in) dues, the courts in effect will be determining dues amounts. This would mean that the Court will have taken labor law far from Congress's original intent in passing the Taft-Hartley Act—specifically, not to have outside determination of union expenditures, dues, or security arrangements.153

C. NLRB Impact

If the *Lehnert* decision is read as controlling private sector union security clauses,154 it will continue the transformation of the fundamental mission of the NLRB. Congress created the NLRB to foster and facilitate the collective bargaining process. The NLRA, in fact, emphasizes that “[i]t is declared hereby to be the policy of the United States ... [to] encourage[e] the practice and procedure of collective bargaining.”155 The NLRB's main purpose is thus to carry out this policy.156 The Supreme Court, however, has altered the historical role of the NLRB with its decisions157 in the union security context by saddling the Board with ac-

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2. This appears to be the early trend. See supra note 127-30 and accompanying text.


4. See id.

5. It is worth noting that the NLRB filed an amicus curiae brief on behalf of the Communication Workers of America in the *Beck* case. The agency pointed out that, in the whole area of fragmenting dues, “[i]t is a path down which, in our view, the Court should not travel any further.” Brief for the National Labor Relations Board at 29, Com-
counting and auditing functions.\textsuperscript{158} This has both burdened the NLRB and undermined its credibility with unions.

As the NLRB, founded to work with unions, increasingly appears to side with dissidents,\textsuperscript{159} it will likely be regarded with greater hostility by organized labor. Unions, in fact, already view the Board with distrust. In 1989, AFL-CIO President Lane Kirkland openly speculated that organized labor might be better off without the NLRB or NLRA.\textsuperscript{160}

\section*{D. Possible Solutions}

As one commentator has succinctly stated,

the problem \ldots will not be [resolved] until the Court decides to cut through its verbiage, reexamine the entire area and issue a decision which says that either any allocation is a deprivation of an individual's first amendment rights or that the typical union due [sic] is so small that it is de minimis to the individual's right of free association and must be paid in full.\textsuperscript{161}

In essence, the conflict between dues objectors and union security clauses is a judicially created problem that the Supreme Court must address in the definitive manner suggested above. Until that happens, however, there may be some other approaches available—some even suggested previously by the Court.

Unions may be able to provide alternatives to financial core members and nonmembers that alleviate concerns over first amendment rights. One suggestion is to allow employees to specify the political areas in which a union can commit funds.\textsuperscript{162} This is a viable alternative because it addresses the courts' concerns.

Specifically, courts have objected not to the collection of union dues per se, but to the various uses to which dues are put. This admits of two solutions upon a finding that a union has improperly applied dues: either

\begin{footnotesize}
\textsuperscript{158} The NLRB "employs two categories of field professionals: field examiners and attorneys. It does not employ auditors or accountants," and thus is ill-suited for the task assigned to it by the Supreme Court. \textit{Agency Fee Objection Law}, supra note 140, at 669.

\textsuperscript{159} Dissenters in the private sector file charges against their unions with the NLRB. The courts have placed the NLRB in the position of having to enforce \textit{Beck} rights against unions. \textit{See supra} note 83 for an example of an NLRB General Counsel memorandum instructing the agency on how to handle \textit{Beck} cases.


\textsuperscript{161} Mazurak, \textit{supra} note 16, at 869.

\end{footnotesize}
dues should be proportionally reduced, or full dues should be collected but not misapplied. The Supreme Court has only fashioned the former remedy, despite the fact that nothing forbids the latter.\footnote{163}

In keeping with expressed legislative intent that union expenditures not be subject to external regulation\footnote{164} nor "free-riders" tolerated,\footnote{165} any remedy should address concerns about the use of dues rather than simply prohibit their collection. Allowing objectors to control the political spending of their dues fits that dual scheme and still fulfills the first amendment mandate that dues objectors not be forced to support political lobbying they may oppose. The proposed solution also avoids any "free rider" concerns, while the Court's chosen path exacerbates that problem.

Other union self-help measures could include: (1) open budget procedures that would allow referenda on specific budgetary items;\footnote{166} and (2) the segregation of dues from other monies (such as interest, investments, and grievance settlements) and the use of a separate fund for non-collective bargaining\footnote{167} activities. In the first case, the union would be allowing its membership to express itself on possible political expenditures: in the latter, the union would not be using an objector's money in impermissible ways and would not have to go through the administrative nightmare of trying to justify expenditures.

It is, of course, possible for unions to refrain from performing any political role or from carrying on functions outside the narrow confines of the Court's reading of "germane." Such an approach affears self-defeating and suicidal, however, as it would severely limit any hope unions have of obtaining favorable legislation.\footnote{168}

Perhaps legislative action on the national and state levels is necessary

\footnote{163. In International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), the Supreme Court spoke about the segregation of a dues objector's money as a possible remedy. The Court proposed that the union be made to reduce its expenditures on non-collective bargaining activities in proportion to the amount a dissenter contributed to the overall budget. See id. at 774-75. The majority cautioned, however, that the union "should not be in a position to make up such sum from money paid by a nondissenter, for this would shift a disproportionate share of the costs of collective bargaining to the dissenters and have the same effect of applying his money to support such political activities." Id. at 775.}

\footnote{164. See supra note 40 and accompanying text.}

\footnote{165. See supra note 29 and accompanying text.}

\footnote{166. This was suggested by the plaintiff's attorney after losing in Kidwell. See Hayes & Berton, Union Members Can't Withhold Dues Over Politics, Ruling Says, Wall St. J., Oct. 7, 1991, at B7, col. 3.

167. In Tierney v. City of Toledo, 917 F.2d 927 (6th Cir. 1990), the defendant union tried such an approach with inconclusive results. The Court held that the union would have to disclose the revenues and expenditures of this separate fund that was, according to the union, used for non-collective bargaining activities. See id. at 938. Further, the Court noted that the Supreme Court had only "tacitly endorsed remedies based upon the proportion of total chargeable expenditures to total expenditures." Id. at 939. The Court here, however, reserved judgment upon the matter. See id.

168. As one commentator has implied, it may not be in the interest of American society to still the only organized voice of its labor force. See Silk, supra note 144, at D2.
to resolve the Beck and Lehnert issues. Congress could clarify the NLRA and the RLA to specify that union security clauses require a full share payment by all who receive the benefits of collective bargaining agreements. As legislative history indicates, this was the original intention of the Congress that passed the Wagner Act.169

With the cooperation of unions, the NLRB itself could refer dues objector cases to binding arbitration. The NLRB can establish clear guidelines for chargeability to serve as reference for an arbitrator. This type of procedure would free the NLRB from the current drag of cases involving dues objectors.170 Arbitration, moreover, is a quicker, less expensive process for all involved.171 Unions might therefore wish to cooperate with an arbitration scheme because they would be able to seek declaratory judgments as to the percentages of dues chargeable. This would further reduce delay, cost, and administrative inconvenience.172

CONCLUSION

Union security clauses were promoted by Congress under the Wagner Act during the Great Depression. Congress sought to enshrine collective bargaining as the centerpiece of the nation's labor policy, and the legislation of the period envisioned that vibrant unions were to play a key role in carrying out that policy.

The closed shop authorized under the Wagner Act proved to be a potent organizing tool. Yet while, union strength grew remarkably, so did the abuses of that new found status. Congress responded by eliminating the closed shop and curtailing the effectiveness of union security clauses. Nevertheless, Congress never intended its changes in the NLRA to be used to divide the unified membership essential to a union's vitality.

Early Supreme Court decisions supported union security clauses against first amendment challenges. Later decisions, such as Lehnert, took a different course, reflecting a concern by the Court for protecting the freedom of expression of nonmembers and financial core members. Through questionable judicial approaches to the relevant statutory law, the Court chose a path—not the only one available to it—that created a weapon with which unions can be destroyed. If alternatives are not devised, the courts, the NLRB, and unions will be lost in a destructive morass of judicial busy-work such as the kind Lehnert fosters. The end will be a frustration of the role unions play in carrying out the expressed "policy of the United States" of promoting effective collective

169. See supra note 29 and accompanying text. The constitutional problems in the public sector would still remain, however. This issue can best be addressed by the Supreme Court. See supra note 161 and accompanying text.
170. See Agency Fee Objection Law, supra note 140, at 670-71.
171. See id. at 673.
bargaining.\textsuperscript{173}

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<td>(1) Be germane to collective bargaining activity</td>
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<td>(3) Not significantly add to burdening of free speech</td>
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**Chargeable Activities**

1. Lobbying for contract ratification
2. Pro-rata share of chargeable activities of state & national affiliates
3. De minimis costs of career support services & information
4. Costs of sending delegates to national union conventions
5. Strike preparation costs, even for a potentially illegal strike

**Nonchargeable Activities**

1. Political lobbying outside the context of contract ratification
2. Public relations campaign
3. Expenses of an illegal strike
4. Organizing or other costs to promote unionism generally

Note: The justice first listed wrote the relevant opinion.

*Figure 1*