Mandatory Political Contributions and Union Democracy

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Beginning with cases arising under the Railway Labor Act, the Supreme Court has established the doctrine that unions may compel contributions from members for expenses related to collective bargaining, but to protect individual first amendment rights, unions may not compel contributions for political expenditures. The author argues that this distinction is without foundation in logic and serves principally to weaken the labor movement. Instead, he proposes that unions be allowed to compel and expend dues for legislative and other political activities. To protect members' rights of non-association, however, individual members should be given the option of designating candidates or charities to which their ratable portion of the contribution fund may be donated.

I

INTRODUCTION

In section 8(b)(3) of the Taft-Hartley amendments, Congress legally condoned collective bargaining contracts which require employees to join, or at least support financially, the labor organization which exclusively represents the bargaining unit in their workplace.¹ The conflict between minority and majority rights in labor unions, which results from union security provisions, is the central question addressed in this article. Union security provisions have assumed constitutional importance because of a series of recent cases which have upheld first amendment claims against unions which require membership or payment of dues as a condition of employment. Because labor unions nor-

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nally spend a part of dues monies they collect for political purposes, some employees have claimed political coercion, and an interference with their constitutional right of non-association.

Majority rule always carries with it the potential for and danger of suppression of the minority. Today’s minority may always turn out to be tomorrow’s majority. In the balance hang the rights of competing groups to determine, by legitimation and force, how society shall be organized and run. The ability to restrict minority rights is nothing other than the ability to remain in power, whether one is examining labor union leadership, or the industrial might of the world’s largest conglomerates. Thus, while the problem of democracy is superficially procedural, the central question is one of substance, since majorities are divided from minorities primarily by their differences over program.

Therefore, if organized labor can be divided, in part by political isolation and forced respect for minority rights, its ability to speak, not only for its members but in the interests of working people generally, will be correspondingly weakened. Labor—already a numerical majority—will be precluded from achieving an ideological “majority” in society at large. It is in this setting that the problem of non-association in labor union political expenditures must be examined, since underlying political beliefs have remained hidden or obscure in the debate over constitutional restrictions on the use of union funds.

The government has a clear interest in permitting unions to compel payment of dues, in order to safeguard industrial stability and eliminate “free riders” from resting on the contributions of others. Moreover, mandatory dues appear equitable, in that all who share in the benefits of the bargaining unit also share in the cost. Unions, however, often wish to use their full financial resources for political purposes, since many bargaining issues are directly affected by political decisionmaking. Yet dissenting employees, often supported by corporate funds, (and in the name of free political association) have asserted a right to withdraw support from any union activity they oppose. In this conflict, the Supreme Court has created a distinction between collective bargaining and politics, and has concluded that the permissible use of union funds extends only to the costs of bargaining, contract administration, and the processing of grievances.

The bulk of this article disputes the validity of that distinction. The first section primarily addresses the legal context, examining first the right of association and union security clauses; next, the cases in which dissenting employees raise free speech claims and the scope of

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2. Dissenting employees are supported particularly by corporate “public interest” law firms such as the Pacific Legal Foundation and the National Right to Work Committee.
mandated political contributions

relief accorded them; and finally, the law of campaign contributions, to
delineate permissible union expenditures of nondisputed funds.

Later sections argue that the use of compulsory union dues for political purposes is not oppressive to the individual union member, and is in fact necessary to the survival of our democratic institutions. The article proposes that individual members be allowed to designate funds to be used for supporting charitable activities or candidates of their individual choice. Yet, funds for legislation or matters of general interest to union members should be permissibly compelled, since taxation for the common good and majority rule are accepted principles of democracy and common practice in associations.

II
THE LEGAL CONTEXT

A. Majority Rule and Majority Rights

1. The Constitutional Right of Association

The first amendment has always implicitly protected individuals who have joined together to exercise their free speech rights. With passage of the National Labor Relations Act (NLRA or the Act), courts began to recognize an associational right in connection with union activities, as part of both common and statutory law.

In *Thomas v. Collins*, for instance, the Supreme Court declared that the organizing activities of a union and its president were protected by the first amendment even though their aims were economic, rather than political or religious. Therefore, a state could not require labor organizers to register without violating their constitutionally protected rights of speech and assembly.

Since then the Court has on several occasions held that the first amendment protects the freedom to associate for political purposes. Except where specifically prohibited, unions have the same right to en-

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3. This guarantee can be found textually in the freedoms of assembly and petition, but was also recognized in opposition to the British taxing power. *See, e.g., Corwin, The "Higher Law" Background of American Constitutional Law*, in 1 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 1 (1938). An explicit right of association appeared in *NAACP v. Alabama*, 357 U.S. 449 (1958). In that case, the Supreme Court held that the first amendment freedoms of speech, assembly, and petition for redress of grievances gave rise to a right of association.


5. 323 U.S. 516 (1945).

6. *Id.*

gage in political activities as other groups.\textsuperscript{8}

The courts have recognized that opposition to legislation which members of a labor union consider inimical to their welfare can be a legitimate object of association, and a permissible subject for union constitutions.\textsuperscript{9} The California Supreme Court, for instance, has upheld a union's right to impose an assessment on its members for the defeat of detrimental legislation,\textsuperscript{10} notwithstanding the dissent of a minority of union members. Unions may take other measures for their protection or preservation, whether a minority of members agrees or not.\textsuperscript{11}

Corporations have more recently been recognized to possess a similar constitutional right to make political contributions and expenditures, and influence the votes of elected representatives. In \textit{Buckley v. Valeo},\textsuperscript{12} the Supreme Court relied in part on the principle that contributing to an organization for the purpose of spreading a political message is protected by the first amendment, since making a contribution "enables like-minded persons to pool their resources in furtherance of common political goals."\textsuperscript{13} The Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests."\textsuperscript{14}

Thus, both union majorities and corporations possess a constitutional and common law right of association for political purposes, and may establish funds to that end. Recognizing this right to act in common in furtherance of political ends, Justice Rutledge commented: "The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it."\textsuperscript{15} The more difficult questions, thus, concern whether majorities may compel minority financial participation, and more specifically whether union security clauses may be used to collect such funds for political purposes.

2. \textit{Union Security Agreements and the Principle of Exclusive Representation}

The right of union members to associate for political purposes began to be questioned by new Republican congressional majorities after

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\textsuperscript{10} \textit{Id.} (union can impose an assessment for the defeat of a state constitutional amendment requiring an open shop).

\textsuperscript{11} \textit{Id.} at 144, 187 P.2d at 773.

\textsuperscript{12} 424 U.S. 1 (1976).

\textsuperscript{13} \textit{Id.} at 22.

\textsuperscript{14} \textit{Id.} at 23.

\textsuperscript{15} United States v. CIO, 335 U.S. 106, 143 (1948).
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World War II. They expressed concern that since government had forced employers to recognize unions as the exclusive bargaining representatives for their members, and since membership was largely compulsory, individual dissenting members were unprotected.

The principle of exclusive representation is essential to collective bargaining purposes, since a multitude of representatives would not prevent labor unrest or disruption due to strikes. Instead, they would actually promote jurisdictional strikes between competing representatives and thus weaken the bargaining strength of labor. The principle of exclusive representation is essentially that of majority rule which necessitates some degree of suppression of minority rights, since some employees might wish to work below union scale, work without union protection, or be represented by another union.

Union security clauses, which are included in nearly all collective bargaining agreements, require employees, as a condition of employment, to become members of a union or pay a specified amount in lieu of dues. The principle forms of union security are the closed shop, union shop, agency shop, and maintenance of membership. The closed shop requires that in order to be hired, an employee must be a member in good standing of the union and remain so for the duration of the employment contract. However, the closed shop is illegal in modern labor relations, as a result of section 14(b) of the NLRA, the so-called “right to work” provision.

The union shop also conditions employment on union membership, although thirty or sixty days must usually elapse before the employee must join the union. The agency shop does not require employees to join a union, but rather obliges non-union employees, as a condition of employment, to pay a fixed sum each month to the union to defray the expenses of collective bargaining and grievance-handling. Maintenance of membership requires that employees maintain their membership in the union for the duration of the contract, as a condition of employment.

Union shop and agency shop, the two most common forms of union security agreement, are sanctioned in section 8(a)(3) of the NLRA, and provide the most common settings within which the issue of use of mandatory dues arises. Courts have generally upheld both against claims of unconstitutionality. Furthermore, an employer’s


17. 29 U.S.C. § 158(a)(3) (1976). The section expressly sanctions the union shop agreement, and an agency shop agreement has been held to be a valid union security agreement under the section, NLRB v. General Motors Corp., 373 U.S. 734 (1963).

18. See, e.g., Wicks v. Southern Pac. Co., 231 F.2d 130 (9th Cir.), cert. denied, 351 U.S. 945 (1956) (union security agreement under Railway Labor Act does not violate constitutional prohibition of slavery in requiring employees to pay over part of their wages to a union); Otten v.
failure to honor a valid union security clause has been held to be a modification of the collective bargaining agreement, in derogation of the duty to bargain under sections 8(d) and 8(a)(5) of the NLRA.\textsuperscript{19}

Congress conceded that unions require compulsory dues and fees when it enacted the Taft-Hartley Act in 1947,\textsuperscript{20} recognizing that without union security provisions, many employees who shared in the benefits of contract negotiation and administration would unfairly refuse to share the costs.\textsuperscript{21} Congress concluded, for this reason, that union shop agreements were an acceptable method of eliminating "free riders," and at the same time, securing financial assistance for a union's bargaining efforts.\textsuperscript{22}

Thus the dissenting minority employee may be compelled to join an employee association, regardless of the existence of a constitutional right of non-association. A question therefore arises regarding the explicit recognition of a right of non-association in the arena of political expenditure. Why should compelled expenditures be allowed for compulsory membership, but be denied for political expenditure?

\textbf{B. Limits on Union Majority Political Action}

Concern for the right of minority union members to refuse association with the majority has historically been a consequence of union security agreements and the principle of exclusive representation.\textsuperscript{23} Both were believed effective in promoting labor stability, by eliminating conflicting employee demands, and decreasing the role of militant minorities.\textsuperscript{24} Thus, in discussion of the Taft-Hartley amendments, it was argued in Congress that:

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the pending bill retains. . .the power of collective bargaining . . .and if [the employees] can get a majority [to select their representative] all the other employees have to keep quiet and permit the representatives of the majority to bargain for all of them.\textsuperscript{25}
\end{quote}


\textsuperscript{20} S. REP. No. 105, 80th Cong., 1st Sess. 6-7 (1947).


\textsuperscript{22} S. REP. No. 105, 80th Cong., 1st Sess. 7 (1947). See also 93 CONG. REC. 3441 (1947) (remarks of Rep. Madden).

\textsuperscript{23} See, e.g., Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975); NLRB v. General Motors Corp., 373 U.S. 734 (1963); Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956).

\textsuperscript{24} See, e.g., 93 CONG. REC. 4194 (1947).

\textsuperscript{25} Id.
Nevertheless the coercive potential of union security arrangements spawned a considerable amount of constitutional litigation. The early cases all arose under the Railway Labor Act, which expressly permits agency shops. More recently, the issue whether union security funds may be used for political purposes has been discussed in the context of public employees and the NLRA.

1. The Railway Labor Cases

The first case to test the constitutionality of union security clauses made it clear that unions could compel contributions from every member of a bargaining unit to finance expenditures for collective bargaining, contract administration and grievance handling. In 1956, a unanimous Supreme Court decided the landmark case of Railway Employees Department v. Hanson.26 In Hanson, an employee challenged agency shop provisions in the Railway Labor Act,27 which authorized contracts requiring union membership as a condition of employment, notwithstanding state law to the contrary. Congress' objective had been to eliminate "free riders," since they enjoyed the benefits of collective bargaining without contributing to their cost, and fomented discontent and strife among other union members.28 The Supreme Court held that requiring monetary support for benefits received by all was consistent with congressional intent.29

Resting on statutory construction rather than constitutional grounds, the Court in Hanson declared:

We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.30

However, the court warned that "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment,"31 its holding would not be dispositive. Nothing in Hanson prevented a union from compelling contributions for political expenditures, so long as employees were aware of these expenditures, and did not object, or "opt out".

Hanson has been criticized for effectively ignoring the question of freedom of association,32 for sidestepping the issue of basic individual

28. Hanson, 351 U.S. at 231.
30. 351 U.S. at 238.
31. Id.
freedom, and for deciding first amendment issues summarily and viewing them as inconsequential. As Justice Frankfurter wrote in dissent in *International Association of Machinists v. Street*, a similar case decided two years later,

> [t]he record before the Court in *Hanson* clearly indicated that dues would be used to further what are normally described as political and legislative ends. And it surely can be said that the Court was not ignorant of a fact that everyone else knew. Union constitutions were in evidence which authorized the use of union funds for political magazines, for support of lobbying groups, and for urging union members to vote for union-approved candidates. The contention now raised by [Street] was succinctly stated by the Hanson plaintiffs in their brief. We indicated that we were deciding the merits of the complaint on all the allegations and proofs before us. "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."

However, in *Street* Justice Brennan, speaking for four other members of the Court, again avoided the constitutional issue:

> We have before us only the question whether the power is restricted to the extent of denying the unions the right, over the employee's objection to use his money to support political causes which he opposes. Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was

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The Court justified its holding on the basis of legislative history and the history of the union, construing the statute to deny use of employees' dues for political expenditures the employee opposed. The Court stated:

The history of union security in the railway industry is marked first, by a strong and longstanding tradition of voluntary unionism on the part of the standard rail unions; second, by the declaration in 1934 of a congressional policy of complete freedom of choice of employees to join or not to join a union; third, by the modification of the firm legislative policy against compulsion, but only as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act.\(^3\)

However, ample legislative history supports an opposite interpretation of the RLA provision: The amendment was passed over management objections that the statute placed no limits on the type or amounts of fees a union could require. In fact, the statute was passed despite the alarmed suggestion in the House that unions would:

by levying political assessments or assessments for the benefit of some union officials and, through the use of this legislation now before us, force their members to meet those assessments—especially those for political purposes—as a condition of an opportunity to earn a livelihood.\(^3\)

According to the majority in Street, when a union spends compulsory dues for political purposes, a court may: (1) enjoin the union from spending on political causes a sum which reflects the proportion of total expenditures for such activities to the union's total budget; or (2) order restitution to the employee of that portion of his or her dues spent for political causes the union had been advised the employees opposed. Suggested remedies of enjoining enforcement of union shop agreements, restraining collection of funds from dissenters, or enjoining any expenditure of funds for disputed purposes were rejected as inappropriate.\(^4\)

In section IV of the majority opinion, Brennan noted that many of the union's expenditures had been used to disseminate information on political candidates and programs, or publicize the positions of the union. He pointed out that an injunction against such expenditures would restrain the expression of political ideas and might offend the first amendment, since the majority also had an interest in stating its

\(^{37}\) 367 U.S. at 768.

\(^{38}\) Id. at 780-81 (emphasis omitted).

\(^{39}\) Bickel, supra note 36, at 235 (citations omitted). See also Note, Labor Law—Union Shop—Expenditure of Funds, 28 Brooklyn L. Rev. 170 (1961).

\(^{40}\) 367 U.S. at 771-75.
views without being silenced by dissenters. To obtain an appropriate reconciliation between majority and minority interests, courts were directed to select remedies which protected both to a maximum extent. The problem was thus one of defining limits.

Four members of the Court did reach the constitutional question in Street, and split evenly. While Douglas concurred, and Black dissented, they both would have found the RLA's union security provision an unconstitutional infringement on free speech. Frankfurter and Harlan argued in dissent, however, that the RLA authorized unions to spend compulsory funds for political purposes, and that no first or fifth amendment rights were infringed in the process.\(^4\)

Douglas concurred, balancing individual freedom with the collective interests of union members. While he recognized that "some forced associations were inevitable in industrial society,"\(^4\) and that collective bargaining is valuable in modern society, such interests could not justify violation of union member's first amendment rights. He concluded that any expenditures of union funds for political purposes would violate the Constitution. Douglas argued that membership could not be conditioned on financial support for political programs which a worker opposed. Thus:

It may be said that the election of a Franklin D. Roosevelt rather than a Calvin Coolidge might be the best possible way to serve the cause of collective bargaining. But even such a selective use of union funds for political purposes subordinates the individual's First Amendment rights to the views of the majority. I do not see how that can be done, even though the objector retains his right to campaign, to speak, to vote as he chooses. For when union funds are for that purpose, the individual is required to finance political projects against which he may be in rebellion.\(^4\)

He distinguished Hanson's support for agency shop provisions, arguing:

As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the Hanson case sub silentio. But since the funds here in issue are used for causes other than defraying the cost of collective bargaining, I would affirm the judgment below with modifications.\(^4\)

Black, in dissent, agreed with Douglas that forced political contributions violated the first amendment. He protested that the Court was

\(^4\) Id. at 797-819.
\(^4\) Id. at 775.
\(^4\) Id. at 778.
\(^4\) Id.
rewriting congressional legislation to avoid deciding the constitutionality of the statute:

Neither § 2, Eleventh, nor any other part of the Act contains any implication or even a hint that Congress wanted to limit the purposes for which a contracting union's dues should or could be spent. All the parties to this litigation have agreed from its beginning, and still agree, that there is not such limitation in the Act. The Court nevertheless, in order to avoid constitutional questions, interprets the Act itself as barring use of dues for political purposes. . . . The very legislative history relied on by the Court appears to me to prove that its interpretation of § 2, Eleventh is without justification. For that history shows that Congress with its eyes wide open passed that section, knowing that its broad language would permit the use of union dues to advocate causes, doctrines, laws, candidates and parties, whether individual members objected or not.\(^45\)

Black distinguished \textit{Hanson} the same way Douglas did:

We only hold that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress. . . . and does not violate either the 1st or 5th Amendments.\(^46\)

But the Court in \textit{Hanson} had reserved judgment about the use of union funds for political purposes, beyond the costs of actual representation. Nor did \textit{Hanson} hold, in Black's view, that workers could be compelled to surrender their constitutionally protected freedom of non-association:

by participating as union "members" against their will. . . . In a word, the \textit{Hanson} case did not hold that the existence of union shop agreements could be used as an excuse to force workers to associate with people they do not want to associate with or to pay their money to support causes they detest.\(^47\)

Justice Frankfurter, on the other hand, joined by Harlan in dissent, found no infringement of free speech in the unions' activities and emphasized that there had been no restriction of individual expression

\(^{45}\) \textit{Id.} at 784-85, citing \textit{Hearings on S.3295 Before the Subcomm. of the Senate Comm. on Labor and Public Welfare, 81st Cong., 2d Sess. 316-17 (1950); Hearings on H.R. 7789 Before the House Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 160 (1950); 96 \textit{CONG. REC.} 17049-50 (1951). In footnote 8, Black cited subsequent legislative history indicating that in 1958:

when Senator Potter introduced his amendment to limit the use of compelled dues to collective bargaining and related purposes, he pointed out on the floor of the Senate that "the fact is that under current practices in some of our labor organizations, dissenters are being denied the freedom not to support financially political or ideological or other activities which they may oppose." 104 \textit{CONG. REC.} 11214. It could hardly be contended that the debate on his proposal, which was defeated, indicated any federally held belief that such use of compelled dues was already proscribed under § 2, Eleventh or any other existing statute.


\(^{47}\) \textit{Id.}
because dissenting members had always been free to express their views in any private or public place. Frankfurter disagreed with the argument that political action was not legitimately related to collective bargaining. In so doing, he reviewed the improvements in working conditions and union recognition won by political action and the close relationship between organized labor and the executive and legislative branches of government.

Indeed, Frankfurter argued:
Nothing was further from congressional purpose than to be concerned with restrictions upon the right to speak. Its purpose was to eliminate "free riders" in the bargaining unit. Inroads on free speech were not remotely involved in the legislative process. They were in nobody's mind. . . . For us to hold that these defendant unions may not expend their moneys for political and legislative purposes would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life. American labor's initial role in shaping legislation dates back 130 years. With the coming of the AFL in 1886, labor on a national scale was committed not to act as a class party but to maintain a program of political action in furtherance of its industrial standards.48

Moreover, labor had since those years achieved a new prominence in politics. It had appeared before congressional committees, presidents, and judicial bodies, in support of a wide range of propositions which were not technically encompassed by a narrow set of contract negotiations. Frankfurter argued that labor's economic and political concerns were inseparable:
When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, it seems rather naive for a court to conclude—as did the trial court—that the union expenditures were "not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents." The notion that economic and political concerns are separable is pre-Victorian.49

While Hanson had first distinguished political expenditures from

48. Id. at 812-13. Frankfurter also addressed himself to the legislative history of the statute, finding with Black that:
The hearings and debates lend not the slightest support to a construction of the amendment which would restrict the uses to which union funds had, at the time of the union-shop amendment, been conventionally put. To be sure, the legislative record does not spell out the obvious. The absence of any showing of concern about unions' expenditures in "political" areas—especially when the issue was briefly raised—only buttresses the conclusion that Congress intended to leave unions free to do what unions had been and were doing. It is surely fanciful to conclude that this verbal vacuity implies that Congress meant its amendment to be read as providing that members of the union may restrict their dues solely for financing the technical process of collective bargaining. Id. at 802, citing 96 CONG. REC. 17049-50 (1951); Hearings on S.3295 Before the Senate Comm. on Labor and Public Welfare, 81st Cong., 2d Sess. 173-74 (1950).

49. 367 U.S. at 814-15 (footnotes omitted).
those concerned with collective bargaining, the various opinions in Street went further and placed this distinction on a potentially constitutional footing. Even at its narrowest, though, the Court's holding ignores that the expenditure of union funds in support of certain legislation, such as full crew laws or national health insurance, may be considered part of the collective bargaining function. Street thus limited expenditures by railway unions for general social or political purposes by implication even where they were connected with collective bargaining activities. Internal union debate was, therefore, rendered pro tanto less important over such issues. Street has thus arguably helped depoliticize internal union affairs, restricting both leadership and rank and file to "purely" economic concerns, where dissenting members could be subject to principles of majority rule.

In fact, Street may be viewed as part of a general social and political movement after World War II to expunge politics, particularly left-wing politics, from organized labor. While the separation of political from collective bargaining functions was only one step in the judicial deradicalization of labor, it was a crucial step, since it rested on a distinction with wider applications. The Court's simple-minded separation of "politics" (a word it wisely left undefined) from collective bargaining left open the possibility that courts would scrutinize union political or social activity, and decide which might be paid for out of general funds and which might not.

The Street decision has not been without its critics. Professor Wellington, for instance, complained of the Court's failure to adequately distinguish between politics and collective bargaining:

[T]he Court's language is ambiguous. Nowhere did it undertake the task—perhaps because it is impossible except in an arbitrary way—of distinguishing between political and collective bargaining activities. Nor has it since attempted to do so. Thus, while it seems probable that the Court meant by "political" anything that has a political element in it, it is not absolutely clear that the Court went this far. Notice, however, that if the Court did not go so far, it has assumed the task of deciding whether the expenditure of money by a union is for political or collective bargaining purposes. It has in the language of Hanson, undertaken to determine whether dues money is used for purposes "germane to collective bargaining." . . . [T]his is likely to lead to distinctions that rest on fiat alone.51

Wellington concluded that if the same issue were to be raised under Taft-Hartley, the Court could not as easily read that statute to exclude political expenditures, as it did the RLA.

[I]t cannot be said that in 1947 Congress was cutting back on a freedom

it had earlier granted dissenting employees. Nor can it be asserted that unions regulated by the Labor-Management Relations Act had traditionally been uninterested in union security. These propositions were made by the Street majority about congressional performance in 1951 and about unions regulated by the Railway Labor Act. They were advanced by that majority as weighty reasons for its readings of section 2, eleventh. They are not available as bases for reaching a like conclusion in a section 8(a)(3) case.52

Other authors commenting on the Street decision have agreed with Wellington, and have suggested that the complex and highly political problem of reconciling the majority's right to political action with the minority's right to dissent is more appropriate to the legislature than the courts. Moreover,

a holding that political expenditures of union dues is constitutional, which is certainly supportable, would have withdrawn the Court from much of its involvement in this area and might have encouraged Congress to determine whether remedial legislation is warranted.53

Lathrop v. Donohue,54 decided the same day as Street, illustrates the degree to which labor unions, as opposed to compulsory associations generally, have been singled out for restraint from compulsory political contributions. In Lathrop, the Court upheld a state requirement of compulsory membership in an integrated bar association, notwithstanding the expenditure of membership funds on legislative activities which bar members opposed.55 The Court split on the constitutional issue, with Justices Brennan, Clark, Stewart and Warren holding in plurality that since the compulsory membership requirement imposed only a duty to pay "reasonable" annual dues, there was no violation of the freedom not to associate.

Yet, as the Court had declared earlier in Hanson with regard to labor unions, "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."56 In Lathrop, the Court again recognized: "[i]n our view the case presents a claim of impingement upon freedom of association no different from that which we decided in Railway Employes' Dept. v. Hanson."57

The Court declared:

the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may consti-
tionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.\textsuperscript{58}

Yet, the plurality rejected consideration of the constitutionality of compulsory contribution for political activities opposed by members, holding that it was not ripe for adjudication since the record did not show any of the plaintiffs' specific objections. The Wisconsin Supreme Court had held that the appellant could be compelled constitutionally to contribute financial support to political activities with which he disagreed, but the Supreme Court stated:

Nowhere are we clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities. There is an allegation in the complaint that the State Bar had "used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to the plaintiff's convictions and beliefs," but there is no indication of the nature of this legislation, nor of appellant's views on particular proposals, nor of whether any of his dues were used to support the State Bar's positions. The Supreme Court assumed, as apparently the trial court did in passing on the demurrer, that the appellant was personally opposed to some of the legislation supported by the State Bar. But its opinion still gave no description of any specific measures he opposed, or the extent to which the State Bar actually utilized dues funds for specific purposes to which he had objected.\textsuperscript{59}

Justice Harlan, joined by Frankfurter, concurred in the judgment, but would have considered the compulsory contribution question, holding that use of dissident members' dues for political purposes did not violate the first amendment.\textsuperscript{60} Black and Douglas, on the other hand, would also have considered the constitutional question, but would have found members' rights had been violated.\textsuperscript{61}

Given the Court's unwillingness to directly address the constitutional question, one author has concluded that with regard to the basic problem of free speech and mandatory association, "the Court in \textit{Lath-}
rop, as in *Street*, decided little or nothing."\textsuperscript{62} Perhaps for this reason the Court did not return to this question until 1963, when another case was presented under the Railway Labor Act.

In *Brotherhood of Railway and Steamship Clerks v. Allen*,\textsuperscript{63} employees who refused to pay union dues sought to enjoin enforcement of a union-shop agreement, objecting to union political expenditures. The Supreme Court reaffirmed its holding in *Street*, reversed the issuance of injunctive relief and remanded the case to determine which expenditures were political and what percentage of total union expenditures they comprised. The Court recommended that any remedy had to provide a dissenter with: (1) a partial refund of each dissenter's exacted funds in the proportion that political expenditures bore to total union expenditures, and (2) a reduction of future exactions by the same amount.\textsuperscript{64}

But Justice Harlan, concurring and dissenting, charged that failure to require each plaintiff to object to specific political expenditures before bringing suit undermined the requirements of *Street* and *Lathrop*:

> At best all that has been alleged or proved is that the union *will* expend a part of each respondent's still-unpaid membership dues for so-called political or other purposes not connected with collective bargaining, and that each respondent would object to the use of any part of his dues for matters other than those relating to collective bargaining. None of the respondents who testified could specify any particular expenditure, or any class of expenditure, to which he objected.

> I do not understand how, consistently with *Street*, the Court can now hold that "it is enough that...[a union member] manifests his opposition to any political expenditures by union"...or how it can say that in so holding "we are not inconsistent with" what the plurality was at such pains to point out in *Lathrop* (albeit in a constitutional context)... The truth of the matter is that the Court has departed from the strict substantive limitations of *Street* and has given them (and, as I see it, also that case's remedial limitations)...an expansive thrust which can hardly fail to increase the volume of this sort of litigation in the future.\textsuperscript{65}

> To avoid just such an explosion of litigation, the Court strongly urged unions to adopt an internal procedure to accommodate dissenters and compute the amount of dues spent over expressed objections of individual members, so that courts would not be burdened with complex determinations.\textsuperscript{66}

\textsuperscript{62} Political Association, supra note 36, at 788.

\textsuperscript{63} 373 U.S. 113 (1963).

\textsuperscript{64} Id. at 122.

\textsuperscript{65} Id. at 130 (Harlan, J., concurring and dissenting) (citations omitted).

\textsuperscript{66} Id. at 122-23.
Allen thus expanded Street to permit refunds where union political expenditures were shown, without requiring that dissenters first complain to the union, or specify their objections. Although the Court in Allen did elaborate on the collective bargaining versus politics distinction, if concentrated on prohibiting use of dues for political purposes per se. Allen thus further differentiates labor unions from other voluntary associations, such as bar associations, whose members under Lathrop must present their objections with specificity.

2. Abbood and Public Employees

Street, Hanson, and Allen all arose under the RLA which specifically approved agency shop agreements. The legislative history of the RLA demonstrated congressional anticipation of political expenditures by unions, and the Court was able to rely on statutory construction. By the 1970's, cases began to arise which concerned both public employees and the application of constitutional standards to private sector employees under the NLRA.

In 1977, the Supreme Court finally confronted on constitutional, rather than statutory, grounds the political uses of mandatory union dues by a public employee union. In Abbood v. Detroit Board of Education, 67 the Court held that use of agency shop fees for political purposes violated dissenting members' rights not to associate, declaring:

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.68

The Court expressly refused to invalidate the union's political fund, however, stating:

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution


68. 431 U.S. at 234-35 (citations omitted).
requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.69

The Supreme Court had long held that government employment could not be conditioned on the surrender of important employee rights.70 Nonetheless, as one article has commented:

The associational interests of public employees are not more worthy of protection than those of their private counterparts simply because the demands of public unions are debated in the political arena. . . . Almost any expenditure made by a union is connected in some ways to its duties as collective bargaining representative. Disbursements for union social activities improve the morale of employees and thus strengthen union solidarity; contributions to political candidates or the financing of lobbying programs may be essential to obtain new laws favorable to the union; expenditures for general ideological, professional, and scientific purposes may sway the public to side with the union in its demands against the government.71

Indeed, the Court in Abood admitted that simple distinctions could not be made between collective bargaining and political expenditure, even from the point of view of dissenting members. In an extraordinary passage, the majority recognized:

to compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in Hanson and Street is that such interference

69. Id. at 235-36.
as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.\textsuperscript{72}

Finally the Court underscored its holding in \textit{Street} that an injunction against expending dues for political purposes would be inappropriate:
not only because of the basic policy reflected in the Norris-La Guardia Act against enjoining labor unions, but also because those union members who do wish a part of their dues to be used for political purposes have a right to associate to that end “without being silenced by the dissenters.”\textsuperscript{73}

As several writers have noted, \textit{Hanson}, \textit{Street}, \textit{Lathrop}, and \textit{Abood} are far from uniform in their treatment of dues or fees used for other than collective bargaining purposes:
The \textit{Hanson} decision had been based on the premise that exacted funds were to be used only for purposes germane to collective bargaining. The holding of \textit{Street} involved a statutory construction which denied unions the power to use such funds for political purposes. In \textit{Abood} the Court found that the interests advanced by union shops do not justify compelling contributions to ideological causes unrelated to a union’s collective bargaining duties. . .[T]he adoption of the test of \textit{relation to collective bargaining} as a constitutional rule undermined the implication of \textit{Street} that exacted funds could constitutionally be used only for non-political purposes. The Court’s application of the test first used in \textit{Hanson} of \textit{relation to collective bargaining} means that political uses can be justified if they are so related.\textsuperscript{74}

Thus, \textit{Abood} adopted the broader \textit{Hanson} test, rather than the more limited \textit{Street} prohibition of expenditure of agency dues for any political purpose. \textit{Abood}, however, casts serious doubt on whether the “free rider” agreement would survive first amendment analysis. Some support for the proposition that the “free rider” may have to be accommodated where first amendment rights are involved can be found in

\textsuperscript{72} 431 U.S. at 222-23.
\textsuperscript{73} \textit{Id.} at 238, quoting IAM v. Street, 367 U.S. at 773.

Hughes noted that \textit{Abood}'s constitutional inquiry employed a balancing test derived in part from \textit{Hanson} and \textit{Street}, rather than a “strict scrutiny,” or “less onerous alternatives” test, standards more commonly used to evaluate claims affecting significant first amendment rights:
The Court in \textit{Abood} was divided on the kind of impact on first amendment rights that could be justified by the government interests of labor peace and the distribution of the costs of union activities. A minority of three justices maintained that the interests advanced would justify compelled political support as a condition of public employment. The plurality, on the other hand, recognized that the Constitution protects all types of thought and speech, not merely political interests. Thus, in balancing individual and state interests, the Court should consider the extent and not the nature of the first amendment abridgement.

\textit{Id.} at 855.
In that case, a plurality of the Court held that discharging a public employee who belonged to an opposition political party contravened his first amendment rights. The Court thus held that receipt of a public benefit could not be made contingent on the surrender of one's constitutional right of free association. *Elrod*, however, addressed restraint on political exercise, where interference with associational beliefs is far more direct that that caused by compulsory contributions. Thus *Elrod* should not be read to apply to union security arrangements.

What Hanson began, *Abood* brought to fruition. No longer limited by the legislative history of the Railway Labor Act, the Court precluded public employee unions from using membership funds to accomplish political goals, even though their employers were political entities. The next step may be the application of *Abood* to the private sector, if not by the first amendment, then by interpretation of the Taft-Hartley Act. While such a result should not be reached, it is arguable that it *could* be reached, as the next section will demonstrate.

3. **Cases Under the NLRA**

A few cases have considered the issue of compulsory political expenditures under the Taft-Hartley Act. As these cases involve neither the legislative history of the Railway Labor Act, nor public employees, they have often reached results different from those in the cases discussed previously.

Relying on the rationale of *Hanson* and *Street*, the Ninth Circuit in *Seay v. McDonnell Douglas Corp.* held that union expenditure of fees collected under an agency shop agreement for political purposes was unlawful. With reference to the Taft-Hartley Act, the court stated:

> The Supreme Court has said as clearly as possible that agency fees exacted from employees under the terms of the bargaining agreement must be limited to use in sharing the costs with other dues of "negotiating and administering collective agreements, and the costs of the adjudgment and settlement of disputes." This limitation is read into the statute under the terms of which the collective bargaining agreement, with its agency fee provision, was entered into in this case. We find that the limitation asserted here does in fact constitute an implied term of the contract. A provision in the collective bargaining agreement authorizing the expenditure of agency fees for political uses would immediately run afoul of the congressional intent delineated in *Street* and

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77. 427 F.2d 996 (9th Cir. 1970).
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the express holding in both Street and Allen.\textsuperscript{78}

The court then found:

The diversion of the employees' money from use for the purposes for
which it was exacted damages them doubly. Its utilization to support
candidates and causes the plaintiffs oppose renders them captive to the
ideas, associations and causes espoused by others. At the same time it
depletes their own funds and resources to the extent of the expropria-
tion and renders them unable by these amounts to express their own
convictions and their own ideas and to support their own causes.\textsuperscript{79}

Seay, however, was a section 301 action, requiring only the appli-
cation of federal law. The court, therefore, did not consider whether
Taft-Hartley approval of the agency shop constituted state action, thus
triggering first or fifth amendment protection.

The Tenth Circuit, in Reid v. McDonnell Douglas Corp.,\textsuperscript{80} took an-
other stance and held that use of compulsory dues for political pur-
poses under a union security agreement raised no direct constitutional
issues under Taft-Hartley. There, the claim was one of breach of the
United Automobile Workers' (UAW's) "'fiduciary duty. . .to use [the
plaintiff's dues] for purposes reasonably necessary and germane to col-
lective bargaining only,'" reasoning that expenditures for political
"doctrines and candidates" opposed by plaintiffs constituted a violation
of that duty.\textsuperscript{81}

The court first contrasted the Railway Labor Act with the NLRA,
finding that:

the NLRA is more neutral and permissive than the policy of the RLA.
In NLRA matters, the federal government does not appear to us to
have so far insinuated itself into the decision of the union and employer
to agree to a union security clause so as to make that choice govern-
mental action for purposes of the first and fifth amendments.\textsuperscript{82}

The court next distinguished the Seay decision, and with it, Street,
Hanson, and Allen, stating:

In Seay v. McDonnell Douglas Corp., the Ninth Circuit relied on Hanson
and Street as demonstrating the existence in the federal courts of
jurisdiction to hear the type of constitutional claim raised here. How-
ever, the Seay court did not consider the question of governmental ac-
 tion, and for the reasons stated above, we cannot agree that the
rationale of the Railway Labor Act cases applies to the present
controversy.\textsuperscript{83}

The court then indicated that although the Supreme Court had

\textsuperscript{78} Id. at 1000-01 (emphasis in original), quoting IAM v. Street, 367 U.S. at 764.
\textsuperscript{79} Id. at 1004.
\textsuperscript{80} 443 F.2d 408 (10th Cir.), cert. denied, 404 U.S. 872 (1971).
\textsuperscript{81} Id. at 411, quoting IAM v. Street, 367 U.S. at 764.
\textsuperscript{82} Id. at 410-11 (citation and footnote omitted).
\textsuperscript{83} Id. at 411 (citation omitted).
never examined the NLRA in the context of the *constitutionality* of union political expenditures, "it may be contended that the Court's reasoning in *Street* is applicable by analogy." After suit had been filed, the UAW amended its constitution to provide an internal remedy for dissenters, guaranteeing that:

Any member shall have the right to object to the expenditure of a portion of his dues money for activities or causes primarily political in nature. The approximate proportion of dues spent for such political purposes shall be determined by a committee of the International Executive Board, which shall be appointed by the President, subject to the approval of said Board.

UAW members possess a right to appeal directly to the full International Executive Board, the Public Review Board and to the Convention. This remedy apparently satisfied the court, which then held the case moot, citing *Allen*.

On remand, *Seay* reached a similar result. The district court found, in light of *Reid*, that the union's agreement to provide, at the request of objecting members, a *pro rata* rebate of fees used for political purposes, diminished the case to a minor problem of accounting. Holding that the agreement repaired the union's breach of its duty of fair representation, the court granted summary judgment for the defendants. The court of appeals reversed, however, and citing *Allen*, remanded for a factual hearing as to whether the union would administer its intra-union remedy fairly. It remained unclear whether the court would dismiss for mootness in the absence of an allegation of unfairness. *Allen* after all was a case under the Railway Labor Act, and the union had been on notice at least since *Street* not to expend dues for political purposes.

In *Linscott v. Millers Falls Co.* a Seventh Day Adventist refused to pay initiation fees or dues under a collective bargaining agreement requiring an NLRA union shop, and was discharged. The court of appeals found state action, and then proceeded to the "more difficult" question of whether a governmental interest justified the interference:

A strong governmental interest in the union shop was found in *Hanson*. Some employees claimed that being obliged to join the union deprived them of freedom of association as guaranteed by the First Amendment, and that compelling the paying of dues violated Fifth Amendment due

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84. *Id.*  
86. 443 F.2d at 412-13.  
88. 443 F.2d 408 (10th Cir.), *cert. denied*, 404 U.S. 872 (1971).  
89. 533 F.2d 1126, 1131-32 (9th Cir. 1976).  
90. 440 F.2d 14 (1st Cir. 1971).
process. As against these contentions the Court held that "[i]ndustrial peace along the arteries of commerce [as] a legitimate objective," . . . , justified the legislation. Undoubtedly the Court recognized the validity and importance of the congressional purpose to achieve uniform union membership, both to further peaceful labor relations, and as desirable for its own sake, to require a fair sharing of the costs of collective bargaining.\textsuperscript{91}

Accordingly, the court denied the claim, holding:

Her alternative is not absolute destitution. The cost to her is being forced to take employment in a nonunion shop—here, less remunerative employment. We conclude that in weighing the burden which falls upon the plaintiff if she would avoid offending her religious convictions, as against the affront which sustaining her position would offer to the congressionally supported principle of the union shop, it is plaintiff who must suffer.\textsuperscript{92}

\textit{Seay} and \textit{Linscott} thus appear to read \textit{Hanson} in entirely different ways, and have reached opposite results.

Support for the \textit{Linscott} decision, as the better result, can be found in an early California case that pre-dates \textit{Hanson}. In \textit{DeMille v. American Federation of Radio Artists},\textsuperscript{93} a special assessment of $1.00 per member was voted by union members to defeat a ballot measure designed to prohibit the union shop in California. The plaintiff refused to pay. The California Supreme Court upheld the assessment against a first amendment challenge, reasoning that the member and the association were distinct, and the union represented the common or group interests of its members, as distinguished from their personal or private interests:

Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It

\textsuperscript{91} Id. at 17 (citation omitted).

\textsuperscript{92} Id. at 18. Cf. Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883 (D.C. Cir. 1970) (court enforced order requiring employers to bargain collectively, notwithstanding the employers' contention that their religious beliefs precluded them from dealing with the labor union).

While religious objection might be thought more meritorious or worthy of protection than objections based upon political expenditures, the results have not borne this out. A few cases have arisen under Title VII of the Civil Rights Act of 1964, where employees objected to forced contribution on religious grounds. The standard adopted there, as in \textit{Linscott}, permits the exercise of majority rule, so long as a "reasonable accommodation" to employee rights is attempted. \textit{See}, e.g., \textit{Tooley v. Martin-Marietta Corp.}, 26 Fair Empl. Prac. Cas. (BNA) 95 (9th Cir. 1981), \textit{cert. denied}, 50 U.S.L.W. 3465 (Dec. 7, 1981); \textit{Yott v. North Am. Rockwell Corp.}, 602 F.2d 904 (9th Cir. 1979).

Recently, the Supreme Court dismissed for lack of a federal question an Alaska Supreme Court decision that unions would not face undue hardship if workers objecting on religious grounds were exempted from paying dues. Moreover, although the dissenting employee could lawfully be discharged under an agency shop agreement for non-payment of dues, the court broadly suggested that the NLRA did not preclude plans which substituted charitable contributions for payments in dues. \textit{Lumber Workers, Local 2362 v. Wondzell}, 444 U.S. 1040 (1980).

\textsuperscript{93} 31 Cal. 2d 139, 187 P.2d 769 (1947).
represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union.94

The California Supreme Court also found the dues and assessments had been validly passed by a majority vote, which necessitated some compulsion:

In no wise may it be said that it necessarily represented the opinion of every individual member thereof, and consequently, that of the plaintiff:

Mere disagreement with the majority does not absolve the dissenting minority from compliance with action of the association taken through authorized union methods. And compliance—here payment by the plaintiff of the assessment—would not stamp his act as personal endorsement of the declared view of the majority. Majority rule necessarily prevails in all constitutional government including our federal, state, county and municipal bodies, else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishment thereof. In a government based on democratic principles the benefit as perceived by the majority prevails. And the individual citizen would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligation because of a difference in personal views.95

In language which anticipated the Lathrop decision concerning political expenditures by integrated bar associations, the court stated:

The plaintiff states that this is a case of first impression. But the principles involved and applicable to the facts are not new. Here novelty is present only in the assertion that the proper use of association funds may be avoided by a member who is committed to a minority view. Other organizations, such as medical associations, bar associations, and the like, have used their funds to support favorable legislation or defeat measures considered in the opinion of the majority or its duly authorized representatives to be inimical to the public interest or to its own welfare. It has never been considered that a difference of opinion within the association as to the use of association funds for such purposes, where otherwise lawful, was a matter for judicial interference.96

Thus DeMille declares the majority's right to secure compensation from every member to secure the defeat of legislation likely to injure the union.97

94. Id. at 149, 187 P.2d at 776, citing United States v. White, 322 U.S. 694, 701 (1944).
95. Id. at 150, 187 P.2d at 776.
96. Id., 187 P.2d at 776-77.
97. Professor Cox approved the DeMille result, arguing "on balance it would seem unwise to enact broader legislation, or for a court to set aside the expulsion of a member who refused to pay nondiscriminatory assessments, approved by the majority, for political purposes." A. Cox, Law and the National Labor Policy 108 (1974).
4. The Scope of Permissible Relief

The Supreme Court has held, reasoning from the principle of majority rule, that internal rules and regulations imposed by labor unions or their members are generally beyond the reach of NLRB jurisdiction under section 8(b)(1)(A), so long as there has been no attempt or threat to induce employer discrimination. Judicial reluctance to intervene in internal union affairs has been expressed both with respect to substantive rights and to selecting an appropriate remedy for individual members. Thus, in connection with political expenditures, the Supreme Court has placed limits on the scope of remedial relief. In *Street*, the Court warned that remedies must be fashioned so as to reconcile minority and majority rights:

The majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other.

The Court has been careful to avoid broad, sweeping remedies, and for this reason has avoided both class actions and injunctive relief. Thus, the *Allen* Court, quoting *Street*, required some form of notice:

"[Dissent is not to be presumed. It must affirmatively be made known to the union by the dissenting employee."

"No respondent who does not in the course of the further proceedings in this case prove that he objects to such use will be entitled to relief. This is not and cannot be a class action."

*Street* similarly ruled out class actions, finding:

only those who identified themselves as opposed to political uses of their funds are entitled to relief. . . .

[The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.

The Supreme Court has further indicated that injunctions restraining enforcement of the union shop are plainly inappropriate.

Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant un-

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99. 367 U.S. at 773.

100. 373 U.S. at 118-19, quoting *Street*, 367 U.S. at 774.

101. 367 U.S. at 774.
ions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.\textsuperscript{102}

Injunctive relief, which is disfavored in labor law, is generally denied in the absence of proof that any other remedy would be inadequate or that the harm would be irreparable, an allegation difficult to prove in such cases.\textsuperscript{103} For example, in an action to enjoin Treasury officials from conferring tax exempt status on a labor organization which spent dues monies on political campaigns,\textsuperscript{104} the court of appeals held remedies for such violations were limited to restitution, and injunction was reserved for exceptional cases. The court recognized that:

the precedents do establish that to some extent, at least, a union's claim of constitutional right to engage in political activity could not be terminated without raising "the gravest doubt" as to constitutionality, . . . and "issues not less than basic to a democratic society."\textsuperscript{105}

For these reasons, courts have, without exception, refused to order "class-based" relief, or invalidate an entire fund. For want of a better remedy, courts have generally chosen two remedial solutions: (a) prohibition of expenditures for political causes opposed by a complaining employee of a portion of the moneys exacted, in the proportion that the union's total expenditure for political activities has to the union's total budget; and (b) restitution to a dissenting employee of that portion spent on political causes the union had been advised the employee opposed.\textsuperscript{106}

Commentators have viewed this solution with mixed reactions. The return of a percentage of exacted funds used for political purposes has been characterized as of little practical value,\textsuperscript{107} while others have suggested that the insignificance of the remedy may be fully commensurate with the small amount of actual financial harm done.\textsuperscript{108} The remedy has, for this reason, been commended as a useful stopgap.\textsuperscript{109}

As an alternative, the Court has several times urged adoption of internal union remedies, while cautioning that such remedies are always subject to judicial review.\textsuperscript{110} Another alternative the Court has recommended is "opting-out," based on the British experience of "con-

\textsuperscript{102} Id. at 771; Allen, 373 U.S. at 119-20.
\textsuperscript{103} See, e.g., Allen, 373 U.S. at 119.
\textsuperscript{104} Marker v. Shultz, 485 F.2d 1003 (D.C. Cir. 1973).
\textsuperscript{105} Id. at 1005 (citations omitted), quoting United States v. CIO, 335 U.S. 106, 121 (1948) and United States v. UAW, 352 U.S. 567, 570 (1957).
\textsuperscript{106} Street, 367 U.S. at 775; Allen, 373 U.S. at 120-21.
\textsuperscript{107} Bickel, supra note 36, at 1518.
\textsuperscript{108} Bickel, supra note 36, at 233, 238.
\textsuperscript{109} Railway Labor Act, supra note 36, at 550.
\textsuperscript{110} See, e.g., Abood, 431 U.S. at 242; Allen, 373 U.S. at 122.
tracting out." The employee would be entitled to a refund of past dues expended for political purposes, and a future reduction of dues in the same proportion as the refund. The Allen Court advised that future suits might be avoided if unions adopted methods for refunding to dissenters some portion of their dues. In response, the UAW's constitution was amended to provide for an "opting-out" rebate procedure. As


The "check-off" system has also been advocated as a method which preserves constitutional rights of dissenting members. See, e.g., Gale, supra note 67, at 312-14.

Justice Frankfurter, dissenting in Street, 367 U.S. at 817, commented on the history of this remedy in England:

The course of legislation in Great Britain illustrates the various methods open to Congress for exempting union members from political levies. As a consequence of a restrictive interpretation of the Trade Union Act of 1876, 39 & 40 Vict., c. 22, by the House of Lords in Amalgamated Society of Ry. Servants v. Osborne, [1910] A. C. 87, Parliament in 1913 passed legislation which allowed a union member to exempt himself. 112. The UAW's constitution provides:

(a) Any member shall have the right to object to the expenditure of a portion of his dues money for activities or causes primarily political in nature. The approximate proportion of dues spent for such political purposes shall be determined by a committee of the International Executive Board, which shall be appointed by the President, subject to the approval of said Board. The member may perfect his objection by individually notifying the International Secretary-Treasurer of his objection by registered or certified mail; provided, however, that such objection shall be timely only during the first fourteen (14) days of Union membership and during the fourteen (14) days following each anniversary of Union membership. An objection may be continued from year-to-year by individual notifications given during each annual fourteen (14) day period.

(b) If an objecting member is dissatisfied with the approximate proportional allocation made by the committee of the International Executive Board, or the disposition of his objection by the International Secretary-Treasurer, he may appeal directly to the full International Executive Board and the decision of the International Executive Board shall be appealable to the Public Review Board or the Convention Appeals Committee at the option of said member.

UAW CONST. art. 16, § 7, quoted in Reid v. UAW, 479 F.2d at 518-19 n.1. Courts have expanded their control over expulsion proceedings as well. Professor Cox has summarized these proceedings as follows:

Although the legal rules were originally formulated in cases involving religious organizations, social clubs, and, somewhat later, fraternal benefit associations, the courts have evolved satisfactory rules applicable to the expulsion of union members. Upon the theory that improper expulsion violates the member's interest in the organization's property or a contract between him and the other members made up of the constitution and bylaws, or in recent years, upon the ground that there is a tortious interference with an advantageous relationship, the courts will set aside an expulsion upon any of five grounds: 1. The procedure violated the union's constitution or bylaws. 2. The constitution or bylaws did not authorize expulsion for the alleged offense. 3. The procedure, though it conformed to the union's constitution and bylaws, did not afford the member a fair hearing.
will be argued later, the most appropriate alternative would be to combine compulsion with "opting-out" in order to satisfy both individual and organizational needs.

C. Other Limits on Labor Union Political Contributions: Federal Election Campaign Law and LMRDA § 501

In addition to first amendment considerations, Congress has created statutory restrictions on campaign financing which affect unions and corporations directly, in the practical establishment and operation of political funds. These restrictions range from setting dollar amounts on campaign contributions to reporting requirements, use of compulsory dues and regulation of lobbying activities. Some of these restrictions apply only to federal elections, while others apply to the states; some involve criminal sanctions, while others impose only a ritual slap on the wrist. To catalog all the statutes, regulations and practices which affect union political expenditures is well beyond this article. Yet a brief overview of the principal statutory provisions may prove helpful in developing the argument which is to follow.

1. Federal Election Campaign Act

In 1971, Congress passed the Federal Election Campaign Act, which, with its 1974 and 1976 amendments, limited union and corporate contributions to "separate segregated funds" which could not exceed $5000 per candidate. The Act did not regulate expenditures for communications by unions to their membership, or the costs of establishing and adminstering separate segregated funds.

As Senator Hansen, author of the 1971 Act, remarked, [I]t should be noted that this prohibition is the most far-reaching in the entire election law. While [section 610 is] based on a fear of the effects

4. The expulsion, though it was authorized by the union's constitution and bylaws, was 'unreasonable', contrary to "public policy", or contrary to "natural justice".
5. The expulsion was in bad faith because the purported ground was only a pretense for getting rid of a troublesome member.

A. Cox, Law and the National Labor Policy 956 (1974) (footnotes omitted). Nonetheless, Cox recognized that,

Expulsion may be used as a method of suppressing criticism or destroying political opposition. Furthermore, quite apart from problems of union government, control over membership may be used to restrict individual liberty, for example, where members are disciplined because of activities in state or national politics distasteful to union officials.

Id.

113. See text accompanying notes 185-208 infra.
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of aggregated wealth on politics [, corporations and labor] organizations are not the sole repositories of funds adequate to finance big money contributions. Yet Congress has never regulated the activities of legal, medical or farm organizations, for example, nor has it placed comparable stringent limitations on wealthy individuals. . . .

Section 304 of Taft-Hartley was incorporated into the United States Criminal Code as section 610 (now 2 U.S.C. § 441b), thus

117. 117 Cong. Rec. 43380 (1971). The 1974 Amendments limited contributions by individuals to $1,000 per candidate for federal office with a total contribution ceiling of $25,000 (reduced to $20,000 in 1976, 90 Stat. 457 § 510(a)(i)) yearly for all candidates, expenditures by an individual “relative to a clearly identified candidate” were limited to $1,000 per year, the amount of personal funds that could be spent by candidates in their own campaigns was limited, total expenditure limits for federal campaigns were specified, cash contributions in excess of $100 and contributions from foreign countries were banned, reporting and disclosure requirements were strengthened, the Federal Election Commission was created, with responsibility for oversight and civil enforcement powers, and a public financing system for presidential contests was elaborated. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263 (1974). Several of these provisions were either repealed or amended by the FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (codified at 2 U.S.C. §§ 437-455 (1976)). Section 441b(b)(2), which replaced 118 U.S.C. § 610, provides:

the term “contribution or expenditure” shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

In addition, section 441b(b)(3) makes it unlawful:

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction; (B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and (C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

Section 441b(b)(5) of the Act provides:

Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.


118. Act of June 25, 1948, Pub. L. No. 80-772, 62 Stat. 723 (1948). The statute was amended in 1951, Act of October 31, 1951, ch. 655, § 20(c), 65 Stat. 718 (1951), to subject any person who accepts or receives any prohibited contributions, as well as any person or organization which “makes or consents to” prohibited expenditures or contributions, to a maximum penalty of
making it enforceable in a federal criminal prosecution by the Attorney General. References to sections 304, 610 and 441b thus all refer to the same general prohibition against certain campaign expenditures.

The issue of voluntary contribution to segregated political funds first reached the Supreme Court in *Pipefitters Local 562 v. United States,*¹¹⁹ a case which arose prior to the 1971 Act. There a union and several of its officers were indicted for conspiracy to violate section 610 by spending money in a federal political campaign. The Supreme Court reversed the defendants' convictions based on an improper jury instruction, sidestepped the constitutional question, and held: "Section 610 does not apply to union contributions and expenditures from political funds financed in some sense by the voluntary donations of employees."¹²⁰

Although the Court did not explain what it meant by the words "in some sense," it did cite favorably Senator Taft's comment that:

If the labor people should desire to set up a political organization and

$10,000 or imprisonment for two years, or both in the case of a willful violation. As amended, the provision reads:

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

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

Id.

In addition to direct regulation embodied in section 304 and section 441b, the Federal Regulation of Lobbying Act (1946), 2 U.S.C. §§ 261-270 (1946), required unions to file reports of legislative spending with the Clerk of the House of Representatives if they "solicit, collect, or receive" money for the principal purpose of influencing federal legislation. The Supreme Court's narrow construction of that statute, together with its exemptions, contributed to the failure of filed information to give an adequate picture of lobbying in general and labor lobbying in particular, see, e.g., H. Wellington, *Labor and the Legal Process* 223 (1968), since the Act does not inquire into the source of lobbying funds.

¹¹⁹. 407 U.S. 385 (1972). *See also* United States v. Pipefitters Local 562, 434 F.2d 1116, 1121 (8th Cir.), affirmed on rehearing, 434 F.2d 1127 (8th Cir. 1970) (en banc).
¹²⁰. 407 U.S. at 409.
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obtain direct contributions for it, there would be nothing unlawful in that, just so long as members of the union know what they are contributing to, and the dues which they pay into the union treasury are not used for such purpose.\textsuperscript{121}

In addition, the Court held in \textit{Pipefitters}: 1) that the words "separate" and "segregated" are synonymous, so that political funds need to be separated from general treasury funds only in the sense that the political monies must be kept distinct from dues and assessments, as two separate accounts;\textsuperscript{122} 2) that while general treasury funds may not be used directly for political purposes, they may be used to administer and maintain a political fund;\textsuperscript{123} 3) that while contributions to a segregated fund must be based on notice of its political nature and contain an option of refusal, such funds may be actively solicited by union officials.\textsuperscript{124}

The Court also commented on the standards for "separate" and "voluntary" funds, indicating that they must be:

separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments. We hold, too, that, although solicitation by union officials is permissible, such solicitation must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional power.

\textmd{... [T]he test of voluntariness under section 610 focuses on whether the contributions solicited for political use are knowing free-choice donations. The dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member. Whether the solicitation scheme is designed to inform the individual solicited of the political nature of the fund and his freedom to refuse support is, therefore, determinative.}\textsuperscript{125}

The Court focused its attention not on problems of corruption or undue influence, but for the first time on voluntary contribution, labeling as a "misapprehension" the idea that Congress intended to ban the collection or use of members' voluntary contributions.\textsuperscript{126} In subsequent caselaw, the federal courts began to close the loopholes and reinforce section 610.

Following \textit{Pipefitters}, a federal district court in Missouri held in \textit{Barber v. Gibbons},\textsuperscript{127} that pledging a portion of mandatory union dues

\textsuperscript{121} Id. at 417, quoting 93 Cong. Rec. 6439 (1947).
\textsuperscript{122} Id. at 414, 422-24.
\textsuperscript{123} Id. at 429-30.
\textsuperscript{124} Id. at 414-15.
\textsuperscript{125} Id. (footnote omitted).
\textsuperscript{126} Id. at 415-16 n.28.
\textsuperscript{127} 367 F. Supp. 1102 (E.D. Mo. 1973).
to a voluntary political fund associated with the union constituted a
section 610 violation. The court reasoned that if all members owed the
same amount of dues, reduction in the dues of contributing members
forced those paying the full amount to carry a heavier burden of sup-
port for the union's non-political activities.

In *United States v. Boyle*,128 the D.C. Circuit upheld section 610
against a claim of overbreadth, since adequate protection for minority
members was not possible through less restrictive means. The argu-
ment that the goals of federal campaign financing statutes could be met
by the less restrictive alternative of majority rule did not impress the
court.129

In *McNamara v. Johnston*,130 departing from the *Pipefitters* line of
interpretation, the Seventh Circuit held that an injunction would not lie
against union violations of section 610 since the Federal Election Com-
mission had "primary jurisdiction" over civil enforcement.131 The
court, relying on legislative history, also held union officers did not vi-o-
late their fiduciary duty to the union, by making expenditures which
were banned under section 610, if such expenditures conformed to the
union's constitution and did not involve "personal gain" to the of-
ficers.132 The court deemed it "significant," although apparently not
indispensable, that dissenting members could have received a pro-rata
share of the political expenditures they opposed.133

The court was forced to this result by the Supreme Court's holding
in *Cort v. Ash.*134 In *Ash*, the Court held that section 610 did not sup-
port a derivative action for corporate violations, and that relief, if any,
should be based on state corporation law. Referring to involuntary
union membership, the Supreme Court had stated: "We intimate no
view whether our conclusion . . . necessarily would imply that union
members, despite the much stronger federal interest in unions, are also
relegated to state remedies."135 These cases led the NLRB's General
Counsel to determine that political activity under the Taft-Hartley
Act's section 304 was outside NLRB jurisdiction, and purely a matter
for state or federal intervention.136 Consequently, there have been no
NLRB decisions in this area.

In 1976, Congress amended the Federal Election Campaign

129. *Id.* at 763.
130. 522 F.2d 1157 (7th Cir. 1975), cert. denied, 425 U.S. 911 (1976).
131. *Id.* at 1161.
132. *Id.* at 1163.
133. *Id.* at 1166.
134. 422 U.S. 66 (1975).
135. *Id.* at 78.
(CCH) (NLRB Dec.) ¶ 11,002.
Congress repealed some sections of Title 18 regulating union political activity, amended others and recodified the Act. The general ban on use of union funds in federal elections remained, but with a new group of exceptions. Regulations issued pursuant to the 1976 Act provided that unions could engage in the following activities with general treasury funds:

1. communicate with union members and their families on any subject whatsoever;
2. conduct voter registration and get-out-the-vote drives aimed at members and their families;
3. expend funds aimed at the general public in voter education campaigns; and
4. establish, administer, and solicit contributions to a separate, voluntary political fund.

Unions were still required to strictly segregate such monies, but union leadership was left free to direct the fund and solicit contributions to it. Members had to be informed of the political purpose of the fund, and of their option to refuse to contribute without reprisal.

Under the 1976 Amendments, a union was prohibited from:

1. making any contribution in connection with a federal election;
2. making expenditures in connection with a federal candidate; and
3. accepting or expending coerced contributions to a separate political fund.

Once a union had established a legal fund, it could then contribute up to $5,000 per candidate for federal office and up to $15,000 to a national party committee, could make independent expenditures of an unlimited amount, including active electioneering aimed at the general public, and could use the fund for any purpose otherwise permitted to a general treasury fund.

2. Labor Management Reporting and Disclosure Act

In addition to remedies available through the Federal Election Campaign Act, certain internal remedies have been created for union members. In 1959, Congress passed the Landrum-Griffin Act, or Labor-Management Reporting and Disclosure Act (LMRDA), which guaranteed union members the right of free speech and association, including the right of assembly, in section 101(a)(2), and established

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140. 2 U.S.C. § 441b(a) (1976).
a fiduciary duty on the part of union officers, in section 501.\textsuperscript{144}

Section 501 originated in the House Education and Labor Committee, whose report called on government to make certain that union power was used, "for the benefit of the employees whom the unions represent...and not for the personal profit and advantage of the officers and representatives of the union."\textsuperscript{145}

The report, however, indicated section 501 was limited in scope, when applied to union expenditures:

Our language does not purport to regulate the expenditures or investments of a labor organization. Such decisions should be made by the members in accordance with the constitution and bylaws of their union. Union officers will not be guilty of breach of trust when their expenditures are within the authority conferred upon them either by the constitution and bylaws or by a resolution of the executive board, convention or other appropriate governing body (including a general meeting of the members) not in conflict with the constitution and bylaws.\textsuperscript{146}

During debate over the bill, Senator McClellan indicated that only limited interference with union affairs was contemplated:

Mr. Kennedy. Suppose an officer of a union expends money for an educational purpose, to advance what he and the other officers consider to be the interests of the union. Assume that there is nothing dishonest about the expenditure. It is not an expenditure for the purpose of taking money in a back-door deal. It is an honest expenditure for educational purposes, without any impropriety. Under the amendment of


Section 501(a) of the Landrum-Griffin Act provides:

(a) The officers, ... and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

\textsuperscript{29} U.S.C. § 501(a) (1976).


\textsuperscript{146} Id. at 81.
the Senator from Arkansas, would it be possible for a member to sue, on the argument that the educational purpose, which he does not like, is not really in keeping with the purposes of a labor organization? Could he take the case into court?

Mr. McClellan. He might make such an allegation, and he might go to court. Each case must stand on its own merits. If the court found that the money was used for legitimate union purposes, for purposes which were proper under the constitution, and that it had been voted to authorize the use of money for educational purposes, I think it would come within the purview of the authority and right of the union officer. But, as my friend knows, the purpose of this amendment is to get at those who organize an executive board of their own, whose members are all in cahoots. One says to the other, "I will keep you employed at a good salary and give you a good expense allowance. You just do what I want."

... If the Senator has any thought that I am trying to interfere with COPE [the AFL-CIO's political action committee], that is not correct. There may be amendments directed to that point, and to deal with that direct question. However, I am not offering my amendment on the direct question of political contributions.147

Moreover, in 1958, the Senate voted down an amendment to the proposed Labor-Management Reporting and Disclosure Act,148 which provided, inter alia:

Any member of a labor organization whose employment is conditioned upon such membership may file a petition with the Secretary [of Labor] requesting that moneys paid as membership dues or fees to such labor organization be expended exclusively for collective bargaining purposes or purposes related thereto.149

While there was some congressional concern over the Hanson-Street problem,150 and Street was called to the attention of the Senate,151 neither the House nor the Senate chose to act on it.

It thus appears, from the legislative history of section 501, that so long as a union leadership had received legitimate authorization under its constitution or bylaws, no political expenditure could be considered a violation of the fiduciary duties created by section 501. This view was upheld in 1979 by the Eighth Circuit in Gabauer v. Woodcock.152

There, union members had alleged that disbursement of funds to political,

151. II Legis. Hist. at 1291-93.
152. 594 F.2d 662 (8th Cir.), cert. denied, 444 U.S. 841 (1979).
social and civil organizations violated the union officers' fiduciary duties under section 501 of the Landrum-Griffin Act.

The court of appeals upheld the district court's dismissal of the alleged breach of fiduciary duty stating: "In our view, the expenditures were clearly authorized by the union's constitution and resolutions of the union's national convention." 153 The court added:

Given the broad authorizations endorsed by the union membership and the absence of specific restrictions, this Court has neither the power nor standards by which to review expenditures challenged by a minority of the union merely because of their politically controversial character. 154

The court of appeals also considered an allegation that the union had violated section 610, reenacted as 2 U.S.C. § 441b, and was liable in damages. The UAW's Community Action Program (CAP) was financed primarily by union dues, while its V CAP (Voluntary Community Action Program) funds were separate and voluntarily financed. The court held that the question was not properly before the court, and affirmed the district court's granting of summary judgment. Yet it indicated in a footnote, that a separate action could be brought under section 441b:

We do not hold that violations of 18 U.S.C. § 610, and of its successor statute 2 U.S.C. § 441b, can never amount to a violation of § 501. Insofar as it is not reasonable to infer that a given donation was authorized, we think there is a remedy under § 501 for violations of federal election laws. We merely hold that apparent authority, if relied on in good faith, is a defense to liability under § 501.155

The principle of Gabauer, that a majority may authorize a tax for political purposes even against the wishes of a dissenting minority; should apply regardless of the legislative scheme, provided some form of "reasonable accommodation" is made to the rights of minorities. Certainly union members, in the absence of fraud, may reasonably understand the issues that are at stake, and determine that such contributions are in their interests, as was done in DeMille v. American Federation of Radio Artists.156 Nothing in the Federal Election Campaign Act or the Labor-Management Reporting and Disclosure Act would indicate otherwise, except where specific prohibited conduct occurs, for example, as with a failure to report financial contributions.

In summary, we have seen that labor union majorities possess a right of association for political purposes, which may translate into the

153.  Id. at 668 (footnote omitted).
155.  594 F.2d at 674 n.7 (citations omitted).
156.  31 Cal. 2d 139, 187 P.2d 769 (1947).
right of the majority to spend funds, even though they have been derived from a dissenting minority. Following World War II, an effort to block labor's political activity merged with concerns over individual liberty, in the form of an emerging doctrine, or right, of non-association. In an effort to distinguish funds which might be spent over members' objections from those which could not, the Supreme Court distinguished collective bargaining from political expenditures, and accepted the "free rider" argument as applicable only with regard to the former. Unfortunately, this distinction has no definable limits and could well encourage anti-union employers and dissident members to attack the financial base of unions.

The scope of available relief also has become more difficult, since return of monies spent on non-bargaining functions may clear the way for wholesale assaults on the union budget, involving detailed judicial supervision of a broad spectrum of expenditures. Federal statutes have not created a suitable alternative, as they have involved uncertain, often drastic criminal remedies or have provided only limited statutory authority for union expenditures.

What is needed, then, is an approach which will accommodate the legitimate interest in individual non-association with the equally legitimate interest of unions in spending funds for political purposes.

III

ANALYSIS

A. In General

The present ban on union political expenditures from compulsory membership contributions is based on an untenable distinction between collective bargaining and politics, and is founded on a solicitude for dissenters that misconceives the basic principles of majoritarian democracy.

The motivation behind the distinction between collective bargaining and politics is one of separating labor unions from political action. Justice Rutledge agreed, concluding that the object of this distinction was:

to force unions as such entirely out of political life and activity, including for presently pertinent purposes the expression of an organized viewpoint concerning matters affecting their vital interests at the most crucial point where the expression would become effective.158

157. See text accompanying notes 193-95 infra.
158. United States v. CIO, 335 U.S. 106, 150 (1948) (Rutledge, J., concurring). Despite this judicial effort to limit the labor movement, most commentators have concluded that "a reliance on economic force alone would place labor at a permanent disadvantage with respect to corporations, which generally have substantially greater financial resources." Comment, The Regulation of
Thus the attack on mandatory political expenditures by labor unions contains at its base a desire to restrict the power of organized labor. This, in turn, has the effect of limiting rather than extending the sway of popular democracy, by maintaining the power of corporate wealth.

In addition, the problem underlying the utilization of the politics/collective bargaining distinction is one of accommodating the rights of labor unions and their individual members, which, in turn, rests on the conflict between principles of majority rule and minority right. In the balance hang the rights of unions to effectively compete with corporations in political and economic action, and the extent to which we recognize the rights of members of industrial associations to individual liberty.

Simply put, the position of management and some dissident members of labor unions is that political activity may not be made compulsory, because individual union members possess both free speech and a right not to associate with or support political causes with which they disagree. The position of most unions is that they have a right to engage in political action under the democratic principle of majority rule, and will become less effective in collective bargaining if they are denied permission to exact mandatory contributions for political and legislative activity.

A decision for one side places the other in apparent jeopardy, yet both have value and a colorable claim to legal protection. Furthermore, any absolute restriction or prohibition, whomever it might favor, would deny important personal rights and frustrate the policies of the National Labor Relations Act in securing industrial peace. Short of a fundamental political realignment in the contest between corporate and trade union organizations for legislative programs, some methods may nonetheless be devised to reach a compromise over certain basic principles to satisfy, in part, the interests of both sides to the dispute.

As Joseph Rauh has argued:

From the first, there has been no line of demarcation between the bargaining, educational and political activities of unions. There is a tradition of over one hundred years of union political activity in this country. As the federal government has increasingly legislated in the field of union activity and on economic matters such as wages, hours and conditions of employment which are of the most immediate concern to laboring men as workers and as union members, the necessity for labor union political activity has correspondingly increased . . .

Political action and the public presentation of the union’s views on who best represents the interest of working men [sic] and their associations, is essential to the preservation and advancement of their common interests. This is recognized by the constitution and organization of every major labor union in the country. Political representation of union members’ interests as union members and workers is at the very center of the purposes for which labor unions are formed and maintained.

In *Abood*, the majority noted that many of the union's expenditures had been directed at disseminating information about political candidates and programs, or at publicizing the position of the union. The Court pointed out that as to such expenditures, injunctive relief would restrain the expression of political ideas guaranteed by the first amendment, since union majorities also have an interest in stating their views without being silenced by dissenters. To obtain an appropriate reconciliation between majority and minority interests, courts were directed to select remedies which protected both to a maximum extent. As noted earlier, the basic problem was one of defining limits.

While the *Abood* Court sought a balance which recognized the government's need to insure labor peace, it did not balance the right of the union to majority rule against the dissenter's right not to associate with a result they had opposed. Yet the balance, if it is to be struck properly, must recognize the right of union majorities to associate for political purposes, and expend monies to that effect. The difficulty lies in combining this right with that of a dissident minority not to associate, i.e., the problem of compulsory contribution.

It has been persuasively argued on behalf of majority rule, that any ban on union political contributions and expenditures "conflicts with the associational rights of union members by preventing them from supporting candidates collectively through the union." Moreover, Justice Harlan, concurring in *Lathrop*, suggested that the benefits of compelled contribution were so great and the injury to the dissenters so remote that the latter's claim to constitutional protection was without substance. The same rationale may be advanced here.

Under the Court's present rationale, however, the union must be concerned always for the individual, and thereby neglect the interest of the whole, whose vision brought it to life. By intervening in union decisionmaking to protect the personal freedom of the individual worker, the courts have decreased the political freedom of workers en masse, limiting the democracy of majority rule in favor of the democracy of minority right.

As a result, in many instances, it is not the freedom of the majority that limits the minority, but vice versa. While the central political conflict within industrial institutions is now between corporations and unions, the next conflict may be between hidebound union bureaucracies and their democratic rank and file. It is therefore important, from the

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perspective of democracy, as well as that of minority rights in general, that some consideration be directed at the limits of internal dissent.

The first such limit is clearly that of majority rule. A minority may not transform itself into a majority by simple declaration of right. It may, however, possess the ability to become a majority at some future time. A second limit on minority rights occurs not as a matter of internal logic, but as a result of the pressure of external conflict. Under conditions of modern capitalist production, one group has exclusive possession of factories, offices, equipment and means of work, while another group possesses only its ability to use these objects productively, and must sell this ability for a wage. Thus, exerting control over the conditions of supply and demand, as well as organizational strength has direct bearing on wages and other social benefits. Internal dissent therefore appears to labor leadership as a desertion to the enemy in a war over compensation, and in some cases, control over the production process itself. This view is enhanced by recognition that the self-interest of the parties creates an intrinsic conflict between owners, managers and supervisors on the one hand, and employees on the other, over the division of the profit share. A primary question therefore becomes: which side in this conflict between labor and management should government, including the courts, take? Not only direct regulation, but simple reporting, observation and investigation, like Heisenberg’s “uncertainty principle” in physics, affect the balance of power between these industrial contestants. For the state to sanction or prohibit any action is to objectively favor one side or the other, no matter how strenuous the protestation of neutrality. And, when the state acts to regulate the participation of labor in the political process, it simultaneously alters the ability of the parties to determine the whole, or general outcome in the struggle for power between labor and management, as well as its constituent parts.

The regulation of competing interests in the political process by government, and especially the judiciary, is thus not disinterested, but designed to enable one side to gain an advantage over its opponent. And the rule that appears to limit one of the parties only in the form of its participation, actually limits it in substance as well. By ignoring this reality and concentrating on apparently neutral principles, the judiciary affects the balance of power between contestants without any discussion of policy, and substitutes its own decision for that of the electorate, without either explicit recognition of what it is doing, or debate over substantive results.

A central policy consideration implicated in this debate concerns the problem of social equality, which is widely correlated with income, and the exercise of political power. It is a central principle of democ-
racy that popular rule must not be conditioned upon the possession of wealth. Yet the de facto rights of the parties in the struggle between labor and management are unequally balanced, even when measured by aggregate dollar amounts, or by more rigorous per capita comparisons.

For example, in the 1980 elections, Common Cause reported that fifty-four committee chairpersons and congressional leaders received $6.5 million from political action committees, with corporate groups contributing $4.1 million of that amount. Business groups contributed roughly twice the amount contributed by labor.162 Furthermore, in 1980, corporate PACs distributed over $10.7 million among 1,106 candidates for Congress, with chemical industry PACs spending nearly $3 million, in an effort to ease environmental legislation. In 1974, there were 401 corporate PACs and only 201 labor PACs. By 1980, there were over 1,940 corporate PACs to 225 labor PACs.163

These disparities are not minor, but are major dislocations with profound effect on the totality of political rights. It is ludicrous to suggest that one may handicap the mouse without increasing the power of the cat, or that a "neutral" prohibition against biting, while permitting each animal to scratch, will not produce the same unequal effect.

In the guise of a neutral labor policy, the strengths of these combatants have been variously adjusted, leaving untouched the unequal distribution of wealth which continues as an "invisible hand" in politics. One cannot, therefore, speak of restricting political expenditures by unions without recognizing the enormity of what is being altered, or the issues that hang in the balance. These countervailing rights require explicit recognition in reassessing the nature of our political process, and in determining how decisions are actually made. We must recognize the importance of extending democracy, not by halves, or to those who already conform in some measure to its precepts, but by expanding its application to the industrial sphere. So long as money remains a force, political power will be dependent on financial contributions, and recognition of the "individual rights" of union members not to participate will diminish the political might of labor as a whole.

Therefore, the following principles should inform us how disputes

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162. U.S. News & World Rep., Apr. 20, 1981, at 12. The 1980 figures are by no means unusual. For instance, in 1972 Congressional candidates received contributions totaling $69.7 million, of which one fifth ($16.6 million) came from special interest contributors and political party committees most of which were corporate. Less than one percent ($3.6 million) came from labor and a like amount ($3.4 million) originated with business, agricultural, and health organizations. Common Cause, 1972 Federal Campaign Finances, in INTEREST GROUPS AND POLITICAL PARTIES iv-vi (1974).

over issues of power should be resolved. First, it is a violation of neutral principles to predetermine an outcome by selection of one over another set of legal obligations, maximally restricting one contestant while minimally restricting another. This outcome occurs wherever the reality of conflict is obscured or papered over, and policy decisions are made in the guise of legal *ratio decidendi*.

Second, it is partisan to select a principle incapable of equal application. As a result of its superior economic position, management will always hold an advantage over labor in the amount of money it expends in political contests. Both by ignoring the reality of unequal wealth, and by providing for a right of nonassociation which only affects union members, the courts are putting labor at a disadvantage, while corporate funds remain relatively untouched. Policy decisions have remained in the background, undisclosed and undiscussed.

**B. The Untenable Distinction Between Collective Bargaining and Political Activity**

Collective bargaining is defined in the Taft-Hartley Act as:

> 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 wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . .

This narrow definition excludes a number of factors which directly affect the bargaining process. Archibald Cox has noted, for example, that:

> It is difficult, if not impossible to separate the economic and political functions of labor unions. Right-to-work laws affect union organization and collective bargaining. Legislation subjecting unions to the anti-trust laws or confining their scope to the employees of a single company would greatly weaken their bargaining power, if it did not destroy them altogether. . . . Political action in these spheres of union interest is hardly more than incidental to the union's economic activities. A similar link exists even when a union takes political action upon a broader front. The basic philosophy of a President and his party affects appointments to agencies like the National Labor Relations Board, which in turn exert tremendous influence upon the course of labor relations. Even the tariff impinges on labor negotiations. The bargaining power of the Hatters Union, for example, is affected by the competition of low-cost foreign goods.

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It should therefore be obvious that any effort to distinguish between collective bargaining and politics will lead to absurd results: Who is to say where the line is to be drawn between collective bargaining and political action? If a union official comes out of a negotiating session and complains about the attitude of representatives of the Federal Mediation and Conciliation Service who have been in attendance, has he expressed a political view? Supposing unions were barred from political utterance, what would this mean in the concrete to their leaders either in an official or personal capacity? For example, would the AFL-CIO have to stop paying the salary of President George Meany when he is requested to appear before a House committee to state his views on pending labor or social legislation?  

One economist has gone so far as to define unions as essentially political organizations, which also represent their members in collective bargaining. Legal writers have similarly concluded that “political activity is a legitimate if not indispensable means of advancing the cause of organized labor”; that “political activities may be germane to collective bargaining insofar as favorable legislation, or the defeat of unfavorable legislation, strengthens the union’s bargaining position”; that unions have an “inherent interest” in lending financial support to political causes; that “union political activity is wholly germane to a union’s work in the realm of collective bargaining, and thus a reasonable means to attaining the union’s proper object of advancing the economic interest of the worker”; and that “union support of platforms and candidates favorable to labor is a natural adjunct of other union activities.”

Recognizing the importance of political involvement to labor unions, Yale economics professor Lloyd G. Reynolds similarly commented:

It is often debated whether unions should “go into politics”; really, they have no choice in the matter. They are automatically in politics because they exist under a legal and political system which has been generally critical of union activities. The conspiracy suit and the injunction judge have been a problem for unions from earliest times.

A minimum of political activity is essential in order that unions

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171. Woll, supra note 166, at 149.
may be able to engage in collective bargaining on even terms.\textsuperscript{173}

Two other reasons have been suggested by commentators to explain why union political activity is crucial to the performance of a union’s functions:

First, certain objectives in which labor has an interest cannot be achieved at all through collective bargaining. These include public education, social insurance of various kinds, adequate housing and effective anti-depression measures. Secondly, certain objectives which might be achieved through collective bargaining can be achieved much faster through legislation. This category embraces legislation covering minimum wages, maximum hours and the elimination of child labor.\textsuperscript{174}

Dissenting in \textit{Street}, Justice Frankfurter took issue with the Court’s suggestion that political action was not legitimately related to collective bargaining, reviewing numerous improvements in working conditions and employee status that had been won in Congress and examining the relationship of organized labor to the operations of the executive and legislative branches of the federal government over many years. Frankfurter concluded:

When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, it seems rather naive for a court to conclude—as did the trial court—that the union expenditures were “not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents.” The notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment. And this Court accepts briefs as amici from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor. It disrespects the wise, hard-headed men who were the authors of our Constitution and our Bill of Rights to conclude that their scheme of government requires what the facts of life reject.\textsuperscript{175}

Indeed, the Court in \textit{Abood} admitted that simple distinctions could \textit{not} be made between collective bargaining and political expenditure, even from the point of view of dissenting members.\textsuperscript{176} If we assume with the Court in \textit{Abood}, that as part of a collective bargaining


\textsuperscript{174} Woll, supra note 166, at 150.

\textsuperscript{175} 367 U.S. at 814-15 (Frankfurter, J., dissenting) (footnotes omitted).

\textsuperscript{176} \textit{See text accompanying note 72 supra}.
agreement, a union has negotiated a medical plan which includes payments for elective abortion, it cannot be maintained that funds spent for these purposes are not political, or that the expenditure of union dues on their behalf will not violate individual conscience. If we assume that a collective bargaining bill is before the legislature, it is likewise plain that lobbying efforts will be “germane” to collective bargaining.

Other categories of “political” expenditure cover the gamut from testimony by union officials before legislative committees or executive departments, to solicitation of political contributions at union meetings, use of union halls for political events, use of mailing lists for political fliers, or union duplicators for political literature, supporting litigation with political goals in mind, visits with foreign political leaders, direct foreign aid or assistance, etc. The list is as limitless as the subjects of political inquiry or debate.177

Given such an ambiguous context, there is grave danger in prohibiting the use of money for purposes which may be examined as to substance, rather than “time, place and manner” regulation of the procedure of contribution. Courts may be tempted to substitute their own judgment for that of the union, or question its wisdom on a case-by-case basis, under the guise of a distinction which is unclear in the extreme.

Moreover, conflicts between labor and management have been resolved, ultimately, by contests in which the political and economic strengths of the contestants have been determinative. Under labor conditions in which employers and employees frequently find themselves at odds, and in a market economy where historically, wages and working conditions have fluctuated with the internal strength and militancy of employees, it cannot be said that political contributions have no rele-

177. In Street, the United States government recognized in its brief that it was precisely this broad range of expenditures that was at issue:

Numerous union activities and expenditures of different kinds [were] drawn in question. They range from testimony by union officials before legislative committees, and solicitation at union meetings of voluntary contributions to political organizations, to the use of union funds for political campaigns; from the endorsement of political candidates by unions and their periodicals, to “interpretive” and “non-objective” news articles by such journals; from union support of legislation concerning wages, hours, and working conditions to support of legislation pertaining to housing, farm programs and foreign aid; and from legislative activities and expenditures by the local lodge, to legislative and political activities and expenditures by the AFL-CIO.

These different kinds of expenditures and activities . . . may well involve differing considerations. For instance, support of legislation concerning wages and hours might be considered more “germane” to collective bargaining than support of legislation involving farm programs; and the majority of the union members may have an interest in associating together to publish their views in a newspaper, which interest may be entitled to greater protection than their interest in having the union render financial support to the campaign of a particular political candidate.

vance to collective bargaining or to "other mutual aid or protection." Mandatory contribution for the general good has long been an essential principle of labor unions, encapsulated in the slogan "an injury to one is an injury to all," and in frequent contributions made to other unions.

It has been recognized even by courts accepting the distinction between politics and bargaining, as in Havas v. Communications Workers,178 that categorization of union activities as collective bargaining in nature was "a matter of degree," and could only be accomplished on an item-by-item basis.

An added reason for viewing union political activity as essential to the collective bargaining process stems from the fact that labor law is incomplete. Collective bargaining is a form of private law designed to fill the gaps in articulated public policy, and is intentionally disjointed, so as to account for unforeseen circumstances. It is not intended to be complete or to prevent the parties from seeking support outside the plant. Both parties recognize that external pressures may be brought to bear in an effort to affect their collective agreement, and that political influence is one of those pressures. Indeed, the collective agreement, as many commentators have noted, is a product of power relationships which exist and become defined in large measure outside the bargaining process. Collective bargaining and politics may therefore be seen as nonexclusive tactics in a larger dispute resolution process, as opposed to clearly distinguishable alternatives.

Finally, it is unrealistic to expect labor unions not to engage in political action, or to fund such activity. Unions are not merely legal, but also political organizations. They rely on their members for expenditures to safeguard their future interests, both as to workers within a single bargaining unit and as to labor in general. To act otherwise would be to undermine their very existence, and to return to the conditions of labor instability which provided the reason for passage of legislation guaranteeing the right to bargain collectively.

C. The Need For Mandatory Contributions

One cannot discuss political activity and political power without reference to financing. And since corporations control a greater portion of the nation's wealth than does labor, the former exercise greater political influence, because elections depend to a considerable extent on money. While money may be numerically "out-voted" (since the majority of eligible voters are wage-earners), private campaign financing permits control over publicity, communications and transportation, which are essential for electoral success.

Money also captures, defeats and controls votes through media advertising, paid political staff, and expertise in campaign management. Thus, the constitutional principle of "one person-one vote," in reality becomes "one dollar-one vote."

Because campaign expenditures are necessarily so great, nonassociated workers are easily "out-voted" by the power of the wealthy. And while unions have grown to considerable size in the twentieth century, they cannot begin to match the disposable wealth of the major American corporations. The United Auto Workers as a whole cannot hope to equal General Motors in access to political funds, and must therefore remain inferior in ability to influence legislation, which in turn may have a corresponding impact on collective bargaining.

Moreover, it is generally recognized that voluntary contributions to political funds by union members do not nearly match compulsory funds. As Joseph Rauh pointed out:

The difficulty in raising these "voluntary dollars" should not surprise anyone. Union members generally believe that they have already contributed for all union activities by the payment of their union dues, intended not only for collective bargaining but also for legislation, political and other community activity. Union members do not expect that they will have to pay twice to protect their interests and are not anxious to contribute a second time.179

Another writer has argued that restricting a union to receipt of voluntary contributions automatically:

creates a free rider situation by preventing union members from spreading campaign contributions among the members who benefit from it. A union member may rationally decline to contribute even if he agrees that the election of a particular candidate is in his interest, because he may be convinced that others will contribute an amount sufficient to assure both the candidate's election and appropriate behavior by the candidate once in office. This disincentive inhibits the ability of union members to associate in the expression of their political preferences through financial support.180

For this reason, union members themselves believe in the necessity of certain forms of compulsion. With regard to compulsory attendance at union meetings, for example, Mancur Olson noted that:

there is a paradoxical contrast between the extremely low participation in labor unions and the overwhelming support that workers give to measures that will force them to support a union. Over 90 per cent will


not attend meetings or participate in union affairs; yet over 90 per cent will vote to force themselves to belong to the union and make considerable dues payments to it. An interesting study by Hjalmer Rosen and R.A. Hudson Rosen illustrates this paradox well. The Rosens conducted an opinion survey of District 9 of the International Association of Machinists and found many workers who told them that, since fines for absences from union meetings had been discontinued, attendance had dropped, as one member put it, "something awful." There was more dissatisfaction among the members over the poor attendance than on any other point covered in the extensive survey; only 29 per cent were satisfied with the attendance at meetings. The Rosens inferred from this that the members were probably inconsistent. "If the rank and file feel that members should attend meetings and are dissatisfied when they don't, why don't they correct the situation by all going to the meetings? The condition they are dissatisfied with is certainly in their power to change."181

Olson found, however, that these workers were not inconsistent: their actions and attitudes were a model of rationality when they wished that everyone would attend meetings and failed to attend themselves. For if a strong union is in the members' interest, they will presumably be better off if the attendance is high, but (when the fines for failure to attend meetings are not in effect) an individual worker has no economic incentive to attend a meeting. He will get the benefits of the union's achievements whether he attends meetings or not and will probably not by himself be able to add noticeably to those achievements.182

Similarly, some members of Congress recognized that unions required compulsory dues and fees when the Taft-Hartley Act was enacted in 1947.183 Congress concluded that union shop agreements were an acceptable method of eliminating "free riders," and at the same time, of securing financial assistance for a union's bargaining efforts.184

A "free rider" in collective bargaining is no less so when the union membership authorizes an expenditure of dues by majority vote for political causes with which the minority disagrees. This is the principle of DeMille, which declared the majority's right to secure contribution from every member for the defeat of legislation they believed would injure the union. The defeat of anti-labor legislation objectively benefits all union members, regardless of whether they agree with it, and their refusal to support financially such efforts makes them "free riders," just as though they had refused to pay dues.

Moreover, corporations are not faced with the "free rider" prob-

182. Id. (emphasis in original) (footnotes omitted).
183. See S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947).
184. Id. at 7.
lem. To restrict labor unions in relation to the dues they can collect from their members, but not corporate extraction of funds from top-level management, is to stack the deck against labor's right to political representation.

Despite the appearance of voluntarism, corporate contributions are in fact frequently coerced. The reality of corporate compulsion is hidden by subtle forms of manipulation. Power over promotions, hiring and firing, transfers and salaries are adequate to compel contribution from top management on request. The union has no such power, and must therefore lose in the battle of contributions.

Corporate executives, furthermore, regularly use corporate offices, facilities, and staff to solicit large contributions, loan private aircraft to candidates, duplicate campaign materials, and use advertising departments, telephone banks, and postage without reporting them as campaign contributions.

It is clear, therefore, that corporate political expenditures cause as great a problem as union expenditures, except that corporations are structured less democratically, and are less accountable to their management teams than unions are to their members. While Congress has accepted the principle of majority rule for unions by application of the rule of exclusive representation, a similar unitary principle at work in corporate hierarchies has not been legislatively recognized or judicially enforced. Since the principle of majority rule has been ignored in this regard, minority rights may be ignored as well. Meanwhile, corporate management is less protected against arbitrary discharge or discipline for disagreement over policy than are union members who are employees. The problem, therefore, is one of dual standards, not on the face of the law, but in its application.

IV

Proposal: The Charitable and Candidate Selection Options

It remains possible for unions to become fully involved in political action, represent their members in grievances and collective bargaining, eliminate the problem of the free rider, and recognize the rights of individual members to dissenting political beliefs or complete nonassociation. Unions may, for example, provide their members with a charitable option, or permit individual donations to alternate candidates. These options would satisfy both the need of labor unions to counter corporate political influence, and still recognize the rights of members to object to candidates, policies, or stands which they refuse to support actively.

At the outset, two points are clear. First, union memberships must
be held to have the right to decide, by democratic process and majority rule, to engage in legislative action and create political funds for that purpose, into which members must contribute, where the expenditure is reasonably calculated to serve the common good.

Second, individual members may be recognized to have a collateral right to be notified that they may refuse to contribute to candidates or political causes with which they disagree and may choose an alternative candidate or charity. Furthermore, they may not be disciplined or fired from their jobs for exercising this option, provided they do not thereby become free riders. Reasonable accommodation to minority rights may be compelled where majority rule is undiminished. This can occur where issues are not reasonably calculated to serve common goals, or where candidates are concerned, since they take a stand on more than one issue, and may support the union on some issues while disagreeing on others, or where a mutual benefit charity is concerned.

The largest part of labor's political expenditure goes to support legislation, rather than candidates, and a great deal of that legislation directly affects collective bargaining over wages, hours, working conditions and other interests which workers have in common. There is, thus, a logical difference between expenditures for specific legislation and expenditures for candidates whose platforms may contain objectionable planks. As to the former, contribution may legally be made compulsory, since, though political in form, legislative expenditures may be found reasonably necessary for collective bargaining or common political ends.

With respect to candidates for public office, however, reasonable accommodation to employee objections could be made without defeating the political goals of union leadership or relying on artificial distinctions between political and bargaining activities. In such cases, one alternative might be employee identification of candidates who would receive their portion of compulsory monies by special ballot, check-off, or general objection.

A second alternative used by several labor unions is the charitable contribution, especially where the charity has been created or augmented by collective agreement. A collective bargaining agreement may provide, for example, that political funds may be forwarded to the union "for allocation as designated by the worker." This language would imply that where dissenting members object to the union's political choices for the receipt of such funds, especially as regards candi-

186. Cf. Stason v. Mott, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976) (public agency may use tax revenues for legislative lobbying efforts, but not to "take sides" in a bond election campaign).
dates, they may *individually* designate their own recipients. This approach would avoid the constitutional and remedial difficulties which have troubled courts and would provide maximum support both for the principle of majority rule and that of minority rights. Employees should not be required to specify an alternative beneficiary for their funds, or to specifically object to each political expenditure. Yet should an employee *choose* to exercise this option, express language in the contract should support the right to do so, in lieu of transferring designated funds to a selected charity. Denial of this right would appear to be arbitrable under the contract, as well as being appealable within the union. With this preservation of employee choice, the dissenters' constitutional objections will have been largely satisfied.

The *Hanson*, *Street* and *Abood* cases leave open the question of whether compulsory dues or fees can be used to finance charitable work which is neither political nor directly related to collective bargaining or grievance handling. The resolution of this issue ultimately turns on which of two competing rationales advanced in *Hanson*, *Street* and *Abood* is deemed the controlling one. The first rationale assumes that only political expenditures are unconstitutional and suggests dividing union expenses into two categories: those that are political and invoke the protection of the first amendment, and all others, which may be made compulsory. The second rationale asserts that Congress permitted compulsory extraction of dues only for collective bargaining purposes, to offset the union's costs in discharging its statutory duties. Under this view, a dissenter could object to *any* use of compulsory monies for non-collective bargaining purposes.

The Supreme Court, in *Abood*, seemed to adopt the former interpretation, holding:

> [I]ndeed, *Street* embraced an interpretation of the Railway Labor Act not without its difficulties, . . . precisely to avoid facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining.\(^{187}\)

The Court, however, expressly refused to decide this point, stating: The appellants' complaints also alleged that the union carries on various "social activities" which are not open to nonmembers. It is unclear to what extent such activities fall outside the Union's duties as exclusive representative or involve constitutionally protected rights of association. Without greater specificity in the description of such activities and the benefit of adversary argument, we leave those questions in the first instance to the Michigan courts.\(^{188}\)

The Supreme Court's earlier decision in *Radio Officers' Union v.*

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187. 431 U.S. at 232 (citations omitted).
NLRB, also failed to clarify this problem, holding simply:

[L]egislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment for union dues and fees. Thus Congress recognized the validity of unions’ concern about “free riders,” i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

The furthest any court has gone in support of the second rationale is the decision of a California federal district court in Ellis v. Railway Clerks, where, in an extraordinary opinion unsupported by logic or rationale, the following activities were held to be non-collective bargaining in nature, and therefore not subject to compulsory contribution:

1. Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.
2. Operation of a death benefit program.
3. Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.
4. Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:
   a. employees not employed by Western Airlines;
   b. employees not employed in the air transportation industry;
   c. employees not employed in other transportation industries.
5. Publications in which substantial coverage is devoted to general news, recreational, and social activities, political and legislative matters, and cartoons.
6. Contributions to charities and individuals.
7. Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such program secured for its salaried officers and employees.
8. Conducting and attending conventions of BRAC.
9. Conducting and attending conventions of other organizations and/or labor unions.
10. Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC.

190. Id. at 41 (footnote omitted).
(11) Support for or opposition to proposed, pending, or existing legislative measures.
(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions.\textsuperscript{192}

\textit{Ellis} involved an allegation that the union had spent compulsory dues and fees for "political and various other non-collective bargaining purposes," in violation of the union's duty of fair representation. The court found it had, citing \textit{Street}, but did not set forth its rationale. \textit{Ellis} did, however, involve the Railway Labor Act, in which considerable legislative history and the \textit{Hanson}, \textit{Street} and \textit{Allen} decisions had given the union ample notice that political expenditures were not to be made from compulsory funds over the objections of dissident members.

In reality, workers join unions not simply as agents of collective bargaining, but for a wide range of social and political reasons, and do not expect expenditures to be restricted to collective bargaining costs. To maintain that members must be refunded the portion of their dues spent for picnics, organizing other workers, death benefits, recruitment of new members, publishing national news or cartoons, or attending their own conventions, is in essence to seek the destruction of collective bargaining, the agency shop, and unions themselves. The fraternal functions of labor unions, even when compulsory among members of a craft or trade, predated legal regulation by over a century, and, since the medieval guilds, have formed an essential ingredient in labor associations. Notwithstanding \textit{Ellis}, no court has yet held the charitable option unavailable where the theory has been that unions are prohibited from using compulsory funds for political goals.

The principal reason which may be asserted for prohibiting the assignment of members' funds to charity over their objection is the right of non-association. Against this rationale, there are several counterarguments: (1) the right not to associate for political purposes deserves greater recognition than the same right exercised for charitable purposes; (2) these funds are indistinguishable from union-run registration and "get-out-the-vote" campaigns; (3) society's interest in preserving welfare, peace, and security becomes paramount where charity is concerned; (4) charitable contributions may directly or indirectly affect collective bargaining; and (5) charitable contributions diminish the problem of the "free-rider," by making some contribution to the common good compulsory.

In the absence of a more specific showing to the contrary, it may be assumed that the reasons for dissent from making charitable contributions are primarily selfish, rather than political, and that an interest

\textsuperscript{192} \textit{Id.} at 2342. \textit{See also} Merrill, \textit{Limitations Upon the Use of Compulsory Union Dues}, 42 J. of Air L. & Com. 711 (1976).
in promoting "mutual aid or protection" should prevail over narrow motives. Charities, moreover, may assist workers, thereby affecting collective bargaining, since these charities satisfy obligations which might otherwise be assumed under a collective bargaining agreement. Given the law of supply and demand in wages, the existence of a large group of destitute laborers lowers wages, worsens working conditions, and affects contract negotiations directly.

The mandatory charitable donation may be further distinguished from its political cousin in that it is designed to prevent individual employees from receiving a windfall through dissent, by making contributions uniform. The point of the "free rider" argument under this rationale is not the specific purpose to which compulsory funds are directed, i.e., political efforts, collective bargaining, charity or grievance handling, but the idea of mutual contribution for mutual benefit. Charitable expenditures may be said not to violate, but to enhance this idea.

The simple exercise of majority rule, without direct abridgement of minority rights, cannot be held to be a per se violation of minority rights, else the basis for all collective action would be vitiated. The principle of majority rule requires protection for the right of a minority to seek adoption of its point of view through democratic decisionmaking, but it cannot deny the right of the majority to act at all.

It has been held that freedom of assembly under the first amendment does not extend to a right to remain unorganized, nor is there here a right, under principles of free assembly, to be free from the obligation to contribute to the general advancement. The Supreme Court declared in Hanson that the union shop was no more an infringement on first amendment rights than state laws compelling membership in an integrated bar, and Lathrop clearly held that compulsory membership in an integrated bar which took positions on legislation opposed by some of its members did not violate bar members' first amendment rights. The problem, in these cases, is thus one of avoiding a double standard, since there is no pretense in integrated bar or government taxation cases that everyone must agree with every expenditure of compulsory funds. Thus, Justice Frankfurter, dissenting in Street, stated:

It is a commonplace of all organizations that a minority of a legally recognized group may at times see an organization's funds used for promotion of ideas opposed by the minority. The analogies are numerous. On the largest scale, the Federal Government expends revenue collected from individual taxpayers to propagandize ideas which many taxpayers oppose.193

Taxation for the common good is universal and essential if the

193. 367 U.S. at 808.
whole is to advance, often in spite of the interests of some of its parts. Government would fall if the dissident interests were to prevail in any area of taxation, as would most other compulsory associations. Exception for individual dissent has never been extended to the power of taxation or compulsory membership in any field other than labor relations.194

It must be recognized, moreover, that democracy requires participation in the decisionmaking process, even to the extent of the common practice of voting in abstention. Ultimately, every dissenter must endeavor to become a majority, or dissent and democracy lose their meaning. Yet exalting the right to dissent over the right of the majority to rule makes the powerless less powerful, by diluting the authority of any majority which may succeed. While it is a permissible goal to seek the abolition of an incumbent regime, this may be accomplished within the framework of democratic participation more readily than from without. Those with great wealth or other sources of power rarely need to safeguard their right to participate in the decisional process, while minorities must affirm the obligation of their participation. With regard to labor unions, maximizing the individual power of minorities simultaneously reduces the power of labor as a whole in its contest with management.

Alternatively, since the population is overwhelmingly composed of wage-earners, the extension of majority rule within labor unions increases the potential political strength of labor as a whole. The extension of majoritarian principles in politics decreases the control of wealth over the political process, expands democracy, and increases the rights of even dissident members to greater social benefits through legislation. This extension of democracy would tend to cause political power to conform to needs of the popular majority, rather than to the economic realities of campaign financing, and the special interests of large-donor corporate funding.

In the process, majority rights become primary, while minority rights remain secondary. This process is not without its dangers. As Justice Rutledge noted:

any asserted beneficial tendency for publicizing political views, whether of a group or of an individual, is certainly counterbalanced to some extent by the loss for democratic processes resulting from the restric-

194. But see Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978). The court there rejected a claimed first amendment right of the city to expend public monies to support a constitutional amendment to permit classification of property for the property tax. In dicta, the court stated that the State had an interest in protecting "a dissenting minority of taxpayers [from financing] the expression on an election issue of views with which they disagree." Id. at 639. Justice Brennan stayed the order prohibiting the expenditure, 439 U.S. 1389 (1978), and later the Supreme Court refused to vacate the stay, 439 U.S. 951 (1978). Three dissenting justices argued it was "frivolous" to assume that the case presented any federal constitutional issue. Id. at 952.
tions upon free and full public discussion. The claimed evil is not one un mixed with good. And its suppression destroys the good with the bad unless precise measures are taken to prevent this.\(^{195}\)

In Rutledge's opinion, though, the fallacy of centering one's attention entirely on minority rights was that of ignoring the principle of majority rule, "which has become a bulwark, indeed perhaps the leading characteristic, of collective activities."\(^{196}\)

Requiring an individual to contribute to a union which spends a portion of the contribution on political causes does not constitute a compulsion to believe in, express support for, or espouse ideas the money finances. Majority rule is the essential principle of democracy, with "reasonable accommodation" given to individual employees' rights, as is done in cases involving religious objectors.

It must be recognized, of course, that unions are often anti-democratic, and that insurgent groups of rank and file members frequently seek to become majorities by maximizing their position as dissenters. There is a great difference, however, between succeeding to leadership on the basis of a majority vote of the membership, and the destruction of the power of any majority to effectuate its policies within the union.

I do not wish to suggest that union members should be without a remedy for violation of free speech rights or misuse of union funds for political or other purposes. In addition to state common law obligations, union officials are under a fiduciary duty to hold a union's funds "solely for the benefit of the organization and its members," who are empowered to sue in federal district court to enforce this duty and recover any misused funds.\(^{197}\)

Union members may also sue for violation of a union's duty of fair representation, in some cases without exhausting internal remedies.\(^{198}\)

With respect to those industries reached by the National Labor Rela-

\(^{195}\) United States v. CIO, 335 U.S. at 143-44 (Rutledge, J., concurring).
\(^{196}\) Id. at 147.

See Clayton v. UAW, 101 S. Ct. 2088, 2093 ("where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his § 301 suit, exhaustion of remedies will not be required"); Goldman v. Coca Cola Bottling Co., 85 Lab. Cas. ¶ 10,950 (1978). See also Syres v. Oil Workers, 350 U.S. 892 (1955).
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In the context of thePolitical Contributions Act, the duty of fair representation has served as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." 199

Similarly, the Landrum-Griffin Act protects the right of union members to participate in electoral and decisionmaking processes in their unions, and requires union officials to report and disclose all official union expenditures. 200 In democratic unions, members have the power to affect union decisions by the ballot. Since unions are majoritarian institutions:

[union officials are elected democratically, either by the direct vote of the members or by the vote of democratically elected delegates. These officials normally set the political tone of the union and its committees, although some unions may choose their political endorsements by a democratic convention system. One course open to dissidents, therefore, is to challenge the politics of their leaders within the structure of the union, because "the free speech rights of rank and file members...include by definition a right of democratic insurgency, both at common law and under modern statutory standards." 201

Even if dissenters are forced to contribute to bargaining activities which they find objectionable, they are not wholly precluded from expressing their opposition to union demands. They may therefore vote in accordance with their convictions to influence the actions of officials negotiating collective bargaining agreements, and speak out against union stands at public meetings. 202

Indeed, most union constitutions provide a "Bill of Rights" for members, which include language similar to the following:

Section 1: All members of this Union shall have equal rights and privileges in nominating candidates for office, voting in elections, and attending and participating in membership meetings...

Section 2: Every member of this Union shall have the right to meet other members, to express any views, arguments, or opinions, and to express at meetings his views on candidates for office and any other business properly before any and all meetings of this Union.

Democracy within the organization is the best guarantee that majority principles will not be abused, and as at least one writer has pointed out, the issue of political expenditure is inseparable from that of internal union democracy:

The courts should direct their attention to such problems as freedom of members to vote and participate in union affairs, admission requirements and equality of treatment. If unions are prevented from using their disciplinary power to foreclose democratic procedures within the union, the right of determining the purposes of union expenditures can safely be left with union representatives.\textsuperscript{204}

Other writers have recognized this fact as well:

Much of the published reaction to the decision in \textit{Street} has posited as a remedy to the dissenting workers' dilemma the augmentation of union democracy; prerequisites to self-government such as equality of admission standards, freedom to vote, and the right to participate in group decision-making are stressed.\textsuperscript{205}

While employees must make their objections to political expenditures known to the union, safeguards should be provided against discriminatory treatment in retaliation for unpopular or dissenting beliefs. Moreover, according to \textit{Street}, while employees need not object to specific causes, they should be permitted, perhaps even encouraged, to do so. A requirement that only general objections be raised would encourage litigation. Particularized objections, on the other hand, would tend to encourage settlement. A right of selective objection to the use of only a portion of the contribution would require, first, that the funded project not be one of supporting or defeating legislation reasonably considered to affect labor's interest, as described in \textit{DeMille};\textsuperscript{206} second, that the objectionable portion be strictly confined to the express written prohibition identified by the union member. With respect to candidates, selective objection would be easier, and would permit simple identification of a chosen candidate, or alternately, a voter registration or "get-out-the-vote" fund.

Where there is no allegation that a union is undemocratic; or that internal appeals will prove inadequate; or that the union member has any genuine objection to making a political contribution; or that there is any significant difference between compulsory support for a political goal and other activities which unions regularly finance out of dues; or that the legislation in question does not reasonably serve common goals; or that there was no proper decision by a majority of the membership, it would be clear that the dissent had not met its burden of proof with respect to showing that the use of mandatory political funds was unlawful.


\textsuperscript{205} Comment, Freedom from Political Association: The \textit{Street} and \textit{Lathrop} Decisions, 56 NW. U. L. REV. 777, 783 (1962).

\textsuperscript{206} See text accompanying notes 92-97 \textit{supra}.
Finally, it should be emphasized that financial contribution to common goals does not, by itself, restrict the free expression of ideas. As Justice Frankfurter noted:

No one's desire to speak his mind is checked or curbed. The individual [union] member may express his views in any public or private forum as freely as he could before the union collected his dues. Federal taxes also may diminish the vigor with which a citizen can give partisan support to a political belief, but as yet no one would place such an impediment to making one's views effective within the reach of constitutionally protected "free speech." 207

The argument that union expenditure on political or social clauses with which a member disagrees per se deprives that member of free speech, or constitutes an interference or restraint, is thus unsound where there is nothing to indicate that the union in any way attempted to "coerce" its members into "ideological conformity," or prevent them from expressing their political views, or supporting candidates of their choice, either inside or outside union meetings.

While the rights of minorities to non-association with objectionable causes is essential to the preservation of democratic rights, nothing indicates that such rights are necessarily incompatible with the right of the majority to alter politically the economic conditions under which it works.

CONCLUSION

The options affecting judicial regulation of union political expenditures are therefore two: either courts must become involved in the totality of union expenditures as in Ellis, which, I submit, will lead to impossible, absurd, and contradictory results; or a de minimis standard must be adopted which will ensure "reasonable" decisionmaking by the union in the interest of the whole, with maximized scope for individual choice regarding candidate selection. Under such a standard, the membership would be taxed only for what reasonably appears to be in the common good, and free choice would be extended to complex options.

The distinction drawn in Abood between politics and collective bargaining forms the basis for the Court's decision that mandatory contributions to a political fund violate members' rights of non-association. Yet it also leads directly to the effort as in Ellis, to seek the return of all funds expended for "non-collective bargaining" purposes. This results in the further isolation of collective bargaining from other union functions, though they are an organic part of the expression of organized labor's self-interest. Street has thus limited expenditures by railway unions for general social or political purposes, even where these were connected with collective bargaining activities. This exclusion of

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207. 367 U.S. at 806 (Frankfurter, J., dissenting).
labor unions from effective political participation tends to result in the simultaneous exclusion of politics from internal union debate. Since unions are permitted to expend their energies on and fund only economic issues, this restriction from active political involvement has had negative social and political consequences for the nation as a whole, encouraging apathy and nonparticipation in decisional processes, and isolating union leaderships from democratic control. Moreover, union political action has a beneficial impact on democracy in general, as a "counterpoise" to corporate influence:

The participation of labor organizations in politics also carries affirmative values for the whole community. The influence of the unions is a counterpoise to the pressures generated by business interests. At their best unions bring to politics a strain of idealism reaching far beyond their own parochial interests, thus furnishing channels of expression for a constructive element of our national life.\textsuperscript{208}

The full participation of labor in political life, commonplace in Europe and other parts of the world, is notably absent in the United States. Commitment and debate over principled issues would measurably increase the intelligence of political decisionmaking, both in process and result, yet both are restricted by efforts to isolate unions from all but collective bargaining functions. The right of the majority of the population to full participation in political life is a prerequisite to the democratic goal of a broader, more informed and active population. It is therefore essential that labor be permitted to exercise the same rights of political participation as already extend to management.

Ultimately, for the progress of the nation as a whole, it is more important that unions be permitted to participate fully in politics, as a part of their collective bargaining function, than for a minority of members to be allowed to undermine the political influence of a democratically responsive majority by withholding a pro rata share of dues. Distinctions between politics and collective bargaining, however drawn, disregard the history and present reality of industrial conflict, and ultimately lead to the \textit{Ellis} solution, with its potentially Draconian dismantling of union functions. Short of \textit{Ellis}, unions still require full authority to tax their membership for the common good, which necessarily involves political contribution. Dissent over allocation priorities should be allowed and internal debate encouraged. But a refusal on constitutional grounds to acknowledge the ultimate choice of the majority cannot be supported, in fact or in logic, where majority rule is an accepted principle of the democratic process. To do otherwise is to truncate and diminish the richness and complexity of political life, and surrender to the money merchants the whole of the political state. This, I believe, the constitution cannot compel.

\textsuperscript{208} Cox, \textit{supra} note 165, at 107.