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Reverse Political Checkoff Per Se Illegal as Violation of Federal Election Campaign Act

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CASENOTES

Labor Law—REVERSE POLITICAL CHECKOFF PER SE ILLEGAL AS VIOLATION OF FEDERAL ELECTION CAMPAIGN ACT, 2 U.S.C. § 441b—*Federal Election Commission v. National Education Association,* 457 F. Supp. 1102 (D.D.C. 1978), *appeal docketed,* No. 79-1077 (D.C. Cir. Jan. 22, 1979).

The National Education Association (NEA), a voluntary professional educators association,[1] maintains a Political Action Committee (NEA-PAC) for the support of political candidates and issues. In the past three congressional campaigns, NEA-PAC has contributed more than one million dollars to candidates.[2] In 1976, the National Right to Work Committee filed a complaint with the Federal Election Commission (FEC) alleging that the NEA's funding procedure—a "reverse checkoff"[3] in which members objecting to the NEA's politics must request a refund of their annual one dollar political contribution—violated the rights of dissenting NEA members.[4] The NEA's Representative Assembly had approved the reverse checkoff procedure for both dues collection and the funding of NEA-PAC.[5] Ruling on cross motions for summary judgment by the FEC and the NEA, the district court for the District of Columbia held that the NEA had violated 2 U.S.C. § 441b(b)(3)(A)[6] because the reverse checkoff procedure placed the burden of dissenting from the political contribution upon the individual association member.[7]

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1. The NEA was recently found to be a labor organization for purposes of the Ladrum-Griffin Act. National Educ. Ass'n v. Marshall, 85 Lab. Cas. ¶ 11,172 (D.D.C. 1979). *See also* [1979] 800 GOV'T EMPL. REL. REP. (BNA) 23-24.

2. [1978] 787 GOV'T EMPL. REL. REP. (BNA) 10.

3. In a checkoff arrangement, employers deduct an employee's union dues from his wages and forward them directly to the union. GUIDEBOOK TO LABOR RELATIONS (CCH) ¶ 308 (1979). In a reverse checkoff system, dues or fees are deducted from an employee's wages unless he indicates otherwise. The checkoff is a widespread union practice. J. STIEBER, PUBLIC EMPLOYEE UNIONISM: STRUCTURE, GROWTH, POLICY 131 (1973). *See also* D. SULLIVAN, PUBLIC EMPLOYEE LABOR LAW § 16.6 (1969).

4. [1978] 771 GOV'T EMPL. REL. REP. (BNA) 16-17.

5. Approximately 10,000 delegates attended the Representative Assembly. Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. 1102, 1103, *appeal docketed,* No. 79-1077 (D.C. Cir. Jan. 22, 1979).

6. 2 U.S.C. § 441b(b)(3)(A) (1976).

7. 457 F. Supp. at 1106.

The court subsequently ordered the NEA to again solicit the contributions for the 1974-75, 1975-76, and 1976-77 memberships years. Any member not affirmatively indicating a desire to have contributed during those years was to have his pro rata political contribution refunded.[8]

I. BACKGROUND

Federal labor laws provide a pervasive structure for the activities of labor unions; virtually every facet of the labor movement is monitored, and the rights of labor unions expand or contract with statutory enactments. Because union rights are generally conferred by statute, labor has a vested interest in the political process. Yet Congress has limited union activities in the very arena in which labor has one of its greatest interests. As might be expected, this tension between government regulation and labor union activity transforms the simplest union policies into questions of political and constitutional significance.

While Congress and the courts have long concerned themselves with the solicitation and spending procedures of unions, the resulting legislation has centered on two areas: regulating campaign expenditures and giving unions the ability to raise funds for their causes. Section 304 of the Taft-Hartley Act—later section 610 of title 18—regulated union expenditures in political campaigns.[9] Section 610 made it "unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any [federal] election."[10] Congress' primary concern in enacting section 610 was " 'the necessity for destroying the influence over elections which corporations [and unions] exercised through financial contributions' ";[11] a secondary purpose was to protect union members from the use of their involuntary contributions for union political activities.[12] Section 152 (Eleventh) of the Railway Labor Act,[13] unlike section 610 which was a criminal

8. Federal Election Comm'n v. National Educ. Ass'n, 99 L.R.R.M. 3463 (D.D.C. 1978).

9. 18 U.S.C. § 610 (1970 & Supp. V 1975) (current version at 2 U.S.C. § 441b(a) (1976)). Section 610 derived from section 313 of the Federal Corrupt Practices Act, Pub. L. No. 68-506, § 313, 43 Stat. 1070, 1074 (1925).

10. 18 U.S.C. § 610 (1970 & Supp. V 1975).

11. Cort v. Ash, 422 U.S. 66, 80 (1975) (quoting United States v. CIO, 335 U.S. 106, 113 (1948)).

12. *Id.* at 81 & n.13.

13. Railway Labor Act § 2, 45 U.S.C. § 152 (Eleventh) (1976).

statute,[14] is a permissive statute conferring on unions a union- or agency-shop privilege. Concomitant to the union-security privilege, the statute authorized a checkoff procedure for dues collection.[15] Congress gave unions the power to raise funds to "[effectuate] the basic congressional policy of stabilizing labor relations in the industry."[16] Through union-security agreements, the unions could eliminate "free-riders"—those who would enjoy the benefits of union membership without contributing their fair share of the costs.[17]

In 1976 Congress amended the Federal Election Campaign Act[18] and codified new limitations on union and corporate political spending.[19] Section 441b of the Federal Election Campaign Act replaced section 610 and contained language virtually identical to that found in section 152 (Eleventh) of the Railway La-

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14. Section 610 provides for fines of up to $5,000 for any corporate or labor union violation of the act. Officers or directors of the organizations may be fined up to $1,000 and imprisoned for up to one year; willful violators may be fined up to $10,000 and imprisoned for up to two years. 18 U.S.C. § 610 (1970 & Supp. V 1975). No private cause of action exists under section 610. Cort v. Ash, 422 U.S. 66 (1975).

15. Section 152 (Eleventh) reads in part as follows:

> [A] labor organization . . . shall be permitted—
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> . . . .
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> (b) to make agreements providing for the deduction by such carrier . . . from the wages of its . . . employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments . . . uniformly required as a condition of acquiring or retaining membership . . . .

45 U.S.C. § 152 (Eleventh) (1976).

16. International Ass'n of Machinists v. Street, 367 U.S. 740, 760 (1961). *See also* Nolan, *Public Sector Collective Bargaining: Defining the Federal Role*, 63 CORNELL L. REV. 419, 456 (1978).

17. 367 U.S. at 761.

18. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 490 (1976).

19. The portion of the statute relevant here states the following:

> It is unlawful for . . . any labor organization, to make a contribution or expenditure in connection with any [federal] election . . . or in connection with any primary election or political convention or caucus held to select candidates . . . .
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> . . . .
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> It shall be unlawful—
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> for . . . a [separate segregated fund utilized by a labor organization for political purposes] to make a contribution or expenditure by utilizing money or anything of value secured by . . . dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment . . . .

2 U.S.C. § 441b(a), (b)(3)(A). For an analysis of section 441b, see Comment, *Corporate and Union Political Contributions and Expenditures Under 2 U.S.C. § 441b: A Constitutional Analysis*, 1977 UTAH L. REV. 291.

bor Act. Despite the fact that a union's political activities extend from the collection of contributions to the expenditure of those funds in a political campaign, the court decisions based on section 610 are remarkably distinct from section 152 (Eleventh) decisions.[20] The potential conflict between the two lines of decisions and the effect the resolution of this conflict will have on section 441b necessitates a review not only of the major cases under section 610 and section 152 (Eleventh), but also a review of the constitutional principles circumscribing the statutes.

A. Section 610 and Minority Interests

1. The influence of union political expenditures: CIO *and* UAW

The first test of the campaign expenditure limitations of the Taft-Hartley Act came shortly after passage of the Act in *United States v. CIO.*[21] Phillip Murray, President of the Congress of Industrial Organizations (CIO), had openly endorsed a candidate for Congress in the union's newspaper. The Supreme Court held in favor of the union and found that financial support of a regularly published union newspaper did not fall within the statute's "contribution or expenditure" language, and that the union could therefore use general union funds for intra-union political purposes.[22]

In a concurring opinion, four justices found that the statute was overbroad and infringed on first amendment rights.[23] The concurring justices granted that one of the reasons for the statute was to protect the political interests of minority union members, but reasoned that a statute so broad as to prohibit all political expenditures encroached on the majority's rights.[24] This would "deprive the union of the principle of majority rule in political expression."[25] Less restrictive measures were available to

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20. Comment, *Of Politics, Pipefitters, and Section 610: Union Political Contributions in Modern Context,* 51 TEX. L. REV. 936, 955 (1973) [hereinafter cited as *Politics and Pipefitters*].

21. 335 U.S. 106 (1948).

22. *Id.* at 123-24. No statutes or cases since *CIO* have dealt with whether any limitations exist on internal union expenditures for the promotion of a union political action committee. *See generally* Comment, *Federal Regulation of Union Political Expenditures: New Wine in Old Bottles,* 1977 B.Y.U. L. REV. 100, 127.

23. 335 U.S. at 150-51 (Rutledge, J., concurring).

24. *Id.* at 146-48.

25. *Id.* at 149.

protect the minority's rights.[26]

Almost a decade after *CIO*, the Court in *United States v. UAW*[27] again ruled on section 610, and again the majority sidestepped the main issues. The indictment stated that the United Auto Workers (UAW) had paid for a television broadcast supporting certain congressional candidates. The district court dismissed the indictment for having failed to state an offense under the statute. Reciting the statute's legislative history, the Supreme Court reversed, holding that the indictment stated a statutory cause of action because the UAW might have used general funds to finance extra-union political activities. The Court declined to discuss the constitutional issues, but noted that the "case . . . raise[d] issues not less than basic to a democratic society."[28]

Justice Douglas, Chief Justice Warren, and Justice Black dissented on the ground that the statute abridged freedom of speech by limiting the union's participation in political activities.[29] With regard to protecting minority rights, the dissent reasoned along the same lines as the concurrence in *CIO*, stating that "[i]f minorities need protection against the use of union funds for political speech-making, there are ways of reaching that end without denying the majority their First Amendment rights."[30]

2. *The source of union political funds:* Pipefitters *and* Boyle

In contrast to *CIO* and *UAW*, which dealt with the nature

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26. Justice Rutledge wrote the following:

> If merely "minority or dissenter protection" were intended, it would be sufficient for securing this to permit the dissenting members to carry the burden of making known their position and to relieve them of any duty to pay dues or portions of them to be applied to the forbidden uses without jeopardy to their rights as members. This would be clearly sufficient . . . to protect dissenting members against use of funds contributed by them for purposes they disapprove, but would not deprive the union of the right to use the funds of concurring members . . . without securing their express consent in advance of the use.

Id.

27. 352 U.S. 567 (1957).

28. *Id.* at 570. One of the questions the Court suggested might have a bearing on the outcome of the trial was whether the UAW paid for the broadcast out of general union funds or funds "fairly said to have been obtained on a voluntary basis." *Id.*

29. *Id.* at 594-98 (Douglas, J., dissenting).

30. *Id.* at 597. The dissent criticized the limitation placed on majority rights as a result of minority objections, equating the approach to "burning down the house to roast the pig." *Id.* at 596. In a footnote, Justice Douglas proposed the English system as an

of unlawful union political expenditures, *Pipefitters Local 562 v. United States*[31] dealt with the way in which the union collected funds for admittedly lawful political expenditures. Officials of Pipefitters Local 562 were convicted of conspiracy to violate section 610 for receiving union member payments that were funneled into a separate union fund and then disbursed to candidates. Union members had testified at trial that the contributions were expected just as were dues and other fees.[32]

The Supreme Court noted from the outset that based on its legislative history "[section] 610 . . . does not prohibit a labor organization from making, through the medium of a political fund organized by it, contributions or expenditures in connection with federal elections, so long as the monies expended are in some sense volunteered by those asked to contribute."[33] The issue thus framed was whether the contributions were "knowing free-choice donations."[34] Once again the Court was concerned about protecting the dissenting member.

The Court found that the union could control the fund,[35] but could only receive political contributions under circumstances plainly indicating to the individual member that (1) the contribution was for political purposes, and (2) he might decline without jeopardizing his union membership.[36] The Court reversed the conviction and remanded with instructions to determine whether the political funds were voluntary donations or

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alternative. In that system "[t]he protection of minority union members from the use of their funds in supporting a cause with which they do not sympathize may be cured by permitting the minority to withdraw their funds from that activity." *Id.* at 597 n.1.

31. 407 U.S. 385 (1972).

32. *Id.* at 393.

33. *Id.* at 401.

34. *Id.* at 414.

35. *Id.* at 439. Justice Powell dissented vigorously. He characterized the issue as "whether the political fund of Local 562 was in reality a sham or subterfuge through which the union itself made the contributions fobidden by the statute." *Id.* at 446-47. Concerning the result reached by the majority he said the following:

> By refusing to affirm the judgment below, the majority renders the ultimate fate of this litigation uncertain. If, on remand, the[se] techniques . . . should be sanctioned, other unions and corporations could easily follow . . . and obtain from members, employees, and shareholders a consent form attesting that the contribution (or withholding) is "voluntary." The trappings of voluntariness might be achieved while the substance of coercion remained. Union members and corporate employees might find themselves the objects of regular and systematized solicitation by the very agent which exercises direct control over their jobs and livelihood.

Id. at 449.

36. *Id.* at 414-15.

"contributions effectively assessed."[37]

Shortly after *Pipefitters*, the issue of the "voluntariness" of contributions was again raised in *United States v. Boyle*.[38] Boyle, a former president of the United Mine Workers (UMW), was convicted of thirteen counts of unlawful campaign contributions under 18 U.S.C. § 610 and of unlawful conversion of union funds and conspiracy. Boyle had authorized payments from UMW general funds to the union's political arm, Labor's Non-Partisan League, and from the League to candidates for federal office. On appeal to the Court of Appeals for the District of Columbia Circuit, Boyle claimed that the government had neither shown that the funds used were involuntary contributions, nor that section 610 was unconstitutional—a question reserved in *Pipefitters*.[39]

Rejecting the first claim, the circuit court found that the "clear intent of § 610 . . . [was] to permit expenditures from separate, segregated funds if the contributions to it were, in truth, voluntary, and to *prohibit* expenditures from a union's general treasury. . . . Congress intended to protect individual union members against both overtly coerced and unknown contributions; each is equally involuntary."[40] On the constitutional claim, the court found that the statute did not, as the defendant contended, impinge on first amendment rights by limiting union contributions to political campaigns. Rather, union political organizations might contribute *"any amount"*[41] provided the monies were not raised through union dues and assessments. This provision protected minority interests by requiring that the funds be voluntary; section 610 was viewed as requiring a "contracting in" system where "assenting members [must] 'give affirmative evidence of such approval' by assenting to having a deduction made from the member's pay check."[42] Therefore, the majority could not compel the minority to subsidize majority political views. The Supreme Court denied review of the decision.[43]

The *Boyle* view that section 610 adopted a system of "con-

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37. *Id.* at 422.

38. 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

39. 407 U.S. at 400.

40. 482 F.2d at 761-62 (emphasis in original).

41. *Id.* at 763 (emphasis in original).

42. *Id.* at 764. In a "contracting in" system, a member must affirmatively assent to any contribution. In a "contracting out" system, a member must assert his refusal to make the contribution. *Id.* at 763-64.

43. Boyle v. United States, 414 U.S. 1076 (1973).

tracting in" was clearly a new gloss on *CIO, UAW,* and *Pipefitters.* The *Boyle* court moved beyond the implicit holding of *UAW* that political funds could not come from general union dues, and even beyond the *Pipefitters* holding that political funds must not be a condition for union membership; the *Boyle* decision required that members give affirmative evidence of their willing contribution—a requirement not found in either *UAW* or *Pipefitters* and not explicit in the language of the statute.[44]

B. Union Security and Section 152 (Eleventh)

One of the reasons Congress authorized the union shop was to eliminate the "free-rider" problem. Unless unions could require fair contributions from all beneficiaries of the unions' collective-bargaining efforts, some members might not pay and would thereby ride the financial coattails of the rest. The union- or agency-shop assessment is the fair cost to each employee of the expense of collective bargaining—the value of which is presumably returned in the form of employee benefits and wages. Section 152 (Eleventh) of the Railway Labor Act prescribes the conditions under which a union may maintain a union shop and a checkoff.[45]

One of the first cases to deal with union security under secton 152 was *Railway Employes' Department v. Hanson.*[46] In *Hanson* a railroad employee claimed, among other things, that the union-shop provision violated the first amendment right of association. Justice Douglas found that Congress had the power to enact a union-shop measure, and that the decision to do so was "an allowable one."[47] While the Court ruled that the union shop did not violate the right of association, the Court declined

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44. "Section 610 wholly fails to specify what funds a labor organization is barred from contributing or expending in connection with a federal election." Pipefitters Local 562 v. United States, 407 U.S. 385, 401 n.12 (1972).

45. A union shop requires that the employee join the union either before or after being hired. In an agency shop, nonunion employees must either join the union or pay a service fee equivalent to membership fees, dues, and assessments. GUIDEBOOK TO LABOR REALTIONS (CCH) ¶ 308 (1979).

"The context in which the difference between a union shop and an agency shop *is* of 'great importance' is in delimiting the union's power to discipline employees for breach of the union's internal rules." Haggard, *A Clarification of the Types of Union Security Agreements Affirmatively Permitted by Federal Statutes,* 5 RUT.-CAM. L.J. 418, 426 (1974).

46. 351 U.S. 225 (1956).

47. *Id.* at 233.

to comment on potential violations of the right of expression.[48]

Five years after *Hanson,* the Supreme Court in *International Association of Machinists v. Street*[49] faced "questions of the utmost gravity."[50] In *Street* railroad employees protested the compulsory nature of the union shop, claiming that union monies, required as a condition of employment, were used to finance campaigns of political candidates. After a lengthy review of union security in the railway industry,[51] the Court construed the statute "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[52]

The Court remanded the case to the Georgia courts to fashion the appropriate remedy. Some guidelines, however, were provided in the Court's opinion. First, the Court emphasized that the courts should strive to "attain the appropriate reconciliation between majority and dissenting interests in the area of political expression."[53] Safeguards were found within the Act for the protection of both interests, and neither interest was to work to the exclusion of the other.[54] Second, in providing a remedy, the court was not to presume that dissent existed.[55] Though monies might still be exacted from employees not affirmatively indicating their dissent, the court and the union were to devise some method to insure that the union did not use the dissenters'

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48. The Court said the following:

> If other conditions [other than 'periodic dues, initiation fees, and assessments'] are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.

Id. at 238.

49. 367 U.S. 740 (1961).

50. *Id.* at 749.

51. *Id.* at 750-64. Even under the union-security provision, the Court noted that "a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion." *Id.* at 761 (citations omitted).

52. *Id.* at 768-69. The question of whether a union could expend, over the objection of an employee, funds for activities other than collective-bargaining agreements was not decided. *Id.* Nor did any party contend that the expenditures violated § 610. *Id.* at 773 n.21.

53. *Id.* at 773.

54. *Id.* at 767-68.

55. *Id.* at 774. The court will not hear claims of dissent by union members after they have been discharged if they had an opportunity to dissent while employed. Hostetler v. Brotherhood of R.R. Trainmen, 294 F.2d 666 (4th Cir. 1961), *cert. denied,* 368 U.S. 955 (1962).

funds for the objectionable purposes.[56]

Brotherhood of Railway and Steamship Clerks v. Allen[57] involved facts almost identical to those in *Street*. In *Allen*, however, the union demanded that a dissenting member indicate each expenditure to which he objected. The Court held that no dissenting employee may be required to specify the objectionable expenditures. Rather, the dissenter merely had to inform the union that he objected to any of the political expenditures,[58] since to require more would place an impracticable burden on the employee, particularly where only the union had a record of the political expenditures.[59]

Allen is authority for two other significant points. For the first time in a case involving the Railway Labor Act union security provision, the Court suggested that unions had a right to expend nondissenters' funds on political activities. Whereas in *Street* the Court had spoken of balancing dissenter and union interests, the Court in *Allen* described union political activity as a right and not merely as a historical union function.[60] In addition, the Court formulated a remedy and recommended that the union refund the dissenting employees' share of the expended funds as well as reduce all future exactions by the amount of the political contributions.[61]

In interpreting the statutory provisions of the Railway Labor Act applicable in *Hanson, Street,* and *Allen,* the Court delineated certain rights and privileges as constitutionally permissible: (1) the union shop is a permissible means of maintaining union security and does not prejudice any union member's right of association, (2) political conformity, under the guise of union security, may not be required over a union member's objection, and (3) a dissenting member's objections, though not presumed, need not be specified.

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56. The Court suggested (1) an injunction against the expenditure of funds in proportion to the contribution of the dissenting employees to the political fund, of (2) a rebate to the dissenters. 367 U.S. at 774-75.

57. 373 U.S. 113 (1963).

58. *Id.* at 118.

59. *Id.* at 122. The Court placed the burden on the party with easiest access to the information.

60. The Court stated that "no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities." *Id.*

61. *Id.*

C. *Union Security and the Constitution*

The Supreme Court largely resolved the section 610 and section 152 cases without resorting to careful constitutional analysis. Up to and including the *Pipefitters* decision in 1972, the Supreme Court conscientiously avoided delineating the constitutional rights of individual union members with respect to union political contributions. In fact the constitutionality of section 610—now section 441b—has never been challenged in the Supreme Court,[62] and in *Boyle* the court of appeals only dealt briefly with the issue.[63] In both *CIO* and *UAW*, the Court refused to adjudicate the constitutional merits of the claims. In both cases, a minority—four justices in *CIO* and three in *UAW*—not only thought the Court should decide the constitutional issue but questioned the validity of the statute if protecting the minority members meant denying the union majority its first amendment rights. The *Hanson* Court found that the union-shop provision of section 152 did not violate the right of association, but the Court did not decide whether it violated the right of free speech. *Allen* suggested that the union shop did not violate the right of association, and that the union itself might even have a constitutional *right* to engage in political activity.

Against this panoply of constitutional intimations, the Supreme Court decided *Abood v. Detroit Board of Education*[64] and thrust itself into the fray between individual and collective rights. After its certification as bargaining agent in 1967, the Detroit Federation of Teachers secured a collective-bargaining agreement that included an agency-shop provision.[65] Abood, along with other teachers in the Detroit school system, complained that the union had used service fees and dues for activities unrelated to collective bargaining.[66] The teachers sought to have the agency-shop provision declared invalid under Michigan law and unconstitutional as a violation of the right of association.[67]

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62. Pipefitters Local 562 v. United States, 407 U.S. 385, 400 (1972); United States v. UAW, 352 U.S. 567, 592 (1957); United States v. CIO, 335 U.S. 106, 124 (1948).

63. *Cf.* United States v. Chestnut, 394 F. Supp. 581, 588, 591 (S.D.N.Y. 1975) (§ 610 was neither unconstitutionally vague nor overbroad).

64. 431 U.S. 209 (1977).

65. The provision required that nonunion teachers, within 60 days of hire, join the union or pay a service fee equal to the union dues. *Id.* at 212.

66. The service fee was a condition of employment and those refusing to pay it were subject to discharge. *Id.* at 212.

67. *Id.* at 213.

Relying on *Hanson,* the Michigan Court of Appeals had upheld the validity of the agency-shop clause. The court, however, had also held that the union could not make expenditures unrelated to collective bargaining over an employee's objections; moreover, the employee had to "make known to the union those causes and candidates to which he objects."[68] The United States Supreme Court noted probable jurisdiction.[69]

In argument before the Supreme Court, the plaintiffs tried to distinguish *Hanson* on the grounds that it only involved private sector employees, whereas in *Abood* the teachers were government employees. The plaintiffs argued, therefore, that they were entitled to greater constitutional guarantees.[70] Plaintiffs also contended that collective bargaining in the public sector was itself such a politically entangled process that to require union membership was to require "ideological conformity."[71] The Court rejected both arguments. First, the *Hanson* rationale applied "not because there was no governmental action, but because there was no First Amendment violation."[72] Second, the Court found that a public sector agency shop was constitutionally permissible and, therefore, a legislative determination.[73]

In holding that the agency shop was permissible, the Court reaffirmed that the union could finance noncollective-bargaining activities from the contributions of members: "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative."[74] Although the union can support its causes through the contributions of some members, the Court held that the union could not compel support for noncollective-bargaining causes from all members:

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68. 60 Mich. App. 92, 102, 230 N.W.2d 322, 327 (1975).

69. 425 U.S. 949 (1976).

70. 431 U.S. at 226, 227 & n.23.

71. *Id.* at 226.

72. *Id.* In fact, in *Hanson,* the enactment of the federal statute was the government action. *Id.* at 218 n.12.

73. The Court reasoned as follows:

> [Michigan] has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment. . . . [T]here can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act.

Id. at 229.

74. *Id.* at 235.

"[T]he Constitution requires . . . that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."[75] Consistent with *Allen*, the Court further held that objecting employees need not specify their objections. On this point the Court reversed and remanded the case to the Michigan courts.[76]

Justice Powell concurred in the judgment[77] but criticized the majority, contending they had not required the state to prove overriding state interests as a defense to a first amendment claim.[78] He reasoned that since a dissenting union member's views are protected,[79] to permit a union to exact fees puts the burden of litigaton on the dissenter. Proper placement of the burden would "require the State [employer] to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives."[80] This burden would protect the minority's views but would not impede the overriding interests of the state.

In large measure, *Abood* adopted as a constitutional standard the statutory standard enunciated in *Hanson*, *Street*, and *Allen:* union-security clauses are permissible under the Constitution provided that no objecting employee is compelled to contribute to causes unrelated to collective bargaining. By acknowledging that union-security provisions are permissible, the Court did not raise the provisions to the status of a union right,[81] thus leaving open the question of the effect of section 610 on a union or agency shop founded on section 152 or *Abood*. Since that

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75. *Id.* at 235-36.

76. *Id.* at 241-42.

77. Justice Powell was joined by Chief Justice Burger and Justice Blackmun. Justices Stevens and Rehnquist wrote brief concurring opinions.

78. *Id.* at 262 (citing Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion)).

79. *See* Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (commission could not prohibit nonunion teacher from speaking at public school board meeting on pending collective bargaining negotiations).

80. 431 U.S. at 264. *See also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 526-27 (1977) (Burger, C.J., dissenting).

81. The National Labor Relations Act § 14(b), 29 U.S.C. § 164(b) (1976), allows the states to prohibit union shops. For a discussion of the interaction of NLRA § 14(b) and § 152 of the Railway Labor Act, see Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. PA. L. REV. 386, 416-20 (1977) [hereinafter cited as *Majority and Minority Rights*].

which is constitutionally permissible is not necessarily constitutionally mandated, it is the interaction of section 610, section 152, and *Abood* that must be reconciled in section 441b decisions.

II. INSTANT CASE

In the instant case, the district court found that the NEA's reverse checkoff procedure violated section 441b(b)(3)(A) of the Federal Election Campaign Act. The Act states that it shall be unlawful for a union "to make a contribution or expenditure by utilizing . . . dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment."[82] The court enjoined the further use of the reverse political checkoff as per se illegal[83] "because it . . . requires the dissenter to act to prevent a contribution rather than requiring his affirmative assent to make one."[84]

The court, relying heavily on *Pipefitters Local 562 v. United States* and *United States v. Boyle,* decided that a " 'knowing free-choice' " contribution could only be made under " 'circumstances plainly indicating donations are for political purposes.' "[85] The reverse checkoff did not comply with this condition, nor according to *Boyle,*[86] would a refund of the contribution adequately protect dissenters' rights. The court further justified its finding that the political checkoff was an involuntary contribution by the fact that the NEA had a ninety-one percent contribution rate. This raised an inference that the members contributed in ignorance.[87] Consequently, the burden of ascer-

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82. 2 U.S.C. § 441b(b)(3)(A) (1976).

83. Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. 1102, 1110 (D.D.C. 1978), *appeal docketed,* No. 79-1077 (D.C. Cir. Jan. 22, 1979).

84. *Id.* at 1106. Local affiliates of the NEA do not have to adopt the checkoff and may allow dues to be paid by check or in cash. Members paying in cash or by check do not have to make the contribution. *Id.* at 1104.

FEC regulations now prohibit the political use of "fees or monies paid as a condition of acquiring or retaining membership or employment . . . even though . . . refundable upon request of the payor." 11 C.F.R. 114.5(a)(1) (1977).

85. 457 F. Supp. at 1105 (quoting Pipefitters Local 562 v. United States, 407 U.S. 385, 414 (1972)).

86. The *Boyle* court rejected "contracting in" and "contracting out" as a less restrictive alternative.

87. Apparently no member was forced to submit to the checkoff, and of those members who did submit during the three years in question, approximately 65,000 (only 8.5% of all contributors) received refunds. 457 F. Supp. at 1108.

The court also referred to statistics compiled by the Kentucky NEA, which showed

taining that the union received only voluntary political contributions "must be on the solicitor and not on the dissenter."[88]

The NEA relied upon both *Abood* and *Street* in support of its checkoff, but the court distinguished *Abood* and ignored *Street*.[89] Because *Abood* did not affect the statutory regulation of elections, the court's inquiry was unaffected by *Abood*. Furthermore, in *Abood* the union had not maintained a separate union fund for political, social, or other noncollective-bargaining expenses, whereas in both *Pipefitters* and the instant case, the union had kept a political fund distinct from the collective-bargaining assessment.[90] The Supreme Court in *Abood* balanced the minority members' interests against the union's interests and supported the union; in the instant case, the court found no "comparable justification" for balancing.[91]

To remedy the improper deductions by the NEA, the court ordered the National Education Association to refund the contributions to all nonassenting members "at no expense to them and with minimal effort on their part."[92] The court suggested that the NEA provide through its magazine a postage-prepaid card informing members that if they did not return the cards to the NEA, their contributions would be refunded.[93] Finally, the

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that in any three-month period in the year prior to November 1975, the Kentucky NEA never collected more than $5,740; after the reverse checkoff was instituted, the contributions ranged between $18,912 and $82,081. "Such a dramatic change suggests inadequate information to the members that the additional amount for political contributions was voluntary." *Id.* It should be noted that the pre-checkoff period was an off-election year, while the year following the implementation of the checkoff was both a congressional and presidential election year.

The NEA alleged that each member was informed of the voluntary nature of the contribution, that the contribution was not a condition of membership, and that each member was told how to request a refund. Brief for Appellant at 12, Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. 1102 (D.D.C. 1978), *appeal docketed*, No. 79-1077 (D.C. Cir. Jan. 22, 1979).

88. 457 F. Supp. at 1109.

89. *Id.* at 1107 & n.10.

90. The court tried to distinguish *Abood* on the grounds that the union there funded the objectionable activities out of its general fund. Since in both *Pipefitters* and the instant case, the union had a separate, segregated fund, the court found *Pipefitters* to apply. The court did not attempt to explain why *Boyle* would then apply to the instant case, since in *Boyle* the union had a "separate" fund but contributed general union funds to the political fund. United States v. Boyle, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

91. 457 F. Supp. at 1107.

92. Federal Election Comm'n v. National Educ. Ass'n, [1978] 771 GOV'T EMPL. REL. REP. (BNA) 46, 51 (D.D.C. 1978).

93. Federal Election Comm'n v. National Educ. Ass'n, 99 L.R.R.M. 3463, 3463 (D.D.C. 1978).

NEA was enjoined from using the reverse checkoff to fund its political activities.[94]

III. ANALYSIS

The enjoining of a reverse political fund checkoff by which a union is engaged in neither criminal misconduct nor overt coercion is unprecedented. The repercussions of the *NEA* decision will affect labor's ability to fund its political activities, and because of the inherently political nature of public sector collective bargaining, public sector labor unions will be particularly affected. In analyzing the *NEA* case, this Note will discuss three main areas. First, this Note will examine the statutory interpretation that should be given section 441b in light of section 610 and section 152. Second, it will analyze some of the constitutional implications arising from the trade-off between traditional union political activities and the rights of union members. Finally, this Note will consider *NEA* in terms of union security and public sector labor policy.

A. Statutory Standards for Section 441b

Section 441b contains two subsections of importance to the instant case: 441b(a) and 441b(b)(3)(A). Subsection 441(a) prohibits union and corporate expenditures in connection with any federal election. With the exception of one additional phrase and an additional word, section 441b(a) is identical to section 610. Subsection 441b(b)(3)(A) prohibits establishing a separate, segregated union political fund using "dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment."[95] This language, though not identical, is strikingly similar to section 152 (Eleventh) (b).[96]

The language of section 441b affirms the Court's assertion in *Pipefitters* that the Federal Election Campaign Act merely codified prior law.[97] The first inquiry in analyzing the *NEA* decision is whether section 441b, interpreted in light of section 610, actually prohibits unions from using a reverse checkoff to fund political activities; the second inquiry is whether section 152

94. 457 F. Supp. at 1112.

95. 2 U.S.C. 441b(b)(3)(A) (1976).

96. 45 U.S.C. § 152 (Eleventh) (1976).

97. 407 U.S. at 399. The two *Pipefitters* requirements were codified at 2 U.S.C. § 441b(b)(3)(B), (C).

(Eleventh) affects the interpretation of section 441b.

1. Relationship of 610 to 441b: "Knowing free-choice"

Pipefitters set the section 610 standard for unions raising political funds: (1) the member must receive notice of the political nature of his contribution, and (2) the member may decline to contribute without jeopardizing his union membership.[98] The *NEA* case requires a "knowing free-choice." Of course, union members who must affirmatively assert their willingness to contribute make a knowing free-choice, but that is not the issue in this case. The real question is whether union members subject to a checkoff can *also* make a knowing free-choice. The district court was not free to re-create federal labor policy.

Although *Pipefitters* effectively requires notice to employees concerning the nature of the fund, neither section 152 (Eleventh) nor the *Street* opinion explicitly mentions giving such notice to the employee in the reverse checkoff situation. Such a right may nevertheless be inferred from the fact that prohibiting the union from using an employee's dues for political purposes over his objection would be a hollow right if the employee was never apprised of how his money was being used.[99]

It is not clear whether the NEA's reverse checkoff meets the second *Pipefitters* criterion, that a member may decline to contribute without jeopardizing his union membership. On this particular point the facts of *Pipefitters* and *Boyle* provide no direction because neither case involved a fact situation similar to that of the instant case. In *Pipefitters,* union members contributed to the political fund "in the same sense that they paid their dues or other financial obligations,"[100] and the union made no attempt to dissuade union members from thinking the contributions were compulsory.[101] In *Boyle,* the UMW, through subterfuge, funded candidates directly out of general union funds—funds required as a condition of membership.[102]

Nevertheless, in one sense the *Abood* holding satisfies *Pipefitters* because the union member may obtain a refund of his contribution without specifying his objections, much less losing

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98. 407 U.S. at 414-15.

99. Section 152 (Eleventh) (b) requires a written assignment that is revocable after one year or after the expiration of the collective bargaining agreement.

100. 407 U.S. at 393.

101. *Id.* at 395.

102. 482 F.2d at 761.

his union membership or his job.[103] In the *NEA* situation, for example, once the union membership accepted the checkoff, individual members who did not wish to contribute had the burden of requesting the refund. Even though the political contribution was exacted, a member retained sufficient control over the donation to obtain a refund. In a case similar to the instant case but involving a state statute, a federal district court stated: "Inertia of a person to take a step to see to it that his money is not being used for political purposes does not deprive him of the right to take that step and cannot be logically interpreted . . . as coercion."[104] Neither *Pipefitters* nor *Boyle* mentioned the possibility of union members obtaining a refund; therefore, neither provides a standard for determining what is a "knowing free-choice" in a reverse checkoff. In fact, individuals could not even bring an action under section 610, meaning that individuals filing a civil action for a refund would have brought it under either the Railway Labor Act cases or *Abood*.[105] The *NEA* case, if decided under either the *Street* or *Abood* rationale, would undoubtedly have been decided in favor of the National Education Association.[106]

2. *Relationship of 152 (Eleventh) to 441b: in pari materia*

The court in the instant case held that *Street* and *Allen*

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103. 431 U.S. at 235-36, 241.

104. Kentucky Educators Pub. Affairs Council v. Kentucky Registry of Election Fin., No. C 77-0575 L(A), slip op. at 8 (W.D. Ky. Jan. 25, 1978). The Kentucky Education Association approved a reverse checkoff for dues and political contributions. However, the Kentucky Registry of Election Finance found that the checkoff violated KY. REV. STAT. § 121.320(2) (1970). The Kentucky statute is similar to § 441b. The court found that the checkoff was not coercive but determined that it might be an "assessment" under the statute. No. C 77-0575 L(A), slip op. at 8. The *NEA* court noted the Kentucky case but dismissed it stating that the unresolved issue of whether the checkoff was an "assessment" was "most closely analogous to the one at bar." 457 F. Supp. at 1107 n.11.

105. Section 610 was a criminal statute and did not create a civil action. Cort v. Ash, 422 U.S. 66 (1975) (shareholder derivative action against a corporation for political expenditures); McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975) (union members sought damages for dues used for political purposes); Miller v. American Tel. & Tel. Co., 394 F. Supp. 58 (E.D. Pa. 1975), *aff'd mem.*, 530 F.2d 964 (3rd Cir. 1976) (stockholder derivative suit). Section 441 is also a criminal statute with penalties similar to those of § 610. 2 U.S.C. § 441j (1976). There is no evidence in § 441 of congressional intent to create a civil remedy.

106. The court ordered a refund to all members not specifically and affirmatively assenting to the contribution; however, § 441 provides no authorization for such relief. In fact, the prescribed remedy does not follow from any of the § 610 cases—*CIO, UAW, Pipefitters,* or *Boyle*—but only from the suggestions by the concurrence in *CIO* and the

were inapposite because they dealt with the union-shop provisions of the Railway Labor Act and not the Federal Election Campaign Act. Such a light dismissal of *Street* and *Allen* is unfortunate.[107] Since cases may arise under both section 441b of title 2 and section 152 of title 45, and since the statutes contain almost the same phrase, under the doctrine of *in pari materia*, the similar phrases should be given similar interpretations.[108]

If, as *NEA* holds, section 441b prohibits raising funds through a reverse checkoff, the political funds must first be categorized as dues, fees, or effective dues or assessments, and then be found to be required as a condition of employment. *Pipefitters* gives little guidance to the instant case on what was meant by "dues, fees or assessment,"[109] but *Street*'s recital of the his-

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dissent in *UAW*. These suggestions clearly accord with the refund remedies in *Street*, *Allen*, and *Abood*.

The *NEA* court presumed dissent on the part of the NEA's members and ordered class relief, even though no class had been certified. Part of the court's order in *NEA* was that

> defendants [NEA], in consultation with plaintiff [FEC], prepare a plan pursuant to which their members will be informed of this lawsuit and the decision of this Court and will be afforded the opportunity of having refunded at no expense to them and with minimal effort on their part the money that has been deducted from their paychecks through reverse check-off.

Federal Election Comm'n v. National Educ. Ass'n, [1978] 771 GOV'T EMPL. REL. REP.(BNA) 51 (D.D.C. 1978).

The § 610 cases contribute nothing on this point, but the Railway Labor Act cases held that "dissent is not to be presumed," International Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961), which means that the court will not grant class action relief. No relief will be given without proof that an individual member objects. Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 119 (1963). *Accord*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237-39 (1977).

107. Since the language in § 441b(b)(3)(A) was not a part of § 610 but is similar to language in § 152, the Railway Labor Act cases should be persuasive. *See Politics and Pipefitters*, *supra* note 20, at 955-56 (*Street* had a substantial impact on § 610). *See also Majority and Minority Rights*, *supra* note 81, at 424 (*Street* remedy protects dissenters and meets purposes of Federal Election Campaign Act, therefore should be applied to National Labor Relations Act cases).

108. *See, e.g.*, Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 546, 551-52 (1954) (Congress presumed to have accepted interpretation of the previous statute in passing a new statute with similar language); Marks v. United States, 161 U.S. 297, 302 (1896) (frequent use of the same phrase in the same subject matter suggests a single meaning). *See generally* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 51.01-.03 (1973).

109. 407 U.S. at 421-27. In *Pipefitters*, the Court interpreted the phrase to include "not only actual but also effective dues or assessments." *Id.* at 427. The Court further stated that "the political contributions in issue violated § 610 if, and only if, payments to the fund were actually or effectively required for employment or union membership. . . . [T]he essence of the crime in this respect is whether the method of solicitation for the fund was calculated to result in knowing free-choice donations." *Id.* at 439. On this point the Court found that the allegation that general union funds were given to the political

tory of section 152 states that " 'fees' meant 'initiation fees,' and 'assessments' was intended primarily to cover the situation of a union which had only nominal dues."[110] The refundable political contribution does not fit under any of these statutory terms.[111] This conclusion is bolstered by the Supreme Court's interpretation of the statute in *Street* and *Allen*. Because the Court ordered a refund, even though section 152 permitted a checkoff, one must conclude that either the Court ignored the statute in providing the remedy or, more plausibly, refundable political contributions do not qualify as the type of dues, fees, or assessments required as a condition of employment.[112]

Even if political contributions could be classified as dues, fees, or assessments, they can hardly be considered a "condition

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fund supported an inference that the political "contributions" were not "knowing free-choice donations." *Id.* at 415-16 n.28, 439 n.48.

The *NEA* funds clearly did not come from general union funds; nevertheless, the *NEA* court interpreted *Pipefitters'* "free-choice donations" to mean "an act intentionally taken and not the result of inaction when confronted with an obstacle." 457 F. Supp. at 1109. The facts and statements in *Pipefitters* simply do not go as far as the *NEA* holding, although the two decisions are not incompatible.

110. 367 U.S. at 766.

111. In an early case dealing with § 152, the Texas Supreme Court stated, "We think a political assessment was not contemplated by the Congress in using the term 'assessments' in the union shop statute, nor that the failure to pay a political assessment would be a valid ground for discharge." Sandsberry v. International Ass'n of Machinists, 156 Tex. 340, 346, 295 S.W.2d 412, 416 (1956), *cert. denied*, 353 U.S. 918 (1957).

In NLRB v. General Motors Corp., 373 U.S. 734 (1963), the Supreme Court found that under the National Labor Relations Act § 8(a)(3) (codified at 29 U.S.C. § 158(a)(3) (1976)), where employment is conditioned upon union membership,

> membership . . . may . . . be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.
>
> . . . If an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of "membership" for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership.

373 U.S. at 742-43.

112. The *Street* Court wrote the following:

> The appellees [dissenters] . . . remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement. Their right of action stems not from constitutional limitations on Congress' power to authorize the union shop, but from § 2 [§ 152], Eleventh itself. In other words, appellees' grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of their funds. If their money were used for purposes contemplated by § 2 [§ 152], Eleventh, the appellees would have no grievance at all.

367 U.S. at 771.

of employment."[113] Continued employment is not founded upon payment to a political fund. The test for the "condition of membership" clause should be whether failure to make the contribution is a ground for dismissal from the union; since *Street,* political contributions have not been in this category.

Adherence to the doctrine of *in pari materia* would promote a consistent standard for labor unions. It is conceivable that dissenting union members could bring an action against a labor union under section 152 (Eleventh) and the Constitution to enjoin the reverse checkoff. On the basis of *Street* and *Abood,* the court would deny the injunction.[114] Based on *NEA,* the same court would grant an injunction to the Federal Election Commission on an identical claim phrased in language identical to that of section 441b. *NEA* is clearly, but unnecessarily, at odds with *Street* and *Abood.* Consistent interpretation of section 441b and section 152 would avoid such an anomalous result.

B. Constitutional Questions Affecting Union Security

Concluding that the political checkoff is or is not statutorily permissible does not dispose of the substantial first amendment problems. The Supreme Court has formed a two-edged constitutional sword that cuts against the positions of both the Federal Election Commisson and the National Education Association.

In *Railway Employes' Department v. Hanson,* the Court decided that the union-shop provision, which compels association for certain activities related to collective bargaining, did not violate freedom of associaton.[115] Restricting the parameters of the *Hanson* decision, the Court in *Street* and *Abood* prohibited the funding of activities outside the scope of collective bargaining to the extent of an objecting employee's contribution.[116] Dis-

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113. *See* NLRB v. General Motors Corp., 373 U.S. at 742-43. In Barber v. Gibbons, 367 F. Supp. 1102 (E.D. Mo. 1973), the union required a contribution from each member, but the member could authorize the union to place the contribution in the political fund instead of the general union fund. The court found the contribution was a condition of membership in violation of § 610.

114. Abood v. Detroit Bd. of Educ., 431 U.S. at 237-41; International Ass'n of Machinists v. Street, 367 U.S. at 771-72. The Court stated in *Street,* "We also think that a blanket injunction against all expenditures of funds for the disputed purposes, even one conditioned on cessation of improper expenditures, would not be a proper exercise of equitable discretion." *Id.* at 772.

115. 351 U.S. at 238.

116. Abood v. Detroit Bd. of Educ., 431 U.S. at 237; International Ass'n of Machinists v. Street, 367 U.S. at 768-70.

senters may be excused from participating in union political activities by merely manifesting their objection to the union's expenditures.[117] Thus the Court fashioned a presumption in favor of union political affiliation[118] that the dissenter has the power to overcome.[119]

The trend following *Street* and *Abood* has been to create a right not to associate.[120] For example, the result in the instant case would be consistent with such a theory.[121] In light of the established right of association, the recognition of a right of nonassociation would ensure that the government could not prohibit association or nonassociation except upon a showing of a compelling state interest.[122]

The argument for a right not to associate, however, would effectively stand *Street* and *Abood* on their heads, since the presumption granted unions in those cases would be reversed. In *Street* and *Abood,* the Court permitted a presumption favoring majority political activity that the dissenting member must overcome, whereas in *NEA,* the court created a presumption favoring the would-be dissenter that the majority must overcome. In either case, one party or the other must make an af-

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117. Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 118 (1963).

118. In NAACP v. Button, 371 U.S. 415 (1963), the Court said, "[T]here is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.' " *Id.* at 430 (quoting NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 460 (1958)).

119. The burden of proof is on the union to show that dues are spent for permissible purposes, but the employee has a duty to continue to pay dues pending that determintion. Browne v. Milwaukee Bd. of School Directors, 83 Wis. 2d 316, 340-340b, 265 N.W. 2d 559, 570-71 (1978).

120. *See, e.g.,* Jensen v. Farrell Line, Inc., 477 F. Supp. 335 (S.D.N.Y. 1979); Good v. Associated Students of Univ. of Wash., 86 Wash. 2d 94, 101-02, 542 P.2d 762, 766 (1975). *See also* Note, 14 WAKE FOREST L. REV. 633, 646 (1978).

121. This philosophy is evident in the district court's subsequent order to the NEA. The NEA proposed an insert for an issue of its magazine, *Today's Education,* which is sent to each NEA member. Any members desiring refunds of their contributions made during the previous three years would mail a postage-prepaid card. Both the FEC and the National Right to Work Committee protested that this proposal would only perpetuate the reverse checkoff. The court agreed and ordered the NEA to provide a postage-prepaid card that members who did not want to refund could return. Any members not mailing the card would automatically receive a refund of $1.00 for each year they contributed. Federal Election Comm'n v. National Educ. Ass'n, 99 L.R.R.M. 3463 (D.D.C. 1978).

122. *Compare* NAACP v. Button, 371 U.S. 415, 430, 438 (1963) (only compelling state interest can limit right to associate for political purposes), *with* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 264 (1977) (Powell, J., concurring) (overriding governmental interest required to compel minority political association).

firmative showing. The individual's burden of assenting to, or dissenting from, a contribution does not seem significantly heavier in either case. In light of the more established right of association and the voluntary nature of the National Education Association, the presumption in favor of the union presents the more reasonable approach. Nonetheless, the *NEA* result remains inconsistent with the *Street* and *Abood* Supreme Court decisions.[123]

The Court recently recognized that corporations possess a first amendment right of speech;[124] unions will likely claim the same right.[125] If indeed unions possess that right, the decision in the instant case makes the NEA's rights of association and free speech of negligible import unless the membership can take collective action even though an individual member dissents. Democratic tradition seeks to protect the minority while giving efficacy to majority decisions. The Court's acknowledgement that contributions serve to affiliate the individual contributor with

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123. *See also* United States v. CIO, 335 U.S. 106 (1948). "Unions too most often operate under the electoral process and the principle of majority rule. Nor . . . does it seem reasonable to presume dissent from mere absence of explicit assent, especially in view of long-established union practice." *Id.* at 149 (Rutledge, J., concurring).

124. "We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . ." First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978). Nevertheless, this first amendment right may be very limited as indicated by the *Bellotti* Court's suggestion that the government interest in preventing corruption of the political process might sustain § 441b against a first amendment challenge. *Id.* at 787 n.26. The dissent in *Bellotti* stated that the Court had only "reserve[d] the formal interment of the Corrupt Practices Act [§ 441b] and similar state statutes for another day." *Id.* at 821 (White, J., dissenting).

125. *See id.* at 777. *See also Politics and Pipefitters, supra* note 20, at 980-82.

Affording unions first amendment rights creates an additional dilemma in the *NEA*, or even *Abood*, situation: What or who constitutes the union? If it is the entire membership, then the *NEA* decision may burden the political decision-making process and chill the union's first amendment rights. On the other hand, if it is only the majority, then the practice of exclusive representation should be abandoned and minority unions be allowed. *See* Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004, 1010-11, 1025 (1970).

The NEA and other unions might argue that since political speech is protected, Buckley v. Valeo, 424 U.S. 1 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964), a union's political speech should be given greater protection than its collective-bargaining activities. Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148, 154 (1974).

the cause or candidate[126] was complemented by the decision in *Street* to give individuals the power to disaffiliate themselves by requesting a refund. The instant case gives complete effect to the minority's viewpoint at the expense of the majority's rights of association and speech.[127] On the other hand, allowing the checkoff in the tradition of *Street, Allen,* and *Abood* would give effect to majority decisions to fund political activities while protecting the minority's right to refuse financial or moral support for the union's political stance.

The constitutional questions raised here lend themselves well to a balancing approach. Since in *Abood* the Court found that the agency shop did not infringe on the minority's first amendment rights, the prohibition of a reverse political checkoff runs the risk of offending the majority's right of association. The Court has consistently suggested the refund mechanism as a means of protecting the minority while not significantly burdening majority decisions.[128] Because no one is compelled to join the NEA and because a member may withdraw from the Association at any time, adopting the *Street* and *Abood* refund would strike a particularly appropriate balance in the instant case.[129] To eliminate the reverse checkoff would swing the constitutional pendulum away from the right of association toward a right of nonassociation where a single dissenter can veto the time-honored principle of majority rule.

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126. Buckley v. Valeo, 424 U.S. 1, 22 (1976). *See* Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546, 551 (E.D.N.Y 1977). *But cf.* Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976) (nothing commits us to the dogma that money is speech).

127. Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures,* 42 U. CHI. L. REV. 148, 154 (1974).

128. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 240 & n.41 (1977); Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 122 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740, 774-75 (1961); United States v. UAW, 352 U.S. 567, 597 n.1 (1957) (Douglas, J., dissenting); United States v. CIO, 335 U.S. 106, 149 (1948) (Rutledge, J., concurring).

129. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 794 n.34 (1978), where Justice Powell suggested that a critical factor in determining minority first amendment rights is the voluntary or involuntary nature of the association. His opinion can be read to suggest that in a voluntary union, the minority might not even have a refund remedy against the union; instead, the minority's only remedy might be to withdraw. Justice White disagreed that dissenting members or stockholders should have to withdraw and cited to *Street* and *Abood* as demonstrating the way the Court has protected minority interests. *Id.* at 813-14 (White, J., dissenting). Thus, according to the dicta in *Bellotti,* dissenters in voluntary unions either have no remedy (Justice Powell) or must resort to the *Street* refund (Justice White).

C. Federal Labor Policy Considerations

1. Purposes of the agency shop: collective bargaining and the "free-rider"

The political activities of private sector unions generally have a less direct impact on bargaining activities than do those of public sector unions. In the public sector, the very nature of the employer makes public sector labor relations a political process.[130] Not only does a checkoff provision preserve union financial security and bargaining,[131] but where the public union bargains with and lobbies to the same party, the line between collective bargaining for present agreements and politicking for future agreements becomes hazy.[132] While the *NEA* principle will burden union activities in both the public and the private sector, the greatest incidence of the burden will be felt in the public sector.[133] In contrast to *NEA*, the *Street* and *Abood* decisions would give greater effect to legislation seeking parity for labor in collective bargaining.

While the FEC's and the district court's concern for the rights of dissenting union members can be appreciated, the *NEA* decision straps the NEA with a free-rider problem affecting the lobbying activities of the union. By enjoining the use of reverse

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130. " 'The uniqueness of public employment is *not in the employees* nor in the work performed; the uniqueness is in the special character of the employer.' " Abood v. Detroit Bd. of Educ., 431 U.S. at 230 (quoting Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 670 (1975)) (emphasis in original).

131. *See* Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004, 1010 (1970). *See also* D. SULLIVAN, PUBLIC EMPLOYMENT LABOR LAW § 16.6 (1969); Nolan, *Public Sector Collective Bargaining: Defining the Federal Role*, 63 CORNELL L. REV. 419, 456-57 (1978) (union security and disciplinary measures contravene the merit principle).

132. *Cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977) (difficult to draw lines in the public sector between activities related and unrelated to collective bargaining); Havas v. Communications Workers of America, 454 F. Supp. 305, 308 n.5 (N.D.N.Y. 1978) (categorizing union activities as collective bargaining is a matter of degree); Jensen v. Yonamine, 437 F. Supp. 368, 376 (D. Hawaii 1977) (difficult to distinguish between collective-bargaining activities and political activities).

133. One commentator has written the following:

> If the first amendment is construed to prohibit public employee unions from expending, over an employee's objection, money collected under union security agreements to finance lobbying and other similar activities aimed at promoting decisions on such "political" matters favorable to their bargaining demands, the unions' ability to achieve their demands when collective bargaining actually occurs would be severely limited.

Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183, 195 (1975).

checkoff and by requiring affirmative proof of the intent to donate, any NEA member may do nothing and receive all the benefits of the NEA's political activities, which will undoubtedly suffer.[134] Although a union's free-rider problem would not be completely eliminated so long as a member could object and get a rebate, not presuming dissent would at least keep the burden on the employee. Under the *Street* rule, the cost to an employee of being a free-rider is the time and effort required to dissent;[135] under *NEA*, there is no cost or burden to being a free-rider. The *NEA* requirement may actually place a greater burden on the employee who wishes to contribute, since the employee must affirmatively assert himself in favor of each expenditure in order to donate to the political fund;[136] under *Allen*, objections to political expenditures of any kind need only be made once.

In the *NEA* context, where NEA membership is voluntary, teachers considering joining the NEA will weigh the costs of membership against the perceived benefits. One cost will be the cost of the union's political activities that the NEA member will bear regardless of whether he makes a de minimus financial contribution. If the costs, ideological or financial, are greater than the benefits of membership, the teacher will not join; therefore, political affiliation becomes part of the cost of membership.[137]

2. *Alternatives to rebate*

The Supreme Court has placed great emphasis on allowing

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134. *See* Federal Election Comm'n v. National Educ. Ass'n, 457 F. Supp. 1102, 1107-20 (D.D.C. 1978), *appeal docketed*, No. 79-1077 (D.C. Cir. Jan. 22, 1979); Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U. CHI. L. REV. 148, 159 n.62 (1974). *But see Majority and Minority Rights*, *supra* note 81, at 409 (size of voluntary political funds suggests that members do support their union's political endeavors).

In a case analogous to the instant case, it was suggested that rather than offer a rebate to dissenters, it might actually be more economical and less troublesome to strike the procedure and request voluntary contributions. Anderson v. City of Boston, 78 Mass. Adv. Sh. 2297, 2320 n.20, 380 N.E. 2d 628, 640 n.20 (1978), *appeal dismissed*, 439 U.S. 1060 (1979).

135. It might be argued, however, that the payroll deduction deprives dissenting employees of the interest on contributions they will ultimately have refunded. While the interest on the $1.00 NEA deduction would be de minimus to any individual, in the aggregate the union clearly benefits. The court in the instant case did not order the NEA to refund the contributions with interest.

136. *See The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 198 (1977).

137. This argument is not as viable in an agency- or union-shop case, such as *Abood*, but is peculiar to a voluntary labor organization such as the NEA or, perhaps, a corporation. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 794 n.34 (1978).

the unions to seek an internal remedy,[138] including a rebate. A rebate, however, is not the only remedy. The rebate procedure has a certain "one person, one vote" flair to it, but is is hardly consistent with democratic sportsmanship for players to be able to withdraw from the game after losing the toss. Ideally, dissenters would work within the union to gain a representative vote. Challenging the politics of the leaders and voicing objections to the use of political funds might be more effective when done within the union than if carried on by the innocuous protest of a rebate.[139] Some unions have allowed dissenters to contract out of political activities.[140] Finally, one commentator suggests that in an agency-shop situation, nonunion members paying fees should be presumed to object to the political contribution, while those who are union members should be presumed to approve of the deduction. The fee payers may affirmatively assent to a donation, and the union members may affirmatively dissent from the deduction.[141]

IV. Conclusion

Federal Election Commission v. National Education Association is a vexing case in which there are many competing interests at stake—individual and collective, statutory and constitutional, and economic and political. The district court opinion shows a concern for the individual union members that no other court has shown when weighing individual rights against union interests and rights. Although the court followed the unclear standards of *Pipefitters*, it misconceived the effect of the Railway Labor Act cases on section 441b of the Federal Election Campaign Act and ignored competing constitutional interests as well as national labor policy. On the basis of *Street*, *Pipefitters*,

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138. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 242 (1977); Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 122 (1963). *But see* Beck v. Communications Workers of America, No. B-76-839 (D. Md. Jan. 12, 1979) (court refused to stay procedures pending union attempts to solve internal problems).

139. *See Majority and Minority Rights*, *supra* note 81, at 411.

140. *See* Gabauer v. Woodcock, 594 F.2d 662, 668 n.4 (8th Cir. 1978), *cert. denied*, 100 S.Ct. 80 (1979); *Majority and Minority Rights*, *supra* note 81, at 416 (citing Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, *aff'd in part and rev'd in part*, 533 F.2d 1126 (9th Cir. 1976)).

141. Merrill, *Limitations Upon the Use of Compulsory Union Dues*, 42 J. Air L. & Com. 711, 725-26 (1976).

and *Abood*, and absent a clear new mandate from Congress, the reverse political checkoff should be permitted.

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