Hastings Law Journal

Volume 41 | Issue 1 Article 1

1-1989

Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases

Roger C. Hartley

Articles

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*Roger C. Hartley**

In 1988, the United States Supreme Court reshaped the National Labor Relations Board's (NLRB) statutory mandate. In *Communication Workers v. Beck*,[1] for the first time, the Court held that the Taft-Hartley Act right not to engage in concerted activities for mutual aid and protection includes the right not to support certain union activities financed by compulsory union dues.[2] The decision was hardly remarkable because the NLRB balances the union majority's right to "full freedom of association" for purposes of collective bargaining and other mutual aid and protection[3] with the minority's right to refrain from such association.[4]

* Associate Professor, Columbus School of Law, Catholic University of America. B.S. 1965, Cornell University; J.D. 1970, University of Pittsburgh; LL.M. 1972, George Washington University. Professor Hartley serves as an impartial umpire, responsible for determining the portion of union expenditures chargeable to nonmember fee objectors.

1. 108 S. Ct. 2641 (1988).

2. "Compulsory dues and fees," as that phrase is used here, connotes monies paid to a union pursuant to the requirements of a union security agreement in a collective bargaining agreement. A union must represent all bargaining unit employees regardless of union membership. To avoid "free riding" by nonmembers who receive benefits of union representation but refuse to contribute to its costs, unions and employers usually negotiate either a union shop clause requiring that represented employees join the union as a condition of continued employment, or an agency shop or fair share agreement, requiring payment of certain dues and fees to the union. *See* Shea, *Unions, Union Membership, and Union Security*, 11 SETON HALL LEGIS. J. 1, 6-15 & n.19 (1987) (discussing content and frequency of various union security clauses in collective bargaining agreements).

3. Section 1 of the Labor Management Relations Act, 29 U.S.C. § 151 (1982) [hereinafter "Taft-Hartley Act," cited by section number], states that the "declared . . . policy of the United States" is to protect "the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

4. Section 7 of the Taft-Hartley Act, provides that employees have the right
to engage in [concerted] activities for the purpose of collective bargaining or other

Propelling the NLRB into the role of annually reviewing millions of dollars of labor union expenditures, however, is an unprecedented escalation of NLRB involvement in the regulation of internal union affairs.

Dues objector litigation has been raging quietly in Railway Labor Act[5] and public sector collective bargaining contexts for over thirty years. Volume has not been great, roughly less than a few dozen reported cases. Of that number, however, an improbable six dues objector cases reached the Supreme Court prior to *Beck.*[6] While two were public sector cases and four were Railway Labor Act Cases, the six evidenced a striking similarity: free speech and association values embodied in the United States Constitution and federal laws clashed with the societal commitment to a strong and independent trade union movement.[7]

The thesis of this Article is that, now conscripted into the fray, the NLRB must consider free speech and association values embodied in the Constitution and laws when deciding Taft-Hartley dues objector issues. Only then can the NLRB fulfill its congressional mandate, recently discovered and described in *Beck,* to develop a coherent body of law that accommodates potentially explosive confrontations between dues objectors' right of free expressive association and the union majority's statutory right to organize and bargain collectively on behalf of all represented employees, including dues objectors.

To develop this thesis, the threshold task is to demonstrate that although most of the pre-*Beck* dues objector litigation nominally focused on statutory interpretation, constitutional values largely determined the cases' outcomes. The Article also demonstrates that these constitutional

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mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

29 U.S.C. § 157 (1982).

5. 45 U.S.C. §§ 151-88 (1982) [hereinafter "RLA," cited by section number].

6. Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986) (public sector decision); Ellis v. BRAC, 466 U.S. 435 (1984) (RLA decision); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public sector decision); BRAC v. Allen, 373 U.S. 113 (1963) (RLA decision); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (RLA decision); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956) (RLA decision).

7. As detailed fully, *infra* notes 8-14 and accompanying text, dues objectors argue that the compulsion to pay dues to a labor union, especially when dues support ideological activities with which the objector disagrees, infringes upon the right of free expressive association. In response, unions argue that the statutory duty to represent the entire bargaining unit obligates each employee who receives the benefit of unionization to pay a fair share of its cost. Only then can the aspiration of industrial stability, secured by a vibrant collective bargaining system, be achieved.

values provide some measure of internal cohesion to decisions that at times seem incoherent.

Background

Both the dues objector and the union majority champion legitimate interests when a conflict arises over compelled monetary support of certain union activities financed by union dues and fees. Dues objectors urge that any compulsion to pay dues to a union compromises, to some degree, the values of free speech and expressive association imbedded in our Constitution and laws.[8] Increase the stakes by spending compelled dues on ideological activities unrelated to collective bargaining and the specter of coerced ideological conformity emerges as a formidable freedom of speech and association issue.[9]

Unions, on behalf of the union-represented majority, counter that everyone receiving the benefit of union representation should pay a fair share of its cost, and that modern collective bargaining costs extend well beyond traditional bargaining table activities.[10] Lurking are deeper phil-

8. *See, e.g., Abood,* 431 U.S. at 255 (Powell, J., concurring) ("*[A]ny* compelled support for a union 'has an impact upon' and may be thought to 'interfere in some way with' First Amendment interests.") (quoting the majority opinion in *Abood*); Pulliam, *Union Security Clauses in Public Sector Labor Contracts and* Abood v. Detroit Board of Education: A Dissent, 31 LAB. L.J. 539, 545 (1980) (compulsory financial support of union, even for union's nonpolitical activities, interferes with right of free association); Staaf & West, *Paying for Compulsory Union Services: the Entanglement Consequences of Agency Shops in the Public Sector,* 17 WAKE FOREST L. REV. 359, 362-64 (1981) (any compulsion to affiliate with union by mandatory contributions invades first amendment interests); *see also* Cloke, *Mandatory Political Contributions and Union Democracy,* 4 INDUS. REL. L.J. 527, 532 (1981) ("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.").

9. *Abood,* 431 U.S. at 234-35 (The "heart of the First Amendment" is the freedom to believe as one will, including the right not to be forced to support financially any ideological cause). *See Street,* 367 U.S. at 768-69 (RLA denies unions, over employee's objection, power to expend exacted funds to support candidates for political office or political programs). For an argument that any use of exacted dues or fees to support ideological positions over an employee objection constitutes an unlawful prior restraint on speech, see Reilly, *The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes,* 32 MERCER L. REV. 561, 566 & n.48 (1981).

10. *See* Woll, *Unions in Politics: A Study in Law and the Workers' Needs,* 34 S. CAL. L. REV. 130, 142, 149 (1961) (modern collective bargaining cannot be limited to negotiations with management but necessarily includes administrative and legislative lobbying); *see also* A. COX, LAW AND THE NATIONAL LABOR POLICY 107 (1960) ("It is difficult, if not impossible to separate the economic and political functions of labor unions."); R. LESTER, AS UNIONS MATURE 14-20 (1958) (political activity is an indispensable adjunct to collective bargaining); L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS (4th ed. 1959) (labor cannot limit its activities solely to the bargaining table because some objectives can only be achieved through legislation and others can be achieved much faster through legislation); Cantor,

osophical arguments: that "majority rule" includes the ability to restrict the minority;[11] that use of compulsory dues for political or ideological purposes is not oppressive to the individual, union-represented dues objector;[12] that a strong trade union movement requires autonomy from the state and, concomitantly, limited governmental interference with internal union affairs;[13] and that dues objectors' challenges, while clothed

Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association, 36 RUTGERS L. REV. 3, 40, 44-46 (1983) (increased governmental regulation of the economy increases importance of representing worker interests beyond the confines of employer-employee negotiations); Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism,* 60 TEXAS L. REV. 1, 3-4 (1981) (private sector collective bargaining is being replaced by political advocacy as parties' interests increasingly become dependent on centralized governmental regulation of the economy). The Supreme Court has acknowledged that costs germane to collective bargaining include not only "the direct costs of negotiating and administering a collective-bargaining contract" but also "expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative. . . ." *Ellis,* 466 U.S. at 448.

11. *See* Cloke, *supra* note 8, at 531 ("The principle of exclusive representation is essentially that of majority rule which necessitates some degree of *suppression* of minority rights . . . ."); *see also* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61-70 (1975) (minority union members' effort to achieve racial equality at work place by direct negotiation with employer must give way to the majority's good faith effort to resolve disputes by presenting a unified voice of all employees represented at bargaining).

12. This view is supported by two related arguments. Kenneth Cloke argues that compelled financial support of "matters of general interest to union members" is not oppressive to the individual because "taxation for the common good and majority rule are accepted principles of democracy and common practice in associations." Cloke, *supra* note 8, at 529. Professor Shiffrin, evaluating the issue from the viewpoint of invasion of the right of freedom of belief or expression, argues that compulsory support of union political activities "does not compel [objectors] to believe anything or to express anything, nor does it prohibit them from believing or expressing anything." Shiffrin, *Government Speech,* 27 UCLA L. REV. 565, 590-91 (1980). *See* Cloke, *supra* note 8, at 582 ("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."); Friesen, *The Costs of "Free Speech"—Restrictions on the Use of Union Dues to Fund New Organizing,* 15 HASTINGS CONST. L.Q. 603, 630-31 (1988) (compulsory contribution to union political expression does not require the objector "to be personally [or] publicly associated with an objectionable . . . message").

13. Government involvement in union funding decisions is seen by some as an insidious mechanism to control unions by defining their "proper role" in the society. Professor Friesen states:

> For the Supreme Court, the decision when to give primacy to individual rights appears to be guided in part by whether the Court believes the union is acting "in role" when it engages in the challenged activity. Treating politics as not "germane" to collective bargaining, irrespective of the benefits that politics confer, represents a policy judgment that political activism is simply too remote from the proper role of an agent certified for collective bargaining rather than political representation. . . . In other words, [through its test of chargeable activities,] the Court seems to define the union's legitimate role . . . .

Friesen, *supra* note 12, at 639.

In any event, union independence from state manipulation and control is central to plu-

in the language of free expressive association and respect for individual autonomy, are financed by corporate funds expended to isolate unions politically and weaken unions' ability to speak for their members and working people generally.[14]

By involving the NLRB in this debate, *Beck* has thrust the NLRB into a new branch of American labor-management relations and internal union affairs. Analogizing from section 2 Eleventh of the Railway Labor Act (RLA),[15] the majority in *Beck* held that section 8(a)(3) of the Taft-Hartley Act prohibits a union from expending dues over the objection of a dues-paying nonmember on any activities except those "necessary to 'perform[] the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.' "[16] Expending

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ralistic democracy. Empirical evidence shows that workers expect their union to democratize the work place by providing a meaningful voice in the decisions that affect them. Beyond the work place, unions fractionalize power within the society by 1) influencing wage policy, and thereby helping to avoid the necessity of centralized governmental regulation, and 2) by acting as a power center, asserting group interests against other groups and the government; *see* Hartley, *The Framework of Democracy in Union Government,* 32 CATH. U.L. REV. 13, 54-61 (1982); *see also*; Brousseau, *Toward a Theory of Rights For the Employment Relation,* 56 WASH. L. REV. 1, 19 (1980). Professor Brousseau argues that through unions, illusory individual liberty to withhold labor is made real when industrial and political conflict are adjusted among "competing units of social and economic aggregation." Independence from state control is thus seen as vital in order for unions, to fulfill these various assigned democratic functions. *See* Hartley, *supra,* at 96-97.

14. *See* Freisen, *supra* note 12, at 639 (limiting the union majority's right to charge compulsory dues permits the judiciary to enforce "a particular view of the normal and proper role of a labor union" and thereby "disfavor[] activities that are aimed at altering the balance of power outside the immediate workplace"); Cloke, *supra* note 8, at 528 ("[I]f 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."); *id.* at 539 (The dues objector cases "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."); *id.* at 563-64 (The limitation on mandatory political expenditures "could well encourage anti-union employers and dissident members to attack the financial base of unions [and] . . . at its base [represents] a desire to restrict the power of organized labor."). It is further argued that there cannot be truly neutral principles limiting union funding of political activities:

> 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. . . . 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.

Id. at 566-67.

15. 45 U.S.C. § 152 (Eleventh) (1982).

16. Communication Worker's v. Beck, 108 S. Ct. 2641, 2657 (1988) (quoting Ellis v. BRAC, 466 U.S. 435, 448 (1984)).

objector's dues for any other purposes violates the union's duty of fair representation.[17]

The Court had no occasion to provide any additional guidance, but a plethora of issues loom. They fall roughly into six categories: 1) activities a union may compel a dues objector to finance; 2) records a union must maintain to prove its chargeable expenditures; 3) notice and procedures a union must provide potential objectors to permit an informed decision whether to voice an objection; 4) permissible methods for calculating the chargeable percentage of an objector's dues and for reducing dues by that percentage; 5) opportunities a union must provide an objector to challenge the determination of the chargeable percentage of dues; and 6) certain procedural and remedial issues.[18]

Because the NLRB has none of its own dues objector case precedent, the NLRB is forced to borrow and improvise. Noting that the language in the RLA permitting union security agreements is almost identical to that in sections 8(a)(3) and 8(b)(2) of the Taft-Hartley Act, the *Beck* Court held: "we think it clear that Congress intended the same language to have the same meaning in both statutes."[19]

Beck's implicit invitation to borrow freely from RLA precedent may prove only marginally useful. Although intense, litigation under the RLA has been relatively sparse. Accordingly, those cases leave many of the important issues unaddressed. For example, in thirty years of RLA litigation, the Supreme Court considered only a few categories of union activity. Dues objectors and unions can be certain only that objectors may not be charged the cost of: 1) political contributions to candidates for political office;[20] 2) general organizing under the RLA;[21] and 3) most

17. *See Beck,* 108 S. Ct. at 2645 (breach of the union's duty of fair representation violates section 8(b)(1)(A) of the Taft-Hartley Act); Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962) (Employer complicity with a union to interfere with rights of employees protected by the Taft-Hartley Act also violates the Taft-Hartley Act), *enforcement denied,* 326 F.2d 172 (2d Cir. 1963). *See also* Union de Tronquistas de Puerto Rico Local 901, 202 N.L.R.B. 399, 400-01 (1973) (union and employer jointly and severally liable when employer unlawfully prevents employee from working at the insistence of a union).

18. *See* authorities cited *infra* notes 73-92; Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986).

19. *Beck,* 108 S. Ct. at 2649. As the Court reiterated, section 2 Eleventh of the RLA "[does] not 'ves[t] the unions with unlimited power to spend exacted money. . . .' [It permits expenditures] 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.'. . . Given the parallel purpose, structure, and language of [section] 8(a)(3), we must interpret that provision in the same manner." *Id.* at 2652 (quoting *Ellis,* 466 U.S. at 447-48).

20. *See* discussion *infra* notes 81-83 and accompanying text.

21. *See* discussion *infra* notes 52-53.

litigation unrelated to a union's collective bargaining responsibilities.[22] By contrast, under the RLA, a union may charge dues objectors their share of: 1) refreshments for union business meetings and occasional social activities;[23] 2) union conventions;[24] 3) litigation related to representing employees as their collective bargaining agent; and 4) the direct costs of negotiating and administering collective bargaining agreements.[25] Finally, unions may charge objectors for the portion of union publications that are related to the union's duties as collective bargaining representative.[26]

These categories of union activity scarcely begin to describe the terrain of normal activities engaged in by modern unions, especially at the international level. Literally dozens of additional categories and subcategories of union activity have yet to be adjudicated.[27]

No doubt the NLRB will experience pressure to rely on public sector precedent.[28] The issues in these two contexts are parallel; the Supreme Court has seemed willing to mix and match between public sector and private sector precedent when it has adjudicated these cases;[29] and there are many more public sector cases from which to draw than under the RLA. Yet, the public sector cases only recently have begun to address the issues presented. Additionally, some may argue that public sector dues objector precedent is inapposite in any event. First, public and private sector bargaining processes differ significantly;[30] and second, public sector cases explicitly rely on first amendment free speech and free

22. *See* discussion *infra* notes 54-56 and accompanying text.

23. *See* discussion *infra* notes 46-47 and accompanying text.

24. *See* discussion *infra* notes 48-51 and accompanying text.

25. *See* discussion *infra* notes 43-44 and accompanying text.

26. *See* discussion *infra* notes 58-59 and accompanying text.

27. *See infra* notes 198-341 and accompanying text.

28. *See* Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986) (public sector decision); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public sector decision).

29. See discussion *infra* notes 97-98 and accompanying text.

30. *Abood,* 431 U.S. at 227 & n.24, 229-30, 232, 236 (The "very real" and "important" differences between public and private sector collective bargaining "do not translate into differences in First Amendment rights" but may make the line differentiating activities chargeable to dues objectors in the public sector "somewhat hazier" than the same line in the private sector.); Champion v. California, 738 F.2d 1082, 1086 (9th Cir. 1984) (whether an expenditure is chargeable to objectors "depends on the nature of the bargaining process"), *cert. denied,* 469 U.S. 1229 (1985); Browne v. Milwaukee Bd. of School Directors, No. 18408-D, slip op. at 17 (Wis. Empl. Rel. Comm'n, Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987) (The context of a union expenditure, the particular bargaining process, largely determines whether it is chargeable to objectors.); *see also* discussion *infra* notes 332-34 and accompanying text.

association rights, constitutional considerations not directly applicable to statutory adjudication under the Taft-Hartley Act.[31]

The paucity of pre-*Beck* precedent would cause less concern if it furnished a clear analytical framework from which the NLRB could draw analogies in adjudicating a wide array of unresolved dues objector issues. Regrettably, it does not. Particularly in cases assessing which union activities are chargeable to objectors, the issues have been adjudicated largely in an ad hoc manner in recent years, usually without a serious attempt to explain clearly the principles underlying outcomes.[32] Hence, while the NLRB may be able to adopt specific holdings from RLA or public sector precedent, these cases cannot provide a clarity of reasoning they lack themselves.

Yet, unity and coherence in the NLRB's dues objector work are essential. They are the key to objectors' and unions' ability to understand their respective rights and obligations in order to comply forthrightly with the law. Only through doctrinal clarity can objectors, unions, and reviewing courts, have a fair opportunity to critique the NLRB's work. Cynicism, born of the appearance of unbridled decisionmaking, can be expected to flourish if the NLRB fails to articulate and apply coherent principles as it proceeds with its new mandate.

31. Communications Workers v. Beck, 108 S. Ct. 2641, 2656-57 (1988) (Court need not reach question whether, as in public employee and RLA cases, compulsory financial support of union activities is limited by the United States Constitution). The NLRB General Counsel has taken the position that *Beck* does not rest on constitutional principles and that the NLRB "may ultimately hold that some of the requirements imposed by the [public employee] case law do not apply to the NLRA private sector." Nevertheless, "in order to place these issues before the Board and courts," the General Counsel has "generally taken the position that the body of law developed in the public and railway labor sectors does apply to the NLRA private sector." Office Of The General Counsel, Memorandum GC 88-14, Guidelines Concerning *CWA v. Beck,* 2 (Nov. 15, 1988), *reported in* 129 Lab. Rel. Rep. (BNA) 399-400 (Nov. 28, 1988) [hereinafter GC Memorandum].

32. *See, e.g.,* Cloke, *supra* note 8, at 545 & n.74 ("As several writers have noted, *Hanson, Street,* . . . and *Abood* are far from uniform in their treatment of dues or fees used for other than collective bargaining purposes."); *id.* at 585 (court involvement in the "*totality* of union expenditures" will lead to "impossible, absurd, and contradictory results"); Shea, *supra* note 2, at 26-27 (Some of the holdings and analysis in *Ellis* were either "highly questionable" or "superficial at best."); Shiffrin, *supra* note 12, at 591 (Supreme Court has failed to justify the distinction it has drawn between compelled payments to union that are chargeable to dues objectors and those that are not chargeable); *see also* discussion *infra* notes 33-60 and accompanying text.

Doctrinal fragmentation has been seen as a recurring characteristic of American labor law. Seldom do decisions coalesce into coherent patterns. Rather, as Derek Bok has observed, "an early articulation of simple standards is typically followed by a constant embellishment of exceptions, qualifications, complex reformulations, and ad hoc decisionmaking." Bok, *Reflections on the Distinctive Character of American Labor Law,* 84 HARV. L. REV. 1394, 1462 (1971).

This Article is a modest effort to advance the twin goals of unity and coherence with respect to determining which activities a union may compel a dues objector to help finance. In section I, the two threshold tasks undertaken are to unveil the ambiguity of the Supreme Court's language delineating the boundaries of union activities chargeable to dues objectors and demonstrate that this rhetoric is marginally useful as a guide for future cases. Section I reveals, however, that the Supreme Court dues objector cases do contain seeds of coherence. Whether these cases nominally entail statutory or constitutional interpretation, a common set of operating principles drives their outcomes. Forming a unifying rationale, these principles derive from and reflect the demands of free speech and association values in our law, as tempered by the legitimate interests of the union majority.

Section II demonstrates, by example, that these operating principles provide a workable framework to determine which union activities are chargeable to objectors. Because some union expenditures support a mix of chargeable and nonchargeable activities, it is necessary to examine the thorny issue of when a union must apportion the chargeable and nonchargeable costs of a single activity. Accordingly, Section II also probes the unexplored terrain of records a union must maintain to compute accurately the portion of its expenditures chargeable to objectors. Record-keeping issues reveal delicate and difficult choices, unveil a host of pivotal questions the NLRB must confront, and expose many of the value-laden decisions that permeate this body of labor law. Finally, Section II shows that the operating principles, derived from the RLA and public sector cases and built upon free speech and association values in our law, are applicable to Taft-Hartley Act dues objector cases. Indeed, *Beck* and the Taft-Hartley Act mandate the adoption of these values.

I. Deriving Operating Principles

A. Supreme Court Rhetorical Precedent

The Supreme Court has not provided careful guidance in describing union activities lawfully chargeable to dues objectors. A brief review of Supreme Court cases demonstrates that the duty is articulated at such a high level of abstraction that it cannot serve as a meaningful guide for deciding future cases, and that the current articulation of the duty only begins to describe the real variables that determine when union activities are chargeable to dues objectors. The result is considerable internal tension in the Court's dues objector cases.

Review of the cases might well begin with *Beck.* Although the most recent effort, the case clearly illustrates the problem. In *Beck,* the Court began by framing the statutory issue. The Court first explained the established principle that while sections 8(a)(3) and 8(b)(2) of the Taft-Hartley Act permit employers and unions to require "membership" in the union as a condition of continued employment, in fact all that lawfully may be required is the payment of periodic dues and fees, the "financial core" of membership.[33] The Court then stated, "The statutory question presented in the present case is whether this 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment. We think it does not."[34]

This "germane to collective bargaining" test, the Court repeatedly emphasized in *Beck,* must be applied in Taft-Hartley contexts as it has been applied in RLA contexts. The provisions permitting union security agreements in the two statutes are " 'statutory equivalent[s].' "[35] In the RLA, Congress extended " 'to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act.' "[36] Accordingly, the Court concluded as follows: "[O]nly the most compel-

33. *Beck,* 108 S. Ct. at 2648.

34. *Id.* By framing the issue as whether the "financial core" includes the obligation to support certain union activities, the Court seems to assume that the union's duty runs only to nonmembers and not to members. Only nonmembers are associated with the union through the compulsion of union security. Only their "membership" is "whittled down to its financial core." NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). *But see* Pattern Makers' League v. NLRB, 473 U.S. 95 (1985) (those voluntarily joining the union as full members assume rights and duties that arise from their contract of membership).

The Court's repeated references to nonmembers' rights when explaining its holding in *Beck* reinforces the conclusion that the *Beck* duties extend only to nonmembers. *See, e.g., Beck,* 108 S. Ct. at 2652 (quoting Ellis v. BRAC, 466 U.S. 435, 447-48 (1984)) (The essential justification for permitting the union shop "limits the expenditures that may properly be charged to nonmembers . . . ."); *id.* at 2655 (Congress' refusal in 1947 to enact legislation regulating the financial support a union may require of *members* is not persuasive evidence that section 8(a)(3) places no limitations on union expenditures because it demonstrates that Congress understood section 8(a)(3) "to afford nonmembers adequate protection . . . ."); *id.* ("[W]e think it . . . far more appropriate to construe 8(a)(3) . . . [as] ensuring that nonmembers who obtain the benefits of union representation can be made to pay for them, than . . . [concluding that Congress] did not address the rights of nonmembers at all.").

The NLRB General Counsel's memorandum to guide regional offices of the NLRB when processing charges brought by dues objectors concludes that only nonmembers of the union are eligible for *Beck* rights. GC Memorandum, *supra* note 31, at 2. *Accord* Crawford v. Air Line Pilots Ass'n, 130 L.R.R.M. (BNA) 2932, 2934 (4th Cir. 1989) ("In *Street* and subsequent cases, the Court drew a line between . . . expenditures . . . germane to collective bargaining and those which would infringe a nonmember's rights."), *petition for rehearing en banc granted,* No. 88-2083 (May 11, 1989).

35. *Beck,* 108 S. Ct. at 2648-49 (quoting Ellis v. BRAC, 466 U.S. 435, 452 n.13 (1984)).

36. *Id.* (quoting 96 CONG. REC. 17055 (1951) (statement of Rep. Brown)).

ling evidence could persuade us that Congress intended the nearly identical language of these two provisions to have different meanings."[37] And "[g]iven the parallel purpose, structure, and language of § 8(a)(3) [and section 2 Eleventh of the RLA], we must interpret [those] provision[s] in the same manner."[38] In short, the Court thought "it clear that Congress intended the same language to have the same meaning in both statutes."[39]

Ellis v. BRAC[40] is the leading RLA case describing the meaning of the "germane to collective bargaining" test. In *Ellis,* the Supreme Court considered the lawfulness of charging dues objectors for expenditures funding five categories of an international union's activities: union recreational and social activities; union conventions; general organizing efforts; litigation not involving contract negotiation or grievance handling; and union publications.[41] In dicta, the Court also provided guidance concerning an international union's death benefit program.[42]

In the course of deciding whether union expenditures to finance these activities were chargeable to objectors, the Court adopted the following seemingly bright-line test to define the union's duty:

> [W]hen employees . . . object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.[43]

Refining this general standard, the Court held unions lawfully may charge all employees for the following: (1) "direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes" and (2) "expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."[44]

Close examination of the above standards reveals their deficiencies. First, whether an expense is a "direct cost" of bargaining is a matter of perspective. Framing a test in terms of "direct cost" and "indirect cost" thus begs the issue. The crucial issue is how close a connection to the

37. *Id.* at 2653.
38. *Id.* at 2652.
39. *Id.* at 2649.
40. 466 U.S. 435 (1984).
41. *Id.* at 440.
42. *Id.* at 453-55.
43. *Id.* at 448. In *Beck,* the Court explicitly cited and adopted this duty for unions regulated by the Taft-Hartley Act. *Beck,* 108 S. Ct. at 2652.
44. *Ellis,* 466 U.S. at 448.

collective bargaining negotiation and administration process will be required before an expense is characterized a "direct cost." The decisionmaker must have a principled way to decide.

Second, the clarifying phrase, "expenses . . . normally or reasonably employed to implement or effectuate [representation] duties . . . in the bargaining unit" only compounds the ambiguity. As an initial matter, the Court could not have intended to suggest that a disjunctive standard of "normally employed" alone could describe the activities chargeable to objectors. Otherwise any activity "normally employed" to effectuate representational duties would be chargeable, irrespective of its ideological content. Contributions to candidates for political office would be chargeable if "normally employed," though the Court clearly has held that the RLA does not permit charging objectors for such expenditures.[45] "Normally employed" must be read as requiring that the expenditure also be "reasonably employed." At some point an activity's relationship to the bargaining process is so attenuated that it no longer may be viewed fairly as being "reasonably employed" to "implement or effectuate" the union's representative duties. How to measure excessive attenuation is the task. Again, the Court's test offers scant guidance.

It is also unclear whether the limiting words "in the bargaining unit" restrict chargeable expenses to only those activities benefitting a dissenting employee's own bargaining unit. Or, does the Court intend to permit unions to pool resources, charge all represented employees a pro rata share of the cost of the pool, and expend the pooled resources on each bargaining unit as the need arises?

Finally, the *Ellis* test, adopted for RLA unions and now applicable to Taft-Hartley unions, does not consider a union's duty to allocate when some components of an activity are chargeable and some are not. Expenditures on fixed operating expenses such as computers used for data retrieval come to mind. These may support bargaining activities when sample contract clauses, for example, are stored for later retrieval. They also can support ideological activities such as "get-out-the-vote" campaigns or political campaigns when computerized membership lists are used to generate mailing labels. Overhead costs, to pay for telephones and other utilities, taxes, and insurance similarly pose allocation problems when a single headquarters building supports both chargeable and nonchargeable activities. Indeed, officers' salaries are fixed costs when the union constitution sets the salary. An officer's participating in nonchargeable activities, then, adds no additional officer salary cost to

45. International Ass'n of Machinists v. Street, 367 U.S. 740, 768-69 (1961).

the union. Must the union, nevertheless, allocate such salaries? Coherence will be lost and ad hoc decisionmaking will flourish until NLRB and court decisions are informed by unifying principles.

Perhaps the best evidence that the language of the Court's test in *Ellis,* without more, fails to provide adequate guidance is its application to the five categories of union expenditure litigated in *Ellis*: union recreational and social activities; union conventions; general organizing efforts; litigation not involving contract negotiation or grievance handling; and union publications.

The Court permitted the union to charge all represented employees a pro rata share of social activity expenses even though it conceded that they were "not central to collective bargaining."[46] It was sufficient that social activities "bring about harmonious working relationships, promote closer ties among employees and create a more pleasant environment for union meetings."[47] Similarly, over the dissent of one of its members, the Court permitted the union to charge objectors a pro rata share of the entire cost of the union's quadrennial convention[48] although numerous politicians addressed the convention in ways that were not shown to contribute "even remotely to collective bargaining."[49] It was sufficient that the convention helps the union "establish bargaining goals and priorities, . . . formulate overall union policy, [and] consult its members about . . . overall bargaining goals and policy."[50] In addition, as the forum by which the union elects officers and otherwise governs itself, the convention helps the union "maintain its corporate or associational existence."[51]

46. *Ellis,* 466 U.S. at 449.

47. *Id.* at 449-50 (quoting court of appeals decision in *Ellis,* 685 F.2d 1065, 1074 (9th Cir. 1982)). The Court also pointed out that 1) social activities were "a standard feature of union operations" and 2) that social activities constituted approximately .7% of the union's overall budget. *Id.* The Court concluded, based on the legislative history of the RLA that "[m]embers of Congress were [not] inclined to scrutinize the minor incidental expenses incurred by the union in running its operations." *Id.* at 450. There was no suggestion that the result would differ should the social activity include some incidental component not related to collective bargaining, such as attendance by a candidate for political office at a union picnic.

48. *Id.* at 448-49.

49. *Id.* at 459 (Powell, J., concurring and dissenting).

50. *Id.* at 448.

51. *Id.* Some convention delegates' work affects all employees within the union—such as work on modifications of the union constitution. Other work affects only a fraction of the membership—such as appeals to the convention by one local union or one member seeking, for example, reversal of an interpretation of the constitution by the international union president and general executive council. *See* Hartley, *supra* note 13, at 70-75 (discussing the various activities of the international union convention). Yet the *Ellis* Court held all objectors must bear a pro rata cost of the entire convention expense. *Ellis,* 466 U.S. at 448.

Yet the Court scrutinized other classes of expenditure much more closely. For example, the Court held general organizing expenses were nonchargeable to dues objectors because organizing under the RLA has only an "attenuated connection with collective bargaining."[52] The Court did not explain how to measure such an "attenuated" nexus or why a slight connection to collective bargaining disqualified organizing expenses when social activity expenses, which "are not central to collective bargaining,"[53] are nevertheless chargeable. In sum, *Ellis'* attempt to describe expenditures that are chargeable cannot remotely begin to explain the results in these cases. Something else must be operating.

The Court's treatment of litigation expenses in *Ellis* further illustrates the limited utility of the language used to describe the union's right to charge objectors. The litigation expenses in *Ellis* resulted from "litigation not involving the negotiation of agreements or settlement of grievances."[54] Scrutinizing such litigation strictly, the Court held that litigation not germane to collective bargaining is chargeable only when the objecting employee's own bargaining unit is "directly concerned."[55] By contrast, objectors may be charged for "any other litigation [that is related to collective bargaining] before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative."[56] The Court did not explain why litigation related to collective bargaining is chargeable if it "concerns" bargaining unit employees and is "normally conducted," while litigation unrelated to collective bargaining is chargeable only if "the [objector's own] bargaining unit is directly concerned." Moreover, this test leaves unanswered a decisive question: how to gauge when litigation is related to collective bargaining.[57]

52. 466 U.S. at 451.

53. *Id.* at 449.

54. *Id.* at 440.

55. *Id.* at 453.

56. *Id.*

57. One class of litigation at issue in *Ellis* challenged the airline industry Mutual Aid Pact. The Pact provided that airlines not on strike provide financial assistance to one that is on strike. The Court found this litigation not to involve collective bargaining, even though the Ninth Circuit Court of Appeals had held: "The aim of the Mutual Aid Pact litigation was to strengthen the union's ultimate collective bargaining weapon—the ability to engage in an effective strike, which is thwarted considerably if the struck carrier continues to receive substantial income from non-struck carriers." Ellis v. BRAC, 685 F.2d 1065, 1073 (9th Cir. 1982), *rev'd in relevant part,* 466 U.S. 435, 457 (1984). The Supreme Court did not explain why it considered this litigation as "not involving the negotiation of agreements." 466 U.S. at 440. Nor did it explain why it similarly characterized "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings . . . or defending suits alleging violation of the nondiscrimination requirements of Title VII." *Id.* at 453.

The Court's treatment of publication expenditures was circular. "[T]he Act . . . allows [the union] to charge objecting employees for reporting to them about those activities it can charge them for doing."[58] As shown above, the language of the *Ellis* test for determining chargeable activities offers little guidance. It should be noted, moreover, that the Court required precise allocation of chargeable and nonchargeable publication expenditures. The chargeable percentage of publication costs is computed by calculating the ratio of lines in a publication reporting chargeable activities to total lines published.[59] The Court did not explain why it refused to treat publication expenditures as it had treated the union convention expenditures, which need not be allocated even though some convention activities plainly were not related to collective bargaining or grievance handling.[60]

The foregoing consideration of the Court's treatment of union expenditures adjudicated in *Ellis* provides more than an occasion to lament the level of lucidity in Supreme Court decisions. This section has attempted to show that whatever unifying principles in *Ellis* give its outcomes coherence, neither the *Ellis* tests, nor their application to the activities actually litigated in the case describe adequately the scope of chargeable activities. One suspects that much more than the language of the test of chargeability is operating.

B. Seeds of Coherence in *Ellis*

(1) The Clash that Barely Surfaced

The briefs to the Court in *Ellis* reveal that three points of contention dominated: close nexus, allocation, and cross-unit costsharing. While hotly contested in the briefs, these arguments barely surfaced in the Court's discussion. These three issues are discussed below.

First, the petitioners, dissenting employees, sought a close nexus test that would require "each expenditure [to be] *directly* related to *and* reasonably necessary for the performance of the [collective bargaining] functions."[61] The respondent union urged approval of the court of appeals' more relaxed nexus test: whether the activity " 'can be seen to promote,

58. 466 U.S. at 451.

59. *Id.* at 450.

60. *See* discussion *supra* note 49 and accompanying text. It should be noted that while precise allocation of publication costs is required, there is no suggestion in *Ellis* that the cost of a newspaper or magazine article may be charged to objectors only if it concerns the objectors' own bargaining unit.

61. Brief for Petitioners at 12, Ellis v. BRAC, 466 U.S. 435 (1984) (No. 82-1150) (emphasis added).

support or maintain the union as an effective collective bargaining agent.' "[62]

Petitioners also urged adoption of a rule requiring precise allocation in all accounts between chargeable and nonchargeable expenditures using a "measurable accounting standard of reliability."[63] The union responded by arguing that such allocation "finds no support in logic, in law, or in experience."[64]

Lastly, petitioners argued that costs are chargeable to an objecting employee only if the benefits thereby accrue to the objecting employees' own bargaining unit, even if the activity were otherwise germane to collective bargaining.[65] By contrast, respondent argued that unions should be permitted to pool their costs, finance the costs from all bargaining units the union represents, and allocate the pool among the bargaining units as the need arises. As they argued, "contrary to [petitioners'] contention, there is nothing in *Street, Allen* or *Abood* [the three previous Supreme Court dues objector cases] limiting chargeable expenditures to a particular employer-employee relationship."[66]

Understanding this struggle between the parties begins to unravel the mystery of *Ellis.* On reflection, *Ellis* represents a compromise, a middle course among these divergent views. A quick review of the Court's holdings with regard to the five categories of union activities litigated in *Ellis* demonstrates this.

First, the Court held that a union may charge for social activities even though the activities do not have a close nexus to collective bargaining. Nor does *Ellis* suggest any duty to allocate. The union is permitted to finance social activities by cross-unit costsharing.[67]

Second, the union also need not allocate convention costs, and may finance such costs by cross-unit costsharing. The Court, however, focused on the close nexus between union conventions and the union's effectiveness "in discharge of its duties as collective bargaining agent."[68]

62. Brief for Respondents at 5, *Ellis* (No. 82-1150) (quoting Appendix to Petition for Certiorari at 13a-14a).

63. Brief for Petitioners at 5, 28, *Ellis* (No. 82-1150).

64. Brief for Respondents at 48, 49 n.36, *Ellis* (No. 82-1150).

65. Brief for Petitioners at 1, 15, 17, 23, *Ellis* (No. 82-1150).

66. Brief for Respondents at 31, 50 & n.37, *Ellis* (No. 82-1150) (allocating costs by bargaining unit benefitted constitutes insurmountable obstacle when applied to convention costs).

67. *See* discussion *supra* notes 46-47 and accompanying text.

68. *See* discussion *supra* notes 48-51 and accompanying text. As the Court found, the union convention is "essential" to the discharge of its representational duties and it "directly relate[s]" to the union's effectiveness as bargaining agent. *Ellis,* 466 U.S. at 449.

Third, the Court found general organizing expenditures nonchargeable. The Court's analysis suggests that to be chargeable, general organizing expenses must either significantly enhance general union effectiveness as bargaining representative or provide the objector's own bargaining unit a significant benefit.[69] The general organizing in *Ellis* was found to do neither.[70] There was no occasion to discuss allocation with respect to general organizing because the Court found it not chargeable, at least in the RLA context.

Fourth, the Court required allocation between litigation costs involving collective bargaining and litigation costs not involving collective bargaining. Litigation not related to bargaining is chargeable only if it "directly concerns" the dues objector's bargaining unit. Litigation related to collective bargaining is chargeable to all employees, the Court stated, if it "concerns" unit employees generally and is "normally conducted."[71]

Finally, the Court permitted cross-unit costsharing with respect to union publications,[72] but required precise allocation.[73]

In summary, the *Ellis* rhetoric describing when activity is "germane to collective bargaining" is not so much a standard against which union activities are measured as it is an abstraction that is incapable of providing predictable results. Viewing *Ellis* through the prism the parties created, it seems clear that its several outcomes reflect manipulations of three variables: close nexus, allocation, and cross-unit costsharing. The case does not explain how these three variables are to be applied to other union activities. For example, what principled mechanism determines when an activity's relationship to bargaining effectiveness will be deemed attenuated? In *Ellis,* the Court sometimes accepted as adequate a slight nexus, with respect, for example, to social activities. At other times, the Court required a closer nexus. Moreover, in those situations when close nexus was required, *Ellis* did not clarify why some activities, such as conventions and portions of union publications, were found to bear a close nexus to overall bargaining effectiveness while others, such as general organizing under the RLA, were found to bear only an "attenuated" relationship to bargaining. Also, *Ellis* failed to discuss when allocation will be required and when will it not. Finally, cross-unit costsharing is generally permitted. Yet, when discussing general organizing expenses

69. *See* discussion *supra* notes 52-53 and accompanying text.
70. *Ellis,* 466 U.S. at 451-53.
71. *See* discussion *supra* notes 54-57 and accompanying text.
72. *See* discussion *supra* note 58 and accompanying text.
73. *See supra* notes 59-60 and accompanying text.

and litigation not related to collective bargaining, the *Ellis* Court referred to the benefit an objector's own bargaining unit derived from union expenditures.

What remains is to determine whether *Ellis* contains a principle clarifying when and how these three variables, directs nexus, allocation, and cross-unit costsharing, will be applied to categories of union activity not yet litigated.

(2) The Constitutional Heritage of Ellis

Ellis cannot be discerned adequately without understanding its constitutional grounding. This requires a short journey through three RLA dues objector cases that preceded *Ellis,* sometimes referred to as the *RLA Trilogy.*

The Court first considered these issues in *Railway Employees' Department v. Hanson.*[74] In *Hanson,* an RLA case, a union shop provision was challenged as a per se violation of both the first amendment and a right to work liberty interest grounded in the due process clause of the fifth amendment.[75] The Court thus was required to render two constitutional holdings.

Responding to the due process attack, the Court held that the RLA's authorization of compelled financial support of the union does not violate the liberty interest in the right to work contained in the fifth amendment's due process guarantee. Congress fairly may have concluded, the Court reasoned, that the best way to advance the right to work is to secure industrial stability, in part, by requiring "the beneficiaries of trade unionism to contribute to its costs [that relate] . . . to the work of the union in the realm of collective bargaining."[76] The Court warned, however, that if compelled financial support were "in fact imposed for purposes not germane to collective bargaining, a different problem would be presented."[77] The Court did not discuss how close a connection to the collective bargaining process would be required for an activity to satisfy due process concerns except that it must "relate . . . to the work of the union in the realm of collective bargaining."[78]

74. 351 U.S. 225 (1956).

75. In *Hanson,* plaintiffs claimed that a union security agreement authorized by section 2 Eleventh of the RLA contravened guarantees in a state constitution guaranteeing the "right to work." *Id.* at 228-30. Since, on its face, section 2 Eleventh preempts state law, that argument depended on a determination that section 2 Eleventh is unconstitutional. *Id.*

76. *Id.* at 235.

77. *Id.*

78. *Id.*

As to the first amendment claim, the Court found no evidence on the record that the union shop arrangement "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights."[79] Again, the Court warned that "if the exaction of dues, initiation fees, or assessments is used *as a cover for forcing ideological conformity* . . ., this judgment will not prejudice the decision in that case."[80]

Accordingly, from the beginning, the Court based permissibility of compelled financial support of unions on two conditions: that activities financed by compulsory dues "relate . . . to the work of the union in the realm of collective bargaining" (due process consideration) and that they not "forc[e] men into ideological . . . association [by] forcing ideological conformity" (first amendment consideration). The Court did not attempt to describe the interrelationship of these two values.

International Association of Machinists v. Street,[81] the second of the Court's three RLA cases prior to *Ellis,* is pivotal. In *Street,* employees alleged that section 2 Eleventh of the RLA was unconstitutional to the extent it permitted unions to expend compulsory dues payments to finance political campaigns of candidates for public office whom objectors opposed "and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed."[82] The Court did not reach this constitutional question, holding instead that the twin constitutional limits on union use of compulsory dues identified in *Hanson* also define the RLA's statutory constraints on a union's right to require objectors to support union activities.[83]

As to the fifth amendment based liberty interest in the right to work, the *Street* Court followed *Hanson,* holding that the RLA only permits a union to require that "the beneficiaries of trade unionism . . . contribute to its costs [that relate] . . . to the work of the union in the realm of collective bargaining."[84] Compulsory support of political causes exceeds that limitation.[85] As to the objectors' right of free expressive association, also considered in *Hanson,* the *Street* Court held that the RLA protects

79. *Id.* at 236.

80. *Id.* at 238 (emphasis added).

81. 367 U.S. 740 (1961).

82. *Id.* at 744-45.

83. *Id.* at 749-50; *see also id.* at 768-70 (Section 2 Eleventh contemplates requiring employees to share the costs of negotiating and administering collective agreements but also is intended to protect freedom of dissent.).

84. *Id.* at 763 (quoting Railway Employees' Dep't v. Hanson, 351 U.S. 225, 235 (1956)).

85. *Street,* 367 U.S. at 768.

the objector's right to dissent by denying unions the right to use objectors dues "to support political causes which [they] oppose[ ]." [86]

Street thus held that the RLA prohibits charging dues objectors any costs of union activities that 1) do not "relate to" the union's collective bargaining function and 2) are such that compulsory financial support would interfere with objectors' right of free expressive association. By that reading, the Court said, "we give § 2 Eleventh the construction which achieves *both* congressional purposes. " [87]

The Court acknowledged that there exists a gray area: costs of activities that are not political (*i.e.*, do not risk coerced ideological conformity), but also are not the type of costs necessary to effectuate collective bargaining. The Court's identification of this gray area offers two important insights.

First, the possibility exists that some activities not necessary to effectuate collective bargaining may be chargeable, if they also are not ideological. The Supreme Court stated that it was expressing "no view as to . . . expenditures [other than political contributions] objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes."[88] The need to reserve this question arises only if a fair argument exists that some activities not necessary to effectuate collective bargaining responsibilities are nevertheless chargeable. But which activities? The Court reserved this question.

Second, the Court seems to suggest that in the case of a nonideological activity, it is not possible to disregard the congressional concern that there be some reasonable nexus between an activity and the collective bargaining process. The gray area described by the Court is gray precisely because there may be a required minimum nexus to the union's representational duties without which even nonideological activities may be nonchargeable to objectors. Determining the nature of this minimum nexus, however, was left for another day.[89]

86. *Id.* at 769. *Street*'s conclusion that Congress has privatized the twin constitutional concerns first identified in *Hanson* (nexus to bargaining and coerced ideological conformity) by establishing them as RLA statutory concerns is not unusual in construing labor law statutes. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law,* 1986 U. ILL. L. REV. 689, 696 (Protection of constitutional values "has never been the exclusive domain of the Supreme Court." Indeed, labor law's "deep-running current for more than half a century has been the protection of personal freedom from private controls and an enrichment of democracy in private employment.").

87. *Street,* 367 U.S. at 768 (emphasis added).

88. *Id.* at 769.

89. There is, of course, a second gray area: activities that are *both* germane to collective bargaining and inherently ideological. The Court did not acknowledge this gray area in *Street.*

The third pre-*Ellis RLA Trilogy* case was *BRAC v. Allen.*[90] Decided on procedural grounds two years after *Street, Allen* seldom is examined closely for its analysis of union activities chargeable to objectors.[91] *Allen* is important, however, because it reveals a maturation of the Court's view that the predominant concern in the dues objector cases is coerced ideological conformity. The *Allen* Court stated that in each case the union must provide those who register dissent "a division of the union's political expenditures from those germane to collective bargaining, *since only the former, to the extent made from exacted funds of dissenters, are not authorized by § 2 Eleventh.*"[92]

The *RLA Trilogy* thus provides the foundation for a principled method to identify expenditures chargeable to dues objectors. To summarize, the dues objectors' constitutional arguments in *Hanson* uncovered two distinct, though related, constitutional concerns limiting union expenditure of compulsory dues. The first was a due process concern. To be chargeable, expenditures must meet the fundamental justification for the union shop. They must in some way "relate . . . to the work of the union in the realm of collective bargaining." Second, a union must not coerce free expressive association by using union security agreements as a "cover," compelling financial support of ideology unrelated to collective bargaining.[93]

Street demonstrates that the RLA statutory limits on charging dues objectors are driven by these two constitutional concerns and *Allen* signals that an activity's potential to advance ideology unrelated to collective bargaining may be the RLA's predominant concern.[94] Indeed, the *Allen* Court was prepared to state that only political expenditures are

90. 373 U.S. 113 (1963).

91. *Allen* addressed the procedural issues of what notice a potential objector must provide to a union to communicate a desire to object, *id.* at 118-19, and whether a class action suit may be brought in the dues objector context. *Id.* at 116-17 n.4. It also confronted certain remedial issues, including the availability of injunctive relief, *id.* at 120-22, and the union's duty to return to the objector the portion of dues found to have financed activities not germane to collective bargaining. *Id.* at 122-23.

92. *Id.* at 122. (emphasis added). Since in *Allen* no evidence was introduced regarding chargeable activities, the Court remanded with instructions to make two determinations: "(1) [W]hat expenditures disclosed by the record are *political*; (2) what percentage of total union expenditures are *political* expenditures." *Id.* (emphasis added). Importantly, this limitation on the inquiry was imposed notwithstanding that the complaint alleged the death benefit system operated by the union—plainly not a political activity—was not chargeable to objectors. This was the gray area expenditure discussed in *Street. See supra* note 88 and accompanying text.

93. *See* discussion *supra* notes 81-87, 91-92 and accompanying text.

94. *See* discussion *supra* notes 84-89 and accompanying text.

nonchargeable to objectors. Yet the Court in *Allen* required unions to segregate expenditures "germane to collective bargaining."[95]

Did *Street* and *Allen* suggest that, as a due process matter, there is a minimum nexus to the union's representative function that must be satisfied before objectors may be charged their "fair share" of any union cost, and that an activity satisfies due process concerns if it has some rational relation "to the work of the union in the realm of collective bargaining," though incidental to the union's collective bargaining effort? This due process need satisfied, does a need for heightened judicial scrutiny arise only if compelling financial support of the activity poses a real risk of forcing support of ideology unrelated to collective bargaining, such as the support for pro-labor candidates in *Street*? The *RLA Trilogy* helped frame the questions, and identified some parameters for resolving them, but offered few clear answers.

Abood v. Detroit Board of Education,[96] a public sector case, was the Court's next dues objector case. Addressing whether compelling public employees to support union activities is per se unconstitutional, it further illuminates the analytical framework developed in the *RLA Trilogy* and subsequently applied in *Ellis.*

Abood held that the constitutional line defining activities an objector can be required to support financially is the same as the RLA statutory line, as interpreted by *Street* and *Allen.*[97] This parallels the holding in *Street*: Congress intended the RLA to guarantee objectors what the Constitution requires.[98] Read together, *Abood* and *Street* confirm the basic proposition that the RLA requires of unions all, but no more than, the Constitution requires with respect to union expenditures chargeable to objectors. Stated in terms of limits, the proposition confirmed by *Abood* is that the RLA limits activities a union may charge objectors only to the extent necessary to protect objectors' twin constitutional interests that the activity bear some rational nexus to collective bargaining (due

95. *Allen,* 373 U.S. at 121-22.

96. 431 U.S. 209 (1977).

97. The Court first concluded that union security issues in the public and private sectors are " 'fundamentally the same.' " *Id.* at 232 (quoting H. WELLINGTON & R. WINTERS, JR., THE UNIONS AND THE CITIES 95-96 (1971)). As the Court said, "The differences between public and private sector collective bargaining simply do not translate into differences in First Amendment rights." *Abood,* 373 U.S. at 232. Moreover, the line the Constitution requires between collective bargaining activities and ideological activities is similar to the line the RLA requires, "but in the public sector the line may be somewhat hazier." *Id.* at 236.

98. *See* discussion *supra* note 81-87 and accompanying text; *see also Abood,* 431 U.S. at 232 ("*Street* embraced an interpretation of the Railway Labor Act . . . to avoid facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining . . . .").

process concern) and not force ideological conformity (free expressive association concern). *Abood* thus confirmed the relationship between the RLA dues objector cases and the constitutional values first articulated in *Hanson.*

Beyond this, *Abood* contributed to understanding how the concerns of nexus to collective bargaining and risk of compelled ideological conformity interrelate. In this regard, *Abood* makes several essential points:

1) A dues objector's first amendment interest lies in the freedom to associate for the advancement of ideas or to refrain from doing so as the objector sees fit. In *Abood,* the Court described this first amendment right of association as "the freedom of an individual to associate for the purpose of advancing beliefs and ideas,"[99] to contribute "to an organization for the purpose of spreading a political message,"[100] and to join with "like-minded persons to pool their resources in furtherance of common political goals."[101] This right also includes the right to refrain from expressive association for ideological purposes unrelated to collective bargaining.[102]

2) *Abood* next explains that objectors' first amendment interests are implicated when compelling financial support of union activity raises "ideological objections." Summarizing the history of first amendment protection of the right of expressive association, the Court concluded that "[t]hese principles . . . thus prohibit the [government] from requiring any of the [union-represented employees] to contribute to the support of an *ideological cause* he may oppose as a condition of holding a job . . . ."[103] Implicit in this reasoning is that compelled financial support for

99. 431 U.S. at 233.

100. *Id.* at 234.

101. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 22 (1976)).

102. *Abood,* 431 U.S. at 233-235.

In Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984), the Court subsequently stated that the Constitution recognizes only two types of freedom of association. One is the right to choose "to enter into and maintain certain intimate human relationships." This right is "intrinsic" as a "fundamental element of personal liberty." The other freedom of association is the freedom to engage "in those activities protected by the First Amendment." *Id.* at 618. Association with a labor union implicates only the second. Indeed, the *Roberts* Court distinguished the intimate association of spouses from associations lacking the qualities of intimate association such as the "large business enterprise" and association "with ones' fellow employees." *Id.* at 619-20. *See also* discussion at *infra* note 122.

103. *Abood,* 431 U.S. at 222, 235 (emphasis added). The Court clarified that unions may expend funds "for the expression of political views . . . or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative . . . [but] such expenditures [must] be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas . . . ." *Id.* at 235-36.

a union activity that does not raise "ideological objections," raises no first amendment concerns.

3) The *Abood* Court next reasoned that when an ideological objection to compulsory support of union activities arises in the context of the union acting "in its role as exclusive representative," then "such interference as may exist" is justified by the contribution the union shop makes to stable labor relations.[104] As the Court observed:

> 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 [such as objection to medical benefits covering abortion or negotiating limits on the right to strike]. . . . 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 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.[105]

4) Relying on Justice Douglas' concurring opinion in *Street,* the Court in *Abood* continued by arguing that union activity, other than actually negotiating or administering collective bargaining agreements, is chargeable to objectors if the union is " 'act[ing] to promote the cause which justified bringing the group together.' "[106] The first amendment line, therefore, must be drawn to protect against compulsory support of "ideological activities unrelated to collective bargaining."[107] Reference to Justice Douglas' concurring opinion in *Street* bolsters the conclusion that the first amendment concern in dues objector cases is limited to financial support of ideological activities not advancing a union's representative function. As Justice Douglas stated in *Street,* the first amendment protection against forced expressive association secures the personal right not to "be forced to surrender any matters of conscience, belief, or expression." This right is not absolute; instead, it protects the objector

104. 431 U.S. at 222.

105. *Id.*

106. *Id.* at 223 (quoting *Street,* 367 U.S. at 778 (Douglas, J., concurring)).

107. The majority in *Abood* held that courts must "draw[] lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court held in Street as a matter of statutory construction that a similar line must be drawn under the Railway Labor Act . . . ." *Id.* at 236.

from having dues used to support "causes beyond what gave rise to the need for group action."[108]

5) Implicit in the *Abood* analysis is another conclusion: Since union activity not fairly raising "ideological objections," poses no free association concerns, any limitation on charging objectors for these activities must arise from a due process concern. Hence, nonideological activity is chargeable to objectors if it is "in the realm of collective bargaining" minimally related to the union's representative function.[109]

Segregating union activity into several categories may help clarify the implications of the principles emanating from *Abood.*[110] The first is nonexpressive union conduct, activity not significantly advancing ideas. Nonexpressive activity implicates only due process concerns. Only expressive union activity fairly can generate "ideological objection" and, therefore, implicate values incorporated in the freedom of expressive association.[111] Accordingly, nonexpressive union activity should be tested by whether it bears some reasonable relation to the union's representative function, whether it can be seen to be "in the realm of collective bargaining," and not "unrelated" to it.[112]

A second category is expressive conduct that goes to the core of the union's "role as exclusive representative," such as union efforts to negotiate or administer collective bargaining agreements. Under *Abood,* these activities are chargeable to objectors not because they are free of "ideological objection," but because such coercion interfering with the right to refrain from expressive association as may result is justified by the governmental interest in industrial stability.[113] Moreover, such activity poses a negligible risk of forcing objectors "into ideological and political associations which violate their freedom of conscience . . . ."[114]

108. International Ass'n of Machinists v. Street, 367 U.S. 740, 776-77 (1961) (Douglas, J., concurring).

109. Railway Employees Dep't v. Hanson, 351 U.S. 225, 234-35, 238 (1956) and *Street,* 367 U.S. at 762-63, 765, had held that the RLA recognizes both a free expressive association right of the dissenter as well as a due process based value protecting liberty interest in the right to work. *See* discussion *supra* notes 74-87 and accompanying text. Accordingly, even activities not raising ideological objection, and therefore not raising free expressive association concerns, must reasonably be "relate[d] to the work of the union in the realm of collective bargaining." *Hanson,* 351 U.S. at 235.

110. The death benefit fund referred to in *Street* might be an example of this activity. *See Street,* 367 U.S. at 770 n.18 ("[M]any of the national labor unions maintain death benefit funds from the dues of individual members transmitted by the locals.").

111. *See* discussion *supra* notes 99-102 and accompanying text.

112. *See* discussion *supra* notes 77-78.

113. For a discussion of the inherent ideological component of the contract negotiation function, see discussion *supra* note 105 and accompanying text.

114. *See* discussion *supra* note 79 and accompanying text. Grievance adjustment is a good

Of the remaining union activity, expressive activity other than actual contract negotiation or administration is chargeable if it "promote[s] the cause which justified bringing the group together."[115] Otherwise, like support for political campaigns, it is "ideological activit[y] unrelated to collective bargaining" and is nonchargeable.[116]

While the above synthesis provides a credible explanation of the Court's work in the *RLA Trilogy* and *Abood,* two questions remain. First, is there any additional evidence supporting this analytical framework? Second, if so, how will the Court actually apply it to various union activities? *Ellis,* the next case decided after *Abood,* answers both questions.

(3) The Ellis *Decision's Operating Principles*

In *Ellis,* the Court concluded that the RLA permits charging dues objectors for social activities, conventions, and publications.[117] Accordingly, the Court was compelled to reach the issue not reached in *Street* or *Abood*: whether these statutory authorizations violate any constitutional limitations. Again, *Ellis* confirmed what the *RLA Trilogy* and *Abood* had previously suggested, that a union may charge objectors for support of some union institutional activities even though the activities are not required to effectuate collective bargaining negotiation and administration functions.

The *Ellis* Court first reaffirmed that "allowing the union shop at all . . . countenance[s] a significant impingement on First Amendment rights."[118] Yet, "at a minimum," the union may charge dues objectors

example. It is an inherently expressive activity. Yet, its purpose is not to propagate political or economic doctrine, concept, or ideology. The same might be said of a lawsuit alleging an employer's breach of contract or an unfair labor practice charge alleging discriminatory discharge.

115. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223 (1977). Union activity "prompt[ing] the cause which justified bringing the group together," albeit away from the traditional bargaining table or the grievance adjustment process, is chargeable because it also contributes to "the system of labor relations established by Congress." *Id.* at 222. Moreover, from the viewpoint of interference with freedom of expressive association, such activity poses a minimal risk of being used as a cover "to promote the propagation of political and economic doctrines, concepts, and ideologies with which [a dues objector] disagrees." *Street,* 367 U.S. at 744.

116. *Abood,* 431 U.S. at 236. Support of the campaigns of candidates for political office is the paradigmatic example of nonchargeable union activity, as *Street* held. *Street,* 367 U.S. at 768. Legislative lobbying unrelated to collective bargaining is another example. Speeches to outside groups, domestic or international, may fall into this category if they involve ideas such as political or economic doctrine, concepts, or ideologies. *See* discussion *infra* notes 237-43 and accompanying text.

117. *See* discussion *supra* notes 46-51, 58-60 and accompanying text.

118. Ellis v. BRAC, 466 U.S. 435, 455 (1984).

for the support of collective bargaining activities because the governmental interest in industrial stability justifies that level of interference with objectors' freedom of expressive association.[119] As to charging objectors the cost of activities other than those associated with collective bargaining negotiation or administration, the Court held the issue is first whether the resulting coercion "involve[s] additional interference with the First Amendment interests of objecting employees, and, if so, whether [it is] nonetheless adequately supported by a governmental interest."[120]

As with the *Abood* and *RLA Trilogy* analyses before it, *Ellis* confirms the value of classifying union conduct into the several categories previously described: 1) nonexpressive activity; 2) expressive activity engaged in by the union exercising its role as contract negotiator or administrator; 3) other expressive activity that also is related to collective bargaining by "promoting the cause which justified bringing the group together;" and 4) expressive activity unrelated to collective bargaining.[121] Examining again the Court's treatment of the various *Ellis* categories of expense shows the value of segregating union activity in this way and clarifies how the Court employs the variables of close nexus, cross-unit costsharing, and allocation.[122]

a. Nonexpressive Activity

Permitting a union to charge objectors a share of the cost of social activities is readily discernable as an application of minimal scrutiny to a nonexpressive activity. First, the Court expressed doubt whether "union social activities implicate serious First Amendment interests" at all.[123] Such activities pose little or no risk of compulsory subsidization of ideo-

119. *Id.* at 456.

120. *Id.*

121. *See* discussion *supra* notes 110-116 and accompanying text.

122. Roberts v. United States Jaycees, 468 U.S. 607 (1984), was decided during the same term as *Ellis.* Justice O'Connor acknowledged in *Roberts* that the driving principle of *Ellis* is that government may compel association for the "commercial purpose" of engaging in collective bargaining related activities, but may not compel association "involving ideological or political associations." *Id.* at 638 (O'Connor, J., concurring). That is the clearest post-*Ellis* confirmation to date from the Court that the "germane to collective bargaining" rhetoric of *Ellis* is an attempt to differentiate between union activities that permissibly impact on an objector's freedom of ideological association and those that impermissibly infringe that right.

Roberts is also noteworthy because the majority held that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . [the] constitutionally protected liberty [of free expressive association] is at stake in a given case." *Id.* at 618. This sliding scale, explicitly adopted in *Roberts,* was implicit in *Ellis. See* discussion *supra* and *infra* notes 117-191 and accompanying text.

123. *Ellis,* 466 U.S. at 456.

logical positions such as the compelled "propagation of political and economic doctrines, concepts, and ideologies" found unlawful in *Street.*[124] The sole objection to paying a pro rata share of a union's social activities, the Court concluded, "is that these are *union* social hours. . . . [T]he fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union."[125]

This is not to say that the RLA places no restrictions on charging objectors for activities having little or no expressive content. Rather, the pre-*Ellis* framework discussed above posits that the Court will exercise minimal scrutiny, required by due process concerns, by inquiring whether the activity bears some rational connection to the union's collective bargaining responsibilities, or as the Court said in *Hanson,* is in "the realm of collective bargaining."[126] That is precisely how the Court handled social activities in *Ellis.*

First, the Court did not require close nexus between social activities and the collective bargaining process. The Court acknowledged that social activities are not "central to collective bargaining."[127] Yet the Court did require a showing of minimal nexus. The union argued in its brief that the nexus test for all activities should be whether the activity " 'can be seen to promote, support or maintain the union as an effective collec-

124. International Ass'n of Machinists v. Street, 367 U.S. 740, 744, 750 (1961).

125. *Ellis,* 466 U.S. at 456. As the Court reasoned, to the extent that contributing money to support union social affairs is an act triggering any first amendment concerns,

> the communicative content is not inherent in the act, but stems from the union's involvement in it. The objection is that these are *union* social hours. Therefore, the fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union. Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint.

Id.

126. *See* discussion *supra* note 111-12 and accompanying text. Post-*Ellis* cases have held that a union may not charge objectors for any political or ideological activity not germane to collective bargaining. *See, e.g.,* Hudson v. Chicago Teachers Union Local 1, 743 F.2d 1187 (7th Cir. 1986) (unnecessary to reach issue of scope of concept of germane to collective bargaining), *aff'd on other grounds,* 475 U.S. 292, 304 n.13 (1984). Whether this position is consistent with *Ellis* depends on the definition of "germane." *Ellis,* as this Article has argued, does require a showing of some rational connection to the union's collective bargaining function before a union may charge for nonexpressive, and thus nonideological, union activities. It does not require more, however. *See* Tierney v. City of Toledo, 824 F.2d 1497, 1504-05 (6th Cir. 1987) (Union activity may constitute neither ideological activity nor a cost of negotiating or administering agreement, but is chargeable if it is "fairly attributable to agreement-related purposes").

127. 466 U.S. at 449.

tive bargaining agent.' "[128] Without quoting that standard, the Court seems to have adopted it for its minimum scrutiny nexus test. The Court held that social activities have the requisite nexus to the union's representation function because social activities "are a standard feature of union operations" and they "bring about harmonious working relationships, promote closer ties among employees, and create a more pleasant environment for union meetings."[129] In short, they maintain the union's effectiveness as collective bargaining agent, and such a nexus satisfied the Court. It follows that other categories of union activity that similarly involve little or no risk of being used to advance ideology may be charged if they reasonably can be seen to maintain the union's effectiveness as bargaining agent, such as by bringing about harmonious working relationships, promoting closer ties among employees, or creating a pleasant environment for union meetings.

Nor did the Court suggest that there is a requirement to allocate social activity costs, even if the social event includes some incidental ideological content, with the remainder of the event being nonideological. The Court simply held that objectors may be charged their share of the cost of the social event.[130] Not requiring allocation was a second manifestation of minimal scrutiny.

Finally, an international union's budget for social activities supports activities touching employees in many different bargaining units.[131] In *Ellis,* the Court did not require segregating social events benefitting the objectors' own bargaining unit. The Court simply held it would not scrutinize the union's decision to charge objectors for their share of the entire social event budget. Accordingly, a third manifestation of minimum scrutiny is that the union may finance such activities by cross-unit costsharing.

b. Expressive Activities Engaged in as Contract Negotiator or Administrator

None of the categories of activity litigated in *Ellis* involved contract negotiation or administration functions. Yet, in all of the pre-*Ellis* cases,

128. Brief for Respondents at 5, *Ellis* (No. 82-1150) (quoting Appendix to Petition for Certiorari 13a-14a).

129. 466 U.S. at 449-50 (quoting Ellis v. BRAC, 685 F.2d 1065, 1074 (1982)). The Court also noted the social expenses were "*de minimis.*" These costs constituted .7% of the international union's total expenditures. *Id.* at 449. While this part of a $10 million annual budget ($70,000), is not a small amount of money, it *is* a small portion of the budget.

130. Of course, assessing objectors for social events may not be used "as a cover for forcing ideological conformity." Railway Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956).

131. The Court referred to expenditures for various "union business meetings and occasional social activities." *Ellis,* 466 U.S. at 449.

as in *Ellis* itself, the paradigm of a chargeable activity has been "the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes."[132] At a minimum dues objectors may be charged these expenses.[133]

The only likely issue, other than what constitutes contract negotiation or administration activity, is whether it may be financed by cross-unit costsharing. Stated differently, may the union spread bargaining-related costs among all represented employees, or must a union identify the particular bargaining unit serviced by each hour of collective bargaining activity engaged in by the union's officers and staff during an audit period and allocate costs to each bargaining unit represented? Again, *Ellis* provides valuable guidance.

First, in *Ellis,* the petitioners argued that "they [could] be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances with [their own employer] Western Airlines."[134] This argument was rejected not only concerning social activities, but also with respect to conventions[135] and publications,[136] both of which served represented employees by facilitating the formulation of bargaining policy and communicating information concerning a variety of contract negotiation and administration activities.[137]

132. *Id.* at 448.

133. *Id.* at 456.

134. *Id.* at 439. *See* Brief for Petitioners at 27, *Ellis.* (No. 82-1150) (Union did not meet its burden of proof because of failure to "isolate the costs of collective bargaining with Western Airlines . . . ."). *See also* discussion *supra* note 65 and accompanying text for other references to this argument in the *Ellis* petitioners' brief to the Court.

135. *See* discussion *supra* note 68 and accompanying text. As the Court stated, "We have very little trouble in holding that petitioners must help defray the costs of these conventions." *Ellis,* 466 U.S. at 448.

136. *See* discussion *supra* note 72 and accompanying text. The Court recognized that the union magazine was used as a cross-unit method of " 'communicating information concerning collective bargaining, contract administration, and employees' rights to *employees represented by BRAC.*' " *Ellis,* 466 U.S. at 450 (emphasis added) (quoting Ellis v. BRAC, 685 F.2d 1065, 1074 (1982), *rev'd in relevant part,* 466 U.S. 435 (1984)).

137. A Fourth Circuit Court of Appeals panel noted that the *Ellis* Court did not require unions to apportion by individual bargaining unit its expenditures germane to collective bargaining. Crawford v. ALPA, 130 L.R.R.M. (BNA) 2932, 2935 (4th Cir. 1989), *petition for reh'g en banc granted,* No. 88-2083 (May 11, 1989). In *Crawford,* the court of appeals panel stated:

> the [*Ellis*] Court's discussion of the types of expenditures that can be charged against nonmembers' fees is instructive. Significantly these expenditures were not limited to individual bargaining units. . . . [T]he distinction the Court drew was between the types of expenditures—not whether the cost should be allocated to the specific unit in which an [objecting] employee worked.

130 L.R.R.M. (BNA) at 2935 (citation omitted).

In *Crawford,* the panel nevertheless viewed the cross-unit costsharing issue to have been

It strains logic to find that a union may charge all represented employees the costs of formulating bargaining policy and communicating it, but conclude unions may not charge all represented employees the pro rata costs of the actual negotiating or grievance handling so planned and reported. This deduction is reinforced by the Court's understanding in *Ellis* that it was being asked "to define the line between union expenditures that *all employees must help defray* and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters."[138]

Beyond this reasoning in *Ellis* lies a more profound basis for permitting cross-unit costsharing. Without it, dues and fees paid by nonmember dues objectors would be insufficient to cover their fair share of representation costs in their own bargaining unit. In *Lehnert v. Ferris Faculty Association,*[139] the District Court for the Western District of Michigan found that "unions operate on a cost-sharing basis [whereby] extraordinary expenses incurred by any one unit in any given year are spread out over all units represented by the union."[140] Cross-unit costsharing enables the union to set stable dues levels.[141] An example is the union strike fund, also known in some unions as the "defense fund."

left unresolved because it erroneously understood that the "issue was not presented in *Ellis.*" *Id.* The parties' briefs did clearly raise the issue. *See* discussion *supra* notes 65-66 and accompanying text. Also, in *Ellis,* the Court understood that the objectors sought only to pay a "pro rata share of the expenses of negotiating agreements and settling grievances *with [their employer] Western Airlines.*" *Ellis,* 466 U.S. at 439 (emphasis added).

In *Crawford,* the panel was presented with collective bargaining by a "unitary national labor organization [that] has no locals . . . [and] which negotiates contracts with the various airlines for the pilots of whom it is the exclusive bargaining representative." Crawford, 130 L.R.R.M. (BNA) at 2934. In this context, all represented employees directly benefit from the collective bargaining with each airline, *id.* at 2934-35, and the union was permitted, therefore, to charge all represented employees a pro rata share of its costs germane to collective bargaining. The Court thus had occasion to determine if cross-unit costsharing is permissible when the international union has locals that hold the bargaining rights. *See also* Pilots Against Illegal Dues v. ALPA, No. 86-2-410, bench op. at 7, 16, 131 L.R.R.M. (BNA) 2514, 2518 (D. Colo. Jan. 30, 1989) (union may finance chargeable activities by means of cross-unit costsharing).

138. *Ellis,* 466 U.S. at 447 (emphasis added). *See also id.* at 446 ("Undoubtedly, the union could collect from *all employees* what it needed to defray the expenses entailed in negotiating and administering a collective agreement and in adjusting grievances and disputes.") (emphasis added); *id.* at 447 (quoting BRAC v. Allen, 373 U.S. 113, 121-22 (1963)) ("*Allen* . . . described the union expenditures that could fairly be charged to *all employees* as those 'germane to collective bargaining.' "(emphasis added)).

139. 643 F. Supp. 1306 (W.D. Mich. 1986), *aff'd,* 132 L.R.R.M. (BNA) 2088 (6th Cir. Aug. 14, 1989).

140. *Id.* at 1325.

141. *See id.* ("[A] unit-by-unit breakdown of . . . any . . . expenditure, in a determination of the chargeable service fee . . . would *logically* lead to drastic fluctuations in the amount of the service fee charged to the objecting nonmembers of individual units.") (emphasis in original).

Professor Ulman has identified the creation of such risk-sharing funds as one explanation for the rise of the national trade union.[142] Bargaining unit employees contribute to such funds during periods of tranquility and draw upon the funds when embroiled in industrial conflict, like insurance.

If dues objectors were required to pay only a pro rata share of the costs of servicing their own bargaining unit during a particular year, while union members paid stable dues determined by cross-unit costsharing, dues objectors would pay less than members in years when the bargaining unit made little demand on various services available to all bargaining units. To pay their fair share, however, they would have to pay more than members in years of extraordinary demand for pooled services by their bargaining unit. Yet, under both the RLA and the Taft-Hartley Act, financial core nonmembers may not be compelled to pay more than the periodic dues uniformly imposed on members, even in years when a disproportionately high percentage of the union's costs are attributable to the dues objector's own bargaining unit.[143] Accordingly, the *Lehnert* Court concluded, "a unit-by-unit breakdown of chargeable expenditures would only exacerbate the free rider problem and thereby

142. *See* L. ULMAN, THE RISE OF THE NATIONAL TRADE UNION 176-96 (1966); *see also* Crawford v. ALPA, 130 L.R.R.M. (BNA) 2932, 2935 (4th Cir. 1989) (Cross-unit costsharing of strike fund is necessary " 'to ensure that those who enjoy union-negotiated benefits contribute to their cost.' " Objectors are relieved from contributing only by proving "that they will never benefit from the [strike] fund.") (quoting Communication Workers v. Beck, 108 S. Ct. 2641, 2649 (1988)), *petition for reh'g en banc granted,* No. 88-2083 (May 11, 1989).

143. Section 8(b)(2) and the second proviso to section 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. § 158 (1982), define the financial obligation on which employment may be conditioned in terms of "*periodic* dues . . . *uniformly* required as a condition of acquiring or retaining membership" (emphasis added). Accordingly, a dues structure imposing different dues rates is presumptively invalid. Justification for different rates is found when the dues differential is based on reasonable general classifications and is " 'susceptible of anticipation as a regularly recurring obligation' " but rejected when it is in the nature of a special assessment. Local 455, United Bhd. of Carpenters 271 N.L.R.B. 1099, 1100 (1984) (quoting NLRB v. Food Fair Stores, 307 F.2d 3, 11 (3d Cir. 1962)). *Compare* Bagnall v. ALPA, 626 F.2d 336, 339 (4th Cir. 1980) (RLA uniformity requirement satisfied by dues formula based on percentage of earnings), *cert. denied,* 449 U.S. 1125 (1981) *and* Schwartz v. Associated Musicians Local 802, 340 F.2d 228, 233 (2d Cir. 1964) (same for Taft-Hartley Act uniformity requirement) *with* Local 455, United Bhd. of Carpenters, 271 N.L.R.B. 1099 (1984) (citing cases holding that special strike assessment not uniform periodic dues). *See* BRAC v. Allen, 373 U.S. 113, 122 (1963) (Union may constitutionally expend "*uniform* exactions under the union-shop agreement in support of activities germane to collective bargaining. . . .") (emphasis added); *see also* NLRB v. Actor's Equity Ass'n, 644 F.2d 939 (2d Cir. 1981) (Uniformity requirement is violated by separate higher dues rates for nonresident alien members when the union could not show compelling reason for disparate dues rate.).

frustrate the governmental interest the Court has repeatedly recognized lies at the heart of statutes authorizing agency shops."[144]

Cross-unit costsharing is considered necessary to prevent the free rider problem in an additional way. The Indiana Court of Appeals confronted the cross-unit costsharing question in *Abels v. Monroe County Education Association.*[145] Modern collective bargaining, the court reasoned, requires the services of administrative personnel, lawyers, expert negotiators, economists, and researchers.[146] Without cross-unit costsharing, provided by national and district labor organizations, each local bargaining unit would be required to finance the cost of acquiring such expert services; accordingly, "the costs of collective bargaining could quickly become prohibitive."[147] By contrast, spreading the cost of these services among many bargaining units facilitates collective bargaining. Indeed, it makes modern collective bargaining possible by assuring that all represented employees obtain the benefit of the continuous availability of these expert services, and by assuming their availability at a reduced cost.[148] In short, the dues objector and the member each receive the present economic benefit of the availability of expert services through economies of scale, the fair share cost of which is the willingness to pay uniform dues calculated on the basis of cross-unit costsharing. Those unwilling to contribute to the present economic benefit of continuous availability of bargaining-related services by paying dues calculated through cross-unit costsharing obtain a free ride from others who are willing to finance these services.[149] The Supreme Court understood in

144. Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1325-26 (W.D. Mich. 1986), *aff'd,* 132 L.R.R.M. (BNA) 2088 (6th Cir. Aug. 14, 1989); *accord* DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 65 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) ("[C]ost-spreading method is a reasonable manner of allocating [union] expenditures."); Browne v. Milwaukee Bd. of School Directors, No. 18408-D, slip op. at 18 (Wis. Empl. Rel. Comm'n Sept. 19, 1985) ("[W]hen we speak of activities of a union that benefit employees generally, we are including, but not limiting it to, the employees in the particular bargaining unit in question."), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987).

145. 489 N.E.2d 533 (Ind. App. 1986), *cert. denied,* 480 U.S. 905 (1987).

146. *Id.* at 537. *Accord* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221 (1977) (The role of the union as exclusive representative "often entail[s] expenditure of much time and money."); Hartley, *supra* note 13, at 65-66 & n.266 (1982) (many unions have instituted administrative systems with a "complex infrastructure").

147. *Abels,* 489 N.E.2d at 537.

148. *Id.* at 537-38.

149. The Court is unlikely to be receptive to the argument that the majority may not choose to finance bargaining-related services by centralizing their delivery through experts who service many bargaining units. When the majority chooses such a strategy to facilitate delivery of bargaining services, "the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Abood,* 431 U.S. at 223.

See also Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-

Abood that union security arrangements incorporate this concept of cooperative cross-funding. As the Court stated, "The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. . . . A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit . . . ."[150]

Finally, some courts have expressed doubt whether unit-by-unit cost accounting is consistent with the Supreme Court's admonition that "the objective must be to devise a way of preventing compulsory subsidization of ideological activity . . . without restricting the union's ability to require every employee to contribute to the cost of collective-bargaining activities."[151] At least with respect to unions having many bargaining units, requiring unit-by-unit cost accounting "would create an unreasonable and unmanageable administrative burden."[152] As the *Lehnert* court concluded, "Assuming *arguendo* that [the unions] were able to break out discrete expenses by bargaining unit—an assumption that is not warranted by the facts at trial—I have little doubt that the marginal revenue received from service fee payors would not justify the cost of modifying the existing accounting systems to accommodate the requirement."[153]

353, slip op. at 39 (Mich. Empl. Rel. Comm'n Feb. 24, 1986) (A.L.J. decision) (Local affiliates benefit from the "opportunity to utilize the expertise of state and national organizations. . . . Much of this expertise is designed to increase the Union's effectiveness at the bargaining table and secure better contracts for its members. Since . . . unit members share in these benefits, . . . they may be charged for the overall costs . . . ."); Browne v. Milwaukee Bd. of School Directors, No. 18408-D, slip op. at 18 (Wis. Empl. Rel. Comm'n Sept. 19, 1985) (To be chargeable, a particular activity "need not relate to a particular bargaining unit's benefits where it is part of an overall program with other units by which they pool their strength, in furtherance of their mutual aid and protection, to assist each other."), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987); National Educ. Ass'n, slip op. at 49 (Feb. 4, 1987) (Lehleitner, Arb.) (Cross-unit costsharing is permissible to ensure "continuous availability of a wide range of services.").

150. *Abood,* 431 U.S. at 221-22.

151. *Id.* at 237. *See also* International Ass'n of Machinists v. Street, 367 U.S. 740, 773 (1961) ("In administering the [RLA], courts should select remedies which protect both [union and objector] interests to the maximum extent possible without undue impingement of one on the other.").

152. Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1325 (W.D. Mich. 1986) (Costs are chargeable to objectors if "pertinent to the unions' duties as bargaining representative" even if the costs are "unrelated to the specific bargaining unit of the dissenting employee."), *aff'd,* 132 L.R.R.M. (BNA) 2088, 2092 (6th Cir. Aug. 14, 1989).

153. *Id. See also* BRAC v. Allen, 373 U.S. 113, 122 (1963) (No decree is proper if it is "likely to infringe on the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining . . . ."), *quoted in Abood,* 431 U.S. at 239-40 & n.40.

Concern, from a cost-benefit standpoint, that unit-by-unit cost accounting will unduly infringe on the union's right to require all represented employees to pay a fair share of representational costs has been a recurring theme in the cases that have considered the cross-unit

In summary, the second category of conduct suggested by *Ellis* is union activity involving collective bargaining negotiation or grievance handling activities. These are expressive activities that inherently involve the advancement of ideas, as the Supreme Court first recognized in *Abood,* and again acknowledged in *Ellis.* Yet the RLA permits charging objectors a pro rata share of these "ideological" expenses because of the overriding governmental interest in industrial stability thereby obtained.[154] Moreover, these costs may be financed through cross-unit costsharing.

c. Other Expressive Activity Supporting the Collective Bargaining Function

Union convention and publication costs are examples of expenditures in this category. Each entails expressive activity, ideological in the sense that it involves the communication of ideas.[155] Through the Court's appraisal of the right to charge objectors a pro rata share of these costs, much can be learned about how other similar activities are to be evaluated.

Union conventions and publications meet the requisite nexus to collective bargaining through their real and substantial contribution to advancing the union's overall effectiveness as bargaining representative. For example, *Ellis* emphasized that the contribution of the union convention to the union's representative function is neither speculative nor in-

costsharing question. *See, e.g., Lehnert,* 643 F. Supp. at 1325 ("[A] decree requiring a unit-by-unit breakdown of chargeable litigation expenses would be 'likely to infringe the union's right to expend *uniform exactions* under the [agency] shop agreement in support of activities germane to collective bargaining. . . .' ") (quoting *Allen,* 373 U.S. at 122), *aff'd,* 132 L.R.R.M. (BNA) 2088 (6th Cir. Aug. 14, 1989); DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. 65 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (Unit-by-unit analysis "would be unduly burdensome to the [union]."); Crawford v. ALPA, No. 87-891-A, slip op. at 6 (E.D. Va. Mar. 25, 1988) (A "union [must] have 'a certain flexibility in its use of compelled funds' for 'the furtherance of the common cause leaves some leeway for the leadership of the group.' ") (quoting Ellis v. BRAC, 466 U.S. 435, 456-57 (1984) and *Street,* 367 U.S. at 778), *aff'd,* 130 L.R.R.M. (BNA) 2932 (4th Cir. 1989), *petition for reh'g en banc granted,* No. 88-2083 (May 11, 1989).

154. Moreover, such activity creates no significant risk of propagating political or economic doctrine, concepts, or ideologies as was found present in *Street.* In most of its incidents, it is more in the nature of commercial speech. *See* Roberts v. United States Jaycees, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring) (Collective bargaining activities, as an example of "association for . . . commercial purposes" and such associations, "lack the full constitutional protections" of "expressive associations" to advance ideology.); *cf.* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 128 L.R.R.M. (BNA) 2001, 2005 (1988) (Some union speech may be of the "commercial speech variety" but handbills "press[ing] the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace" are not commercial speech.).

155. As the Court said in *Ellis,* "Both have direct communicative content and involve the expression of ideas." 466 U.S. at 456.

substantial. "Conventions . . . are normal . . . events and seem to us to be essential to the union's discharge of its duties as bargaining agent."[156] The Court explained that the union "must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy."[157] The union convention facilitates this.[158] Nor are union publications' contribution to the union's effectiveness as bargaining representative speculative or insubstantial. "The union must have a channel for communicating with employees, including the objecting ones, about its activities."[159] The magazine " 'is the union's primary means of communicating [with employees]. . . .' " [160]

As the Court further explained, these activities are "well within the acceptable [constitutional] range" of chargeable activities because: 1) "they 'relat[e] to the work of the union in the realm of collective bargaining;' "[161] 2) charging objectors poses "little additional infringement of First Amendment rights beyond that already accepted [by compelling financial support of bargaining activities], and none that is not already justified by the governmental interests behind the union shop itself [industrial stability];"[162] and 3) the governmental interest in overcoming the free rider problem requires providing the union "flexibility in its use of compelled funds [for] 'the furtherance of the common cause . . . .' "[163]

Accordingly, the Supreme Court views noncollective bargaining expressive activity as "germane to collective bargaining," and therefore chargeable, unless its contribution to union bargaining effectiveness is either speculative or insubstantial. This is true at least insofar as the activity in question does not impose substantial additional infringement of first amendment rights beyond that already accepted by compelling financial support of bargaining activities, and none that is not already justified by the government interests behind the union shop itself (*i.e.*, industrial stability).[164]

156. *Id.* at 448-49.

157. *Id.*

158. *Id.*

159. *Id.* at 450.

160. *Id.* at 450-51 (quoting Ellis v. BRAC, 685 F.2d 1065, 1074 (9th Cir. 1982), *rev'd in relevant part,* 466 U.S. 435 (1984)). *See also* discussion *supra* notes 58-60 and accompanying text.

161. *Id.* at 456-57 (quoting Railway Employees' Dep't v. Hanson, 351 U.S. 225, 235 (1956)).

162. *Id.* at 456.

163. *Id.* (quoting International Ass'n of Machinists v. Street, 367 U.S. 740, 778 (1961) (Douglas, J., concurring)).

164. *See* discussion *supra* notes 161-63. *Cf.* Allied Chem. & Alkali Workers Union Local

Ellis also permitted cross-unit costshare financing of chargeable noncollective bargaining expressive activity. The union in *Ellis* was permitted to charge all represented employees a pro rata share of the convention costs rather than charge them only for that portion attributable to convention activities benefitting the objectors' own bargaining unit. Similarly, the only limitation placed on a union's right to charge objectors a share of publication costs is that "[i]f the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing about that activity."[165] In short, the union is not limited to charging objectors only for articles about the objectors' own bargaining unit.

The *Ellis* Court understood that both the union convention and union publications can advance ideology not substantially related to representing employees in collective bargaining. In *Ellis,* the union publication reported on "proposed or recently enacted legislation" and urged support for a variety of product boycotts.[166] Similarly, numerous politicians addressed the convention at issue in *Ellis* on a variety of political and legislative matters.[167] It will be recalled that allocation was not required for the union convention, but was required for union publications.[168] An explanation is found in the Court's primary standard:

No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176-82 (1971) (close nexus required when the bargaining demand relates to unrepresented persons is measured by whether the demand provides a speculative or insubstantial benefit to represented employees).

With regard to the appropriate judicial deference to a union's judgment that expressive activities bear the requisite nexus to bargaining effectiveness, see Pilots Against Illegal Dues v. ALPA, No. 86-z-410, bench op. at 14-15, 131 L.R.R.M (BNA) 2519 (D. Colo. Jan. 30, 1989) (Court "must look at what is germane to collective bargaining broadly, because the . . . public policy as expressed in [the] Supreme Court [dues objector] decisions is to support strong unions who can effectively engage in their job of collective bargaining with employers" and, therefore, court should defer to union judgment that expense is germane if conclusion is "reasonable.").

165. Ellis v. BRAC, 466 U.S. 435, 451 (1984).

166. *Id.* at 450.

167. *Id.* at 459 (Powell, J., concurring and dissenting). *See also supra* notes 49-51 and accompanying text.

168. *See* discussion *supra* notes 68, 73 and accompanying text. *Ellis* suggested computing the ratio of chargeable to total articles in the union newspaper by comparing the column inches of chargeable articles to the total column inches published. *See* discussion *supra* note 59 and accompanying text. The post-*Ellis* cases generally have followed this approach. *See, e.g.,* Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1321 (W.D. Mich. 1986) ("[T]he cost of such publications is chargeable under the RLA to the proportional extent that the publications report chargeable activities. . . . Presumably, this calculation should be made on a column inch basis."), *aff'd,* 132 L.R.R.M. (BNA) 2088 (6th Cir. Aug. 14, 1989); DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 23 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (supporting union's prima facie calculation of chargeable expenditures for internal communications); Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-

whether a union activity is deemed to pose "little additional infringement of First Amendment rights" beyond that already countenanced by requiring financial support of collective bargaining and grievance adjustment activities.[169]

Union publications, much more than union quadrennial conventions, create an additional risk of compelled subsidization of ideological activity beyond that incurred by requiring financial support for collective bargaining activities. First, a union magazine is published regularly, usually monthly, and, therefore, simply has more occasions to be ideological than a convention. The union also can argue and reargue an ideological point in successive issues of a union publication and reap a cumulative effect on the reader. Union publications, moreover, normally are written and, therefore, capable of easy dissemination. Finally, the union magazine is mailed to all represented employees and, therefore, the ideological messages in it are communicated more widely than a few speeches to elected delegates at a quadrennial convention. In short, while union publications certainly are not solely, or even primarily, vehicles for propagating a union's economic or political doctrine, concepts, or ideologies, they do pose a greater risk than do conventions of advancing a union's broader ideological agenda.

The significantly greater risk posed by union publications of interfering with the objectors' right of free expressive association justifies heightened scrutiny of union publication expenditures in order to protect objectors' free association interests. In other words, *Ellis* suggests a sliding scale of scrutiny such as is well-established in free expressive association cases generally.[170] In *Ellis,* allocation was adopted as a method of heightened scrutiny.

353, slip op. at 40-41 (Mich. Empl. Rel. Comm'n Feb. 24, 1986) (A.L.J. decision) (upholding union's calculation of chargeable expenditures for internal communications based on proportion of column inches devoted to chargeable activities). *Cf. id.* at 41 (Union need not make "detailed content analysis" of irregularly, bi-monthly published two page publication having de minimis" nonchargeable content). A representative sample of issues of the union's magazine published during the audit period may be a sufficient basis for making the column inch calculation. *See* Newton Teachers Ass'n (Irene Roman), No. MUPL-2685, slip op. at 14 (Mass. Lab. Rel. Comm'n Apr. 3, 1987) (union's failure to supply a representative sample of internal publications left insufficient evidence to justify the union's fee for communications).

169. *See supra* note 162 and accompanying text.

170. A sliding scale framework in dues objector cases is consonant with Roberts v. United States Jaycees, 468 U.S. 607, 618 (1984), decided the same term as *Ellis.* In that case the majority held "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which Constitutionally, the protected liberty [of free expressive association] is at stake in a given case." *Id.* at 618. This sliding scale, explicitly adopted in *Roberts,* was implicit in *Ellis.*

The operating principle that emerges is that the Court will scrutinize more closely a union activity by requiring allocation when compelled financial support for that activity poses a significantly greater risk of interfering with the right of free expressive association than does requiring financial support for collective bargaining negotiation or grievance adjustment activities.[171]

d. Expressive Activities Not Bearing a Real and Substantial Relationship to Collective Bargaining

General organizing costs and the cost of litigation unrelated to collective bargaining are examples of activity in this category.

The *Ellis* Court reasonably could have concluded that implicitly or explicitly all organizing campaigns propagate the economic doctrine, concept, or ideology that workers should unite around unions as their most effective alternative to avoid the harmful effects resulting from their own bargaining impotence as individuals.[172] Undeniably, every collective bargaining session communicates the same message, at least implicitly. But organizing is different from collective bargaining activities, the union convention, or a union publication. Unlike those activities, the ideology inherent in organizing is directed externally—to persons not presently represented by the union. Accordingly, the Court in *Ellis* may well have concluded that organizing poses a greater risk to the right of free expressive association than already countenanced by compelling fi-

171. It may be recalled that only with respect to allocating chargeable and nonchargeable costs associated with the union convention did members of the *Ellis* Court disagree. *See supra* notes 48-49 and accompanying text. That disagreement can be seen as one grounded in a different perception of the degree to which compelling financial support of the union convention poses a significant risk of compelling ideological conformity. The majority stated that the union convention entails "direct communicative content and involve[s] the expression of ideas. Nonetheless, we perceive little additional infringement of first amendment rights beyond that already accepted, and none that is not justified by the government interests behind the union shop itself." Ellis v. BRAC, 466 U.S. 435, 456 (1984). By contrast, Justice Powell, concurring and dissenting, viewed the convention much more ominously. The union convention, he argued, "afford[s] opportunities—that often are fully exploited—to further political objectives of unions generally and of the particular union in convention." *Id.* at 459 (Powell, J., concurring and dissenting).

The point of disagreement is the potential of compulsory support of the union convention to compel ideological conformity beyond that already countenanced by requiring financial support for collective bargaining activities. The majority saw little, if any, additional risk and does not, therefore, require allocation. Justice Powell perceived a much greater invasive potential on first amendment rights and, accordingly, would require allocation, as a means of asserting greater judicial scrutiny.

172. *See, e.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (The purpose of providing for collective bargaining is to "supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.").

nancial support of collective bargaining expressive conduct. Hence, organizing may well require greater judicial scrutiny.[173] One way to assert greater judicial scrutiny is to require a showing of close nexus between organizing and enhanced union bargaining power.

In *Ellis,* evidence failed to demonstrate a causal relationship between organizing and bargaining effectiveness. The Ninth Circuit Court of Appeals nevertheless found that the union had established the requisite nexus, concluding that successful organizing efforts strengthen the union generally and thereby necessarily strengthen the union's bargaining position.[174] The Supreme Court rejected the view that generalized enhancement of union power through increased membership necessarily translates into enhanced bargaining power in presently organized bargaining units. Organizing RLA covered employees, the Court reasoned, enjoys only an "attenuated connection with collective bargaining. . . . Using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer."[175]

It may be important in future cases that the Court in *Ellis* did not hold that in all contexts organizing is categorically a nonchargeable

173. This is consistent with the sliding scale of scrutiny underlying much of *Ellis*, see discussion *supra* note 170 and accompanying text, and with the greater scrutiny given to union publications that also, but to a much lesser degree, pose a risk of propagating ideology beyond the confines of the bargaining units already represented by the union. *See* discussion *supra* notes 169-70 and accompanying text.

174. Ellis v. BRAC, 685 F.2d 1065, 1074 (9th Cir. 1982), *rev'd in relevant part,* 466 U.S. 435 (1984).

It was necessary for the court of appeals to find a nexus between organizing activities and increased collective bargaining effectiveness because the legislative history of the RLA precluded the argument that organizing costs may be charged to objectors simply on the theory that organizing is a "tool for the expansion of overall union power." *Ellis,* 466 U.S. at 451. In legislative hearings, union proponents of permitting union security agreements under the RLA explicitly had "disclaimed" expansion of overall union power as a governmental interest justifying union security agreements negotiated by RLA unions. *Id.* at 451. As the Supreme Court in *Ellis* concluded, "the notion that [the union security authorization in the RLA] would be a tool for the expansion of overall union power appears nowhere in the legislative history." *Id.*

Charging nonmembers the organizing costs as a "tool" to increase overall union power would raise serious questions, in any event, since it might seem perverse to charge a nonmember such a cost. Indeed, the Court stated that nonmembers may not be charged for in-unit organizing costs. "[I]t would be perverse to read it [the RLA] as allowing the union to charge objecting nonmembers part of the costs of attempting to convince them to become members." *Id.* at 452 n.13.

175. 466 U.S. at 451-52. Nor did any other governmental interest justify charging objectors for general organizing costs. Benefit to the objector's own bargaining unit did not justify charges because "[o]rganizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues." *Id.* at 453.

union activity.[176] By reading "attenuated" as a rhetorical proxy for the Court's conclusion that the general organizing at issue in *Ellis* bore a speculative or insubstantial relationship to the union's overall bargaining effectiveness, the discussion of organizing in *Ellis* may be primarily the result of failure of proof in that litigation.[177] When the issue is revisited, the operating principles of *Ellis* suggest first that the union's burden will be to prove a real and substantial relationship between organizing and enhanced union bargaining effectiveness. In addition, the heightened scrutiny accorded organizing[178] likely will require that the burden be met by the introduction of compelling record evidence of such a nexus.

Depending on its content, litigation may or may not infringe on free expressive association beyond that already countenanced by requiring financial support of collective bargaining.[179] The *Ellis* Court made the judgment, therefore, that litigation not having a real and substantial relationship to the union's effectiveness generally as collective bargaining agent is chargeable only if it can be seen to advance some governmental interest other than overall industrial stability achieved through enhanced union collective bargaining effectiveness. It either must benefit the objectors' own individual bargaining unit or advance some other important governmental interest.[180] In *Ellis,* the litigation at issue did neither.[181]

By contrast, litigation related to collective bargaining that "concerns bargaining unit employees and is normally conducted by the exclusive representative" is chargeable.[182] This conclusion is consistent with the rest of *Ellis,* especially the Court's evaluation of why convention costs and costs of producing some articles in union publications are charge-

176. *See* discussion of organizing activity outside of RLA labor relations contexts *infra* notes 247-48 and accompanying text.

177. This is not to say that *Ellis* could not be read to preclude any charging of organizing costs. In *Ellis,* the Court expressed the view that objectors refusing to help finance the union's organizing activities presents no significant free rider problem. 466 U.S. at 452-53 (any free rider problem created by objectors' refusal to help finance organizing under the RLA is minimal and is equated to objector resistance to compulsory subsidization of union support of pro-labor political candidates). *But see* discussion *infra* note 248 and accompanying text.

178. *See* discussion *supra* note 173 and accompanying text.

179. *See* Roberts v. United States Jaycees, 468 U.S. 607, 636 (1984) ("Lawyering to advance social goals may be speech, NAACP v. Button, 371 U.S. 415, 429-30 (1963), but ordinary commercial law practice is not, *see* Hishon v. King & Spalding, 467 U.S. 69 (1984)." (O'Connor, J., concurring).

180. *See* discussion *supra* note 120 and accompanying text.

181. Some litigation not literally involving collective bargaining or grievance adjustment might well bear a real and substantial relationship to enhancing the effectiveness of the union as bargaining representative. *See* discussion *infra* notes 299-303 and accompanying text concerning litigation to maintain a union's corporate or associational existence.

182. *Ellis,* 466 U.S. at 453 (emphasis added).

able. As with those costs, the *Ellis* Court reasonably could conclude that litigation related to collective bargaining poses "little additional infringement of First Amendment rights beyond that already accepted [by compelling financial support of bargaining activities to which the litigation is related], and none that is not justified by the governmental interests [industrial stability] behind the union shop itself."[183] Such litigation is chargeable because, by definition, it has a real and substantial (not speculative or insubstantial) relationship to the union's collective bargaining functions.[184]

The Court did not discuss allocation of litigation costs because the litigation at issue in *Ellis* was unrelated to collective bargaining. The clear implication, however, is that a union will be required to allocate carefully its chargeable and nonchargeable litigation expenditures. Just as union publications are scrutinized more closely than conventions or collective bargaining, so also is litigation because in some contexts it can be used effectively to advance ideology.[185]

Finally, litigation germane to collective bargaining that "concerns bargaining unit employees and is normally conducted"[186] may be financed by cross-unit costsharing. This conclusion follows from the Court's own evaluation in *Ellis* that only litigation unrelated to collective bargaining requires inquiry as to whether the objector's own bargaining unit is "directly concerned" with the litigation. Moreover, it strains logic to suppose that the Court intended that unions may employ cross-unit costsharing to finance the cost of developing bargaining strategy, negotiating contracts, and communicating negotiation outcomes, but did not

183. *Id.* at 456. Typically litigation related to collective bargaining entails enforcement of the duty to bargain, enforcement of duties arising from collective bargaining contracts, or the various garden variety unfair labor practice matters that come before the NLRB. It is more in the nature of commercial speech typical of a commercial law practice. *See* cases discussed *supra* note 154. *But see* DuQuoin Educ. Ass'n (Darrell J Bosecker) No. 85-FS-0002-S, slip op. at 23 (Ill. Lab. Rel. Bd. Apr. 8, 1988) at 73-75 (Litigation is an inherently ideological activity and is chargeable to objectors only if it directly involves bargaining unit members.).

184. *See Ellis,* 466 U.S. at 456 (Because of the "governmental interest in industrial peace" the union "[a]t a minimum . . . may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.' ") (quoting BRAC v. Allen, 373 U.S. 113, 122 (1963)).

185. *See* discussion *supra* note 179 and accompanying text. One need contemplate only the extraordinary social changes wrought by litigation in the post-World War II period to appreciate the enormous potential of litigation to advance economic or political doctrine, concepts or ideologies. *See, e.g.,* Bakke v. Regents of the Univ. of Cal., 438 U.S. 265 (1978) (affirmative action); Baker v. Carr, 369 U.S. 186 (1962) (apportionment); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (school desegregation). Indeed, the *Ellis* line of cases have effected a major shift of rights and responsibilities regarding administration of union security agreements and regulation of internal union affairs.

186. *Ellis,* 466 U.S. at 453.

intend to permit such financing of the cost of litigation to compel an employer, for example, to bargain in good faith or the cost of a suit to compel arbitration required by a contract. Permitting only unit-by-unit funding of chargeable litigation costs threatens to recreate the free rider problem Congress sought to avoid and may result in unacceptable accounting burdens the Court has warned should be avoided.[187]

e. The Equal Benefit Requirement

Somewhat ironically, some of the clearest guidance in *Ellis* was in dicta. The Court did not decide if the cost of the union's death benefit fund was chargeable because the intervening decertification of the union mooted the issue.[188] Responding to the argument that this cost should not be chargeable to objectors because only members were eligible for the death benefits, the Court, in dicta, was quite exact: "We would have no hesitation in holding, however, that the union lacks authorization . . . to use nonmembers' fees for death benefits they cannot receive. [The statute] is based on the presumption that nonmembers benefit equally with members from the uses to which union money is put."[189] The Court's discussion of social activities reinforces the conclusion that the union may not charge objectors for benefits they cannot enjoy. There the Court expressed its understanding that "[t]hese activities are formally open to nonmember employees."[190]

The Court had no occasion to develop its view that a precondition of a chargeable union activity is that objectors must be able to benefit from the expenditure. Yet the equal benefit requirement raises important policy questions when the activity entails union governance. Must the union offer governance rights to objectors in order to charge them the cost of internal governance, or may governance be limited to members without the consequence of governance costs being deemed nonchargeable to nonmember dues objectors? *Ellis* left this and other equal benefit issues undiscussed.[191]

(4) Summary of Operating Principles

The *RLA Trilogy, Abood,* and *Ellis* thus offer coherent principles to gauge whether union activities are chargeable to objectors. They can be summarized as follows:

187. *See* discussion *supra* notes 134-53 and accompanying text.
188. *Ellis,* 466 U.S. at 454.
189. *Id.* at 455 n.14.
190. *Id.* at 449.
191. *See* discussion *infra* notes 200-02 and accompanying text.

1) Union activity that does not significantly advance ideas does not implicate constitutional values of free speech or free expressive association. This nonexpressive activity implicates the minimal scrutiny generated by due process concerns. Accordingly, nonexpressive activity must bear a reasonable relationship to the union's representative function to be viewed as "in the realm of collective bargaining" and not "unrelated" to it. This relationship exists if the nonexpressive activity can be seen to promote, support, or maintain the union as an effective collective bargaining agent. Proof that an activity is "a standard feature of union operations," "bring[s] about harmonious working relationships," "promote[s] closer ties among employees," or "create[s] a more pleasant environment for union meetings" demonstrates the requisite nexus. In short, the question is whether such activities can be seen in some rational way to maintain the union as an effective collective bargaining agent. This activity is not subject to allocation and may be financed by cross-unit costsharing.[192]

2) Union expressive activity is conduct having communicative content that involves the expression of ideas. Expressive union activity may go to the core of the union's role as exclusive representative, such as union efforts to negotiate or administer collective bargaining agreements. This may be referred to as expressive activity while engaged as contract negotiator or administrator. Such activity is chargeable to objectors not because it generates no "ideological objection," but because interference with the right to refrain from expressive association that may result is justified by the governmental interest in industrial stability. This activity also is not subject to allocation and may be financed by cross-unit costsharing.[193]

3) Expressive union activity also may exist other than when the union is acting as contract negotiator or administrator. It is viewed as chargeable to objectors if it "promote[s] the cause which justified bringing the group together." A relevant measure is whether the activity makes a real and substantial contribution to the union's effectiveness as collective bargaining representative. An expressive activity is well within the acceptable range of making a real and substantial contribution if it helps the union form and communicate union bargaining or internal policy or helps maintain the union's corporate or associational existence. Other expressive union activity also is within the acceptable range if its contribution to the collective bargaining function is real and substantial. Each evaluation must be made keeping in mind that the governmental

192. *See* discussion *supra* notes 123-31 and accompanying text.
193. *See* discussion *supra* notes 132-54 and accompanying text.

interest in overcoming the free rider problem requires providing the union "flexibility in its use of compelled funds [for] 'the furtherance of the common cause.' "[194] If the activity is found to be chargeable, it may be financed by cross-unit costsharing. Allocation may be required, however, when not allocating imposes significant additional infringement of first amendment rights beyond that already countenanced by compelling financial support of bargaining activities.[195]

4) Another type of union activity is expressive activity not bearing a real and substantial relationship to collective bargaining generally. This activity generates the greatest scrutiny because it poses the highest risk of advancing ideology unrelated to collective bargaining. This is not to say the activity is necessarily nonchargeable, but rather that it is most carefully scrutinized. Union activity that bears only an attenuated (speculative or insubstantial) relationship to the union's overall effectiveness as a bargaining representative, may be charged to an objector only if it provides a direct beneficial service to the objectors' own bargaining unit or is otherwise supported by a governmental interest. The required heightened scrutiny mandates allocation.[196]

5) Finally, "the union lacks authority . . . to use nonmembers' fees for . . . benefits they cannot receive. [The statute] is based on the presumption that nonmembers benefit equally with members from the uses to which union money is put."[197]

II. Application of the *Ellis* Decision's Operating Principles

Proving that these principles derive from *Ellis* and its predecessor cases may be more interesting than important unless the principles provide increased coherence to the process of adjudicating the myriad of as yet unlitigated chargeability issues. This section demonstrates that these principles can provide unity to this litigation.

A. The Union's Collective Bargaining Activities

(1) Negotiating the Contract

The first step in contract negotiations is setting bargaining policy. *Ellis* directs that these costs are chargeable since "establishing bargaining

194. *Ellis,* 466 U.S. at 456 (quoting International Ass'n of Machinists v. Street, 367 U.S. 740, 778 (1961) (Douglas, J., concurring)).

195. *See* discussion *supra* notes 155-71 and accompanying text.

196. *See* discussion *supra* notes 172-81 and accompanying text.

197. *Ellis,* 466 U.S. at 455 n.14. *See* discussion *supra* notes 188-91 and accompanying text.

goals and priorities" are essential functions.[198] In addition, costs related to the actual negotiation of the contract are chargeable.[199]

The "equal benefit" principle raises the important question whether a nonmember objector may be charged for these contract negotiation costs if the objector benefits equally with the union member from the negotiated contract but is ineligible to participate in electing those who formulate bargaining policy or the ratifying the collective bargaining agreement. *Ellis* seems to provide the answer. In *Ellis,* the union convention played an important role in formulating and communicating bargaining policy.[200] Convention costs were chargeable to objectors notwithstanding that nonmembers of the union were ineligible to serve as convention delegates or vote for convention delegates.[201] National labor policy developed under the Taft-Hartley Act supports this result. It pro-

198. Ellis v. BRAC, 466 U.S. 435, 448 (1984). Typical functions would include:
- — background reading, research, and discussions concerning bargaining subjects;
- — formulating bargaining goals, priorities, and proposals;
- — drafting contract language;
- — preparing supporting arguments for bargaining positions;
- — developing computer based or other information retrieval research files for bargaining and providing research, technical assistance, and staff support relating to bargaining;
- — producing and distributing materials, organizing and attending meetings and conferences that provide research, technical assistance, and staff support related to bargaining;
- — designing and conducting surveys to ascertain employee bargaining goals and priorities;
- — preparing and distributing materials and organizing and attending meetings that inform and educate employees about bargaining goals, policy, priorities, and strategy;
- — purchasing books, reports, and advance sheets used in negotiating collective bargaining agreements; and
- — paying specialists in labor law, economics, and other areas for services related to the above tasks.

For a discussion of securing compliance with the duty to bargain, see discussion *infra* notes 203-05 and accompanying text.

199. Typical activities would include:
- — travel and lodging costs and staff employee expenses incurred to negotiate contracts;
- — compiling and maintaining information on the status of negotiations; and
- — drafting reports and other work related to contract ratification.

200. *See supra* notes 49-50 and accompanying text.

201. The convention expenses at issue in *Ellis* arose out of the union's 25th quadrennial convention. *Ellis,* 466 U.S. at 459 (Powell, J., concurring and dissenting). Held in 1975, the convention was governed by the union's 1971 constitution. *See* Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Constitution of the Grand Lodge, Statutes for the Government of Lodges; Protective Laws and T.C. Division By-Laws (1971). The union's constitution provides that "[n]o member shall be eligible for nomination and election as delegate or alternate unless he has been a member of the Union in good standing continuously for one (1) year immediately preceding the date of his nomination." *Id.* at 11 (Qualifications of All Delegates and Alternates, Article 6, § 6(a)).

vides that union policy formation is the prerogative of the membership. As the Supreme Court explained two years after its decision in *Ellis*:

> [A] union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective bargaining agreement, or select union officers and bargaining representatives. Under the [Taft-Hartley] Act, dissatisfied employees may petition the Board to hold a representation election but . . . dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of their organization and "[n]on-union employees have no voice in the affairs of the union."[202]

(2) Economic Force to Achieve Bargaining Goals

Beyond preparing for negotiations and participating in the negotiation process itself, the union's collective bargaining function includes exerting economic force in support of the union's bargaining position. "[T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion en-

202. NLRB v. Financial Inst. Employees, 475 U.S. 192, 205 (1986) ("[NLRB] exceeded its statutory authority by requiring that nonunion employees be allowed to vote in the union's affiliation election."); *accord* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 288 (1984) (public employee union did not violate nonmembers' freedom of association by choosing only members to serve on "meet and confer" committees advising employer on labor-management issues); Wellington, *Union Fines and Workers' Rights,* 85 YALE L.J. 1022, 1046 (1976) (An employee who resigns from the union "surrenders his right to vote for union offices, to express himself at union meetings, and even participate in determining the amount or use of dues he may be forced to pay under a union security clause."); *see* Newton Teachers Ass'n (Irene Roman), No MUPL-2685, slip op. at 15 n.5 (Mass. Lab. Rel. Comm'n, Apr. 3, 1987) ("[A] benefit or activity is [nonchargeable] if it is available only to union members *and* is 'not germane to the governance . . . of the bargaining agent.' ") (emphasis in the original); *In re* Petition for Investigation and Determination of Fair Share Fee Assessment, BMS Case Nos. 85-FSC-320-A, slip op. at 10 (Minn. Bureau Mediation Serv., Feb. 27, 1987) (Objectors may be charged expense of ratification vote; "right to vote on policy matters [is] . . . an inherent right of membership as opposed to a members-only benefit.").

The Supreme Court explained that this commitment to control of the union by the members was intended by Congress to "insulate [unions] from outside interference." *Financial Inst. Employees,* 475 U.S. at 209. This policy can be found in the legislative history of the Taft-Hartley Act amendments to the NLRA. There, the Senate conferees rejected proposals prescribing procedures for union decisionmaking such as election of officers, dues assessment, and the decision to strike, concluding " 'it was unwise to authorize [the NLRB] to undertake such elaborate policing of the internal affairs of unions.' " *Id.* at 204 n.11 (quoting 93 CONG. REC. 6443, *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 1540 (1948). Subsequent attempts in 1959 to regulate union constitutional amendments, recall of officers, waiver of the right to strike, mergers and transfers between locals, and creation of affiliated organizations were all rejected because " 'Congress was guided by the general principle that unions should be left free to operate their own affairs, as far as possible.' " *Id.* (quoting Steelworkers v. Sadlowski, 457 U.S. 102, 117 (1982)). *Accord* NLRB v. Boeing, 412 U.S. 67, 71 (1973); Scofield v. NLRB, 394 U.S. 423, 428 (1969).

joined by the Act; it is part and parcel of the process of collective bargaining."[203] In *Ellis,* the Ninth Circuit Court of Appeals affirmed the district court's finding that "a strike is one of the central methods employed in collective bargaining for improving wages and working conditions."[204] That determination was not challenged before the Supreme Court. Boycotts, informational picketing, and publicity other than picketing are other well-established union economic tools.[205] When undertaken to advance bargaining goals, these activities make a real and substantial contribution to the union's effectiveness as bargaining agent and, therefore, are chargeable to objectors.

Care may be required with respect to product boycotts. They certainly are a traditional and legitimate weapon in a union's economic arsenal.[206] They also may be used to advance an ideological agenda unrelated to the collective bargaining interests of those the union represents when, for example, the union participates in a national product boycott against an employer with whom it has no bargaining relationship and whose labor relations policies do not significantly affect the union's represented employees.[207]

The product boycott problem implicates a larger policy issue the NLRB eventually will need to address: sympathy strike activity. In *Gary-Hobart Water Corporation,*[208] the NLRB, with judicial approval, ruled that the right to strike includes the right to engage in sympathy strikes and the right to honor another union's picket line, either at one's own workplace or at the premises of another employer.[209] The issue raised by *Ellis* is whether objectors may be charged for such activity. Its operating principles would suggest that sympathy activity that makes a

203. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 495 (1960); *see id.* at 489 (quoting G.W. TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS 18 (1948)) ("economic force [is] 'a prime motive power for agreements in free collective bargaining' "); *id.* at 495 (the strike is the union's "traditional" and "normal" economic weapon).

204. Ellis v. BRAC, 685 F.2d 1065, 1071 (9th Cir. 1982).

205. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Employees' Constr. Trades Council, 108 S. Ct. 1392 (1988) (handbilling); NLRB v. Retail Store Employees' Union Local 1001, 447 U.S. 607 (1980) (consumer informational picketing); NLRB v. Fruit Packers (Tree Fruits), 377 U.S. 58 (1964) (consumer informational picketing); NLRB v. Servette Inc., 377 U.S. 46 (1964) (boycott).

206. *See DeBartolo,* 108 S. Ct. at 1402 (handbills urging customers to boycott stores did not violate the NLRA).

207. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (product boycott to effect change in community racial policies).

208. 210 N.L.R.B. 742 (1974), *enforced,* 511 F.2d 284 (7th Cir. 1975), *cert. denied,* 423 U.S. 925 (1975).

209. *Accord* Ashtabula Forge Co., 269 N.L.R.B. 774 (1984) (sympathy strikers deemed to have "common cause" with striking employees regardless of motive for honoring picket line).

real and substantial contribution to achievement of the union's own bargaining goals is chargeable to objectors.[210] For example, several different unions may represent employees of the same employer at an industrial facility. The wages and conditions of employment obtained by one union may set a pattern for future negotiations with the other unions. If, in such a case, the record evidence demonstrated that bargaining success by the striking union would have a real and substantial effect on the other unions at the facility in achieving their bargaining goals, then a sympathy strike by the other unions would be chargeable to objectors. Other sympathy strikes or picketing may not have the requisite nexus to a union's representational responsibilities to be chargeable to objectors. Each case should be evaluated on its own facts.

A potentially explosive question lurking behind charging objectors a pro rata share of the cost of economic pressure in support of collective bargaining goals is whether objectors may be charged if the strike or boycott is unlawful. This issue has arisen in the public sector because state law often prohibits strikes by public employees. Such was the case in *Lehnert v. Ferris Faculty Association.*[211] There the Court permitted a union to charge objectors for the cost of operating a "crisis center," which never became a strike headquarters because a strike was averted. The crisis center disbursed information concerning bargaining developments and obtained feedback from represented employees. The district court judge stated, however: "I think the fact that the [union] did not engage in an illegal strike is of paramount importance."[212] Indeed, the court in *Lehnert* did not permit the union to charge objectors the cost of an interest-free loan to another local of the same international union that

210. *Ellis* thus suggests that the scope of a union's right to charge objectors for sympathy activity may be narrower than the concept of "mutual aid and protection" in section 7 of the Taft-Hartley Act, as applied to sympathy activity. *Compare* Eastex, Inc. v. NLRB, 437 U.S. 556, 567 n.17, 568 (1978) (Employee "mutual aid and protection" encompasses employee efforts supporting their own or other employees' conditions of employment whether or not their employer has the power or right to affect the outcome. The test is whether employee conduct bears a reasonable relationship to employees' interests as workers.). A dichotomy between what is chargeable and what is "mutual aid and protection" hardly is surprising. General organizing, for example, is not chargeable to objectors but certainly is "mutual aid and protection" within the meaning of section 7 of the Taft-Hartley Act. *See* General Elec. Co., 169 N.L.R.B. 1101, 1103 (1968) ("[m]utual aid and protection" encompasses supporting another union's organizing efforts), *enforced,* 411 F.2d 750 (9th Cir. 1969).

211. 643 F. Supp. 1306 (W.D. Mich. 1986), *aff'd,* 132 L.R.R.M. (BNA) 2088 (6th Cir. Aug. 14, 1989).

212. *Id.* at 1326 (Funds expended "to prepare for a possible strike and to publicize the union's position so as go put pressure on [a public employer]" chargeable: such "negotiation tactics and public relations activities [are] within the range of reasonable bargaining tools available to a public sector union during contract negotiations" even though a strike would have been illegal under state law.).

was engaged in an unlawful strike. The court held that "inasmuch as strikes by public employees are illegal under Michigan law, this expenditure was made in support of an illegal activity, and hence cannot be charged to the objecting nonmembers of the bargaining unit."[213]

This outcome may be soothing to those who respect the rule of law. It generates, however, complex policy issues. First, while the issue has never been presented to the Supreme Court, there is no indication in any of the Court's cases that the legality of a union activity determines whether it may be charged to objectors. For example, the act of calling a convention might well violate either the union's constitution or federal law.[214] Yet in *Ellis,* the Supreme Court did not suggest that only lawfully called conventions were chargeable to objectors. Similarly, a union's conduct at a bargaining meeting might be found violative of its duty to bargain in good faith.[215] Again, none of the Court's prior cases

213. *Id.* at 1326-27; *accord* Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 46 (Mich. Empl. Rel. Comm'n Feb. 24, 1986) (A.L.J. decision) (holding that strikes are prohibited conduct and therefore strike activities are not chargeable); Browne v. Milwaukee Bd. of School Directors, No. 18408, slip op. at 6 (Wis. Empl. Rel. Comm'n Feb. 3, 1981), *reconsidered and aff'd in relevant part,* No. 18408-D, (Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987) (holding that unlawful strike activity does not relate to the ability of the union to carry out its representational interest).

214. Much of union internal government is governed by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (1982) [hereinafter the LMRDA, cited by section number]. Section 501(a) of the LMRDA requires union officers to act "in accordance with its constitution and bylaws . . . ." Section 101 (a)(1) of the LMRDA has been interpreted to guarantee union members a "meaningful vote" on matters properly brought before the membership. *See, e.g.,* Sertic v. District Council of Carpenters, 423 F.2d 515, 521 (6th Cir. 1970) (entitled to meaningful vote on increases in dues or assessments). Accordingly, union officers participating in the union's internal governance might violate either of these two sections of the LMRDA, or others. *See, e.g.,* BRAC Local 1380 v. Dennis, 625 F.2d 819 (9th Cir. 1980) (violation of LMRDA to deny members ratification vote as provided by union constitution); Pignotti v. Local No. 3, Sheet Metal Workers Int'l Ass'n, 477 F.2d 825 (8th Cir 1973) (violation of LMRDA to force local union participation in international union's pension plan contrary to majority vote of local union membership), *cert. denied,* 414 U.S. 1067; Blanchard v. Johnson, 388 F. Supp. 208, 214 (N.D. Ohio 1974) (referendum election on affiliation proposal is unlawful when members provided insufficient information to allow an informed and reasoned vote on the ballot proposal), *aff'd in part, rev'd in part on other grounds,* 449 F.2d 1193 (D.C. Cir. 1971), *cert. denied,* 429 U.S. 869 (1976); Wade v. Teamsters Local 247, 527 F. Supp. 1169, 1175 (E.D. Mich. 1969) (violation of LMRDA to deny union members regular union meetings as provided by union constitution).

215. Taft-Hartley section 8(b)(3) requires that a union bargain in good faith, and Taft-Hartley section 8(d)(4) prohibits employers and unions from making unilateral modifications to collective bargaining agreements prior to their expiration. Violation of either of these proscriptions constitutes an unfair labor practice. *See, e.g.,* Local 13, Detroit Newspaper Printing & Graphic Arts Comm'n Union (Oakland Press Co.), 233 N.L.R.B. 994, 996 (1977) (union's failure to disclose certain information to employer during collective bargaining negotiations violates union's duty of good faith bargaining), *enforced,* 598 F.2d 269 (D.C. Cir. 1979); Broth-

suggest that only collective bargaining negotiation activity in conformity with the requirements of good faith bargaining is chargeable. From a theoretical point of view, moreover, an expenditure in support of an unlawful strike no more coerces ideological conformity than does one in support of a lawful strike.

Second, should conditioning chargeability on the lawfulness of economic actions become accepted and imported into private sector contexts, intricate questions of limits will arise. Will all expenditures in support of union conduct prohibited by some labor law be nonchargeable to objectors? If so, the rule could well be applied to the whole gamut of union economic options—unlawful secondary boycotts, unprotected picket line conduct, and strikes allegedly in breach of a collective bargaining agreement's no-strike clause. The principle could extend even to the negotiation of certain contract clauses such as "hot cargo" agreements.[216] Differentiating union costs supporting the lawful portion of a strike or bargaining session from the unlawful portion is a bit like unscrambling an egg. Moreover, the legality of a particular strike, boycott, or contract clause is usually the subject of reasonable dispute and may not be resolved until many years following the event. The NLRB and the courts will have to determine whether Congress intended that an objector's right to a final accounting is to be so delayed.

Additionally, some union activity is lawful under the RLA but unlawful under the Taft-Hartley Act. Secondary boycotts are an example.[217] If legality of a union's economic response in support of its collective bargaining goals determines whether costs may be charged to

erhood of Painters Dist. No. 9 (Westgate Painting & Decorating Corp.), 186 N.L.R.B. 964, 966 (1970) (unilateral implementation of maximum production quota by union violative of union's duty of good faith bargaining), *enforced,* 453 F.2d 783 (2d Cir. 1971).

216. Agreements in which an employer agrees to cease doing business with any other person is an illegal "hot cargo agreement" when the agreement has a secondary objective. *See* NLRB v. International Longshoremen's Ass'n, 447 U.S. 490, 503-04 (1980). Such agreements can arise when a union attempts to preserve work for its represented employees. *See id.*; NLRB v. Enterprise Ass'n of Pipefitters, 429 U.S. 507, 517 (1977) (efforts to apply provisions of work preservation agreement to someone other than immediate employer are prohibited); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 620, 635 (1967) (agreements whereby employer promises not to handle another employer's products are prohibited unless made to preserve for employees, work traditionally done by them). Contract agreements may be deemed unlawful "hot cargo agreements" under certain circumstances when a union negotiates an agreement concerning which picket lines its members may cross or goods they may refuse to handle without fear of discipline. *See, e.g.,* Truck Drivers Union Local 413 v. NLRB, 334 F.2d 539, 543, 547 (D.C. Cir. 1964), *cert. denied,* 379 U.S. 916 (1964).

217. Secondary boycotts, which are unlawful under the Taft-Hartley Act, International Union of Electrical, Radio & Machine Workers, AFL-CIO Local 761 v. NLRB, 366 U.S. 667, 672 (1961), are lawful under the RLA. Burlington Northern R.R. Co. v. Brotherhood of Maintenance Way Employees, 481 U.S. 429 (1987).

objectors, the same union activity will be treated differently under the two statutes. That outcome must be reconciled with the admonition in *Beck* that "Congress intended the same [union security] language to have the same meaning in both statutes."[218]

Finally, the NLRB and the courts will have to decide whether enhancing the NLRB's power to police labor policies limiting union economic options against employers is an appropriate use of the *Ellis/Beck* doctrine. The NLRB, of course, has broad remedial authority to effectuate the purposes of the Act.[219] That power has been exercised in the past to deny unions rights they otherwise enjoy. For example, the NLRB has rescinded the certification of unions that execute racially discriminatory contracts and administer them in a racially discriminatory manner,[220] or exhibit a pattern of coercion or violence.[221] Just as clearly, however, the NLRB lacks authority to issue punitive remedies.[222] Applying the *Ellis/Beck* doctrine to prohibit charging objectors for unlawful economic activities, for example, would be punitive unless that remedy could be shown to effectuate the values underlying the *Ellis/Beck* doctrine and not simply those underlying limitations on union economic activity. Otherwise, the remedy effectuates the policies of the Taft-Hartley Act only by deterring future violation of the limitation on economic activity. In that case the remedy is punitive, deterrence being a well-established hallmark of such a remedy.[223]

218. Communication Workers v. Beck, 108 S. Ct. 2641, 2649 (1988). *See also supra* notes 35-39 and accompanying text.

219. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941) (affirming order of NLRB and holding that Board has broad remedial power).

220. *See* Independent Metal Workers (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964) (executing discriminating contracts justifies removal of certification).

221. Union Nacional de Trabajadores (Carborundum Co. of Puerto Rico), 219 N.L.R.B. 862 (1975) (violent misconduct warrants removal of certification), *enforced,* 540 F.2d 1 (1st Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977). *See also* Union de Tronquistas Local 901 (Lock Joint Pipe & Co.) 202 N.L.R.B. 399, 399-400 (1973) (violent actions to enforce representation rights may be remedied by denial of bargaining order otherwise authorized).

222. Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 655 (1961) (power of NLRB is remedial and not punitive); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) ("only actual losses should be made good"); Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940) (The NLRA is essentially remedial).

223. *See* IBEW v. Foust, 442 U.S. 42, 48 (1979) (punitive remedies do not compensate for injury but instead are imposed " 'to punish reprehensible conduct and to deter its future occurrence' ") (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)); *accord id.* at 48 n.10 (the hallmark of a punitive remedy is its attempt to inhibit future misconduct).

The Supreme Court's warning against imposing punitive sanctions in duty of fair representation cases also may provide useful guidance in the NLRB's future *Beck* cases. In *Foust,* the Court stated, "Inflicting this risk [of depleting union treasuries through punitive sanctions] on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have." *Id.* at 51.

(3) Contract Administration

Collective bargaining extends beyond the negotiation of the collective bargaining contract.[224] As the Supreme Court has stated, "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. . . . [A]rbitation is the substitute for industrial strife [and] is part and parcel of the collective bargaining process itself."[225] Accordingly, grievance adjustment and arbitration activities are chargeable to all employees for the same reasons that contract negotiation expenses are chargeable: they help secure industrial stability.[226]

B. Union Activities Ancillary to Collective Bargaining

(1) Activities Calculated to Build Group Cohesion

In addition to the above, *Ellis* holds that a union may charge objectors the cost of activities, ancillary to collective bargaining negotiation and administration, that enhance or maintain a united front, allegiance, or commitment among represented employees.[227] This follows at least to the extent that activities designed to develop cohesiveness are seen to make a real and substantial contribution to the union's effectiveness as bargaining representative.[228]

Included in this category is the payment of strike benefits.[229] But many, more subtle, union activities also may act as ligaments holding the

224. NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967).

225. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

226. *See* discussion *supra* note 76 and accompanying text.

The following are examples of contract enforcement activities:

— handling employee questions and complaints about working conditions, benefits, and contract rights;

— attending stewards meetings and grievance committee work;

— communicating with employer representatives to discuss the meaning of contract generally or its meaning with respect to a particular grievance;

— participating in education and training programs related to grievance handling or arbitration; and

— preparing for and representing the grievants at the arbitration hearing.

For a discussion of pre- and post-arbitration efforts to secure compliance with the contract, see discussion *infra* notes 297-98 and accompanying text.

227. A standard of union operations is to promote closer ties among employees. Ellis v. BRAC, 466 U.S. 435, 449-50 (1984).

228. Of course, at some point an activity's contribution to group cohesiveness is too speculative or insubstantial to make a real and substantial contribution to industrial stability by creating a stronger and, therefore, a more effective bargaining representative.

229. *See* Pilots Against Illegal Dues v. ALPA, No. 86-z-410, bench op. at 14-15, 131 L.R.R.M. (BNA) 2514, 2518 (D. Colo. Jan. 30, 1989) (Strike fund is chargeable to objectors because union has to be strong and "when the [employer] knows that [union] can't last long in the strike, [the union will not] be able to negotiate—the union isn't going to be able to negoti-

collective together as a cohesive group capable of acting in unison. For example, human relations and minority participation efforts primarily directed at represented employees and calculated to produce harmony among them are designed to enhance the effectiveness of the union as bargaining representative.[230] Professional development programs that enhance self-esteem of represented employees are chargeable under the same theory.[231] To the extent professional development programs enhance a union's strike threat by making employees less susceptible to replacement, such programs make a real and substantial contribution to the union's effectiveness as bargaining representative. A union's efforts to build *esprit de corps* and group pride among represented employees through activities such as communicating the union's history, its past struggles, its past and present heros, and the like also would be chargeable as activities designed to develop group cohesiveness among represented employees.

In addition, community service liaison activities that provide represented employees information or assistance regarding governmental services to which they are entitled are chargeable under this theory. Providing information concerning community services builds group cohesiveness by stimulating loyalty to the union when it assists a repre-

ate the kind of contract that all [represented employees], members and nonmembers alike, would like to have."); Crawford v. ALPA, No. 87-891-A, slip op. at 8 (E.D. Va. Mar. 25, 1988) ("creation of [strike] fund [is] . . . a device reasonably employed to implement the duties of the union as exclusive representative . . . ."), *aff'd,* 870 F.2d 155, 130 L.R.R.M. (BNA) 2932 (4th Cir. 1989), *petition for reh'g en banc granted,* No. 88-2083 (May 11, 1989) (contingency fund expenses to finance future strikes " 'reasonably incurred for the purpose of performing the duties of an exclusive representative of employees in dealing with the employer in labor-management issues' ") (quoting *Ellis,* 466 U.S. at 448).

230. DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 90-95 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (human relations programs directed at represented employees chargeable but it is important not to include civil rights efforts directed at outside community); National Educ. Ass'n, slip op. at 29 (Feb. 4, 1987) (Lehleitner, Arb.) (expenditures to "encourage minority participation in the union" chargeable). *Contra* Thomas Loweree, No. 51 673 0004 88, slip op. at 7 (March 20, 1989) (Gruenberg, Arb.).

231. *See* Abels v. Monroe County Bd. Educ., 489 N.E.2d 533 (Ind. App., 1986) (professional development workshops sufficiently related to collective bargaining to justify assessment against nonmembers); DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 95-96 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (holding that professional development is chargeable because it relates to the improvement of employees' working conditions); Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 43 (Mich. Empl. Rel. Comm'n. Feb. 24, 1986) (A.L.J. decision) (holding that professional development is an activity normally and reasonably conducted by an exclusive bargaining agent and is chargeable). *Contra* National Educ. Ass'n, slip opinion at 36-37 (Feb. 4, 1987) (Lehleitner, Arb.) (Union's proof inadequate to demonstrate that "instructional institute" that helps upgrade bargaining unit members' professional skills is related to terms and conditions of employment).

sented employee during a time of personal crisis such as a child's drug or alcohol abuse or major medical emergency. The cumulative contribution to group cohesiveness of these union activities thus makes a real and substantial contribution to the union's effectiveness as bargaining representative.[232]

Similarly, a union's death benefit program for represented employees would be chargeable if objectors are eligible to participate in the death benefit program on the same basis as union members. In *Ellis,* the Court acknowledged the lower court's finding that a death benefits program both frees the union to negotiate additional benefits or higher wages and " 'tends to strengthen the employee's ties to the union . . . .' "[233] Applying the *Ellis* operating principles reinforces the conclusion that the costs of a death benefit fund should be viewed as chargeable to objectors. A death benefit fund is nonexpressive union conduct. It does not advance any ideology and, therefore, raises no ideological objection interfering with the right of free expressive association. Accordingly, applying minimal scrutiny, the question becomes whether a death benefit fund is "in the realm of collective bargaining" in the sense that it can be seen to promote, support, or maintain the union as an effective collective bargaining representative.[234] If a union's death benefit fund fairly can be seen to facilitate collective bargaining and promote internal cohesion, as the Supreme Court seems to acknowledge,[235] its costs are chargeable to all who are eligible to receive a death benefit. Other insurance related to employment or calculated to add group cohesiveness similarly would be chargeable.[236]

The operative concept is that a union activity that makes a real and substantial contribution to promoting group cohesiveness among represented employees is chargeable because it thereby contributes to the union's effectiveness as bargaining representative by creating a group better able to act as a collective for mutual aid and protection.

232. Moreover, union efforts to refer represented employees to government services are nonexpressive in that, like the social activities in *Ellis,* they do not significantly advance any ideology. Accordingly, as the *Ellis* operating principles instruct, such union activity warrants minimal scrutiny in any event.

233. 466 U.S. at 454 (quoting Ellis v. BRAC, 685 F.2d 1065, 1074 (9th Cir 1982)).

234. *See* discussion *supra* notes 111-12 and accompanying text.

235. *Ellis,* 466 U.S. at 454.

236. *See, e.g.,* DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 98 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (Employees' employment liability coverage for teachers is "an employment-related service to the employees whom the [teachers' union] represents.").

(2) Activities Directed at Outside Groups

Presenting more substantial issues are activities ancillary to collective bargaining but primarily directed at persons not represented by the union. Public relations efforts and similar activities seeking community good will are primarily at issue. This might include such things as: 1) participation in public affairs conferences or media events; 2) lectures or addresses to or appearances before gatherings consisting principally of persons not represented or employed by the union; 3) seminars and training conferences directed primarily at community organizing; and 4) public information reports, news releases, and similar efforts. For modern unions in a media conscious society, these are increasingly important activities. Yet, union public relations activities propagate ideology beyond the confines of the bargaining units represented by the union, often communicating the basic message that unions are wholesome, responsible, and necessary institutions in the community's life. The *Ellis* framework and operating principles instruct that to be chargeable to all employees, an expressive activity must provide a real and substantial contribution to the union's effectiveness as a bargaining representative. Moreover, greater scrutiny, manifested in part by allocation requirements, is required as expressive activity poses a significantly greater risk of infringing free expressive association rights beyond those countenanced by requiring financial support of collective bargaining. Union public relations activities appear to pose such an increased risk of compelled ideological conformity. Accordingly, allocation should be required.[237]

The public sector cases generally have been sympathetic to union arguments that public relations activities make a real and substantial contribution to public sector unions' effectiveness as bargaining representative.[238] This may be explained, at least in part, by the fact that "deci-

237. It will be recalled that *Ellis* required allocation between chargeable and nonchargeable union publication costs and litigation costs, but not union convention costs. The former pose a significant risk of being used to propagate ideology outside the bargaining units already represented by the unions while the latter do not. *See* discussion *supra* notes 168-70, 185 and accompanying text. Public relations activities, like union publication and litigation activities, are directed at persons outside represented bargaining units, thereby increasing their potential to propagate ideology and necessitating the need for allocation. *See, e.g.*, DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 88 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) ("Because we are unable, on the basis of the evidentiary record, to separate the [nonchargeable public relations] expenditures from other [chargeable public relations expenditures], we determine that none of the [union's] expenditures for [public relations] are chargeable.").

238. *See* Lehnert v. Ferris Faculty Ass'n., 643 F. Supp. 1306, 1326-27 (W.D. Mich. 1986) ("expenditures for disbursing information to the public that was favorable to the bargaining unit's position [during contract negotiations] chargeable to the plaintiffs"), *aff'd*, 132 L.R.R.M. (BNA) 2088, 2092 (6th Cir. Aug. 14, 1989) (Funds expended "to prepare for a

sion making by a public employer is above all a political process."[239] Public officials are responsible to taxpayers, users of particular governmental services, and to other government employees. As the Court summarized in *Abood,*

> Whether these [public officials] accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service.[240]

Private sector employers are responsible to corporate shareholders rather than to a public electorate. This may constitute a sufficient difference to distinguish the public sector cases. Yet it is difficult to deny that private sector unions also require favorable community sentiment about unionism generally and the involved union in particular. The outcome in the private sector likely will turn on whether the contribution of public relations efforts to the union's effectiveness as bargaining representative, increased public understanding and support for union goals, is viewed as speculative and uncertain in a particular private sector labor relations context. Much may depend on the evidentiary record developed in each case. For example, if the record suggests that public relations efforts simply are ancillary to the union's organizing efforts, they should be viewed as nonchargeable.[241] By contrast, public relations efforts during a major

possible strike and to publicize the union's position so as go put pressure on [a public employer]" chargeable: such "negotiation tactics and public relations activities [are] within the range of reasonable bargaining tools available to a public sector union during contract negotiations" even though a strike would have been illegal under state law.); Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 45 (Mich. Empl. Rel. Comm'n. Feb. 24, 1986) (A.L.J. decision) (Public relations activities are a standard feature of union operations that should be shared by all represented employees because "to be effective, a teachers' representative must keep the public informed of issues such as millages or the status of contract negotiations . . . ."); Browne v. Milwaukee Bd. of School Directors, No. 18408, slip op. at 7 (Wis. Empl. Rel. Comm'n Feb. 3, 1981) (Public advertising of bargaining positions as well as other matters relating to the union's representational interest in the collective bargaining process are chargeable.), *reconsidered and aff'd in relevant part,* No. 18408-D, (Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987); *see also* DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 85 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) ("Communications to the public which promote the [union] as an institution are . . . chargeable if they were reasonably incurred in the [union's] representative role. Public communications which communicate the [union's] position on ideological issues, however, are ideological in character and are chargeable only if they were necessarily incurred in the [union's] representative role."); National Educ. Ass'n, slip opinion at 37-38 & 45-46 (Feb. 4, 1987) (Lehleitner, Arb.) (actions to forge a more positive image for union and the employees it represents are chargeable).

239. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228 (1977).

240. *Id.*

241. *See* Beck v. Communications Workers, 776 F.2d 1187, 1212 (4th Cir. 1985) (expendi-

strike designed to marshal public sentiment may be seen to make a real and substantial contribution to the union's collective bargaining efforts.

Affiliation fees paid to outside groups, various types of contributions, and other expenditures related to participation in outside organizations are not likely to be ruled chargeable. First, a union may find it difficult to demonstrate that such expenditures make real and substantial contributions to a union's effectiveness as bargaining representative, whether the outside group is labor or nonlabor; domestic or international; or charitable, political, ideological or nonideological.[242] Second, no doubt a union can demonstrate that some affiliations with other organizations, especially umbrella labor organizations such as the AFL-CIO or its state or local affiliates, enhance its bargaining effectiveness by providing technical expertise and facilitating coordination with other labor organizations concerning mutual bargaining concerns. Yet, surely the *Ellis* operating principles require allocation between the outside group's chargeable and nonchargeable activities.[243] This is likely to present an

tures for "Publicity and Public Relations" not chargeable because viewed as part of organizing), *aff'd,* 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd on other grounds,* 108 S. Ct. 2641 (1988).

242. *See, e.g.,* Beck v. Communication Workers, 776 F.2d 1187, 1211 n.32 (4th Cir. 1985) (Charitable contributions by a union are not chargeable because their contribution to bargaining, creating a favorable climate of public sympathy and support for union's collective bargaining efforts, is not reasonably necessary for proper effectuation of collective bargaining.), *aff'd,* 800 F.2d 1280 (4th Cir 1986) (en banc), *aff'd on other grounds,* 108 S. Ct. 2642 (1988); *id.* at 1212 (expenditures related to "foreign affairs" not chargeable); Ellis v. BRAC, 91 L.R.R.M. (BNA) 2339, 2342 (S.D. Cal. 1976) (charitable contributions, expenditures to attend conventions of organizations and labor groups other than BRAC, and affiliation fees to outside labor and nonlabor groups are not chargeable), *aff'd,* 685 F.2d 1065 (9th Cir. 1982), *aff'd on other grounds,* 466 U.S. 435 (1984); Browne v. Milwaukee Bd. of School Directors, No. 18408, slip op. at 4-5 (Wis. Empl. Rel. Comm'n Feb. 3, 1981) (contributing to and supporting charitable, ideological, or political organizations as well as matters of international affairs are not chargeable to objectors), *reconsidered and aff'd in relevant part,* No. 18408-D, (Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987). *But see* Pilots Against Illegal Dues v. ALPA, No. 86-z-410 bench op. at 13, 131 L.R.R.M. (BNA) 2514, 2518 (D. Colo. Jan. 30, 1989) (financial aid to flight attendants' who honored airline pilots' picket line chargeable to objectors because "public policy expressed in . . . Supreme Court [dues objector] decisions is to support strong unions who can effectively engage in their job of collective bargaining with employers . . . ."); Browne v. Milwaukee Bd. of School Directors, No. 18408, slip op. at 32 (Wis. Empl. Rel. Comm'n Feb. 3, 1981) (Affiliation fees paid to outside groups are chargeable to the extent the union is able to prove support enhances its collective bargaining effectiveness or otherwise is related to the union's representational interest in the collective bargaining process.), *reconsidered and aff'd in relevant part,* No. 18408-D, (Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987).

243. Outside groups that engage in propagating political or economic doctrines, concepts or ideologies create an additional risk of infringement of first amendment rights beyond that already countenanced by requiring support for collective bargaining, if for no other reason than the ideas expressed are communicated beyond those already represented. For this reason, the duty to allocate arises. *See* discussion *supra* notes 168-70 and accompanying text.

insurmountable obstacle if, as can normally be expected, the outside group does not maintain financial records in ways that are sufficient to prove, by a preponderance of the evidence, its costs that are allocable to chargeable and nonchargeable activities.

Organizing is a paradigmatic example of an activity directed at an outside group. The determination in *Ellis* that the organizing there was not chargeable may prove determinative in future dues objector cases arising in both public sector and Taft-Hartley Act contexts. Yet, the organizing in *Ellis* was among workers covered by the Railway Labor Act, and the railway industry in the United States is organized extensively. During the World War II era, an estimated ninety percent of rail workers were union members.[244] Even in the post-war period, seventy-five to eighty percent of all rail workers belonged to a union.[245] In the context of such widespread unionization, the Court in *Ellis* might have concluded fairly that collective bargaining success for those already organized is not significantly imperiled by the presence of nonunion rail employees. As the Court in *Ellis* concluded, organizing bears only an attenuated relationship to a rail union's effectiveness as bargaining agent.[246]

If the level of unionization in the railway industry explains the Court's holding in *Ellis* that organizing expenses there are not chargeable, the question arises whether that reasoning applies to the contemporary airline labor relations environment, for example.[247] Moreover, the issue of the relationship of organizing to a union's bargaining effectiveness could be resurrected in future *Beck* litigation before the NLRB,

244. International Ass'n of Machinists v. Street, 367 U.S. 740, 754-55 (1961).

245. *Id.* at 762.

246. Ellis v. BRAC, 466 U.S. 435, 451-52 (1984).

247. *See generally* CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION (J. McKelvey ed. 1988):

> Airline deregulation prompted a surge of nonunion "upstart" carriers. . . . 37 have survived [as of 1987, and] their inroads have encouraged a variety of anti-competitive responses . . . .
>
> . . . .
>
> At the collective bargaining table, carriers that found themselves in economic difficulty pressed hard for and secured concessions through pay freezes and cuts and through changes in work rules that reduced labor costs. . . .
>
> . . . .
>
> Deregulation spawned an era of much bitterness and hostility in airline labor relations, as well as a host of inventive responses to unprecedented challenges.

Id. at 3-4. The "first response to deregulation [by ALPA] was to set a priority on organizing all non-ALPA carriers . . . ." *Id.* at 27. As a means of combatting concession bargaining, this tactic is challenged by some economists who argue that general business conditions, more than competition from nonunion carriers, explain the prevalence of concession bargaining in the airline industry during the mid-1980s. *Id.* at 50.

should record evidence be introduced that unionized wage gains are dependent on wage levels of nonunion sectors. The NLRB's "area standard" picketing cases already suggest such a relationship in the construction industry, for example.[248]

In the face of such record evidence, the NLRB should not simply follow the *Ellis* rhetoric with respect to charging organizing costs. On the one hand, increasing the percentage of unionized employees undoubtedly strengthens a union's bargaining position substantially, at least in some collective bargaining contexts. The dilemma, perhaps, is that organizing success also invariably acts to increase overall union power and thus may help substantially to advance a union's noncollective bargaining ideological agenda. The NLRB's task will be to evaluate whether organizing efforts in industries covered by the Taft-Hartley Act produce both of these effects and, if so, to recognize they cannot be segregated but must be reconciled in ways that "protect both [union and objector] interests to the maximum extent possible without undue impingement of one on the other."[249]

248. *See, e.g.*, Houston Bldg. and Const. Trades Council (Claude Everett Const. Co.), 136 N.L.R.B. 321, 323 (1962) (area standards picketing reflects the union's legitimate concern that a nonunion employer is undermining area standards of employment by maintaining lower standards).

249. *Street*, 367 U.S. at 773. *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 (1977) (Compulsory subsidization of ideological activity must be prevented but "without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities.").

Pre-*Beck* decisions held that unions regulated by the Taft-Hartley Act may charge objectors for organizing activity. *See* Price v. International Union, United Auto Workers, 795 F.2d 1128, 1135-36 (2d Cir. 1986) (Charging objectors a share of organizing costs is a not violation of the duty of fair representation because this is an ordinary and routine union expense.), *vacated and remanded*, 108 S. Ct. 2680 (1988); Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund, 700 F.2d 1269, 1275 (9th Cir. 1983) ("Money spent on organizing to eliminate competition from non-union employers is germane to collective bargaining . . . ."), *cert. denied*, 464 U.S. 825 (1983); Freisen, *supra* note 12, at 645-46 (arguing that organizing expenses should be chargeable to objectors).

In the public sector, the post-*Ellis* cases have been mixed. *Compare* discussion in Hudson v. Chicago Teachers Union Local 1, 699 F. Supp. 1334, 1339 n.2 (N.D. Ill. 1988) (reporting that the Illinois Educational Labor Relations Board has concluded that Illinois law permits a union to charge objectors for the expense of union organizing) *with* Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1324 (W.D. Mich. 1986) (organizing is not chargeable), *aff'd*, 132 L.R.R.M. (BNA) 2088 (6th Cir. Aug. 14, 1989).

The General Counsel of the NLRB has taken the position that union organizing activities are not chargeable to objectors. G.C. Memorandum, *supra* note 31, at 6. No position has been taken by the NLRB General Counsel regarding whether expenses incurred in defending against a raid by another union or a decertification effort are chargeable. *But see* DuQuoin Educ. Ass'n (Darrell T. Bosecker), No. 85-FS-0002-S slip op. at 84 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (efforts to maintain existing representation rights are chargeable).

C. Internal Governance — Maintaining the Union's Corporate or Associational Existence

How to charge internal governing expenses can present endless opportunities for incoherent ad hoc decisionmaking unless the operating principles from *Ellis* are observed. The Supreme Court's discussion of union conventions makes plain that maintenance of the union's "corporate or associational existence" is an undertaking "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[250] Other examples cited by the Court were "elect[ing] officers to manage and carry on [the union's] affairs," "formulat[ing] overall union policy," and "consult[ing] members about overall . . . policy."[251] In the course of discussing social activities, the Court also recognized the need for union meetings and the legitimate union interest in "creat[ing] a more pleasant environment for union meetings."[252] Finally, efforts to "bring about harmonious working relationships and promote closer [associational] ties" were found to be chargeable to all represented employees.[253] *Ellis* thus strongly suggests unions should be given wide discretion to charge all represented employees for the broad range of activities related to its internal governance, management, and administration.

The operating principles derived from *Ellis* substantiate this conclusion.[254] The union's interest is at the maximum when engaging in activities related to maintaining its corporate or associational existence. The majority in *Ellis* concluded that a union "must maintain" this existence to perform its statutory functions.[255] Moreover, union internal management and administration activities are normally devoid of ideological content. Union financial administration is a good example. There is virtually no ideological component to payroll and accounting activities, paying state and local taxes, negotiating and paying premiums on fire insurance and other normal types of business insurance, bonding of union officers, arranging for the leasing of automobiles for staff, maintaining name and address lists of represented employees, collecting dues,

250. Ellis v. BRAC, 466 U.S. 435, 448 (1984).

251. *Id.*

252. *Id.* at 450.

253. *Id.* at 449-50. Internal governance activities may be financed by cross-unit costsharing and allocation is not required, at least when internal governance activities pose little risk of propagating ideology unrelated to collective bargaining. *See* discussion of allocation and the union convention *supra* notes 168-70 and accompanying text.

254. *See* discussion *supra* notes 192-97 and accompanying text.

255. 466 U.S. at 448.

overseeing investments, administering staff pension funds, and filing the myriad of reports required by state or federal law. Accordingly, union financial management activities are chargeable to objectors.[256]

If they convey ideas at all, union internal governance activities, like the union convention, normally create a minimal risk of forcing ideological conformity and none beyond that already countenanced by requiring financial support for collective bargaining. For example, unions arrange a variety of union gatherings that, like conventions, are normal aspects of governance. These may include union business meetings, district and international union executive council meetings, staff meetings, and various other assemblies to formulate or disseminate union bargaining or internal governing policies.[257]

Union judicial administration is another category of normal internal union governance that is expressive but poses little or no risk of propagating ideology. It entails the interpretation and enforcement of the

256. *See, e.g.*, DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 98 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (liability coverage for union's leaders and staff as well as cost of fidelity bonds for union staff is chargeable); Newton Teachers Ass'n (Irene Roman), No MUPL-2685, slip op. at 16 (Mass. Lab. Rel. Comm'n Apr. 3, 1987) (property insurance and accounting and auditing costs "incurred in connection with the union's existence as a collective bargaining representative" are chargeable).

257. Membership meetings of various types serve as important communication conduits conveying the union's policies to its membership and the membership's concerns to the union's leadership. *See generally* Hartley, *supra* note 13, at 82-91 (discussing the contribution of union meetings to the vitality of a democratic political life within the union, and to the setting of a union's collective bargaining agenda). Indeed, most union constitutions guarantee regular union meetings and when such meetings are guaranteed, the union leadership violates the Labor Management Reporting and Disclosure Act by refusing to schedule the meeting. *See* Wade v. Teamsters Local 247, 527 F. Supp. 1169, 1175 (E.D. Mich. 1981) (failure of union local to hold regular meetings violates the LMRDA); *see also* Moshetta v. Cross, 48 L.R.R.M. 2669 (E.D. Pa. 1961) (it is a violation of LMRDA for union's general executive board to refuse to complete arrangements for special convention authorized by the general executive board).

Objectors are required to contribute to the costs of holding a variety of union meetings. *See* Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1326 (W.D. Mich. 1986) (meetings to coordinate bargaining strategies and representational policies, state representative assemblies, and national conventions are chargeable to objectors), *aff'd*, 131 L.R.R.M. (BNA) 2088, 2090 (6th Cir. Aug. 14, 1989) (conventions of both the international union and its subordinate governing units—state associations—chargeable to objectors even if incidental nonchargeable activities also undertaken at such conventions); Newton Teachers Ass'n (Irene Roman), No. MUPL-2685, slip op. at 15 (Mass. Lab. Rel. Comm'n Apr. 3, 1987) ("[e]xpenditures for union conferences or conventions at which the union elects officers or otherwise maintains its organizational existence" chargeable); Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 45 (Mich. Empl. Rel. Comm'n. Feb. 24, 1986) (A.L.J. decision) (Expenditures "relating to maintaining an effective union structure and organization . . . includes board meetings, staff meetings, and training and assisting local members [as well as much work of various] commissions, committees and task forces, conferences, and meetings . . . .").

union's constitution, bylaws, and rules. Union discipline is a prominent example.[258] Approving bylaws of subordinate union governing groups within the union and providing interpretations of them are, perhaps, less familiar but no less important internal governance tasks, particularly of international union staff.[259] The costs of union judicial administration are chargeable to objectors.[260]

Finally, international unions may expend considerable effort on what may be termed parent-affiliate relations. These activities involve the international union's relationship with or the relationships among subordinate governing groups such as district councils and local unions. This may entail, for example, mergers of local unions, jurisdictional disputes between or among local unions, or initiation of trusteeships.[261]

In sum, *Ellis* demonstrates that expenditures to maintain a union's organizational existence are chargeable to objectors because these activities have the requisite nexus to the union's effectiveness as collective bargaining representative.[262]

The issue more likely to create debate is whether unions must identify and allocate chargeable and nonchargeable components in a single

258. *See* Scofield v. NLRB, 394 U.S. 423 (1969) (enforcement of a union rule as to production ceilings by reasonable fines did not violate the Act); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) (unions are not prohibited from imposing and attempting to collect fines against members who decline to honor authorized strikes), *reh'g denied,* 389 U.S. 392 (1967).

259. An international union's supervisory authority over its subordinate governing units (local unions and district councils) may include ensuring the conformity of local union bylaws with the requirements of an international union's constitution. *See* Hartley, *supra* note 13, at 91.

260. *See* Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 45 (Mich. Empl. Rel. Comm'n. Feb. 24, 1986) (A.L.J. decision) (costs associated with administering union's "Board of Reference," its "judicial body [which] settles disputes regarding its constitution and bylaws and governing policies" are chargeable to objectors); National Educ. Ass'n, slip opinion at 29 (Feb. 4, 1987) (Lehleitner, Arb.) ("administration of internal discipline" is chargeable).

261. *See* United Ass'n of Journeymen Plumbers v. Plumbers' Local 334, 452 U.S. 615 (1981) (challenge to international union's authority to order the merger of two of its locals); Booth v. Carlough, 90 L.R.R.M. (BNA) 2508, 2511 (C.D. Cal. 1975) (president of international union has authority under union's constitution to "decide matters pertaining to local union trade and territorial jurisdiction"); M. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 175-205 (1988) (discussing the regulation of union trusteeships under the LMRDA).

262. The Court's warning in *Hanson* again deserves mention. A union activity will not be chargeable if compelled financial support were used "as a cover for forcing ideological conformity." Railway Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956). Accordingly, a union meeting nominally convened for a chargeable purpose but that primarily was employed to advance ideological goals unrelated to collective bargaining would not be chargeable. Nor may objectors be charged for any other expenditure "actually incurred in furtherance of an exclusively [nonchargeable] activity" such as renting space used to support a political campaign or insuring office equipment used for nonchargeable purposes. Newton Teachers Ass'n (Irene Roman), No. MUPL-2685, slip op. at 16 (Mass. Lab. Rel. Comm'n Apr. 3, 1987).

act of internal governance. For example, those conducting the union business meeting may include incidental reference to politics or organizing when, for example, a report is made by a political affairs or organizing committee or when those attending the meeting are encouraged to contribute to the union's political action committee. May the union, therefore, charge only for the percentage of the meeting discussing chargeable activities?[263]

By further example, the same computer software and hardware that maintain membership records or generate mailing labels to mail an internal union election ballot or contract referendum ballot, also can generate mailing labels used to mail political materials.[264] Assuming that the postage and staff time actually incurred in preparing and mailing the political materials are not chargeable to objectors, what about the staff time devoted to creating the membership record in the first place and the computer time expended to generate the mailing labels? Such incidental use of the membership file for nonchargeable purposes adds no cost to the union staff responsible for creating and maintaining the file. The membership file, essential to maintain the union's associational existence, would have been created in any event. Similarly, computer time to produce a set of mailing labels is negligible and costs the union nothing when the union owns the computer, or leases it by paying a uniform monthly fee. Must records nevertheless be maintained showing the chargeable and nonchargeable use made of the membership file in order to allocate costs of the staff that creates and maintains it?[265] And must every use of a main frame computer be documented and allocated as supporting chargeable or nonchargeable activities?

Finally, the bills paid and the financial records maintained by a union's accounting department support both the chargeable and

263. If so, would this be true of every union meeting? What type of records would have to be maintained to substantiate the chargeable portion of these meetings; and how would those records be audited?

264. Indeed the same mailing label could support chargeable and nonchargeable activities when, for example, it is used to mail represented employees the union's monthly magazine.

265. This is not an isolated problem. A union maintains many files to make its representational efforts more effective and to maintain its corporate and associational existence. These may, however, provide incidental support to nonchargeable activities. For example, a union may maintain computerized records of union contract clauses negotiated in its various bargaining units and used primarily to prepare for collective bargaining. The file might also be used to develop arguments demonstrating the benefits of unionization in an organizing drive by showing favorable union contract terms at unionized plants. A union research department may maintain financial information concerning the employers it bargains with to counter arguments of inability to provide contract enhancements. The same financial information also can counter predictions of adverse economic consequences made by the same employer when resisting an organizing effort at one of its nonunion plants.

nonchargeable activities of the union.[266] Must the union develop allocation methods to allocate its bookkeepers' time? Should it make any difference if processing bills for nonchargeable activities and preparing payroll for staff engaged in nonchargeable activities do not add any incremental cost to accounting department salaries?[267]

These are more than prosaic inquiries. First, there is some precedent in the public sector cases requiring unions to allocate between chargeable and nonchargeable costs of union meetings[268] and use of a union research computer system.[269] Moreover, as discussed next, allocation issues go to the heart of important questions that will confront the NLRB and the courts as they work to accommodate the legitimate competing interests of dues objectors and their unions. Examining allocation

266. One check may pay the fee of a labor arbitrator and the next the fee of a political consultant. Payment of a rental fee for a conference room is chargeable when the room is used for collective bargaining negotiations, but not when it is used for a union organizing rally.

267. For example, a single bill for services from one vendor, such as a printing company, may include services that are both chargeable and nonchargeable activities. The cost to the accounting department of processing this single bill is unaffected by the inclusion in the bill of some nonchargeable services: a single entry is made in the financial records and a single check is prepared regardless of the mix of services provided by the vendor. In any event, the increased workload on the accounting department attributable to incidental support of nonchargeable activities is negligible. Most, if not all accounting department costs are essentially the same whether or not the department is responsible for processing financial transactions related only to chargeable activities or also to nonchargeable activities such as organizing, political activities, and others unrelated to collective bargaining.

268. The post-*Ellis* cases in the public sector generally have followed *Ellis'* lead, not requiring allocation of the cost of union meetings. *See* Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1328 (W.D. Mich. 1986) (state and national representative assembly meeting costs need not be allocated), *aff'd,* 132 L.R.R.M. (BNA) 2088 (6th Cir. Aug. 14, 1989); *id.* at 1326 (costs of coordinating council primarily developing bargaining strategies and representational policies need not be allocated); Newton Teachers Ass'n (Irene Roman), No. MUPL-2685, slip op. at 16 (Mass. Lab. Rel. Comm'n Apr. 3, 1987) (no allocation requirement of expenditures for union conference or convention when union elects officers and "otherwise maintains its organizational existence"); National Educ. Ass'n, slip opinion at 28 (Feb. 4, 1987) (Lehleitner, Arb.) ("As long as the fundamental purpose of the representative assemblies are to consider issues germane to collective bargaining, the expenses associated with these conferences are chargeable in their entirety."). *But see* Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 41 (Mich. Empl. Rel. Comm'n. Feb. 24, 1986) (A.L.J. decision) (staff meetings and conferences and committee meetings to be allocated); Browne v. Milwaukee Bd. of School Directors, No. 18408, slip op. at 32 (Wis. Empl. Rel. Comm'n Feb. 3, 1981), *reconsidered and aff'd in relevant part,* No. 18408-D (Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987) (Some membership meetings "involve both [chargeable and nonchargeable] categories of expenditures, thus requiring an apportionment of the expenditures").

269. DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 99 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (costs associated with use of research computer in support of union program are not chargeable because records are not sufficiently detailed to determine whether its use included support for nonchargeable activities).

issues is valuable because it also demonstrates the merit of acknowledging the role of constitutional values in the *Ellis* line of cases.

Requiring allocation of internal governance costs can be expected to have significant cost implications. The greatest financial cost to the union required to allocate is not likely to be the decreased revenues resulting from decreased dues it may charge objectors,[270] but rather the cost of devising, maintaining, and auditing records sufficient to identify the nonchargeable component of otherwise chargeable internal governance activities. This cost is significant both financially and in terms of disruption of the union's normal operations.[271] For example, record-keeping requirements would be substantial if the NLRB and the courts hold that, unlike the union convention, the costs of every union business meeting, union staff conference, or committee meeting must be allocated should any nonchargeable topic or activity be discussed.[272]

270. The few minutes of computer time devoted to generating mailing labels for political mailings and retrieving contract clauses for use in an organizing drive, for example, are insignificant compared to the hours of computer time required for the union's payroll, financial accounting, and other normal business activities that maintain its corporate or associational existence. If the union were to decrease objectors' dues by the nonchargeable share of the system, the effect in terms of net dues owed would be negligible.

The same is true of the small portion of total time a union computer operator, a bookkeeper in a union accounting department, or a membership file clerk can be expected to devote to support nonchargeable activities.

Similarly, an international union's periodic executive council meetings or a local union's business meeting is likely dominated by internal governance matters, member complaints, and problems arising at shops where the union has bargaining rights. The few minutes devoted to urging support for the union's political action committee, or to a report from an organizer, is likely to be de minimis in the larger scheme of things and not likely, therefore, to affect overall dues owed by a significant amount.

The consensus is that for most unions, net impact on chargeable dues can be expected to be negligible. *See A Say Where the Union Dues Go,* INSIGHT, Feb. 1, 1988, at 43 ("[T]he net impact on unions is likely to be almost negligible.' ") (quoting Professor Leo Troy, a specialist in union finances); *id.* at 43 (no significant risk of dues loss); The Daily Record, July 7, 1988, at 7, col. 2-3 (financial impact on individual dues obligation slight and net financial impact on union not significant unless "large numbers of employees opt to become dues-paying nonmembers").

271. Daily Labor Report, July 8, 1988, (Current developments Section), at 1-6 (Consensus of union lawyers is that the greatest cost of *Beck* likely to be cost of compliance and "administrative hassle" of "more bookkeeping" and "set[ting] up . . . accounting practices.").

272. The specter of union bookkeepers maintaining records of their time devoted to processing each of thousands of invoices and preparing each check for payment, while being responsible for a multimillion dollar international union annual budget, could make a mockery of a very important constitutional doctrine designed to protect objectors from being compelled to finance ideology and other expenses unrelated to collective bargaining. The same can be said of the specter of union file clerks tracking every use made of membership files.

Similarly, maintaining and auditing records to identify the cost of the mailing labels used in the political mailing example discussed above could far exceed the cost of producing them in

The compliance cost to the union if it were required to allocate internal governance costs to reflect incidental support of nonchargeable activities is a relevant consideration,[273] but is not determinative. For example, compliance cost was not mentioned by the *Ellis* Court when it held a union need not allocate union convention costs but must allocate union publication costs.[274]

Nor can the duty to allocate turn solely on whether incidental support of nonchargeable union conduct adds any associated costs to the union. First, in *Ellis,* as Justice Powell argued in his concurring and dissenting opinion, the union did not charge objectors for any honorarium paid to political speakers at its convention, though there were related travel and hotel expenses incurred by those delivering political speeches.[275] Yet the union was permitted to charge all represented employees for the full cost of the convention.[276] Nor should the rule simply be that objectors may by charged the full cost of an activity whenever its support of nonchargeable conduct adds no cost to the union. Otherwise, a union could charge the full salary of all of its constitutional officers whose positions are created by, and whose salaries are set by, the union constitution. The union would be permitted to show that the constitution requires a certain number of officers, that they are paid a set salary regardless of the activities in which they engage, and that their engaging in nonchargeable activities, therefore, adds no incremental cost to the union.

This problem was litigated extensively in *Beck.* Testimony elicited from economists discussed the "concept of joint production" defined as " 'a problem which arises when a single input is used almost automati-

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the first place. The same is true of the cost of allocating as nonchargeable the cost of office supplies used by a union accounting department in support of nonchargeable activity.

At some point, the cost of administering union security exceeds its benefit. At that point, the Supreme Court's admonition in *Abood* bears reconsideration. There the Court said that "the objective must to devise a way of preventing subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective bargaining activities." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 (1977).

273. *See id.* (high cost of complying with allocation requirement for internal governance expense may restrict unions' effectiveness as collective bargaining agents).

274. Moreover, the Court has cited James Madison with approval. Speaking of religious liberty, Madison stated, " 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' " Chicago Teacher's Union v. Hudson, 475 U.S. 292, 305, n.15 (1986) (quoting 2 THE WRITINGS OF JAMES MADISON 186 (G. Hunt ed. 1901)).

275. Ellis v. Brac, 466 U.S. 435, 459-60 n.1 (1984) (Powell, J., concurring and dissenting).

276. *Id.* at 448.

cally in the production of two outputs . . . or more.' "[277] With respect to officers' salaries, "under the joint production theory 'any assignment of [an] officer's salary between categories is arbitrary . . . .' "[278]

Concentrating on the constitutional values at stake in *Ellis* offers a principled way to decide these allocation questions. From objecting employees' viewpoint, their dues support all union officer activities by helping make possible the salaries without which none of the activities could be sustained. The law responds to this perception by creating a presumption that every dues dollar supports equally every activity in which a union engages, both chargeable and nonchargeable.[279] Objectors' dues are thus seen as supporting all officer activities, even when officers are paid a set salary. Accordingly, the fact that a nonchargeable activity adds no additional cost to the union cannot be determinative of the allocation issue. A no-cost nonchargeable activity simply does not abate the essential conflict *Ellis* attempts to accommodate: perceived violation of conscience due to compelled support of ideology.

What then explains why in *Ellis* the union was not required to allocate convention costs but was required to allocate union publication costs? The operating principles derived from *Ellis* provide useful guidance and promise to liberate future decisionmakers from irreconcilable ad hoc allocation decisions.

Ellis teaches that the question to be answered is whether failure to allocate would compromise substantially the first amendment right of free expressive association beyond that already countenanced by requiring support of collective bargaining.[280] From the *Ellis* Court's holding on the union convention, it appears the Court would not find such an increased infringement when support of nonchargeable activities is inci-

277. Supplemental Report of Special Master at 26-29, Beck v. Communications Workers, No. M-76-839 (D. Md. Sept. 14, 1981), *aff'd in part, rev'd in part,* 776 F.2d 1187 (1985), *aff'd,* 108 S. Ct. 2641 (1988). The standard example cited was the production of mutton and wool. Because there is no way of producing mutton without producing wool, the cost of mutton production is unaffected by the presence of the other output. Moreover, there is "no way of sorting out . . . the costs of producing the wool and mutton separately." *Id.*

278. *Id.*

279. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 n.35 (1977) (union may not limit the use of dues collected from objectors to only chargeable activities for that limitation "is of bookkeeping significance only rather than a matter of real substance") (quoting Retail Clerks v. Schermerhorn, 373 U.S. 746, 753 (1963)).

280. Ellis v. BRAC, 466 U.S. 435, 456 (1984). This principle reconciles the majority opinion of the Court in *Ellis* with the concurring and dissenting opinion by Justice Powell. The disagreement whether to require the union to isolate and allocate costs associated with political activities at the union convention apparently turned on different perceptions of the convention's potential to propagate ideology. *Compare Ellis,* 466 U.S. at 448-49 *with id.* at 459 (Powell, J., concurring and dissenting).

dental to, and not a substantial portion of, a chargeable activity. The political speeches delivered at the union convention were delivered to a limited audience of assembled delegates, were incidental to the main work of the quadrennial convention, and likely represented a relatively minor portion of the convention.[281] Accordingly, in *Ellis,* the Court held that charging objectors a pro rata share of all convention costs added "little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." [282]

By contrast, if an expenditure furthering a nonchargeable activity was not incidental to a chargeable activity and was a significant part of that activity, then it may be seen to infringe the objector's right of free expressive association beyond that already accepted by requiring support for collective bargaining.[283] The union's obligation to allocate publication costs reflects this principle. The support given nonchargeable activities by the publication expenses in *Ellis* was neither incidental to, nor an insubstantial aspect of, the union's publication effort. The publications' content regularly included articles calculated to propagate economic or political doctrine, concepts, or ideology.[284] In addition, the Court fairly could have considered that union publications have a powerful potential to propagate ideology because, among other things, the message is written, periodic, and directed to a large audience, including many not represented by the union.[285] In short, failure to allocate the cost of producing articles in the union publication would have increased the compelled subsidization of ideology well beyond that already countenanced by requiring support for collective bargaining.

This method of determining when to allocate is both sensible and workable.[286] A large body of literature describing the components of union structure and government is available to help decisionmakers

281. *See* discussion *supra* notes 48-51 and accompanying text.

282. *Ellis,* 466 U.S. at 456. *See also id.* at 450 ("Members of Congress were [not] inclined to scrutinize the minor incidental expenses incurred by the union in running its operations.").

283. *See, e.g.,* DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 98-99 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (cost of research computer system supporting substantial political action and nonchargeable legislative lobbying activity engaged in by union must be allocated); Newton Teachers Ass'n (Irene Roman), No. MUPL-2685, slip op. at 16 (Mass. Lab. Rel. Comm'n Apr. 3, 1987) (expenditure not chargeable if significant expense interwoven with chargeable activities "was actually incurred in furtherance of an exclusively [nonchargeable] activity").

284. *Ellis,* 466 U.S. at 450-51.

285. *See* discussion *supra* notes 169-70 and accompanying text.

286. It may not always easily be determined when support of nonchargeable activity by internal governance support staff is "incidental to" and not a "substantial portion of" the staff's internal governing responsibilities. As Justice Powell correctly observed, however, "like

gauge which union activities make a real and substantial contribution to maintaining a union's corporate and associational existence.[287] Moreover, the NLRB and the courts will be able to develop methods to determine when support for nonchargeable activities is incidental to and not a substantial portion of internal governance.

One factor is whether a nonchargeable activity is inextricably intertwined with chargeable union operations and adds no cost because the cost would have been incurred in any event to provide chargeable internal governance or collective bargaining services to represented employees.[288] Similarly, when support of nonchargeable activity does generate minor incidental expenses, not allocating would not substantially infringe on the first amendment right of free expressive association beyond that already countenanced by requiring support of collective bargaining. As was true concerning the union convention in *Ellis,* relatively small extra costs attributable to the support of nonchargeable activity is persuasive evidence that such support truly is incidental to the chargeable union activity of which it is a part.[289]

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any general standard, reasonable people—and judges—may differ as to its application to particular types of expenditures." *Ellis,* 466 U.S. at 458 (Powell, J., concurring and dissenting).

287. *See, e.g.,* the body of literature cited in Hartley, *supra* note 13, at 62-92. In addition, expert testimony can be proffered both by objectors and the union to further educate decisionmakers.

288. Examples of inextricably intertwined chargeable and nonchargeable union operations, from the discussion at *supra* notes 262-72 and accompanying text, include conducting a union business meeting, creating and maintaining a membership file or a sample contract clause file, paying a vendor's invoice that consolidates charges for multiple services, preparation of a year-end reconciliation of financial records, and consuming computer time (assuming the union owns or leases the computer). These support activities must be organized and financed to provide chargeable services to represented employees. In addition, there is a question whether a union incurs any additional expense from the support these activities lend to the union's nonchargeable activities (*e.g.,* salaries of computer operators who may occasionally generate mailing labels for political mailings or bookkeepers and accountants who must pay bills and process payroll for both chargeable and nonchargeable activities).

Relieving unions of the duty to allocate would not result in the unacceptable outcome of unions charging objectors the cost of union officer salaries when the union's constitution designates a certain number of constitutional officers and sets their salaries. *See* discussion *supra* notes 275-78 and accompanying text. The approach proposed here relieves unions from a duty to allocate only when no-cost support of a nonchargeable activity is inextricably intertwined with the performance of a chargeable internal governance activity or other chargeable activity. If a salaried union officer were assigned to attend a national political convention, for example, this activity would be nonchargeable. It would not be inextricably intertwined with some other fully chargeable activity. The same would be true if the officer were assigned organizing responsibilities or another nonchargeable activity.

289. *See* Ellis v. BRAC, 466 U.S. 435, 450 (1984) ("Members of Congress were [not] inclined to scrutinize the minor incidental expenses incurred by the union in running its operations."). In *Ellis,* the travel and lodging expenses of at least some of the nine politicians who spoke at the union convention were charged to objectors. *Id.* at 459-60 n.1 (Powell, J., concur-

The above approach to allocation suggests that unions normally must allocate overhead expenses incurred to provide the union's various staff sections with telephone service and other utilities, building maintenance, mortgage, or rental payments for a headquarters building in which staff work, leased automobiles, payment of property taxes, postage, supplies, and the like. These expenditures are not incidental to chargeable activities. Typically nonchargeable union activities, such as an organizing department or a political affairs staff, generate discrete overhead costs of the type just described. Moreover, operating expenditures are likely to be significantly affected by the amount of nonchargeable activity undertaken by a union.[290] Not allocating would thus increase significantly the infringement of first amendment rights beyond that already countenanced by requiring support of collective bargaining activities.[291]

D. Litigation Expenses

The Court's analysis of litigation expenses in *Ellis* has been described above. In general terms, objectors need not share the cost of litigation not related to collective bargaining negotiations or grievance handling "unless the [objecting employee's] bargaining unit is directly concerned."[292] By contrast, litigation related to collective bargaining negotiation or contract administration is chargeable to all represented employees if it "concerns bargaining unit employees" and is "normally

ring and dissenting). The record does not disclose the amount of these costs, but they were probably small compared to the total cost of the quadrennial convention ($1,802,000). *Id.* at 459 (Powell, J., concurring and dissenting).

290. This is true even of certain fixed operating expenses such as property taxes and mortgage payments on a headquarters building. Office space devoted to nonchargeable activities has a rental value that could offset mortgage and tax payments but for the presence of staff engaged in nonchargeable activities occupying that space in the headquarters building.

291. This view of operating expenses is widely accepted. *See, e.g.*, Beck v. Communication Workers, 776 F.2d 1187, 1211-12 (4th Cir. 1985) (nonunion employees may not be charged for union's political expenditures, lobbying activity not directly related to working conditions, community service expenditures, union organizing expenditures, publicity, public affairs costs, and costs in support of another union's strike); Newton Teachers Ass'n (Irene Roman), No MUPL-2685, slip op. at 16 (Mass. Lab. Rel. Comm'n Apr. 3, 1987) ("In the absence of contrary evidence, such expenses will be presumed [chargeable] in the same proportion as the union's activities are found to be allocable to [chargeable] categories."). *But see id.* at 16 (building maintenance and repair expenditures need not be allocated).

292. *Ellis*, 466 U.S. at 453 (the cost of litigation (1) challenging the legality of the airline industry mutual aid pact; (2) seeking to protect the rights of airline employees generally during bankruptcy proceedings; and (3) defending Title VII employment discrimination suits are examples of litigation not involving collective bargaining negotiation or administration). *See also* discussion *supra* notes 55, 179-81 and accompanying text.

conducted."[293] This differentiation in *Ellis* necessarily implies a duty to allocate, but also affects the union's right to finance chargeable litigation by cross-unit costsharing.[294] This understanding of *Ellis* largely has prevailed.[295]

This outcome conforms with the *Ellis* principle that an activity that makes a real and substantial contribution to the union's effectiveness as

293. *Id.* (fair representation suits and union jurisdictional disputes are examples of litigation costs chargeable to objectors). *See also* discussion *supra* notes 56, 182-84 and accompanying text.

294. *See* discussion *supra* notes 186-87 and accompanying text.

295. *See, e.g.*, Crawford v. ALPA, No. 87-891-A, slip op. at 11 (E.D. Va. Mar. 25, 1988), *aff'd*, 870 F.2d 155, 130 L.R.R.M. (BNA) 2935 (4th Cir. 1989), *petition for reh'g en banc granted*, No. 88-2083 (May 11, 1989). In *Ellis*,

> the distinction [drawn] was between the types of expenditures—not whether the cost should be allocated to the specific unit in which an employee worked. . . . The Court . . . distinguished between litigation involving the negotiation of agreements or settlement of grievances, which can be charged to nonmembers, and litigation that does not involve these subjects, which cannot be charged to nonmembers.

Id. (quoting *Ellis*, 466 U.S. at 453); Pilots Against Illegal Dues v. ALPA, No. 86-z-410 bench op. at 5, 131 L.R.R.M. (BNA) 2514, 2515 (D. Colo. Jan. 30, 1989) (objectors may be charged for litigation that is "an element of collective bargaining itself, or . . . involve[s] issues of concern to employees that are customarily done by employee representatives"); Lehnert v. Ferris Faculty Ass'n., 643 F. Supp. 1306, 1325 (W.D. Mich. 1986) (unit-by-unit breakdown of chargeable litigation expenses addressing issues of shared concern is not warranted. Such a breakdown would "exacerbate the free rider problem and thereby frustrate the governmental interest . . . at the heart of statutes authorizing union/agency shops," and would create an "unreasonable and unmanageable administrative burden."), *aff'd*, 132 L.R.R.M. (BNA) 2088, 2092 (6th Cir. Aug. 14, 1989) ("[A] union [may] use the agency fees paid by dissenting employees for expenditures outside of the dissenters' immediate bargaining unit [when] the expenditures in question [are], as required by *Ellis*, 'germane' to the union's obligation as bargaining representative."); Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 32, 42 (Mich. Empl. Rel. Comm'n Feb. 24, 1986) (A.L.J. decision) (litigation is chargeable to all represented employees if it "concern[s] bargaining unit employees and [is] normally conducted by the exclusive representative"); *id.* at 42 (represented employees benefit from any litigation that "may affect the Union's bargaining rights [or] may set a precedent for all represented employees [and] it is appropriate that all employees benefiting from the Union's litigation/representation efforts share in those costs"); Browne v. Milwaukee Bd. of School Directors, No. 18408, slip op. at 7-8 (Wis. Empl. Rel. Comm'n Feb. 3, 1981) (A union may charge objectors for "[p]roceedings regarding jurisdictional controversies," "lawful impasse procedures" and the "prosecution or defense of litigation or charges to enforce rights related to concerted activity and collective bargaining, as well as collective bargaining agreements."), *reconsidered and aff'd in relevant part*, No. 18408-D, (Sept. 19, 1985), *reconsidered and aff'd in relevant part*, No. 18408-G (Apr. 24, 1987); National Educ. Ass'n, slip op. at 39 (Feb. 4, 1987) (Lehleitner, Arb.) (litigation costs chargeable to objectors if "germane to and supportive of [union's] exclusive representation as a whole . . . ."); *see also* Woburn Teachers Ass'n (Ellen M. Dailey), No. MUPL-2850, slip op. at 18 (Mass. Lab. Rel. Comm'n Apr. 3, 1987) (the cost of legal services related to collective bargaining is chargeable to all objectors but must be itemized carefully in order to allocate expenses). *Contra* DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 73 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (*Ellis* "confined the union's charges to litigation directly involving bargaining unit employees.").

collective bargaining representative is chargeable to all employees because it does not increase the infringement of first amendment rights beyond that already accepted by requiring support of collective bargaining.[296] Garden variety bargaining-related litigation supports the core of the union's representational role and is seldom ideological.[297]

A less theoretical reason supports charging all represented employees the cost of bargaining-related litigation. In some unions, nonlawyer staff perform functions that only lawyers perform in other unions. Representing grievants in arbitration hearings may be the most prevalent example. Employing nonlawyer union staff to represent the union in NLRB hearings is also customary in many unions. To permit the union to charge objectors when union staff administer the contract or represent the union before the NLRB, but to assert increased scrutiny when lawyers perform the same function, confuses form and substance. A focus on the core values of *Ellis* readily avoids such errors. It is the risk of compulsory subsidization of ideological activity and not the forum or the credentials of the union representative that must drive the outcome. Further, since the union may charge all employees the cost of a strike to redress a breach of contract, for example,[298] it strains logic to argue that a union may not also charge all employees the cost of litigation that seeks the same redress. Also, it would turn the policy of promoting industrial stability on its head to adopt a rule that gave unions a financial incentive to strike rather than litigate to achieve the same result.

The *Ellis* principles also facilitate resolution of the yet to be litigated issue of the union's right to charge objectors for the cost of litigation related to internal union governance and otherwise maintaining the union's corporate or associational existence. For reasons discussed below, the principles show this class of litigation should be chargeable to objectors.

First, internal union affairs litigation poses little risk of serving as a vehicle to promote a union's political or ideological agenda. Most of this litigation merely involves the union defending its institutional conduct in cases whose focus normally is the interpretation of the union's constitution or bylaws,[299] or interpretation of legislation regulating internal

296. *See* discussion *supra* notes 155-64, 193 and accompanying text.

297. *See* discussion *supra* notes 179-83 and accompanying text.

298. *See* discussion *supra* note 229 and accompanying text.

299. *See, e.g.*, United Ass'n of Journeymen Plumbers v. Plumbers' Local 334, 452 U.S. 615 (1981) (interpreting of union constitution regarding international union's right to merge two locals).

union affairs such as the Labor Management Reporting and Disclosure Act.[300]

Second, it is not sensible to permit a union to charge objectors for convention costs but not for the cost of litigation required to uphold the work of the delegates, or to charge all objectors for publication of articles reporting chargeable activities but not the cost to defend a libel suit such an article might provoke. Similarly, if a union may charge objectors for efforts to resolve jurisdictional disputes among several of its locals, or for efforts to merge locals when needed to ensure the financial integrity of small locals with declining membership,[301] then the cost of defending this action in court also is chargeable. Finally, trusteeships may be imposed to protect a local union's treasury from unlawful or unauthorized depletion.[302] It simply makes no sense that Congress would, nevertheless, have intended not to permit unions to charge objectors costs of litigation incurred to enforce the trusteeship.[303] In short, the *Ellis* operating principles and good sense justify charging all represented employees the costs of litigation involving internal governance and maintenance of the union's corporate and associational existence.

E. Nonpartisan Political Activities and Lobbying

An important question *Ellis* left unanswered is which, if any, political activities may be charged. *Street* had already answered part of the question by holding that the cost of partisan political activity on behalf of political candidates and the propagation of political or economic doctrine, concepts, or ideology are nonchargeable.[304] Two important cate-

300. *See, e.g.*, cases cited in M. MALIN, *supra* note 261, at 49-136. Some litigation may also involve interpretation of the Taft-Hartley Act's limitations on a union discipline of members. *See, e.g.*, Scofield v. NLRB, 394 U.S. 423 430-31 (1969) (fining members who exceed union rule setting production ceiling is not an unlawful labor practice); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 192 (1967) (fining members who cross lawful picket line is not an unlawful labor practice); *See generally* NLRB union fine cases cited in BARTOSIC & HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 216-22 (1986).

301. *See* discussion *supra* note 261 and accompanying text.

302. *See* union trusteeship cases cited in M. MALIN, *supra* note 261, at 175-204.

303. Similarly, maintaining accounting records used to calculate and substantiate the portion of a union's annual expenditures that is chargeable to objectors is now a standard feature of governmental regulation of internal union government. These records must be maintained and the expense incurred is a chargeable internal governance expense. It follows that dues objector litigation costs incurred when a union's dues objector program is challenged would also be chargeable.

304. International Ass'n of Machinists v. Street, 367 U.S. 740, 768 (1961). Among the activities that seem clearly to fit this description are partisan voter registration drives; political education fund raising and related activities; attending political dinners, conferences, and similar gatherings; contributions of any kind to political campaigns whether it be financial contri-

gories of political activities the NLRB must address are nonpartisan political activity and legislative or administrative lobbying.

(1) Nonpartisan Political Activity

By applying the *Ellis* operating principles, the issue readily is narrowed. Nonpartisan political activity inherently advances an idea with which some may disagree: that political participation by all citizens is desirable. Nonpartisan political activity, therefore, is expressive conduct other than negotiating or administering collective bargaining agreements. To be chargeable, it must make a real and substantial contribution to the unions's representative function.[305] Moreover, because its message is disseminated widely, often by written word, nonpartisan political activity is likely to be given heightened scrutiny, at least as much as is given to union publications.[306]

Applying these standards, it is doubtful whether nonpartisan political activity should be chargeable to objectors. In *Street,* the Court considered the benefit derived from support given to pro-labor candidates too attenuated to provide real and substantial assistance to the union's collective bargaining function.[307] In *Ellis,* the court concluded that the benefit derived from general organizing expenditures in the railway industry was attenuated, since it was "roughly comparable to that resulting from union contributions to pro-labor political candidates."[308] It seems safe to conclude that expenditures encouraging participation in the political process generally have no greater relationship to a union's success as bargaining representative than support of pro-labor political candidates or general union organizing. Accordingly, it is unlikely that courts will find nonpartisan political activities chargeable.[309]

(2) Legislative and Administrative Lobbying

Lobbying expenditures pose a much more complex problem. These also are expressive activities, usually not literally involving contract negotiation or administration. To be chargeable, they must make a real

butions, free use of paid union staff, data processing support, or use of union equipment or facilities; and training sessions and conferences related to political action.

305. *See* discussion *supra* notes 195 and accompanying text.

306. *See* discussion *supra* notes 169-70, 195 and accompanying text.

307. *Street,* 367 U.S. at 768-69.

308. Ellis v. BRAC, 466 U.S. 435, 453 (1984).

309. *But see* Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 44-45 (Mich. Empl. Rel. Comm'n. Feb. 24, 1986) (A.L.J. decision) (contributions to nonpartisan political action fund seeking better employment conditions are chargeable).

and substantial contribution to collective bargaining effectiveness.[310] In addition, lobbying creates a risk similar to union publications of propagating ideology beyond the confines of union membership.[311] Accordingly, close allocation is required, assuming that lobbying of any kind is considered chargeable.

The argument that objectors are excused from supporting lobbying expenses because they ideologically oppose certain legislative changes is not conclusive in determining chargeability of lobbying expenses. This simplistic approach has been rejected in lower court opinions.[312] Moreover, *Abood* and *Ellis* hold that some infringement of an objector's right of free expressive association is inherent in all compulsory support of union activities.[313] Courts must consider, in addition to the first amendment interests of objectors, "the rights of the majority employees to association for the purposes of advancing their interests" and "the Congressional determination that collective bargaining best promotes industrial peace."[314] Accordingly, the issue in each case is whether lobbying expenses "involve additional interference with the First Amendment interests of objecting employees [beyond that already countenanced by

310. *See* discussion *supra* note 195 and accompanying text. In *Street,* Justice Douglas gave the classic illustration of lobbying that is not chargeable to objectors because it does not so relate to bargaining effectiveness:

> If . . . dues are used, or assessments are made, to promote or oppose birth control, to repeal or increase the taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money causes beyond what gave rise to the need for group action.

Street, 367 U.S. at 777 (Douglas, J., concurring).

311. By definition, legislative and administrative lobbying are conducted beyond the confines of employees in a union's various bargaining units. The audience may be the general public, but more often is elected representatives. When successful, the effect of lobbying is felt statewide or even nationally. It truly poses the very risk identified as a core concern in *Street*: the propagation of economic or political doctrine, concept, or ideology.

312. *See, e.g.,* Robinson v. New Jersey, 741 F.2d 598, 609-10 (3d Cir. 1984) (allowing union to charge objectors for lobbying expenses despite objectors' opposition to the outcomes sought by the union), *cert. denied,* 469 U.S. 1228 (1986).

313. *See* discussion *supra* notes 105-18 and accompanying text. *Accord* Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 94 (Mich. Empl. Rel. Comm'n Feb. 24, 1986) (A.L.J. decision) ("critical question [is] not whether the activity could be termed political, but rather whether it was sufficiently related to collective bargaining").

314. *Robinson,* 741 F.2d at 605; *accord Street,* 367 U.S. at 773 (a blanket injunction prohibiting all political expenditures was not a proper remedy). In *Robinson,* the court concluded that "[u]nions advancing the collective interests of the employees they represent need not shoulder the financial burden of non-members simply because effective representation necessarily includes taking positions on the issues affecting the membership." *Robinson,* 741 F.2d at 610.

requiring support for collective bargaining], and, if so, whether they are nonetheless adequately supported by a governmental interest."[315]

In the public sector, it is now established that a union may charge objectors for considerable amounts of legislative lobbying. The Third and Ninth Circuit Courts of Appeals have so concluded,[316] as have federal district courts,[317] state courts,[318] and state public employee relations boards.[319]

Analysis begins with the Supreme Court's repeated admonition that the determination of whether certain expenditures are chargeable depends on the nature of the bargaining process.[320] In the public sector, *Abood* itself largely resolves the issue in concluding that

> [t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent ap-

315. Ellis v. BRAC, 466 U.S. 435, 456 (1984); *see also* discussion *supra* notes 155-64 and accompanying text.

316. *See Robinson,* 741 F.2d at 609-10 (unions may charge objectors the cost of lobbying even if objectors disagree with union goals); Champion v. California, 738 F.2d 1082, 1086 (9th Cir. 1984) (objectors in public sector jobs may be charged with lobbying before the legislature); *cf.* Beck v. Communications Workers, 776 F.2d 1187, 1210-11 & n.31 (4th Cir. 1985) (consistency of *Robinson* and *Abood* are questioned in dicta).

317. *See, e.g.,* Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1326 (W.D. Mich. 1986) (lobbying for funding for public education is chargeable where funding for employment positions, salaries, and benefits is conditioned upon legislative appropriations), *aff'd,* 132 L.R.R.M. (BNA) 2088, 2091 (6th Cir. Aug. 14, 1989) (lobbying to secure favorable "governmental budgetary and appropriations decisions" chargeable because these legislative decisions "directly affect the terms and conditions of employment for public employees").

318. *See, e.g.,* Abels v. Monroe County Educ. Ass'n, 489 N.E.2d 533, 541-42 (Ind. App. 1986) (as long as lobbying activities are pertinent to collective bargaining, their costs are chargeable); New Prairie Teachers Ass'n v. Stewart, 487 N.E.2d 1324, 1329 (Ind. App. 1986) (objecting teachers charged with costs of lobbying activities related to unions exclusive representation), *cert. denied,* 480 U.S. 917 (1987); Cumero v. Public Employment Relations Bd., 167 Cal. App. 3d 131, 213 Cal. Rptr. 326 (1985), *rev'd,* 49 Cal. 3d 575 (1989); *In re* Board of Educ. of the Town of Boonton v. Boonton Educ. Ass'n, 99 N.J. 523, 547, 494 A.2d 279, 296 (1985) (costs of lobbying activity germane to collective goals are chargeable to objectors).

319. *See, e.g.,* DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 76-77 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (lobbying on matters that directly affects wages, hours, terms and conditions of employment, or are otherwise necessary to union's performance as exclusive representative chargeable to objectors); Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 43-44 (Mich. Empl. Rel. Comm'n Feb. 24, 1986) (A.L.J. decision) (lobbying aimed primarily at improving funds for education or working conditions is closely tied to collective bargaining issues and therefore chargeable); Browne v. Milwaukee Bd. of School Directors, No. 18408-D, slip op. at 19 (Wis. Empl. Rel. Comm'n Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987) (lobbying chargeable to implement the duties of the union as exclusive representative of bargaining unit).

320. *Champion,* 738 F.2d at 1086. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 n.33 (1977) (facts inconclusive whether social activities are related to union's role as exclusive representative).

> proval by other public agencies; related budgetary and appropriation decisions might be seen as an integral part of the bargaining process.[321]

Lower courts widely concur in this assessment of public sector collective bargaining.[322] As the Third Circuit Court of Appeals has concluded, courts must "distinguish between union expenditures based upon the subject matter of the expenditure, rather than the forum. . . . [T]he agency fee case law points to a focus on collective bargaining as a process whereby unions must advance the collective bargaining interest of their members in a number of arenas."[323] Even in the public sector, however, unions are limited to charging objectors for lobbying that makes a real and substantial contribution to effective employee representation.

It is worth distinguishing two emerging categories of chargeable lobbying. First, and probably most self-evident, is lobbying that is inextricably part of the bargaining process itself. In some public sector contexts, collective bargaining requires resort to the legislature on various employment-related questions. This is the case when state law requires legislative approval of a collective bargaining agreement as a condition for lawful expenditure of funds pursuant to that agreement.[324] Also, standard terms and conditions of employment, negotiated at the bargaining table in the private sector, may be nonnegotiable in the public sector and are instead set by statute.[325] In that case the bargaining table has shifted to the legislative chamber and cloakroom.

A second category is lobbying for legislation that enhances the union's leverage in bargaining or in administering bargaining agreements. This can take a variety of forms. The first is legislation that creates a status quo from which the bargaining representative begins negotiations for represented employees. In this case, conditions of employment are provided by statute, but may be changed through negotiation. In public sector bargaining, for example, legislation may set grievance adjustment procedures, methods to compute leave when there is a break in service, and comparable worth wage systems for female em-

321. *Abood*, 431 U.S. at 236.

322. *See* cases cited *supra* notes 316-19.

323. Robinson v. New Jersey, 741 F.2d 598, 607 (3d Cir. 1984). For secondary authorities urging that some lobbying expenses should be chargeable to objectors, see Freisen, *supra* note 12, at 627-28 nn.82-89.

324. *See, e.g., Champion*, 738 F.2d at 1086 (objectors in public sector jobs may be charged with costs of union lobbying before legislature); DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 76 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) ("[L]obbying for contract ratification is clearly chargeable.").

325. *See, e.g., Robinson*, 741 F.2d at 609 (listing many conditions of employment for public employees that are set by statute, civil service rules, administrative regulations, or executive orders).

ployees to eradicate the effects of past discrimination.[326] This floor from which negotiations begin, created in a forum away from the bargaining table, is so important "that public employee representatives [are] given broad authority to protect their members' interests before the legislature."[327]

A union may also be empowered at the bargaining table by interjecting its influence in the legislative appropriations process. When the ability to secure better employment conditions for employees depends on legislative appropriations, "such lobbying is directly related to the statutory duties of the exclusive representative."[328]

Similarly, lobbying for collective bargaining legislation that places unions in a more advantageous position to exert economic or other pressure to achieve bargaining demands has been held to be chargeable.[329] A more permissive right to strike or an expansion of mandatory subjects of bargaining better enables a union to secure bargaining goals and, therefore, is substantially related to strengthening a union's bargaining position.

More problematic, perhaps, is the view that lobbying for legislation that affects wages, hours, and working conditions of employees generally is chargeable on the theory that each condition of employment provided by statute is one less for which the union must trade at the bargaining table.[330] Under this view, lobbying is chargeable when it is

> "reasonably calculated to benefit bargaining unit employees in their wages, hours, and conditions of employment." . . . While lobbying for such legislation benefits the employees in the bargaining units repre-

326. *See, e.g., Champion,* 738 F.2d at 1086 (legislating right to maternity leave).

327. *Id.* at 1083 (approving charging objectors for lobbying costs "designed to foster policy goals [in] collective negotiations and contract administration, or other conditions of employment in addition to those secured through meeting and conferring with the state employer."); *see also Robinson,* 741 F.2d at 602 (approving charging objectors for lobbying costs "designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the employer.").

328. Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1326 (W.D. Mich. 1986), *aff'd,* 132 L.R.R.M. (BNA) 2088, 2091 (6th Cir. Aug. 14, 1989) (Lobbying and other " 'political' activities by public sector unions . . . may be charged to dissenting employees if such activities are directly related to collective bargaining. [Hence,] millage and ballot campaigns "necessary to fund public education" are chargeable.).

329. Browne v. Milwaukee Bd. of School Directors, No. 18408-D, slip op. at 7, 19 (Wis. Empl. Rel. Comm'n Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987).

330. *See* Browne v. Milwaukee Bd. of School Directors, No. 18408-D, slip op. at 7, 18-19 (Wis. Empl. Rel. Comm'n Sept. 19, 1985), *reconsidered and aff'd in relevant part,* No. 18408-G (Apr. 24, 1987) (lobbying for legislation chargeable when reasonably necessary to benefit bargaining unit employees in wages, hours, and conditions of employment).

> sented by the union, it obviously also benefits other public employees outside those bargaining units. [This is acceptable when lobbying] "is part of an overall program with other units by which they pool their strength, in furtherance of their mutual aid or protection, to assist each other."[331]

It would be inappropriate for the NLRB to dismiss summarily this case law simply because it arises in the public sector. There is no question that significant differences exist between public and private sector collective bargaining and that these differences may require a different result in determining whether particular union expenditures are chargeable to objectors.[332] In the private sector, collective bargaining agreements need not be ratified by the legislature. Nor does legislation normally set nonnegotiable terms and conditions of employment. Accordingly, collective bargaining in the private sector may not literally move to legislative halls as it often does in the private sector.[333] Yet legislation and administrative decisions increasingly affect vital interests of private sector unions and their employers, especially when it empowers or bridles the union at the bargaining table.[334]

For example, state and federal legislation increasingly creates a status quo from which private sector bargaining begins. Some legislation sets minimum employment conditions and only permits the bargaining

331. Browne v. Milwaukee Bd. of School Directors, No. 18408-D, slip op. at 18-19 & n. 28 (Wis. Empl. Rel. Comm'n Sept. 19, 1985), *reconsidered and aff'd in relevant part*, No. 18408-G (Apr. 24, 1987) (citing the Wisconsin Public Employee Relation Board's earlier opinion in Browne v. Milwaukee Bd. of School Directors, No. 18408, slip op. at 30-31 (Feb. 3, 1981)); *accord* Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 44 (Mich. Empl. Rel. Comm'n. Feb. 24, 1986) (A.L.J. decision) ("Lobbying . . . aimed primarily at improving funding for education or securing legislation which will improve employment conditions for teachers [is] closely tied to collective bargaining issues and [is] properly chargeable to agency fee payers.").

332. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236, 313 (1977) (lobbying is chargeable if sufficiently related to union's role as bargaining representative); Browne v. Milwaukee Bd. of School Directors, No. 18408-D, slip op. at 17 (Wis. Empl. Rel. Comm'n Sept. 19, 1985), *reconsidered and aff'd in relevant part*, No. 18408-G (Apr. 24, 1987) (difference in the nature of public sector collective bargaining process will significantly affect what union activities will be considered "reasonably employed to implement or effectuate the duties of the union as exclusive bargaining representative").

333. *See* discussion *supra* notes 324-25 and accompanying text.

334. The Supreme Court has recognized the importance of the political process for furthering employee goals in the private sector. In Eastex, Inc. v. NLRB, 437 U.S. 556, 566 (1978), the Court concluded that the mutual aid and protection contemplated by section 7 of the Taft-Hartley Act includes seeking to improve working conditions "through resort to administrative and judicial forums [including] appeals to legislators to protect their interests as employees . . . . " *See also* United States v. Congress of Indus. Org., 335 U.S. 106, 144 (1948) (Rutledge, J., concurring) (To discount unions' legitimate role in politics is to "ignore the obvious facts of political and economic life and their increasing interrelationship in a modern society.").

parties to provide more protective employment conditions than provided by statute.[335] In such cases, legislation empowers the union in bargaining by creating a floor from which negotiations begin. Other legislation provides minimum employment conditions that may be modified in bargaining.[336] Legislation may also provide the employer a right it otherwise would not have or would have only by first bargaining to impasse.[337] In such cases, union lobbying seeks to strengthen the union by depriving an employer of a bargaining advantage it seeks to obtain by statute. Other legislation may bolster a union's bargaining position by creating or saving bargaining unit jobs. An appropriations bill may fund a multimillion dollar project employing hundreds or thousands of the union's represented employees. Legislation may also save bargaining unit jobs by prohibiting the exportation of bargaining unit work to other countries.

Finally, lobbying for collective bargaining legislation that places unions in an advantageous bargaining position can serve to strengthen substantially the bargaining position of a private sector union. This could result from legislation restricting subcontracting, expanding subjects of bargaining, making more effective Taft-Hartley Act remedies for refusing to bargain or discriminatory discharge, or modifying restrictions on union economic pressure against employers to secure bargaining goals.

The public sector cases, as well as the private sector analogies discussed above, are merely applications of the *Ellis* operating principles. It may be recalled that those principles eschew political or ideological labels and examine the relationship of a union activity to the union's effectiveness as bargaining representative. The *Ellis* rationale requires that to be chargeable, lobbying must make a real and substantial contribution to effective representation and that sufficient records be kept to allocate between chargeable and nonchargeable lobbying expenses.[338] While the public sector lobbying cases may adopt different language, uniformly they attempt to limit chargeable lobbying to that having a significant re-

335. *See, e.g.*, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 758 (1985) (state law requirement that minimum mental health care benefits be provided in general health insurance policies and employee health care plans is not preempted by the NLRA).

336. *See, e.g.*, Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987) (Maine plant closing statute established severance payments absent a provision for such payments in parties' collective bargaining agreement).

337. Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1411 (1989) (Drug and alcohol tests prescribed by the Federal Railroad Administration enforceable against employees without need to negotiate first with employee's bargaining representative).

338. *See* discussion *supra* notes 310-11 and accompanying text.

lationship to bargaining effectiveness[339] and require allocation between chargeable and nonchargeable lobbying expenses.[340]

The real differences between the bargaining processes of the private and public sectors may affect application of the principles in some situations, but not the principles themselves. Not permitting unions to charge objectors for lobbying that makes a real and substantial difference in unions' representation effectiveness would represent a deviation from the *Ellis* principles. Indeed, in the context of modern labor-management relations, it also would undermine the fair share foundation upon which *Ellis* and *Beck* are based.[341]

III. Conclusion: Applicability of the *Ellis* Operating Principles to Taft-Hartley Act Dues Objector Cases

This Article has argued that constitutional values, and not the label "germane to collective bargaining," determine which union activities are chargeable to objectors in both the public sector and the RLA dues objector cases. What needs finally to be demonstrated is that the NLRB also must apply those values as it adjudicates chargeability issues. This conclusion follows directly from the Court's mandate in *Beck*. As previ-

339. *See, e.g.*, Robinson v. New Jersey, 741 F.2d 598, 609 (3d Cir. 1984) (lobbying must be "pertinent to the duties of the union as bargaining representative and . . . not used to advance the political and ideological positions of the union" in order to be chargeable to objectors); Champion v. California, 738 F.2d 1084, 1086 (9th Cir. 1984) (unions are given "broad authority" to charge for lobbying but chargeable lobbying is limited to "protect[ing] their members interests before the legislature"); Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306, 1326 (W.D. Mich. 1986) (lobbying germane to collective bargaining is chargeable), *aff'd*, 132 L.R.R.M. (BNA) 2088, 2091 (6th Cir. Aug. 14, 1989) (public employee union may charge costs of lobbying for favorable legislative decisions if lobbying " 'pertinent to the duties of the union as bargaining representative' " (quoting Robinson v. State of New Jersey, 741 F. 2d 598, 609 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985))); Abels v. Monroe County Educ. Ass'n, 489 N.E.2d 533, 541-42 (Ind. App. 1986) (*Robinson* test adopted); New Prairie Teachers Ass'n v. Stewart, 487 N.E.2d 1324, 1329 (Ind. App. 1986); ("[L]obbying efforts germane to the union's units as an exclusive representative are chargeable to objecting employees."); Cumero v. Public Employment Relations Bd., 167 Cal. App. 3d 131, 213 Cal. Rptr. 326 (1985), rev'd 47 Cal.3d 575 (1989); *In re* Board of Educ. of the Town of Boonton v. Boonton Educ. Ass'n, 99 N.J. 523, 547, 494 A.2d 279, 292 (1985) (costs of lobbying activity germane to collective bargaining are chargeable to objectors).

340. *See, e.g.*, DuQuoin Educ. Ass'n (Darrell J. Bosecker), No. 85-FS-0002-S, slip op. at 89 (Ill. Educ. Lab. Rel. Bd. Apr. 8, 1988) (none of the union's government relations expenses are chargeable because the union failed to segregate costs of chargeable and nonchargeable lobbying); Bridgeport Spaulding Community Schools (Bridgeport Educ. Ass'n), No. C79 J-353, slip op. at 44 (Mich. Empl. Rel. Comm'n Feb. 24, 1986) (A.L.J. decision) (lobbying is chargeable because union "segregated those political costs unrelated to collective bargaining").

341. *See* Cloke, *supra* note 8, at 569 nn.167-72 (collecting authority that legislative lobbying is essential to bargaining effectiveness in contemporary labor relations).

ously explained,[342] the parallel language, purpose, and history of section 8(a)(3) of the Taft-Hartley Act and section 2 Eleventh of the RLA led the *Beck* Court to conclude that "Congress intended the same language to have the same meaning in both statutes."[343] That will be achieved only if the NLRB acknowledges the central role of constitutional values in cases such as *Street* and *Ellis* and adopts the *Ellis* operating principles, which reflect those values.

Suggesting that the NLRB consider constitutional values hardly is remarkable, for the Board must confront constitutional values as it adjudicates other Taft-Hartley statutory issues. Through what Professor Summers appropriately terms the "privatization of personal freedoms,"[344] labor law for over half a century has statutorily protected constitutional interests of workers by balancing workers' right of free association against other competing legitimate interests.[345] As Professor Summers demonstrates, "[p]rotection of constitutional values has never been the exclusive domain of the Supreme Court."[346] He states that "[c]onstitutional values are not cabined in the confines of state action . . . . Other institutions of government have equal, indeed greater, responsibility for protecting and promoting constitutional values . . . ."[347] With its freedom of association and free speech foundations, "the core of labor law is protection and promotion of constitutional values."[348]

For example, as early as the Norris-LaGuardia Act of 1932,[349] the public policy of the United States has been rooted in the first amendment right of free association. Section 2 of the Norris-LaGuardia Act states that national labor policy is to protect workers' "full freedom of association" while recognizing that a worker also is "free to decline to associate with his fellows."[350] Congress subsequently relied on these constitutional values of free association and the related right to refrain from association in formulating section 7 of the Taft-Hartley Act.[351]

342. *See* discussion *supra* notes 35-39 and accompanying text.

343. Communication Workers v. Beck, 108 S. Ct. 2641, 2649 (1988).

344. Summers, *Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law,* U. ILL. L. REV. 689, 696 (1986).

345. *Id.* at 694-702.

346. *Id.* at 696.

347. *Id.* at 695.

348. *Id.* at 701.

349. 29 U.S.C. §§ 101-15 (1982).

350. *Id.* § 102.

351. Taft-Hartley Act section 157 guarantees covered workers the right to engage in association with other workers for "mutual aid and protection" and the right to "refrain from . . . such activities." 29 U.S.C. § 157.

By further example, attention to constitutional values is essential when the NLRB litigates Taft-Hartley section 8(c) issues. Section 8(c) states that "[t]he expressing of any views, arguments, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." This language, the Supreme Court held in *NLRB v. Gissel Packing Co.*,[352] "merely implements the First Amendment."[353] Accordingly, when interpreting section 8(c) free speech cases, the NLRB must apply first amendment free speech values.

Similarly, in fair representation cases (and *Beck* is based on the union's duty of fair representation)[354] the statutory representative has "at least as exacting a duty to protect equally the interests of the members . . . as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."[355] Accordingly, fair representation adjudication must consider equal protection values.

This Article does not assert that *Beck* requires a massive importation of the full panoply of constitutional law into Taft-Hartley dues objector cases or that the members of the NLRB must now become front line constitutional adjudicators. In *Beck,* the Supreme Court explicitly avoided finding that a union owes any constitutional duty to dues objectors. The Court found that the duties owed are statutory. Nor is there a need to quarrel with the well-established doctrine that the NLRB will not render judgments whether an application of the Taft-Hartley Act is unconstitutional. As the Board often has restated, "as an administrative agency created by Congress, [the NLRB] will presume the constitutionality of the Act . . . absent binding court decisions to the contrary."[356] To the contrary, by applying the constitutional value-based *Ellis* operating principles in Taft-Hartley dues objector adjudication, the NLRB shields the Act from serious constitutional challenge.[357]

The thesis here, simply, is that in both the RLA and the Taft-Hartley Act, Congress has secured by statute the right of dues objectors to

352. 395 U.S. 575 (1969).

353. *Id.* at 617.

354. *See* discussion *supra* note 17 and accompanying text.

355. Steele v. Louisville, Nashville R.R., 323 U.S. 192, 202 (1944).

356. Hospital and Service Employees Union Local 399 and Delta Airlines, Inc., 263 N.L.R.B. 996, 999 (1982); *accord* Florida Gulf Coast Bldg. Trades Council and Edward J. DeBartolo Corp., 273 N.L.R.B. 1431, 1432 (1985) (peaceful picketing urging consumer boycott of neutral employer is not prohibited by NLRA), *enforcement denied,* 796 F.2d 1328 (11th Cir. 1986), *aff'd,* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 108 S. Ct. 1392 (1988) .

357. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) (federal statutes are to be construed so as to avoid serious doubt about their constitutionality).

refrain from ideological association and the right of the union majority to engage in the "full freedom of association" to advance the collective interests of all represented employees. To avoid doctrinal confusion, the NLRB needs to apply the operating principles distilled from the RLA cases, and especially from *Ellis*. These cases begin to give unity and coherence to this body of law. Sound application of the principles requires sensitivity to the values from which these operating principles are derived.

It is not proposed that assaying *Ellis* for the constitutional values it applies to statutory construction will, or should, end the debate. Rather reference to those values will reform that debate in a highly beneficial way. Supplementing marginally useful rhetoric that describes which union activities are chargeable, with operating principles based on familiar constitutional norms promises a significant measure of increased coherence to the task of discerning the chargeability of hundreds of union activities yet to be adjudicated. Thereby, unions that wish to comply with the law, and objectors who have a right to such compliance, are better able to understand their respective rights and obligations. Similarly, reviewing courts are positioned better to gauge the work of the NLRB as it ventures into its new assignment. The larger community, finally, is better protected from the cynicism that inevitably results when decisions suffer from the appearance of ad hoc decisionmaking. The slate on which the NLRB will write may not be clean but it is not yet cluttered. The prospect of being able to shape a unified and coherent body of labor law is available to the NLRB since virtually no Taft-Hartley dues objector precedent exists, and precedent in the public sector and under the RLA is still emerging. A unique opportunity is at hand.