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RECLAIMING THE LABOR MOVEMENT THROUGH UNION DUES? A POSTMODERN PERSPECTIVE IN THE MIRROR OF PUBLIC CHOICE THEORY

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The National Labor Relations Board's (NLRB) seeming powerlessness to process dues objector cases has led to a proliferation of state sponsored "paycheck protection" laws and popular referenda devised to ensure that workers will not be obliged to pay dues for non-germane purposes. Recently, California captured national attention as the site of a richly contested paycheck protection referendum. Such proposals have electrified union advocates and have enlivened the debate over the proper use of union dues. In addition, recent attempts to reform campaign finance have run aground on the thorny issue of union political contributions (both in-kind and in cash). Concurrently, private sector unions continue to decline in significance as agents of change within the workplace. On the other hand, union influence within the political sector may be ascendant.

This Article inspects attempts to reclaim the labor movement and to enhance worker solidarity through expansive interpretations of the social and political meaning of union dues. By investigating whether the interests and identities of individuals or subgroups of workers are necessarily congruent with those of either the union majority or union leadership and by disputing dominant free rider assumptions embedded in the Taft-Hartley Act, this approach delegitimizes coerced transfers from union members and dues payers for political and other purposes. Methodologically, the Article deploys postmodern insights, group cooperation theory, and public choice theory to contest the prevailing view that individuals and identifiable subgroups of workers must sacrifice their particular interests and identities to the "greater totalizing goals of the working class." While postmodernism has its critics, the author argues that an expansive deployment of union dues to revitalize the union movement is inconsistent with the notion that the individual has the right to decide the proper ends of her life. Accordingly, the application of union dues to a variety of union efforts that are unrelated to collective bargaining must inescapably be seen as promoting a form of subservience to authoritarian unionist values, which would in turn submerge individual, ethnic, and gender identity, and ideological diversity in support of hierarchical aims.

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INTRODUCTION

> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.
>
> —James Madison[1]

I. OVERVIEW

The interstices of the private sector employer-employee relationship continue to leave it vulnerable to a variety of competing and often controversial claims. One bewildering aspect of this dispute is the proper role of unions in a representative democracy.[2] Should unions be conceived as limited vehicles to both further self government by workers oriented toward their own common economic interest[3] and eliminate industrial strife?[4] Or, on the other hand, should unions be conceived as the robust engine of collec-

1. THE FEDERALIST No. 10, at 46 (James Madison) (Clinton Rossiter ed., 1961), *cited in* DENNIS C. MUELLER, PUBLIC CHOICE II 307 (1989).

2. One observer contends that this issue exposes two contradictory themes within the National Labor Relations Act (NLRA): "The Wagner Act portion of the NLRA which is framed in terms that arguably emphasize the value of associations in self-government . . . , [and] the Taft-Hartley portion of the NLRA [which seems to place] a premium on personal autonomy." Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of* Debartolo, 1990 WIS. L. REV. 149, 151–52 (footnotes omitted).

3. Viewed this way, "unions . . . operate as mini-legislatures. Under this view, collective bargaining was conceived as a form of democratic self-government . . . complete with general legislative principles, including the principle of majority rule." Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1343–44 (1997).

4. *See* 29 U.S.C. § 151 (1994), *cited in* James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1565 n.6 (1996); *see also* RESTORING THE PROMISE OF AMERICAN LABOR LAW 158, 180, 261 (Sheldon Friedman et al. eds., 1994) (noting that promoting industrial peace was one reason behind the passage of the labor laws).

tive insurgency against globalization, hierarchy, unwarranted management power, class-based injustice,[5] and increasing disparities in income? Specifically, should labor unions focus on the limited collective interest of workers, focusing on such issues as wages, hours, and working conditions of a particular plant or employer? Or, alternatively, should unions seek to redress perceived imbalances in economic, social, and bureaucratic power[6] between employers and workers in the pursuit of a "larger interest," namely, the transformation of the labor movement, the workplace, and the economic, social, and political system of the country? If, labor unions conceive their primary role as catalyst in the drive to improve the "larger interest," are the interests of the individual worker or subgroups of workers advanced or impaired? To frame the question in the postmodern idiom, should employees find their identity[7] in a union that represents their economic interest in rebalancing disparities in bargaining power in exchange for the compulsory payment of dues,[8] or in a union movement that transcends the

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5. *See* George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 193 (1994) (citing cases reflecting the liberal doctrine that labor law only protects unions insofar as they limit their role to that of representative of the employees of an individual employer and not of *all* workers in the fight for national class-based justice).

6. For an argument in favor of this approach, see Brudney, *supra* note 4, at 1564–66. Concern for subordination is grounded in considerations of both economic and social power. Workers join bureaucratic organizations comprising a hierarchy of ranks of employees. Normally the consent of the parties legitimates any subordination so created by contractual obligation. Bureaucracies impose subordination through hierarchical social structure and disparities in economic power. This dual source of subordination has the capacity to lead to worker abuse and to arbitrary employer actions. This may lead to reductions in individual dignity and autonomy. *See* Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 INDUS. L. J. 1, 1–3 (1986); *see also* OTTO KAHN-FREUND, LABOUR & THE LAW 51 (2d ed. 1977) (arguing that organized labor seeks to preserve "the physical integrity and moral dignity of the individual"). On the other hand, another observer grounds the benefits of freedom of contract in the avowed equality of bargaining between workers and employer based on a concern for individual autonomy. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 948–55 (1984). Epstein favors less regulation of the employment relationship and would encourage contracts-at-will (if the parties so choose) to minimize the potential for *both* employer and employee abuses. *Id.*

7. ◦ For a cautionary explication on appeals to group interest, group loyalty, and group identity, see generally Harry Hutchison, *From Bujumbura to Mogadishu: Ethnic Solidarity, African Reality, American Implications*, 31 GEO. WASH. J. INT'L L. & ECON. 141, 159–67 (1997) (reviewing KEITH B. RICHBURG, OUT OF AMERICA: A BLACK MAN CONFRONTS AFRICA) [hereinafter Hutchison, *From Bujumbura to Mogadishu*]; Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995).

8. "Dues" as the term is used here refers to compulsory dues and fees paid to a union as prescribed by the union security agreement in a collective bargaining agreement. A union must in theory represent all employee dues payers regardless of union membership.

boundaries of craft, geography, nation-state, and narrowly prescribed self-interest,[9] even if such a conception leads inevitably to the subordination of individual or subgroup identities and monies to group goals and group hierarchy?[10] This query becomes even more important given the persistence of the political influence[11] and economic wealth[12] of unions despite profound declines in union membership.[13]

A. Background—The Rise and Decline in Union Membership

Unions flourished between 1935 and 1947.[14] During that period, unions empowered by the Norris La Guardia and Wagner Acts saw

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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.

Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 HASTINGS L.J. 1, 1 n.2 (1989).

9. Indeed, it has been asserted (uncritically) that economic inequality creates the requirement for collective action and of state intervention to protect it. Feldman, *supra* note 5, at 204. This begs the question: what is economic equality or inequality?

10. This of course raises the question of what constitutes a model group. For one view, see Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 135 (1996).

11. *See* William J. Moore et al., *The Political Influence of Unions and Corporations on COPE Votes in the U.S. Senate, 1979–1988*, 16 J. LAB. RES. 203, 218–19 (1995) (revealing that the available evidence fails to show a decline in the political influence of unions). In 1996, the AFL-CIO "launched an overwhelmingly partisan $35 million 'voter education project,' funded mainly with mandatory union dues, to defeat conservative members of the 104th Congress" despite the fact that union members, in opposition to their leaders, split their vote roughly sixty—forty between the two major political parties in 1994. Kenneth R. Weinstein & Thomas M. Wielgus, *How Unions Deny Workers' Rights*, The Heritage Foundation, *at* http://www.heritage.org/library/categories/regulation/bg1087.html (July 18, 1996) (on file with the *University of Michigan Journal of Law Reform*).

12. From the period 1991 through 1995, for example, total receipts by several of the major international unions which make up the AFL-CIO actually increased while membership declined. Weinstein & Wielgus, *supra* note 11, at 5.

13. For instance "[u]nion density as a percentage of private nonagricultural wage and salary workers fell from 38% in 1954 to 11.5% in 1992." Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 59 n.1 (1993).

14. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS AND THE NATIONAL LABOR RELATIONS ACT 35 (Patrick Hardin et al. eds., 3d ed. 1992) [hereinafter THE DEVELOPING LABOR LAW].

union membership soar from three to fifteen million.[15] In some heavily industrialized sectors, union membership comprised eighty percent of the workforce.[16] This vision of expansive labor union power reached its apex when John L. Lewis conducted two prolonged and devastating strikes among coal miners during World War II,[17] when, in response to the postwar deregulation of wages and prices in August 1945, "major unions immediately demanded huge raises, thirty percent and more . . . [and] union leaders . . . threatened to shut the country down."[18] Against this backdrop, President Truman proposed a modest alteration of the nation's labor laws.[19] However, Congress had much tougher measures in mind. Consequently, the Taft-Hartley Act was passed despite Truman's veto in August 1947.[20]

In general, the Act shifted the emphasis of federal labor law from simply a scheme protecting the rights of employees to organize and engage in concerted economic activities to a more balanced scheme which placed certain restrictions on unions while guaranteeing certain freedoms of speech and conduct to employers and individual workers.[21] Among the more contentious provisions are subsection 158(a)(3), which makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization,"[22] but allows the creation of union security provisions, and subsections 158(b)(1) and 158(b)(2),

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15. *Id.*

16. *Id.*

17. *Id.*

18. DAVID FRUM, WHAT'S RIGHT: THE NEW CONSERVATISM AND WHAT IT MEANS FOR CANADA 84 (1996).

19. *See* THE DEVELOPING LABOR LAW, *supra* note 14, at 36.

20. *Id.* at 39. An important question is whether the Taft-Hartley Act contributed to the decline in unionism or, on the contrary, whether it merely ratified an emerging industrial orthodoxy. It must be admitted that ten years after the enactment of the Taft-Hartley Act union membership rose by more than three million. Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 764 (1998). In spite of that fact, it is asserted that the Taft-Hartley Act was perhaps part of "a much larger social and political project whose import extended well beyond the recalibration of the 'collective bargaining' mechanism." *Id.* at 765. Instead, the law stands like a fulcrum upon which the entire New Deal order teetered. "Before 1947 it was possible to imagine a continuing expansion and vitalization of the New Deal impulse. After that date, however, labor and the left were forced into an increasingly defensive posture." *Id.*

21. *See* THE DEVELOPING LABOR LAW, *supra* note 14, at 40. It was an attempt to constrain the labor movement, which some observers saw as "the most powerful, and the most aggressive [labor movement] that the world has ever seen." *Id.* at 35.

22. 29 U.S.C. § 158(a)(3) (1947); *see also* Communications Workers of Am. v. Beck, 487 U.S. 735, 744–45 (1988) (resolving a conflict regarding the interpretation of two provisos within § 158(a)(3)).

which define certain unfair labor union practices.[23] The section contains two provisos without which all union-security clauses would fall within this otherwise broad condemnation. The first states that nothing in the Act "preclude[s] an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein"[24] thirty days after the employee attains employment. The second provides that

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.[25]

Despite these changes in the NLRA, which labor unions heavily opposed as a form of "slave labor,"[26] union membership remained strong during the ensuing era. Nevertheless, since the late 1960s, union membership and union leverage have experienced a rather sharp decline.[27]

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23. 29 U.S.C. § 158(b)(1)–(2) (1994); *see also* THE DEVELOPING LABOR LAW, *supra* note 14, at 1495–96. These additions to the NLRA preclude union restraint or coercion of employees in the exercise of the rights guaranteed in section 7 and outlaw union-sponsored employer discrimination against employees in violation of section 8(a)(3), as well as outlawing union discrimination with respect to union membership. Section 158(b)(2) declares it to be

> an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied . . . on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(b)(2).

24. 29 U.S.C. § 158(a)(3); THE DEVELOPING LABOR LAW, *supra* note 14, at 1495 n.31.

25. 29 U.S.C. § 158(a)(3).

26. *See, e.g.*, THE DEVELOPING LABOR LAW, *supra* note 14, at 46.

27. *See* Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW 117, 117 (1996) (noting that the unionization rate has plummeted from thirty-five to twelve percent of the private sector workforce from the mid-1950s and is likely to fall further) (citation omitted); *see also* Charles Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616, 1616 (1995) (predicting that the private sector union density rate may fall to five percent by the end of this decade) (citation omitted).

Now, more than sixty years after the enactment of the NLRA, a growing number of labor sympathizers lament the hard times experienced by unions.[28] This decline has been caused by, among other things, structural change within the economy, enhanced global competition, and important social factors.[29] For instance, workers increasingly enticed by an "expressive individualism,"[30] which focuses on subjective self-realization, are less likely to find attractive any collective action that requires individual interests to yield to group interest and group solidarity. This diminishes demand for unionism[31] and emphasizes the notion that each individual has the right to decide the proper ends of her life.

One commentator concludes that "collective action appears moribund. Current analysis burying and praising the NLRA has focused primarily on the changed economic realities of the product and labor markets . . . [while] changes in federal workplace law over the past thirty years have undermined the concept of group action . . . ."[32] Furthermore, he suggests that "the diminished legal role for group action in labor relations is in part a function of the diminished power of unions in an economy increasingly subject to

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28. *See, e.g.*, Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 4–6 (1988); Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 954–69 (1991); Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1016–21 (1991).

29. Among the catalog of plausible reasons why unions have declined are the following: (1) "American workers born after World War II are less inclined to favor collective and statist solutions," Estreicher, *supra* note 27, at 118; (2) unions "operate in less friendly terrain" given the shrinking manufacturing sector and the growth of the service sector, *id.*; (3) plant relocation decisions from the Rust-Belt to the southern part of the United States; and (4) the remedial deficiencies of the labor laws. *See id.* More controversially, Estreicher asserts that the principal cause of labor's decline lies in the fact that "the model of employee organization promoted by the labor laws has failed to keep pace with the unleashing of competitive forces in product markets as a result of deregulation, technological advances, and global competition." *Id.*

30. "Expressive individualism" holds that each person has a unique core of feelings and intuition that unfold or are expressed for individuality to be actualized. Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, *in* EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING: PROCEEDINGS OF NEW YORK UNIVERSITY 50TH ANNUAL CONFERENCE ON LABOR 41, 41–49 (Samuel Estreicher ed., 1998). It has little to do with the acquisition of material possessions. *See id.*

31. *Id.*

32. Brudney, *supra* note 4, at 1563; Gottesman, *supra* note 13, at 61–62 (suggesting that the vast majority of American workers likely would not embrace collective bargaining even if bargaining was free from all of its present legal infirmities); *cf.* Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 97–100 (1993) (condemning the legal structure of labor relations as outdated and ill-suited to both workers and management). *See generally* WILLIAM B. GOULD, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW (1993).

global competition and rapid technological change . . . [and] changes in the legal status of group action may be cause as well as effect."[33]

This deterioration in union organizing power has arguably been encouraged by the vigorous opposition of business interests, which successfully lobbied for the Taft-Hartley Act,[34] and has been exacerbated by court decisions,[35] popular referenda,[36] and state legislation.[37] These actions by the legislative and judicial branches of government, as well as the electorate, signify "that collective bargaining has become an anachronistic means of promoting employee interests,"[38] that leads inexorably to the "loss of legitimacy for unions as the enablers of group action."[39]

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33. Brudney, *supra* note 4, at 1564.

34. *See* Craver, *supra* note 27, at 1620. For a detailed examination of how Congress and the courts have arguably diminished group action over the past thirty years, see Brudney, *supra* note 4, at 1564–87.

35. *See* Brudney, *supra* note 4, at 1572–91; *see, e.g.*, Lechmere Inc. v. NLRB, 502 U.S. 527, 531–41 (1992) (holding that nonemployee union access rights need not be accommodated unless the workplace is otherwise inaccessible); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 106–12 (1956); *cf.* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 93 (1983) (condemning court decisions which stress property rights and accordingly justify limitations on union access to workers). *But cf.* Harry G. Hutchison, *Through the* Pruneyard *Coherently: Resolving the Collision of Private Property Rights and Nonemployee Union Access Claims*, 78 MARQ. L. REV. 1, 5–7 (1994) (arguing in favor of access limitations) [hereinafter Hutchison, *Through the* Pruneyard *Coherently*].

36. *See, e.g.*, Jodi Wilogren, *NLRB Chief Scolded for Prop. 226 Stand*, The LOS ANGELES TIMES, May 7, 1998, *available at* LEXIS, News Library, Los Angeles Times File (discussing Proposition 226 "which would prevent unions from spending dues on politics without member's permission.")

37. The Governor of Wyoming signed his state's "paycheck protection" law in March 1998. WYO. STAT. ANN. § 22–25–102 (Michie 1999). Idaho only allows employers to deduct political contributions from worker paychecks after the worker has given her permission in writing for each calendar year. IDAHO CODE § 67–6605 (Michie Supp. 2000). All workers in Washington are protected by the state's paycheck protection law, enacted with the passage of Initiative 134 in 1992, which protects private sector employees from involuntary paycheck deductions for political purposes. WASH. REV. CODE ANN. § 42–17 (West 2000). In Ohio, "paycheck protection" was enacted in 1995, but after legal challenges, only took effect in 1998 and prohibits public employers in the state from withholding political funds from their employees. OHIO REV. CODE ANN. § 3599.031 (West 2000). Michigan's "paycheck protection" measure protects Michigan workers by precluding employer deductions of political action committee funds without annual written authorization. MICH. COMP. LAWS § 169.225(6) (2000). This summary of referenda and legislation is based on an Americans for Tax Reform press release available at http://www.atr.org/paycheck/pp0006.html (last visited June 15, 1999) (on file with the *University of Michigan Journal of Law Reform*). A California "paycheck protection" initiative failed to win approval following a vigorous campaign by labor in 1998. *See* Donald Lambro, *Big Labor Revs Up to Kill Union-Dues Initiative in California*, WASH. TIMES, May 17, 1998, at A2.

38. Brudney, *supra* note 4, at 1564.

39. *Id.* In addition, Brudney argues that the NLRA, by choosing group action, reduces certain individual values to secondary status. *Id.* at 1565.

B. Responding to the Decline in Union Power at the Workplace

Given the degeneration in union power and influence in the workplace (if not in politics), and the growing allure of collective action to commentators, if not to workers, a variety of proposals for pro-labor union action have arisen. The methods advocated to revitalize union membership include enlargement of "workplace democracy,"[40] the intensification of collective bargaining through increased access to and use of the workplace for employee self-organization and concerted activity,[41] the democratization of firms through a "systematic program of egalitarian market reconstruction,"[42] the boosting of the minimum wage,[43] and most notably for our purposes, the redeployment of union dues[44]

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40. *See* Klare, *supra* note 28, at 3–7. Klare seeks to expand the reconstruction logic of the New Deal labor law system beyond its self-imposed limits. *Id.* Instead, the NLRA should be reconceived as a vehicle to mobilize democracy systematically on virtually all aspects of the employment relationship.

41. *See, e.g.*, Curtis J. Berger, Pruneyard *Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633 (1991); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 704–08 (calling for, among other things, broadened access to private property by nonemployees). *But see* BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 9–12 (1997); BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 81 (1987) (stating that the Supreme Court has failed to protect property rights); Hutchison, *Through The* Pruneyard *Coherently*, *supra* note 35, at 41–44.

42. Klare, *supra* note 28, at 23.

43. *See, e.g.*, *Fair Labor Standards Act: The Minimum Wage: Hearing of the Senate Comm. on Labor and Human Resources*, 104th Cong. 35–48 (1995) (statement of Richard Trumka, on behalf of the AFL-CIO), *available in* LEXIS, Legis Library, ALLNEWS File. *But see* Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 119–26 (1997) (reviewing unions' historical motive for backing minimum wage) [hereinafter, Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*].

44. Notably,

> [n]ot all workers represented by unions pay dues and fees voluntarily; many are required to do so as a condition of keeping their jobs. Private sector unions operating outside the twenty-one "right-to-work" states generally negotiate with the employer for some type of contractual union security device. A clause requiring union "membership" as a condition of continued employment is most common.

Jennifer Friesen, *The Costs of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing*, 15 HASTINGS CONST. L.Q. 603, 606 (1988). Agency shops decline to make employment conditional upon union membership; instead, employees must contribute payments equal to those required of union members. *See* FLORIAN BARTOSIC & ROGER C. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 420 (2d ed. 1986); Heidi Marie Werntz, Comment, *Waiver of* Beck *Rights and Resignation Rights: Infusing the Union Member Relationship with Individualized Commitment*, 43 CATH. U.L. REV. 159, 161 n.7 (1993).

as a vehicle for reclaiming the vitality of the labor movement.[45]

Many commentators, outraged by the decline in unionization, do not think union dues should primarily inure to the benefit the workers who pay them.[46] To the contrary, they imagine union dues principally as a vehicle for economic, political, social, national, and workplace transformation that strengthens union organizing clout and bargaining power.[47] However poignant the call for redeploying union dues in the service of change, the claim that they should be a vehicle for revitalizing the labor movement and for reclaiming collective action has been unevenly supported. On the one hand, the U.S. Supreme Court has forcefully declared that union dues are properly spent to attain the limited collective goal of improved hours, working conditions, and wages.[48] On the other hand, despite this decision, employee *Beck* rights[49] have not been enforced uniformly by the National Labor Relations Board[50] (NLRB) or the President of the United States.[51]

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45. Werntz, *supra* note 44, at 193–207 (1993) (articulating the value of dues to the continued vitality of the labor movement).

46. *See, e.g.*, Friesen, *supra* note 44, at 603–04 (arguing that the Supreme Court's decision precluding unions from funding organizing activities undermines national labor policy and is not justified by either the federal labor statutes or the First Amendment).

47. *See id.* at 645–46.

48. Communications Workers of Am. v. Beck, 487 U.S. 735, 762–63 (1988). The proper allocation of union dues has been the subject of litigation both under the NLRA and the Railway Labor Act (RLA). *See, e.g.*, Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447–48 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) (holding state government employees have a constitutional right to object to their "required service fees" being used to fund various union activities); Bhd. of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 117 (1963) (repeating the jury's finding that the union cannot use monies extracted under collective agreement for purposes not reasonably necessary or related to collective bargaining); Perry v. Local Lodge 2569, 708 F.2d 1258, 1259 (7th Cir. 1983) (regarding an employee who "refused to pay [agency shop] fees . . . spent on matters not related to the Union's duties as collective bargaining representative"); Reid v. Int'l Union, 479 F.2d 517, 518 (10th Cir. 1973) (stating that the employees alleged that over their objections the union wrongfully spent agency fees for political and ideological purposes); Reid v. McDonnell Douglas Corp., 443 F.2d. 408, 409 (10th Cir. 1971) (explaining that the court must determine whether it has jurisdiction to hear dispute over whether union may spend dues for political purposes over the objections of nonmembers).

49. *See* discussion *infra* Part II.A–D.

50. Robert Hunter, *Compulsory Union Dues in Michigan: The Need to Enforce Union Members' Rights, and the Impact on Workers, Employers, and Labor Unions* 12, May 1997, Mackinac Center for Pub. Pol'y (arguing that the NLRB has operated at a "snail's pace" in enforcing *Beck* protections); *see also* Editorial, INVESTOR'S BUS. DAILY, Dec. 2, 1998, at A22 (stating that the NLRB "has a funny way of doing its job. Seven out of eight cases languishing on its docket involve workers trying to reclaim union dues extorted for political purposes . . . 13 of the board's 20 oldest cases . . . are so-called *Beck* cases") (emphasis added).

51. President Clinton rescinded President Bush's executive order as "distinctly anti-union." Hunter, *supra* note 50, at 13. President Bush's Executive Order 12,800 proposed to provide information to "employees working for federal contractors that they have individual rights and discretion to control union political contributions generated from dues." *Id.* at 12. The order mandated the posting of a notice regarding the payment of fees to the union

Resistance to enforcement of *Beck* rights has led to several recent state initiatives, Congressional bills, and other proposals to facilitate the enforcement of *Beck* rights.[52] Such efforts have generated widespread condemnation from many commentators, including William Gould (the outgoing NLRB Chairman), who asserts that efforts aimed at helping workers to limit their dues payments are "'deeply flawed' on constitutional and policy grounds."[53]

C. The Postmodern/Public Choice View

Both a majority of union workers and the American public oppose the use of union dues for political purposes,[54] as reflected by referenda and legislation limiting the uses of union dues as well as criticism of the influence of labor in national politics.[55] Given this political context, it is an opportune moment to examine the debate over union dues from a postmodern/public choice perspective.

1. A Postmodern View—As the dominant union ideology has disintegrated both culturally and within the workplace, the urge to "move from integration, or a collective identity, to separatism, or more defined individualizing identities" has taken center stage.[56]

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in "all places where notices to employees are customarily posted." Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (Apr. 13, 1992), *repealed by* Exec. Order 12,836 (Feb. 1, 1992). President Clinton's decision may reflect his "considerable political debt to organized labor. . . ." Estreicher, *supra* note 27, at 120.

52. *See, e.g.*, Worker Paycheck Fairness Act, H.R. 1625, 105th Cong. (1997); Worker Right to Know Act, H.R. 3580, 104th Cong. (1996); *see also* Robert Hunter, *Paycheck Protection in Michigan: A Proposal to Safeguard Union Workers' Wages and Freedom of Speech*, Sept. 1998, Mackinac Center for Pub. Pol'y 9–11 (discussing various state paycheck protection efforts).

53. Hunter, *supra* note 52, at 6. Chairman Gould was accused of, among other things, the posting by the NLRB on its website the highlights of his criticism of a California Initiative, Proposition 226, that would grant "paycheck protection" to California union dues payers. This conduct drew bipartisan criticism. *See* Jodi Wilgoren, *NLRB Chief Scolded for Prop. 226 Stand*, L.A. TIMES, May 7, 1998, at A3, *available at* LEXIS, News Library File, Los Angeles Times File.

54. *See* Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 349 n.14 (1998) (stating that one poll found that fifty-three percent of union households and sixty-three percent of the general public agree that unions should not be allowed to use members' dues for political purposes).

55. *See id.* at 347. The Center for Responsive Politics reports that seven of the largest ten contributors to the 1996 federal campaigns were labor unions. *In the News: Paycheck Protection Facts, at* http://www.atr.org/archives/issues/i0021.htm (last visited June 15, 1999) (on file with the *University of Michigan Journal of Law Reform*.)

56. McUsic & Selmi, *supra* note 3, at 1351.

This trend[57] toward separatism is consistent with the views of the dues objectors in *Communications Workers of America v. Beck*[58] and other cases and with the emerging lack of consensus among workers concerning the benefits of unionism.[59] This trend is indicative of the transition from a utilitarian individualism grounded solely in pecuniary rewards toward "expressive individualism," which entails the creation of a larger list of individual rights and a larger space for personal autonomy.[60]

"In the employment context, the ill fit between the collective bargaining regime and the identities of women and people of color have led some to conclude that unions did not, and perhaps cannot, represent their interest."[61] In light of the exclusionary[62] policies of the majority of labor unions, the notion that unions are one community comprising "diverse groups is, for many, a concept that appears inherently coercive and infused with notions of domination."[63] Given the "failure of unions to represent the interests of nontraditional groups as well as the larger failure of class-based communities . . . some scholars . . . call for multiple representative structures in the workplace as a replacement for a

57. This move toward fragmentation and separation is not an entirely recent development. For example, William Gould, former chairman of the NLRB, at one time advocated intervention by civil rights groups on behalf of racial minorities in labor arbitration proceedings. *See* William Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 61 n.81, 64 (1969).

58. 487 U.S. 735 (1988).

59. One observer concedes that workers do not necessarily accept conventional unions as the best vehicle for the advancement of their interest.

> In their preferences for how an ideal employee organization should be structured, workers diverge sharply from the union model in some respects—again reflecting their perceptions that management cooperation is essential. By an overwhelming 86% to 9% margin, workers want an organization run jointly by employers and management, rather than an independent employee-run organization. By a smaller, but still sizable margin of 52% to 34%, workers want an organization to be staffed and funded by the company, rather than independently through employee contributions.

Estreicher, *supra* note 27, at 118 n.2 (citing PRINCETON SURVEY RESEARCH ASSOCIATES, WORKER REPRESENTATION AND PARTICIPATION SURVEY: REPORT ON THE FINDINGS 49 (1994)).

60. *See* Margalioth, *supra* note 30, at 48–49.

61. McUsic & Selmi, *supra* note 3, at 1351.

62. *See* AUGUST MEIER & ELLIOTT RUDWICK, BLACK DETROIT AND THE RISE OF THE UAW 3 (1994) (pointing out that since the turn of the century, the mainstream of the labor movement, the AFL unions and the Railway Brotherhood, have generally excluded blacks or restricted them to Jim Crow units); Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 43, at 118–34.

63. McUsic & Selmi, *supra* note 3, at 1351.

broader unified organizational structure."[64] Such scholars argue that instead of a single union hegemonically "representing the interest of workers, workers should organize at the workplace in whatever group identity they are most comfortable [with] and where their interests are most likely to be furthered."[65]

While voices of caution have been raised against the ascendant preference for fragmented worker representation,[66] and while one set of commentators suggests "that labor unions can function as a source . . . [of] cosmopolitan renaissance,"[67] the historical tendency of unions has been to suppress particular identities and interests of workers in support of the "universal worker."[68] Postmodernism insistently challenges the legitimacy of this result.

2. Public Choice in the Mirror of Postmodernism—"The fact of scarcity, which exists everywhere, guarantees that people will compete for resources. Markets are one way to organize and channel this competition. Politics is another. People use both markets and politics to get resources allocated to the ends they favor."[69]

Premised on economic evaluation, public choice is also known as the interest group theory of legislation. It posits that "legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups which derive the greatest value from it, regardless of overall social welfare."[70] Thus, "all citizens are both demanders and suppliers of laws, but certain citizens share legislative goals with highly organized interest groups that provide them with an advantage over other citizens in the

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64. *Id.* at 1352.

65. *Id*; *cf.* McAdams, *supra* note 7, at 1007 (stating that social groups are based on demographic traits such as race, gender, or age). Social groups based on demographic traits may give rise to what can be called predominantly "affective-oriented groups." Vernon J. Dixon, *Some Thoughts on Teaching Predominantly Affective-Orientated Groups, in* INTRODUCING RACE AND GENDER INTO ECONOMICS 177, 177–89 (Robin L. Bartlett ed., 1997). Affective-oriented groupings may reflect the view that "[w]hatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual." *Id.* at 178–79.

66. *See* McUsic & Selmi, *supra* note 3, at 1353; *see also* Katherine Van Wezel Stone, *The Feeble Strength of One: Why Individual Worker Rights Fail*, 14 AM. PROSPECT 60, 60 (1993) (arguing that increased statutory protection for individual workers undermines unions and the strength of collective bargaining).

67. McUsic & Selmi, *supra* note 3, at 1341.

68. *Id.* at 1343, 1346–49.

69. Richard L Stroup, *Political Behavior, in* THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 45, 45 (David R. Henderson ed., 1993).

70. Jonathan R. Macey, Book Review, *Public Choice, Public Opinion, and the Fuller Court: The Chief Justiceship of Melville W. Fuller, 1888–1910*, 49 VAND. L. REV. 373, 375 (1996) (citing Richard A. Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982)).

procurement of favorable legal rules."[71] As one public choice scholar avers: "[p]olitics is a structure of complex exchange among individuals, a structure within which persons seek to secure collectively their own privately defined objectives that cannot be efficiently secured through simple market exchanges."[72]

This viewpoint demands skepticism of the "benefits" of proposals put forward by interest groups, including unions and their academic advocates. Public choice theory suggests that the policies and legislation advocated by such groups may not be in the larger interest.

When people form, join or simply pay dues to an interest group[73] in furtherance of the "greater good," collective action problems such as free riding and forced riding may result from conflicting preferences among members of the group. Individuals can be members of more than one group at the same time,[74] and may have significantly different, even antithetical, viewpoints from one another. Discord may also occur regarding whether the putative benefits accrue evenly to all constituents of the group.[75]

If unions are conceived as representative structures,[76] will the attempt by unions and labor advocates to enlarge both the amount of union dues and the collective uses to which they can be put plausibly benefit all workers as individuals or as members of identifiable subgroups of the union, or even society as a whole?

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71. Macey, *supra* note 70, at 375–76.

72. James M. Buchanan, *The Constitution of Economic Policy, in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 103, 107–08 (James D. Gwartney & Richard E. Wagner eds., 1988). This view can be seen in contradistinction to the perspective of some public choice scholars who seem to believe that self-interest simply means avaricious greed in a simple monetary sense. At least two scholars in their examination of public choice investigate the role of self-interest in politics by asserting that self-interest can be separated from ideological/nonmaterial considerations. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 7 (1991).

In my view, the attempted separation of ideology from self-interest has not been proven. *Cf.* McAdams, *supra* note 7, at 1007 (noting that "[g]roups use intra-group status rewards as a non-material means of gaining material sacrifice from members").

73. While unions conceived of as mini-legislatures are subject to the application of public choice insights in terms of internal decision making, unions also have an external dimension as well: acting as a pressure group attempting to achieve collective objectives in a contest with other actors and interest groups within the polity.

74. *See* Posner, *supra* note 10, at 161. For instance, a woman may be a member of a family in which she is the mother, a member of a charitable organization, a union local, and a church group. Each group provides benefits which may overlap and impose costs and other obligations. *See id.*

75. *See infra* Part IV.C. (discussing forced riders).

76. Under the influence of Archibald Cox, courts initially conceptualized the labor relationship as a form of representative government. *See* McUsic & Selmi, *supra* note 3, at 1343 n.12.

D. Developing a Postmodern/Public Choice View

Part II of this Article evaluates the worker's right to avoid paying dues grounded in *Beck*, and briefly appraises the response to the *Beck* line of decisions. Part III develops a postmodern conception of unions, which challenges insistent claims of solidarity. Part IV extends the prevailing perception of free riding upon which the logic of coerced dues conscription is established, by examining whether individuals or subgroups who are compelled to sacrifice their particular interests to the "greater totalizing goals of the working class"[77] are in fact free riders, or to the contrary, *forced* riders.[78] This perspective delegitimizes coerced transfers of union members' dues for hierarchical or majoritarian political purposes.

This Article seeks to establish that continuing union claims of solidarity and cooperation may be incompatible with both individuated and group claims to identity. By creating a hypothetical model of mandatory dues payments as applied to a range of archetypal workers, the author investigates the interplay between public choice, group cooperation and postmodernism.[79] Additionally, the author argues that an expansive deployment of union dues for the purpose of revitalizing the union movement is inconsistent with the notion that the individual has the right to determine the proper ends of her life.[80]

Accordingly, the application of mandatory union dues to broad political causes must be seen as a form of majoritarian exploitation which submerges individual, ethnic, and gender identity in support of hierarchical aims which do not necessarily advance the interests of either individuals or subgroups of workers, or enhance the greater good.

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77. *Id.* at 1342.

78. Elementary public choice theory suggests that collective action can give rise to both forced riders and free riders. A forced rider is a person or group compelled to subsidize benefits, which accrue primarily to others. A forced rider is the opposite of a free rider who receives benefits without fully paying for them. *See* ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 625 (1997); MUELLER, *supra* note 1, at 308.

79. *See infra* Part IV.D.

80. *See infra* Part IV.E.

II. BECK AND THE RESPONSE TO BECK AND SIMILAR DECISIONS

A. The Beck *Decision*

In 1988 the U.S. Supreme Court reshaped the National Labor Relations Board's statutory mandate when it held "for the first time . . . 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."[81] Instead, the Court held that unions are not "free to exact dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective-bargaining activities."[82] The Supreme Court's decision in *Beck* is a logical expansion of its "fee speech" doctrine first applied to preclude the use of dues to finance political candidates and causes that were opposed by individuals and subgroups of workers.[83] As one commentator notes, this "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 with the minority's right to refrain from such association."[84]

In *Beck*, twenty employees who had declined union membership brought a suit challenging the use of their agency fees for purposes other than collective bargaining, contract administration, grievance adjustment, and representational activities.[85] The Court confronted the contention that the expenditure of a portion of nonmember union dues for such purposes as organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events is a violation of the union's duty of fair representations, section 8(a)(3) of the

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81. Hartley, *supra* note 8, at 1 (citing Communications Workers of Am. v. Beck, 487 U.S. 735, 744–54 (1988)).

82. *Beck*, 487 U.S. at 759.

83. *See* Friesen, *supra* note 44, at 609; *see also* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 764 (1961). The Supreme Court's "fee speech" doctrine can be broken down into its statutory and constitutional components. Statutory analysis relies primarily on the Court's view of the Railway Labor Act and the NLRA. Friesen, *supra* note 44, at 609–10. Constitutional inquiry rests on issues of freedom of speech and freedom of association. *Id.* at 608–10. Three questions might arise in a dispute over how union dues can be spent: 1) whether it is authorized by union membership; 2) whether it is authorized or prohibited by statute; and 3) whether it is allowed or prohibited by the constitution. *Id.* at 605 n.11.

84. Hartley, *supra* note 8, at 1.

85. *Beck*, 487 U.S. at 739–40.

NLRA, and the plaintiffs' First Amendment rights.[86] While conceding that section 8(a)(3) of the NLRA permits a collective bargaining agreement that compels all bargaining unit employees to pay periodic union dues and initiation fees as a condition of continued employment;[87] that such a provision applies whether or not the employee wishes to become a union member;[88] that the union as exclusive bargaining representative enjoys broad authority in the negotiations and administration of the collective bargaining contract;[89] the Court nevertheless reasoned such authority must be tempered by the union's "statutory obligation to serve the interests of all members without hostility or discrimination."[90] While the Court rather effortlessly concluded that the defendant's policy violated the judicially created duty of fair representation, it failed to decide the plaintiffs' First Amendment claim.[91]

Moreover, the claims that such a policy also violated section 8(a)(3) of the NLRA were rather, controversially, subject to section 7 or section 8 of the NLRA, thus leading the Court, in general, to defer to the exclusive competence of the NLRB.[92] Nevertheless, the Court concluded that it was not prevented from deciding the merits of "the § 8(a)(3) claim . . . insofar as such a decision was necessary to the disposition of respondents' duty-of-fair-representation challenge."[93] Hence, a divided Court sustained the plaintiffs' duty of fair representation claim and constrained the union's capacity to expend nonmember dues on activities other than "core" union activities (those activities germane to collective bargaining).[94] Consequently, the Court limited the use of mandatory

86. *Beck*, 487 U.S. at 740. The possibility that compulsory union payments interfere with employee First Amendment interests remains alive. *See generally* Hartley, *supra* note 8.

87. *Beck*, 487 U.S. at 744–45.

88. *Id.* at 744.

89. *Id.* at 739.

90. *Id.* (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1967)).

91. *See Beck*, 487 U.S. at 740–42. First Amendment claims can be grounded in among other things, the notion of coerced association that union membership requires. Union security agreements, at the union request, allow the discharge of workers and are generally held permissible under the First Amendment because of the governmental interest in precluding free riding. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977); Ry. Employees' Dep't v. Hanson, 351 U.S. 225, 238 (1956); Friesen, *supra* note 44, at 607.

92. *See Beck*, 487 U.S. at 742 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959)).

93. *Beck*, 487 U.S. at 743. Significantly, the dissent could not agree with the majority of the Court's resolution of the section 8(a)(3) issue. The dissent asserts that without reference to the Railway Labor Act and a case arising under it, the Court could not reach the conclusion that the federal courts, as opposed to the NLRB, have jurisdiction in at least some instances to resolve the section 8(a)(3) issues. *Id.* at 763.

94. *See Beck*, 487 U.S. at 762–63.

union dues to the pursuit of the limited collective interest in the collective bargaining and exclusive representation of workers in their particular employment context.[95]

B. Beck*'s Free Riding Analysis*

The Supreme Court's analysis of the free rider problem within the collective bargaining context illustrates the twin purposes that the Taft-Hartley Act was intended to accomplish:

> On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost."[96]

Thus, in an attempt at balancing, the Court held that dues that do not contribute, and which are not intended to contribute to the cost of the operation of a "union in its capacity as collective-bargaining agent cannot be justified as necessary for the elimination of 'free riders.' "[97]

The concern of both the Court and Congress for the free rider problem was made apparent in their confined solution. Part IV presents a more sophisticated conception of the free rider problem derived from the literature of public choice and group cooperation and suggests that Congress and the courts have not fully dealt with the potential abuses of compulsory unionism. The next subsection, however, examines the constraints under which union dues objectors are forced to operate.

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95. *See id.*

96. *Id.* at 749 (citing with approval NLRB v. General Motors Corp., 373 U.S. 734, 740–41 (1962)). The legislative history of the Taft-Hartley Act demonstrates Congressional concern that the beneficiaries of union negotiated benefits must contribute their fair share of costs incurred in achieving those benefits. *See, e.g.*, *Beck*, 487 U.S. at 749 n.5 (citing 93 CONG. REC. 3,447 (1947) (remarks of Rep. Jennings); 93 CONG. REC. 3,558 (remarks of Rep. Robison); and 93 CONG. REC. 3,837 (remarks of Sen. Taft)). Indeed, none recognized this issue more clearly than the leaders of organized labor, who thus sought to limit free riding. *Id.* (citing S. REP. at 6, *reprinted in* LEG. HIST. 412). Similar free rider concerns encouraged Congress to amend the Railway Labor Act. *Id.* at 750.

97. Teamsters Local No. 959, 167 N.L.R.B. 1042, 1045 (1967), *cited in Beck*, 487 U.S. at 752, but subsequently repudiated by the NLRB in Detroit Mailers Union No. 40, 192 N.L.R.B. 951, 952 (1971).

C. Limiting the Application of Beck

Despite the impact of the *Beck* decision, its impact is limited. First, while "workers cannot be forced under union contracts to pay any dues or fees beyond those necessary for the performance of the union's employee representation duties,"[98] unions routinely compel dues objectors to *resign* their membership.[99] In this event, dues objectors must continue to pay for representation rights, but are deprived of the ability to influence union governance.[100] Depending on the member's level of participation, she can influence critical decisions, strategies, and goals for negotiation, the enforcement of the collective bargaining agreement, and the selection of grievances for arbitration. Furthermore, many objectors must forgo other badges of union membership such as participation in strike votes, ratification or rejection of contract terms, and union elections.[101] In effect, a dues objector must confront a Hobson's choice: exercise her democratic union rights grounded in her economic interests, or exercise her *Beck* rights, premised on her ideological desire to refrain from subsidizing

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98. Hunter, *supra* note 52, at 3. By contrast, most paycheck protection proposals would allow union members to object to noncore expenditures without resigning. Accordingly, such proposals would preserve objectors' governance rights. *See id.* at 8.

99. *Id.* at 5. In reality the question of resignation from membership seems a bit confused with regard to NLRA, RLA, and constitutional cases. Judge Murnahan cast what has been called the deciding and concurring vote in the Fourth Circuit's *Beck* decision. *See* Beck v. Communications Workers of Am., 800 F.2d 1280 (4th Cir. 1986) (en banc). He seemed to limit his rationale to nonunion, involuntary fee payers although the other five judges supporting the judgment were not clear on this point. *See Beck*, 800 F.2d at 1287 n.10; Friesen, *supra* note 44, at 620–21 n.57. In addition, Justice Brennan's opinion affirming the lower court characterized the beneficiaries of the doctrine disallowing dues payments for objectors as "dues paying nonmember employees." *Beck*, 487 U.S. at 748; *see also* Friesen, *supra* note 44, at 620–21 n.57. One observer notes that: "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." Hartley, *supra* note 8, at 10 n.34.

For a summary of the Supreme Court's views with regard to Railway Labor and constitutional cases, see Friesen, *supra* note 44, at 620–21 n.57.

In addition, it is possible to contend that the obligation to pay full union dues might conceivably survive a resignation where an individual has waived her right to revoke her dues check-off authorization. *See* Werntz, *supra* note 44, at 163–64.

100. *See* Hunter, *supra* note 52, at 5–6.

101. *See id.* As one observer notes, "[i]n 1991, the Fourth Circuit for the first time directly answered whether a worker could pay only for collective bargaining and still remain a member of the union. The Court answered this in the negative." Knollenberg, *supra* note 54, at 365 (footnote omitted); *see* Kidwell v. Transp. Communications Int'l Union, 946 F.2d 283, 293 (4th Cir. 1991).

objectionable activities.[102] As such, unions and union leaders may discover that their accountability is vitiated as dues objectors who resign no longer matter for purposes of union governance.[103]

Second, potential dues objectors must clear several hurdles, including the depletion of their own dues by labor union leaders, to contest federal and state sponsored "paycheck protection" proposals that would give life to their *Beck* rights,[104] information constraints,[105] and the sclerotic reluctance of the NLRB to process dues objector cases.[106] In addition, just as whites and blacks in the Jim Crow South faced social sanction and violence for failing to

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102. Several witnesses before the House Employer-Employee Relations Subcommittee expressed disappointment with the choice to join the union and gain valuable workplace rights or to resign and lose any rights which they had. *See* Knollenberg, *supra* note 54, at 366–67.

103. For some observers, the need for action on the enforcement of *Beck* rights is compounded by the fact that NLRB has operated at a snail's pace in enforcing such rights. *See* Hunter, *supra* note 50, at 12. For an argument that the dues check-off provision contained in many collective bargaining agreements constitutes independent grounds for the payment of union dues which may trump *Beck* rights, see Werntz, *supra* note 44, at 159–67.

Moreover, individuals who exercise their right to resign from the union may face threats to life, to family, and run a gauntlet of intimidation, insults, and coercion. *See* Knollenberg, *supra* note 54, at 366.

104. For instance, financial figures released showed that the largely labor union opponents of California's Paycheck Protection Proposition 226 spent nearly twenty million dollars while proponents spent $2.1 million. The press release suggests that labor union dues largely financed the efforts of opponents of the initiative. Press Release, Project 21, Blacks Say Labor Union Behavior is Best Reason for "Paycheck Protection," *at* http://www.Project21.org (May 28, 1998) (on file with the *University of Michigan Journal of Law Reform*); *see also* Lambro, *supra* note 37 (reporting that labor leaders and Democratic Party officials step up attacks on initiative and union officials vowed to spend whatever it takes).

105. For instance, only nineteen percent of union members are aware that they have the right to object to their union's use of their dues for political purposes. Hunter, *supra* note 52, at 4 (stating that most workers are unaware that *Beck* rights exists); *see also* Knollenberg, *supra* note 54, at 349; Greg Pierce, *Unions No Longer Required to Reveal Political Funding*, WASH. TIMES, Jan. 12, 1994, at A8 (reporting that the United States Labor Department has eliminated a Bush administration requirement that unions reveal how much they spend on political activities—information that may have been helpful to workers trying to get their noncore dues returned). *But see* Marquez v. Screen Actors Guild, Inc., 119 S. Ct. 292, 294 (1998) (holding that a union does not breach its duty of fair representation by merely negotiating a union security clause that uses the statutory language contained in section 8(a)(3) but does not explain and therefore inform workers of the Supreme Court's decision in *Beck*); Ferriso v. NLRB, 125 F.3d 865 (D.C. Cir. 1997) (holding that where a union collects a compulsory agency fee, it is required to provide nonmembers with an independent audit); Abrams v. Communications Workers of Am., 59 F.3d 1373, 1379 (D.C. Cir. 1995) (holding that union breached its obligations as it defined core expenditures too broadly and failed to inform nonmembers that they had the right to object). As yet, a Supreme Court and/or federal legislative remedy for these problem remains elusive. *See* Knollenberg, *supra* note 54, at 353–68.

106. *See* Hunter, *supra* note 52, at 6 (arguing that the NLRB has approached its enforcement duty timidly—it took more than seven years from the *Beck* case for it to issue its first case explaining its policy).

abide by the customs of segregation,[107] threats and other forms of coercion[108] impede a potential dues objector's ability to exit from union membership and vindicate his *Beck* rights. Third, the federal courts, blinded by their simplistic concern for free riders, invoke free riding postulates incompletely and inappropriately and thus fail to notice countervailing interests.[109] Despite these obstacles, the *Beck* judgment, which sustains preexisting principles derived from both the Railway Labor Act and public sector union cases,[110] has electrified an already exasperated group of union advocates. The next subsection briefly examines this backlash.

D. The Response to Beck *and Similar Decisions Empowering Dues Objectors*

Although a majority of both union members and the American public agree that "a union should not be allowed to use members' dues for political purposes,"[111] *Beck* and similar decisions constraining the application of union dues have met with less than universal acclaim. While one commentator asserts that "[b]oth the dues objector and the union majority champion legitimate interest[s],"[112] others argue that limiting the union majority's right to charge compulsory dues imposes a constrained view of the normal and proper role of a labor union and impairs activities aimed at transforming the balance of power outside the immediate workplace,[113] and that *Beck* constitutes a substantial burden on

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107. *E.g.*, McAdams, *supra* note 7, at 1041–42. This analogy is apt. Unions sought to exclude blacks especially from craft and railway unions. For example, after racially motivated strikes failed in the southern railroad industry, white trainmen engaged in terrorism, killing several black trainmen. David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and The Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 101 (1993).

108. *See* Knollenberg, *supra* note 54, at 364–65. "Employees who know their rights and decide to take on the union establishment find the process . . . marked by threats of life, family, intimidation, insults and coercion." *Id.* at 364.

109. *See* discussion *infra* Part IV.F.

110. *See generally* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (discussing collective bargaining in the public sector); International Association of Machinists v. Street, 367 U.S. 740 (1961) (construing the Railway Labor Act).

111. Hunter, *supra* note 50, at 13 (citing a Wall Street Journal/NBC News Poll).

112. Hartley, *supra* note 8, at 3.

113. *See* Friesen, *supra* note 44, at 639. *But see*, Knollenberg, *supra* note 54, at 347 (advocating the strengthening of *Beck* through legislation "empowering union members and non-members to decide individually if their dues or fees can be used by the union for political or other purposes not germane to collective bargaining.").

collective bargaining.[114] Still others resist respect for minority workers' rights because such deference would not only weaken the union but would also weaken the interests of working people generally.[115] Others contend that union independence from any state controls is (1) indispensable if unions are to democratize the work place by providing a meaningful voice in the decisions that affect workers; (2) necessary to avoid government regulation of wages; (3) dictated by the aspiration to make real the previously illusory concept of individual liberty by aggregating power to confront other social and economic aggregations within society; and (4) not oppressive to the individual despite obligatory financial support of matters of general interest to union members because "taxation for the common good and majority rule are accepted principles of democracy and common practice in associations."[116]

For some commentators, dues objector cases, if not the objectors themselves, are an integral element of a general post-World War II social and political movement to expunge politics, particularly left-wing politics, from organized labor while simultaneously encouraging antiunion employers and dissident members to attack the financial base of unions at its foundation.[117] Moreover, government regulation of competing interests in the political process (allowing dues objectors to escape ideological expenses) cannot be seen as neutral[118] unless one also agrees that it is possible to hinder "the mouse without increasing the power of the cat."[119] Union defenders contend that *Beck* must be reversed to facilitate the survival of unionization.[120]

Accordingly, for many observers, mandatory financial contributions in support of majoritarian union political expressions must not only be permitted, they must also be compelled.[121] Suppression of the minority to benefit the majority is the price dissident workers must pay to facilitate the transformation of the workplace and society.[122] This conclusion raises urgent questions concerning the

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114. Lisa Rhode, Case Note, Communications Workers of Am. v. Beck, 108 S. Ct. 2641 (1988), 57 U. CIN. L. REV. 1567, 1594 (1989).

115. Kenneth Cloke, *Mandatory Political Contributions and Union Democracy*, 4 INDUS. REL. L.J. 527, 528 (1981), *cited in* Hartley, *supra* note 8, at 5 n.14.

116. Hartley, *supra* note 8, at 4 n.12.

117. *Id.* at 5 n.14 (citing Cloke, *supra* note 115, at 539, 563–64).

118. Friesen, *supra* note 44, at 639–40.

119. Cloke, *supra* note 115, at 567.

120. Friesen, *supra* note 44, at 645–46.

121. *See e.g.*, *id.* at 645 (suggesting that there is a need for a statutory amendment that compels the funding of union organizing expenses through union dues). *See generally* Cloke, *supra* note 115.

122. Given the distinct possibility that a majority of union workers oppose the use of their dues for political purposes, see Knollenberg, *supra* note 54, at 348–50, it is possible to

legitimacy of union solidarity from a postmodern view, which the next section attempts to answer.

III. A POSTMODERN VIEW IN THE MIRROR OF SOLIDARITY

Historically, the workplace has been considered a place of conflict centered in the struggle between employers and workers.[123] Workers were generally seen as bound together in a transcendent common interest, and whatever differences existed between and among workers became diaphanous when framed against the dominant friction between the interests of workers and management. Indeed, the Wagner Act arguably transforms the operative unit of labor from the individual to the collective, and unions have demanded that the individual sacrifice her particular interest to the "greater good" as the price of participation.[124]

Today, however, the diversity of worker viewpoints is recognized and the legitimacy of the sacrifice of particular interests or particularized identities to the communal good remains under review.[125] This is consistent with the notion that we now live in an age which questions everything, including the universality of categories,[126] (including group categories), and the omnipresence of knowledge[127] (including knowledge about what workers want). Hence, the universality of worker interest, and union solidarity are placed in issue by voices calling for separation, separateness, and fragmentation.[128] Unions cannot be seen as merely neutral actors. Indifference and hostility from unions toward the diversity of

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argue that both the majority and the minority must be suppressed by hierarchical and dominant union leadership allied to political or ideological interest.

123. McUsic & Selmi, *supra* note 3, at 1339.

124. *Id.* at 1342; *see also* Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L.REV. 481, 501 (1992).

125. McUsic & Selmi, *supra* note 3, at 1342–43.

126. Michel Foucault, for example, gave precedence to the specific and special above the general and universal and denied the universality of categories. STANLEY J. GRENZ, A PRIMER ON POSTMODERNISM 127 (1996).

127. For example, knowledge in the sense that it connotes true beliefs considered as useful nonrepresentational mental states as distinguished from accurate (and *therefore* useful) representations of reality which actually correspond to reality is seen as a difference which makes no difference in practice to pragmatic postmodernists. *See* RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 20 (1998)[hereinafter, RORTY, TRUTH AND PROGRESS]. *Contra* DANIEL FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 27 (1997) (noting that "since the Enlightenment, knowledge has been thought of as universally accessible and objective.").

128. McUsic & Selmi, *supra* note 3, at 1340.

worker interests have accelerated the fragmentation of worker interests where such interests and identities differ from traditional union constituencies.[129]

Thus, proponents of the view that the vitality of the union movement must be reclaimed through union dues should be obliged to confront this question: To what degree can workers with diverse identities in a pluralistic world be required to suppress their identities in pursuit of the collective goals of majoritarian institutions? This question is the challenge that postmodernism poses to all institutions wedded to collective power.

A. Postmodern Views

While some may conclude that all of the demands for recognition by particular groups, subgroups or individuals are dubious, "[t]his conclusion is surely too hasty."[130] On the other hand, for instance, Jean-Jacques Rousseau and his followers in satisfying the perceived and perhaps universal[131] need for public recognition, attempted to convert the concept of human equality into identity.[132] The Rousseauean politics of recognition, as one observer notes, "is simultaneously suspicious of all social differentiation and receptive to the homogenizing—indeed even totalitarian—tendencies of a politics of *the* common good, where the common good reflects the universal identity of all citizens."[133] Some unions and union leaders devoted to the idea of the "universal worker" have replicated this commitment to "collective rights" and the "common good."[134]

All attempts to achieve the collective good run the risk of submerging the identity of subgroups and individuals to the service of others. It is the challenge of the postmodernist emphasis on the politics of difference, to recognize the unique identity of a particular individual or group as distinct from project, with its everyone else.[135]

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129. *See supra* note 57.

130. Amy Gutmann, *Introduction* to MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 3, 4 (Amy Gutmann ed., 1994) [hereinafter MULTICULTURALISM].

131. Postmodernists generally do not believe in "universal" explanations. *See* RORTY, TRUTH AND PROGRESS, *supra* note 127, at 19–42; David Brooks, *Class Politics Versus Identity Politics*, 125 PUB. INT. 116, 118 (1996) (reviewing MICHAEL TOMASKY, LEFT FOR DEAD (1996)).

132. *See* Gutmann, *supra* note 130, at 6.

133. *Id.* (citing Charles Taylor, *The Politics of Recognition, in* MULTICULTURALISM, *supra* note 130, at 38).

134. McUsic & Selmi, *supra* note 3, at 1339–50.

135. *See* Taylor, *supra* note 133, at 38.

While one can debate whether the recognition of uniqueness should be optional or mandatory, or contest the relevance of postmodern insights,[136] it is nonetheless possible to maintain that those who seek the possibility of recognition will find both their identity and their particular interest eviscerated by what has been called the "greater totalizing goals of the working class."[137] This perception of subordination has been substantially enhanced by the understanding that unions have often furthered the interest of their traditional constituents at the expense of women and minorities.[138]

When a union leader or the union majority conceptualizes a particular purpose which mandatory union dues must promote, it is difficult to conclude that such a purpose is derived or even derivable from some transcendental standpoint or ontological perspective.[139] If the politics of recognition demands that we live consistently with the ideal of being true to oneself, it is only a modest step to establish the politics of identity with its focus on the politics of difference. This difference, in its individual or collective senses must confront the real risk of being ignored, glossed over, and ultimately assimilated into a dominant or majority identity.[140]

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136. *See generally* FARBER & SHERRY, *supra* note 127 (arguing that postmodernism distorts democratic discourse and is perhaps irrational).

137. This tendency toward disaggregation among labor unionists is not limited to the United States. *See* Morten Madsen, *Trade Union Democracy and Individualisation: The Cases of Denmark and Sweden*, 27 INDUS. REL. J.: EUR. J. ANALYSIS, POL. & PRAC. 115, 116 (1996).

138. McUsic & Selmi, *supra* note 3, at 1348; *see also* Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1157 (1991) (noting that many feminists distrust male-dominated unions, which remain insensitive to many of the concerns of women who play a minor role within unions); Karl Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 162–64 (1982) (conceding the less-than-salutary history of unions regarding racism).

139. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 231 (2d ed. 1999) (stating that postmoderns reject the notion of a foundational or transcendent source for truth or justification while concurrently rejecting the notion of determinate unique meaning for statements); RORTY, TRUTH AND PROGRESS, *supra* note 127, at 11–13. On the other hand, some form of consensus might be achievable through intersubjective agreement attainable through free and open discussion of all available hypotheses and policies. *See id.* at 7.

140. *See* Hutchison, *From Bujumbura to Mogadishu*, *supra* note 7, at 142–44; Taylor, *supra* note 133, at 25–38. Whether the demand for recognition by groups or individuals from differing groups can be squared with "liberalism" as distinct from some version of the postmodernist project is beyond the scope of this enterprise. Suffice it to say that one observer posits at least two kinds of commitments to liberalism: (1) that which is incompatible with a commitment to the flourishing of distinct cultures, religions, or collective goals beyond the personal freedom and physical security, welfare and safety of its citizens; and (2) that which allows for a state committed to the survival and flourishing of a particular nation, culture or religion as long as the basic rights of citizens who have different commitments or no such commitments are protected. *See* Michael Walzer, *Comment*, *in* MULTICULTURALISM, *supra* note 130, at 99.

For postmoderns, such assimilation is the principal sin "against the ideal of authenticity."[141] In labor unions the sin has taken two forms: (1) the subordination of the interests of individuals and minority groups to majoritarian ideals and collective goods;[142] and (2) the assumption that the preferences of the majority and that of individuals and the members of subgroups are congruent.[143] As Richard Rorty describes Nietzsche: "To fail as a poet—and thus . . . to fail as a human being—is to accept somebody else's description of oneself, to execute a previously prepared program . . . ."[144] Accordingly, to accept homogenized collective goals grounded in the idea of the universal worker is to fail as a human.

B. Postmodernism and Group Cooperation Theory

In a postmodern, pluralistic world, group cooperation poses both theoretical and operational problems, because humans are potentially "egoistic, rational, utility maximizer[s]."[145] The activities of the group are advanced by appeals to group interests, group loyalty, and group identity.[146] While "some . . . groups . . . serve the individual's interest by minimizing the transaction costs she incurs while acting to satisfy her preference for whatever interest or function the group facilitates,"[147] attempts to reclaim the union movement through union dues must confront the possibility that preferences, and hence group identity and group loyalty, have become and should become fragmented by the postmodern project.

If labor unions, conceived of as interest groups and as mini-legislatures, seek to maximize the social welfare of their members, they must confront the necessity of aggregating individual preferences in pursuit of a collective goal just as surely as the acquisition

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141. Taylor, *supra* note 133, at 38. This notion of identity can find linkages with "contemporary individualism [which] is dominated by ideas such as free choice in all aspects of life, the right to develop oneself, and to build one's own life uniquely, through free and open selection of styles of living." Margalioth, *supra* note 30, at 48.

142. Such as fighting for "class-based justice."

143. Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1542–44 (1999).

144. RICHARD RORTY, CONTINGENCY, IRONY, & SOLIDARITY 28 (1989)[hereinafter RORTY, CONTINGENCY]. Freedom for the individual can be conceived as the experience of emancipation from oppression by nature as well as by other human beings. *See* KEITH ANSELL-PEARSON, AN INTRODUCTION TO NIETZSCHE AS POLITICAL THINKER 64 (1994).

145. MUELLER, *supra* note 1, at 2. As used here, utility maximization is not limited to merely direct pecuniary goals.

146. *See* McAdams, *supra* note 7, at 1007.

147. *Id.*

of collective goals provides benefits which may be distributed evenly or unevenly within the group. Furthermore, to the extent that the attainment of such goals provides external benefits and generates external net cost to those outside the union, members of identifiable subgroups (within and outside of the union) will likely find that attainment of the union goal may not be in their subgroup's interest. In other words, there is a conflict between the assumed common identity of the union and various collective identities, which demand recognition, as well as between any individual identities, which seek recognition.[148]

For example,

> a black nationalist might state her case this way: "African-American identity is shaped by African-American society, culture, and religion. It is dialogue with these black others that shapes the black self; it is from black contexts that the concepts through which African-Americans shape themselves are derived. [Accordingly,] "white society, the white culture, against which an African-American nationalism of the counterconventional kind poses itself, is therefore not part of what shapes the collective dimension of the individual identities of black people in the United States."[149]

If this accurately states one view of black nationalism, then unions dominated by white men should not be able to dictate the broad political goals and preferences of African-American dues payers.[150]

Similarly, a postmodern expressive individualist might state her case this way: her life is successful and triumphant insofar as she escapes from inherited and imposed descriptions of her existence and finds new descriptions.[151]

> This is the difference between the will to truth and the will to self-overcoming. It is the difference between thinking of redemption as a making contact with something larger and more enduring than oneself and [thinking of] redemption as

148. *See* K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction, in* MULTICULTURALISM, *supra* note 130, at 151.

149. *Id.* at 154–55.

150. One observer states that the politics of group assertion is grounded in the basic principle that members of oppressed groups need separate organizations that especially exclude those from more privileged groups. *See* IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 167 (1990).

151. RORTY, CONTINGENCY, *supra* note 144, at 29.

> Nietzsche describes it: "recreating all 'it was' into a 'thus I willed it.' "[152]

As Rorty illumines, the post-modern world has been captured by a de-universalized moral sense where the moral consciousness is seen as historically conditioned—a product of time and chance as well as political or aesthetic consciousness.[153] If true, it is hard to understand why unions should have the universal *right* to speak on this individual's behalf as a class-based force for societal solidarity and social change.[154]

Yet, there is widespread support for the belief that "[p]eople can best obtain the ends they desire in some cases by engaging in cooperative behavior and in others by acting independently."[155] One cooperative approach is to join a union; independent action might involve threatening to quit.[156] Presumably, successful cooperation can be more beneficial than independent action because cooperation allows people to pool resources and divide tasks.[157] Nevertheless, cooperation involves costs, which the independent actor does not incur.[158] "[A]n actor will choose cooperation over independent action only if the increased value of the benefits—that is, the 'surplus' resulting from cooperation—exceeds the cost of cooperation."[159]

The point of departure for these claims is the presumed validity of what Eric Posner calls a "simplified model of group cooperation."[160] The salient features of the model include the concepts of "solidarity," "group," and "category." " 'Solidarity' denotes the ability of people to cooperate in the absence of legal sanctions."[161] The term "group" refers to a collection of people who *choose* to cooperate—for example, the members of a union.[162] Lastly, "category" means a collection of people who happen to share some attribute,

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152. *Id.*

153. *See id.* at 30.

154. *See* Feldman, *supra* note 5, at 199–202 (asserting that unions have both the power and the right to speak on behalf of the entire workforce as a class-based force for societal solidarity and social change). To be fair, even postmoderns of the pragmatic variety speak at times of human solidarity as "our recognition of one another's . . . humanity." RORTY, CONTINGENCY, *supra* note 144, at 189.

155. Posner, *supra* note 10, at 137.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* Cooperation surplus in this context refers to the actor's share of the joint surplus created in a two person model less her share of the cost of cooperation. *Id.*

160. *Id.* at 135.

161. *Id.*

162. *Id.*

such as employment, but who do not necessarily cooperate with each other.[163] When the payoffs to cooperation exceed the payoffs to acting independently, a necessary but insufficient condition for cooperation is met.[164] All this appears rather uncontroversial, but several caveats are warranted.

While Posner states that this simplified model applies to labor unions, this analysis does not fully apply to all unions organized pursuant to the NLRA. First, in most states, such organizations can impose legal sanctions, which lead to the termination of a worker's employment,[165] when the worker fails to "cooperate" by paying dues.[166] Sanctions present a challenge to Posner's framework by introducing an element of coercion that is inconsistent with his model of voluntary collaboration.[167] Will a dues payer continue to pay dues because she is *obliged* in the same sense one pays a robber who points a gun at one's head, or because she acts out of a sense of *obligation* believing that one ought to do so premised on some intrinsic moral duty based on mutual benefit?[168]

Second, Posner's notion of "category" seemingly overlooks the fact that both individuals and subgroups of employees in a post-modern world have enormous differences, which could more than offset the value of the shared attribute (employment). It is questionable whether such a modest level of sharing is sufficiently meaningful to provide a basis for instrumental commonality between workers.

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163. *Id.*

164. Where both actors share a joint surplus over independent action that will not ensure cooperation. The logic of the prisoner's dilemma demonstrates that each actor finds it rational to cheat—that is, to attempt to convince her fellow actor that she will in fact cooperate but then to defect. *See id.* at 138.

165. While the Taft-Hartley act allows individual states to make union shops illegal, most states have declined this option. Labor Management Relations (Taft-Hartley) Act § 14(b), 29 U.S.C. § 158. Accordingly, unions in most states can seek the termination of nondues paying workers if the union is the exclusive bargaining representative. Labor Management Relations (Taft-Hartley) Act § 8(a)(3), 29 U.S.C. § 158.

166. On the other hand, one onlooker asserts that "[o]nly nonmembers are associated with the union through . . . union security." Hartley, *supra* note 8, at 10 n.34. While such a claim has some relevance, the essential point is that unions have at their disposal a powerful enforcement mechanism backed by the power of government, which contains a coercive element. Concededly, certain religious objectors can escape direct payments to the union by making equal payments to a charitable organization.

167. This problem resembles H.L.A. Hart's distinction between being obliged to act and acting out of sense of obligation. H.L.A. HART, THE CONCEPT OF LAW 80–82 (1972). For an accessible introduction to Hart's concepts, see BIX, *supra* note 139, at 33–36.

168. HART, *supra* note 167, at 82; *see* Sylvester Petro, *Civil Liberty, Syndicalism, and the NLRA*, 5 U. TOL. L. REV. 447, 450–51 (arguing that only ignorance or duplicity accounts for the common practice of referring to the NLRA as establishing a regime of "free collective bargaining"). *But see* Brudney, *supra* note 4, at 1565 (asserting that workers in a collective bargaining setting "gave up" their freedom to contract on an individual basis).

Additionally, individuals can be members of several groups simultaneously. It is possible that some individuals are predominately affective-oriented, that is, they have principle concern for members of the same affective-oriented group, be it gender, race or ethnicity. If true, the value of non-affective-oriented shared attributes such as employment would seem to be reduced. In addition, the Posner model seems to assume, unlike the postmodern project, that all cooperation produces benefits as people pool their resources and their lives.[169] Postmodernism diminishes the viability of the conclusion that cooperation, as opposed to independent action, is beneficial insofar as it demonstrates that there may be no conclusive intersection between the union's goals and the goals of various collective and individual identities.

On the other hand, the postmodern project is congruent with the cooperation model insofar as it recognizes and affirms the construction of identity through one's membership in various racial, gender, religious, or sexual categories. Thus, ethnic homogeneity has been shown to reduce transaction costs and thereby enhance group solidarity.[170] However, to the extent that individuals are fragmented into racial, gender, and class categories, the benefits of broad (cross-class, cross-racial) solidarity decline as the benefits of affective-group affiliation rise. Thus, the benefits of union solidarity will decline as the calculus of cooperation versus independence changes in favor of independence.[171] This conclusion questions the

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169. Posner suggests that groups engage in the pooling of resources and the division of tasks. Posner, *supra* note 10, at 137. The postmodern project argues that people cannot necessarily be pooled, homogenized, and/or universalized. The postmodern desire for uniqueness may require a fairly high degree of separation. Pooling of resources (immaterial or material) may diminish uniqueness. For instance, ethnic solidarity may require that we only engage in dialogue with those who share our hue, and implies both instrumental and substantive or normative benefits for the recognition of difference. If true, some form of cooperation and pooling eviscerates our unique identity. *See* Hutchison, *From Bujumbura to Mogadishu*, *supra* note 7, at 160–61.

170. *See* Janet T. Landa, *A Theory of the Ethnically Homogeneous Middlemen Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349, 359–61 (1981).

171. Additionally, it is suggested that the calculus of cooperation and independence may change after an individual joins a cooperative venture. Depending on the incentives available, "the actor will (1) cooperate, (2) free ride (in other words defect), or (3) revert to independent action." Posner, *supra* note 10, at 137. In this view, "[t]he payoff from cooperation equals the actor's share of the cooperative surplus less the actor's cooperation cost. The payoff from defection equals the share of the cooperative surplus less the expected cost associated with detection and sanction . . . [while t]he payoff from independent action includes neither a share of the cooperative surplus nor any cost of cooperation." *Id.* at 137–38.

It is not altogether clear how the model handles or should handle the possibility that an ideological objector to union dues could resign and pay only core union dues. Could this case be plausibly characterized as (1) less than full cooperation, (2) defection/free riding,

legitimacy of the concept of the universal worker and the intrinsic worth of union solidarity as well as the contested idea of free riding which fuels the union dues debate.

IV. FREE RIDING, FORCED RIDING: FROM BECK TO PUBLIC CHOICE

A. Conceiving the Free Rider: A Public Choice View

Proponents of the collective good utilize the government, voluntary collaboration, and involuntary action in securing a just and equitable distribution of resources and collective goods.[172] Where the central government provides collective goods and services, such collective goods are theoretically nonexcludable.[173] If the goods in question are *pure* public goods, they would be characterized as non-rival in consumption and nonexcludable in supply.[174] Significantly, "[t]here are increasingly few examples remaining of pure public good[s] otherwise defined as a public externality."[175]

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or (3) a reversion to completely independent action? This issue will be discussed but not necessarily solved in the next section.

172. P. A. MCNUTT, THE ECONOMICS OF PUBLIC CHOICE 178 (1996). To be sure, some groups expend vast amount of resources to obtain rent-seeking legislation which primarily benefits its members or most of its members. *See* Macey, *supra* note 70, at 377. Labor union rent-seekers for instance, might attempt to obtain legally mandated barriers to entry such as licensing requirements. *See id.* at 377 n.12.

173. MCNUTT, *supra* note 172, at 178.

174. *Id.* at 181.

> There are two salient properties pertaining to the provision of collective goods, namely, non-excludability in supply and nonrivalry in consumption. The latter implies that . . . the consumption by one citizen of the collective good will not affect the consumption level of any other citizen. Radio broadcasts, clean air or defence spring to mind as examples of a non-rivalrous collective good. Nonexcludability is the hallmark of a political system where the central government funding emanates directly from citizen taxation [or regulation].

Id. at 178–79.

Conceptually, there is a difference between club and interest group provision of collective goods. "Whereas a club provision refers to an excludable goods provision, an interest group provision may refer to the possibility of a non-excludable goods provision . . . . How [this affects the] theory of public goods provision ultimately depends on intra-interest group economies of organisation." *Id.* at 180. Accordingly, if unions are conceived of as a club, union provision may refer to an excludable good, meaning that it is only available to dues paying members.

175. *Id.* at 181.

The production of public goods and externalities[176] creates market imperfections by furnishing benefits and imposing costs on individuals who are not necessarily members of the particular interest group or groups, which worked to attain the good. Some interest groups, such as labor unions, industrial trade groups, and farmer associations, seek to further the narrow objectives of their members by delivering club goods, such as higher wages for members.[177] This concentrated focus may allow these interest groups to insist on the provision of goods largely for the benefit of members while excluding nonmembers (or perhaps nondues payers).[178] Other groups, such as peace or environmental groups, seek to influence public policy or opinion broadly by providing nonexcludable benefits to society as a whole or to nonmembers of their group.[179] Groups, which organize initially to provide club goods, such as labor unions, will also often seek to influence the distribution and kinds of nonexcludable public goods available to their members.[180]

While commonality may be presumed, groups, subgroups and individuals may nonetheless have disparate interests. Such interests may be narrowly or broadly focused. For instance, the various subgroups or the individuals within the association may share a common organizational goal such as the requirement that only licensed plumbers (union plumbers) be allowed to work in federal buildings. This provides excludable benefits to union plumbers. On the other hand, some members of the union or the leadership of the group might seek to further nonexcludable public goods such as enhanced social justice. Such efforts extend group goals beyond pecuniary concerns. If a group has one common and narrowly prescribed interest (e.g. increased wages), it is possible for those in positions of power to capture the common interest in increased wages to further a particular and nonexcludable collective good. The resulting benefits and costs will not necessarily be shared equally, however. This is especially true where the benefits primarily accrue to nonmembers and the costs accrue to members. It is possible that many union dues payers share with union leadership the common goal of attaining any particular public good or club good.

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176. *See id.* at 178.

177. *See* MUELLER, *supra* note 1, at 308. Another example of a collective club good might be the statutory imposition of a licensing requirement by a union which already controls the supply of licensed plumbers or pipe fitters.

178. *See supra* note 174.

179. *See id.*

180. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 15 (1997). "Private groups [often] prefer to have social resources shifted from the general public to their members." *Id.*

Still, in a postmodern world, many are not all. Must those individual dues payers (either of an expressive individualist or a black nationalist variety) who oppose the group's attempt to attain a given public or collective good be required to resign from membership and lose the utility of the opportunity to influence union affairs and yet still be compelled to provide financial support because of an oppressive concern for the free rider? More succinctly, are *all* dissenting employees, whether they resign or not, whether they receive benefits or not, subject to the logic of free riding?

B. Free Riding, Union Dues: A Public Choice View

While unions were largely conceived in the 1930s and 1940s as economic agents attempting to maximize worker gains in excludable collective goods, such as higher wages, better working conditions, and fewer hours, some unions today conceive their goals in broader terms.[181] The primary goal of the Taft-Hartley Act in eliminating closed shops was to eviscerate free riding by workers who receive the benefits of improved wages, working conditions, and hours.[182] From a group cooperation theory perspective, if the collective good is conceived of as better wages for members of the group, because of the tendency of some workers to defect, it might be undersupplied.[183] Accordingly, and consistent with public choice theory, trade unions insist on, and legislatures enact, "*separate and 'selective' incentive(s)*"[184] to curb free-riding. Trade unions have fought to have employers deduct dues from union members' wages, have sought to maintain closed shops and, where that has not been possible, have endeavored to put in place union security agreements complete with check-off provisions.[185]

> Where they have succeeded in forcing employers to abide by these rules, as in many states in the United States and in the

181. *See, e.g.*, Werntz, *supra* note 44, at 166 (noting that unions assert that even core collective bargaining activities go beyond the bargaining table and include "organizing, lobbying, and participation in social, charitable and political events vital to bolstering the union's bargaining clout") (footnote omitted).

182. *See* Communications Workers of Am. v. Beck, 487 U.S. 735, 747–50 (1988). "By 1947 Congress was equally concerned, however, that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing to the financial support of these efforts . . . . [resulting in the] man who does not pay dues rid[ing] along freely." *Id.* at 748 (citations omitted).

183. Posner, *supra* note 10, at 143.

184. MUELLER, *supra* note 1, at 308.

185. *Id.* at 309.

> United Kingdom, union membership has been relatively high and union workers have earned higher wages. In France, where these selective incentives encouraging union participation are absent, union membership is much lower and largely ineffective.[186]

Arguably "the best evidence that such selective incentives are needed to avoid free-riding behavior is the importance union leaders place on getting legislation and/or contractual stipulations requiring closed shop contracts, the collection of union dues, and the like."[187] Apparently, worker solidarity real or presumed will not suffice.[188]

C. Applying Free Rider Analysis to Union Mandated Collective Goods

The free rider concern is premised upon the assumed congruence between the economic interests of the worker and the union.[189] This conclusion is dubious. As one commentator notes, "it is plainly untrue that all workers share equally"[190] in the economic gains attributable to union activity at every stage of both the negotiating and grievance processing—the union must engage in discriminations among workers and categories of workers.[191] Consequently, "[s]ome workers benefit, but only at the expense of others."[192] Whether assumed economic congruence can be fully disproved is beyond the scope of this Article. The absence or existence of economic congruence between the union and subgroups and individuals will be of consequence; however, the primary concern of this Article is the extent of congruence between the ideological interests of individuals and minority dissidents on one hand, and of the union leadership on the other. A divergence in preferences between the individual and the union will enhance the

186. *Id.* (footnote omitted).
187. *Id.*
188. *See id.*
189. *See, e.g.*, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62 (1975) (reasoning that collective strength requires the subordination of the strengths of individuals and groups to the interest of the majority); *see also* McUsic & Selmi, *supra* note 3, at 1344 n.17.
190. Petro, *supra* note 168, at 511.
191. *Id.*
192. *Id.*

benefits of independent action by reducing the benefits and the shared surplus derived from cooperative action.

Because individuals may misrepresent their preferences for the collective good in an attempt to free ride, underprovision of the collective good may result.[193] Accordingly, where an individual union member shares the same goal of attaining a particular public or collective good with the union, union leaders can legitimately claim that the collective interest requires that all who benefit from goods supplied through union effort must be required to pay union dues.

On the other hand, where the dues payer does not receive the benefits of the particular public or collective good because she disapproves of the goal selected on her behalf by the union majority, she is not a free rider. The cooperation surplus available to her has declined while the benefits of independent action have increased. In fact, if she is compelled to pay dues in support of a particular and detestable ideological objective, then she is a *forced rider.* A forced rider is an individual who is required to consume a public good whether she likes it or not[194] or receives benefits or not. Thus, absent relocation constraints, a worker forced to contribute dues to fund the attainment of a public good could simply leave her job.

For analytical purposes, an individual who is compelled to pay dues should not be compelled to give up her job where she objects to the allocation of such payments to promote public goods or collective goods from which she secures no benefit. To conclude otherwise is inconsistent with an individual's autonomy[195] and is hence *prima facie* illegitimate. Similar analysis with respect to members of identifiable subgroups of the union would lead to a comparable conclusion.

In some circumstances there may be no conflict within the organization about the attainment of collective goods. For instance public choice and group cooperation scholars agree that smaller

193. MCNUTT, *supra* note 172, at 186.

194. *Id.* at 189. This analysis is derived from McNutt's economic analysis of clubs, which are analogous to unions so long as one understands that unions likely have more power as they benefit from more legal sanctions than clubs generally. For example, labor unions are the beneficiary of statutory monopoly power that allows them to wield market power and to influence wages. *See* MORGAN O. REYNOLDS, MAKING AMERICA POORER 3 (1987).

195. The absence of a rule that precludes the employee's termination would fail to deal with an individual's dignity and autonomy interest in retaining a particular job. For an expanded discussion of dignity and autonomy concerns in the context of employment termination generally, see HUGH COLLINS, JUSTICE IN DISMISSAL 16–21 (1992); Epstein, *supra* note 6, at 953–55; *see also* JOHN GRAY, THE MORAL FOUNDATIONS OF MARKET INSTITUTIONS 26 (1992) (arguing that autonomy is an essential element of the good life for people situated in our historical context).

groups are more likely to solve their collective action problems cooperatively.[196] On the other hand, the available evidence indicates sharp disagreement between the opinions of union leadership and those of workers in the United States.[197]

Where the union's conception of the appropriate collective goal differs from that of an objector, who is nonetheless compelled to pay dues in full, the beneficiaries of union dues (the majority of union workers, union leaders, or nonexcludable members of the public) realize the benefits of the public or collective goal without incurring the whole cost. Income is redistributed and welfare is reallocated by a coercive transfer from dissenters to subsidize the preferences and welfare of others.[198] Where objectors refuse to pay dues in service of incompatible preferences, they cannot be characterized as free riders. Moreover, where the objecting individual (or subgroup of workers) is obliged to resign from the union as a predicate to avoiding payment of dues for objectionable causes, the union majority effectively excludes her,[199] as she can no longer hold the union leadership accountable.[200] Consequently, her core dues will probably supply a lesser utility. Hence, one cannot even assume that the ideological dissenter receives the full value of her core dues.

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196. *See* MCNUTT, *supra* note 172, at 4; *see also* Posner, *supra* note 10, at 140–41 (describing the importance of membership monitoring systems that occur in small groups in order to ensure solidarity and survival).

197. Knollenberg, *supra* note 54, at 360 (observing that while unions overwhelmingly fund Democrat party candidates and causes, more than thirty percent of the union workforce are Republican and another ten percent support third party candidates). It is possible, if not likely, that even those numbers overstate private sector union member support of the Democrat party as such figures include both public and private sector members. Public sector union members are much more likely to vote for the Democrats. I am indebted to Leo Troy for this insight. *See also* Stephen J. Hadley et al., Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 409, 417–21 (1972) (describing that union leaders, who have been out of the shop for many years, and who have a monopoly hold on both their positions and the streaming of communication within the union, become closer to being employers themselves, falling out of touch with the working union membership).

198. To take one example, despite the political diversity among union members, union dues were used to pay part of the cost of the Ohio Democratic Party's new state headquarters. *See Union Dues Buys Ohio Democrats New Headquarters*, POL. MONEY MONITOR, Feb. 27, 1998, at 2, *available at* http://www.nationalcenter.org/PMM10.html (on file with the *University of Michigan Journal of Law Reform*).

199. Such exclusion is consistent with the entire exclusionary history of labor unions. *See* Bernstein, *supra* note 107, at 85; Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 43, at 118–26.

200. The union must, of course, conform to its duty of fair representation despite her resignation.

D. A Model of Free and Forced Riding

A simple hypothetical model[201] may be helpful in understanding unions as comprising an amalgamation of distinct interest groups and individuals with disparate interests and dissimilar preferences and utility valuations. This model demonstrates the possibility of more kinds of free and forced riding than either the courts or Congress have imagined.

UNION GOALS

	DIRECT AND EXCLUDABLE ECONOMIC BENEFITS[202]	NON-EXCLUDABLE IDEOLOGICAL GOODS[203]	EXPAND THE POLITICAL POWER OF THE UNION[204]	LEGISLATION SPECIFIC TO THE PROVISION OF EXCLUDABLE CLUB GOODS[205]	EXPANDING MEMBERSHIP GENERALLY
Type of member					
A—Classic free rider	Agree	Agree	Agree	Agree	Agree
B—Partial free rider	Agree	Disagree	Disagree	Disagree	Disagree
C—Post-modern forced rider	Disagree	Disagree	Disagree	Disagree	Disagree
Subgroup R—modified classic free rider group	Agree	Disagree	Agree	Agree	Agree
Subgroup S—Postmodern forced rider group	Disagree	Disagree	Disagree	Disagree	Disagree

201. This formulation assumes that the *Beck* decision and its progeny are a proper initial starting point.

202. Direct and excludable economic benefits would include wages, salaries, working hours, and other objectives commonly associated with collective bargaining.

203. Nonexcludable ideological goods could include, for instance, union advocacy to improve childcare, decriminalize marijuana, and increase the minimum wage.

204. This category would include supporting political candidates, political parties, and political causes which have a particular view of society and human life.

205. An example of an excludable club good might include advocacy of legislation requiring that all pipe fitters on government projects be licensed and paid the prevailing wage where the union operates an apprentice system leading to the licensing of pipe fitters.

The above diagram scarcely hints at the diversity of viewpoints, combinations and preferences available. In addition, several caveats are warranted. First, there may be degrees of agreement or disagreement between individuals, subgroups, the majority, and union leadership. Second, even where individuals or subgroups express disagreement, it is possible to postulate that such dissenters might credibly receive the benefits of core/economic, noncore/ideological, or other collective union policy and their declared disagreement may simply mask preferences for the collective goal or collective good however described.

Despite the caveats, where individual dues payers and subgroups of dues payers fail to obtain the benefits of the proposed core/economic or noncore/ideological objective or an excludable or nonexcludable good, it is illogical to assert that such individuals and subgroups are free riding.[206] First, the model assumes that where an individual or subgroup is in agreement or disagreement with her union that constitutes a statement of true preference. Second, a limited number of examples of the collective goods associated with specific union goals are illustrated, where appropriate, by footnotes.

1. Individual A—Classic Free Rider—Individual A is in full agreement with all the collective aims of the union. The group cooperation surplus outstrips the benefits of independence or defection by a wide margin. Consistent with public choice theory, the Supreme Court's jurisprudence, and the Taft-Hartley Act's legislative history, Individual A could free ride with regard to all of the collective goods offered by the union. Accordingly, she should be compelled to pay her union dues in full.

2. Individual B—Partial Free Rider—On the other hand, Individual B, despite his agreement with the collective core/economic goals, disagrees with all other stated objectives. The only advantages he gains from cooperation, as opposed to independence, are the economic benefits that membership provides him. He could only be a free rider with respect to core economic goals. Given the implications of *Beck*, however, he could be required to resign from the union and to relinquish his union governance prerogatives as the price of withholding his contribution to the union's noncore or ideological objectives—and he still must brave the insults, threats, and other informal enforcement mechanisms that act as

206. That is, unless one can plausibly argue that their failure to terminate their employment relationship constitutes conclusive evidence of receipt of the benefits of the union policy.

barriers to exiting the union.[207] The opportunity to influence union decisions and the fear of intimidation might cause him to undervalue his ideological and political interests in favor of tranquillity. If he declines to resign despite his distaste for the union's noncore goals, this decision results in a net reduction in the amount of free riding he could savor. Hence, he could only be a partial or incomplete free rider.[208]

In addition, it can be argued that nonobjecting members, the putative beneficiaries of the noncore goals, are themselves free riders or at least partial free riders with regard to noncore expenses to the detriment of noncore objectors such as Individual B. Because Individual B does not receive *any* benefits from noncore expenditures, those who actually receive the benefit of a particular noncore goal *underpay* to the extent that Individual B *declines* to resign and pays a fully allocated portion of union dues.

3. Individual C—Postmodern Forced Rider—Individual C disagrees with the full menu of collective goods and receives no welfare benefits from any of the union's collective goals. Because the benefits of cooperation are less than the benefits of independence, she cannot free ride on union efforts. On the contrary, despite the Supreme Court's free rider presumption,[209] non-objecting union members obtain a subsidized ride at Individual C's expense. Furthermore, in light of the union security agreement entered into by the union and her employer, her sole method of escaping this imposed reduction in her welfare caused by any union dues is to terminate her employment relationship.[210] If Individual C retains

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207. *See supra* note 108 and accompanying text.

208. In fact, it is possible to speculate that were he to *decline* to resign from membership, and simultaneously fail to pay any dues whatsoever, then he would not be a free rider despite claims made by the court in *Beck*. Communications Workers of Am. v. Beck, 487 U.S. 735, 748–50 (1988). If (1) the positive utility derived from the excludable economic benefits (that is, benefits which are only available to members of the union) on offer *plus* (2) the positive utility (however determined) of retaining his union democracy rights with regard to core union *equals* the *disutility* of his distaste for noncore union expenditure, then he is plausibly not a free rider. Where true equality is achieved between the core benefits he receives and the disutility associated with his distaste for the noncore expenditures he must endure, then he should not be required to pay *any* dues. Thus, where the utility of independence exceeds the utility of core dues cooperation, the cooperation surplus is negative, and free riding is impossible.

209. *Beck*, 487 U.S. at 749 (concluding that union security agreements are designed to eliminate free riders and assumes that all employees receive the benefits of union representation).

210. Earlier analysis grounded on autonomy considerations foreclosed this option. *See supra* note 195 and accompanying text. However, if the assumed importance of autonomy is eliminated, her willingness to resign will be a function of a variety of factors including the availability of alternative employment, the quality and quantity of relocation restraints, the

her job but resigns her membership to avoid paying noncore dues, she would still be required to pay for core union representation because she is a presumed free rider,[211] despite the loss of her union governance rights. If her democratic rights have utility, her compelled resignation should serve to increase the amount of forced riding she incurs by increasing the net disutility she receives per dollar of core dues.

4. Subgroup R—Modified Classic Free Riders—Much, if not all of the above analysis referring to Individual A, applies to Subgroup R. This group would be subject to the logic of free riding for all union goals except nonexcludable ideological ones. The benefits of these goals flow to members and nonmembers alike, but they are not shared equally within the union. All members bear the costs, regardless of whether they receive the benefit. Because union dissenters do not receive the benefits of ideological goals, they are partial forced riders. Where they cannot elude ideological dues payments, they subsidize the preferences of others; and over provision of union-sponsored ideological goods are likely to occur, as the putative beneficiaries do not pay the full costs of such goods.

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perceived advantages she secures from her employment despite the union dues, and lastly, the amount of dues demanded.

211. Recall, beneath the rhetoric of protection against free riding, see *Beck*, 487 U.S. at 748–49, that the Supreme Court *assumes* uncritically that she would be a free rider with respect to core/economic goals. *See id.* The Court accepts that in the absence of a compulsory contribution scheme—i.e., a union security agreement—all workers could reap the benefits of unionization without in any way contributing financial support to the union. Her ability to free ride depends on whether the union provides her with actual economic benefits greater than the cost of such benefits. Economic data suggest that unions provide some economic benefits to average union workers who earn a wage premium versus nonunion workers. *See* REYNOLDS, *supra* note 194, at 73 (citing studies suggesting that union wages range from sixteen to thirty percentage points above the wages of similarly skilled nonunion workers); *see also* RICHARD K. VEDDAR & LOWELL E. GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA 258 (1993). However, it must be conceded that the union will not necessarily improve the wages and benefits of *all* members. Thus, if one assumes that she has special abilities and operates within a tight labor market, the presumed economic benefits of the union will not necessarily accrue to her. Further, given the existence of intra-group conflict, the union will inevitably favor one individual at the expense of another especially in the contest for promotions. It is doubtful that the loser in such a contest will concede that the union acted in her interest. *See, e.g.*, Benson v. Communications Workers of Am., 866 F. Supp. 910, 914–15 (E.D. Va. 1994) (discussing junior employee's claim against union and employer alleging that union breached its duty of fair representation with regard to its opposition to his promotion); *see also* Petro, *supra* note 168, at 511 (describing how unions successfully negotiate for higher pay resulting in less demand for nonunion workers thus undermining the argument that all workers benefit equally from the union).

5. Subgroup S—Postmodern Forced Riders—[212]The above analysis of Individual C applies equally to Subgroup S. Members of Subgroup S would be both core and noncore forced riders as the benefits of independence from union dues clearly exceeds the benefits of cooperation. If they wish to exercise their right to object to nonpecuniary expenditures, they must suppress their democratic rights. Additionally, postmodern scholars have expressed concern for members of marginalized groups.[213] If Subgroup S is a marginalized ethnic or gender category concerned about all category constituents, whether union members or not, then in order to express their displeasure with the noncore goals of the union they must become even more marginalized by losing union governance rights, thus further reducing their already minimal influence. Second, to the extent that there is an absence of congruence between the union and members of Subgroup S with respect to both core and noncore goals, a form of reverse income redistribution arguably occurs. If members of Subgroup S continue to pay full dues, they subsidize the preferences of others. Because Subgroup S is probably already economically marginalized, the coerced transfer of funds to achieve the collective goals of the union's leadership or majority constitutes a regressive transfer payment.[214] It can be argued that all forms of income redistribution are objectionable,[215] and it is especially difficult to find any principled support for transfers that diminish the income of the economically disadvantaged in favor of those who are better off.[216] Thus, the transfer of

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212. This identifiable postmodern subgroup could be, for instance, a predominately affective-oriented group containing individuals whose self-worth is enhanced or diminished by what happens to the group. *See* Dixon, *supra* note 65, at 178–79. Under this conception, the self-worth of the group is diminished or enhanced by what happens to individual members of this group. *See* Petro, *supra* note 168, at 511.

213. *See* Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 803 (1994); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2207 (1992); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 686 (1992).

214. This can be imagined by assuming that a group of African-American workers are required against their will to pay dues in support of advocacy for the minimum wage, which would reduce the average income of African-Americans by increasing disproportionately the level of African-American unemployment. *See* ARMEN A. ALCIAN & WILLIAM R. ALLEN, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION AND CONTROL 335 (3d ed. 1983) (stating that the groups most vulnerable to the adverse effects of minimum wages include teenagers, blacks, women, and the aged); Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 43, at 108–34.

215. *See generally* BERTRAND DE JOUVENEL, THE ETHICS OF REDISTRIBUTION (1952).

216. First, most economic rents generated in the United States accrue to labor. *See* Harry G. Hutchison, *Distributional Consequences, Policy Implications of Voluntary Export Restraints on Textiles and Apparel, Steel, and Automobiles*, 38 WAYNE L. REV. 1757, 1769 n.4 (1992) (citing Lawrence F. Katz & Lawrence H. Summers, *Industry Rents: Evidence and Implications*,

income from the members of Subgroup S to benefit members of the non-marginalized majority is unjustified. Nor are the members of the majority the only beneficiaries of such regressive transfers; if the collective good in question is nonexcludable, then to the extent the beneficiaries of this transfer are relatively better-off than members of Subgroup S, the dues payments which facilitated the provision of the good are a regressive transfer.

Consistent with public choice theory, members of the *majority* also underpay for the benefits of unionization. If members of Subgroup S decline to resign from the union because they lack sufficient information concerning their *Beck* rights, for instance, then the majority is potentially subsidized with regard to both core and noncore union expenditure. Moreover, if the members of Subgroup S resign but are nonetheless forced to pay core dues, the majority will be subsidized with regard to core dues.[217] Underpayment of dues by members of the majority constitutes a form of free or partial free riding, while dues overpayments by members of Subgroup S constitutes a form of forced riding given the cooperation-independence calculus.[218] This possibility was overlooked by the Supreme Court.

Lastly, it is likely that unions will inflate the amount of dues required to support core "benefits" or otherwise act to obstruct the exercise of *Beck* rights.[219] The Supreme Court has not provided

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in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 209, 209–10 (1989)) [hereinafter Hutchison, *Distributional Consequences*]. Second, labor unions as a whole seem to do well at the expense of minorities. *See* REYNOLDS, *supra* note 194, at 29; *see also* THOMAS SOWELL, MARKETS AND MINORITIES 110 (1981) (noting that government-supported unions were used to limit black employment); Hutchison, *Through the* Pruneyard *Coherently*, *supra* note 35, at 35–36 (noting that unions redistribute income to their well-paid white members at the expense of groups with lower incomes).

217. Additionally, members of the majority/leadership gain some hypothetical value associated with their freedom from being held accountable to, or being associated with, members of Subgroup S, since the subgroup most probably forfeits its governance rights.

218. In fact, such forced riding may be a form of rent-seeking.

219. In Abrams v. Communications Workers of America, 23 F. Supp. 2d 47, 51–54 (D.D.C. 1998), the court agreed that the Communications Workers union had overstated its core expenses, which accordingly understates noncore expenses to the detriment of dissenting dues payers. In addition, unions commonly fail to report so-called "in-kind" expenditures despite statutory requirements that they must file financial reports with the Federal Election Commission. *Influencing Elections: Political Activity of Labor Unions: Hearing Before the House Comm. on Ways and Means: Subcomm. on Oversight*, 104th Cong. (1996) (statement of Leo Troy, Professor of Economics, Rutgers Univ.), *available at* http://www.claremont.org/campfin/leotroy.cfm (on file with the *University of Michigan Journal of Law Reform*). Such "in-kind" expenditure can exceed direct financial expenditures. *See id.* To the extent that Professor Troy's statement is true, and to the extent that the proper allocation of dues into core and noncore categories is unreported or underreported, this leads inevitably to an overstatement of core dues. For a discussion of the proper allocation of funds between core and noncore expense, see Hartley, *supra* note 8, at 29–35.

careful guidance in delineating which union activities should be chargeable to dues objectors.[220] Possible overstatements grounded in "computational problems" understate both the level of free riding by union supporters and the amount of forced riding incurred by dissenters. Free rider analysis by the Court and Congress fails to account for the possibility.

E. Refining the Free Rider Model

If computational and allocational problems associated with reliably defining core and noncore dues can be resolved, the amounts of free riding and forced riding that accrue to dues objectors can be analyzed as follows:

Comprehensive Free Riding = KFR = f(EB + NCPB)–f (EC + NCC).

Where KFR = Comprehensive Free Riding;

EB = f(economic benefits);

NCPB = f(noncore/nonpecuniary benefits);

EC = economic costs = f(core dues payment);[221]

NCC = noncore costs = f(provision of noncore dues payment by dues objectors + other nonpecuniary cost[222] [e.g. the disutility of losing the right to participate in union governance as well as the disutility of barriers to exit]).

Put differently, a comprehensive Free Rider = KFR = f (EFR + NCFR)

Where an Economic Free Rider = f(EFR) = f(EB - EC).

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220. *See* Hartley, *supra* note 8, at 9. Further, a review of Supreme Court cases demonstrates that the proper allocation between lawful, chargeable dues activities is articulated at such a high degree of abstraction, it is doubtful that it can serve as a meaningful guide to deciding future case. *See id.*

221. Notably core dues payment under this conception may or may not be equal to the amount referred to as germane to collective bargaining. The "germane to collective bargaining" test was repeatedly emphasized in *Beck* and has been applied in RLA contexts. *See* Hartley, *supra* note 8, at 10.

222. If the individual is a member of a predominantly affective-oriented grouping and also a union member/dues payer, then consistent with the perspective that what diminishes the ethnic group, for example, diminishes the individual, her noncore costs should reflect the disutility of being diminished by virtue of the loss in her welfare attributable to the reduction in the welfare of her kin. *See* Dixon, *supra* note 65, at 178–79. Conceptually, nonpecuniary costs are analogous to what economists call "shadow prices." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 (1998).

A Noncore Free Rider = f(NCFR) = f(NCPB -NCC).

If EC [economic costs] exceeds EB [ECONOMIC BENEFITS], then EFR [economic free rider calculus] is negative and,

If NCC [noncore cost] exceeds NCPB [noncore/nonpecuniary benefits], then NCFR [noncore free rider calculus] is negative.

Thus, the *comprehensive* free rider calculus should look like this: KFR = f(EFR + NCFR) with a full understanding that both EFR and NCFR could be negative. This raises the distinct possibility that KFR can be a negative. Where KFR is negative, comprehensive free riding is *absent* and comprehensive forced riding is *present.* This implies that the benefits or payoff to independence exceeds the benefits of cooperation.

Where for example, a union champions such nonexcludable goals as the decriminalization of marijuana or contests "three-strikes you're out" legislation, union dues can be impressed to serve this objective.[223] Depending on the amount of noncore dues payments required to fund this goal and other associated costs, a dues payer who dissents largely because of such noncore concerns is not a comprehensive free rider, despite the presumptions of Congress and the Court. Mathematically, this can be described by assuming that NCFR (noncore free rider calculus) is negative therefore raising the possibility that KFR (comprehensive free rider calculus) is also negative in that case—thus demonstrating that the objecting dues payer is a forced rider.

Additional examples also exist. For instance, where a union seeks to restrict imports from abroad (in an attempt to increase demand for American products and labor)[224] marginalized members of a predominately affective-oriented grouping[225] of the union can justifiably spurn the group goal. This is because the union goal causes nonexcludable *external* costs (e.g. reduced employment for the identifiable members of the subgroup who are non-union

223. One observer notes that organized labor in California used union dues to oppose the "three strikes you're out" initiative and to support the legalization of marijuana use. *See* Press Release, Project 21, *supra* note 104. In each instance, the union position was very unpopular with the black community. *Id.* Despite the unpopularity of these goals within the community, black union members through their dues were compelled to financially support these stands. *Id.*

224. JOSEPH E. STIGLITZ, PRINCIPLES OF MICROECONOMICS 459 (2d ed. 1997).

225. The intensity of the level and predominance of affective-orientation may increase "when differences of culture, ethnicity, or race coincide with class differences—when the members of minority groups are also economically subordinated." MICHAEL WALZER, ON TOLERATION 56 (1997).

members), coupled with elevated internal costs (the disutility derived from the concern for the welfare of non-union members of the economically subordinated ethnic group) that accrue directly to minority members of the union. So the net utility or benefit of this specific collective goal is negative because the benefits of independence exceed the benefits of cooperation. Funding this collective goal through mandatory union dues demands that minority group members with an interest in the lives of their kin submerge their identity, incur affective-oriented costs, and redistribute their income in support of a policy that is detrimental to their interests.[226]

Analogously, by the latter part of this century most protective labor legislation, which applied only to women, restricted the ability of women to compete in the labor market both in Europe and the United States.[227] Much of the legislation was enacted by a coalition which included labor leaders and others.[228] Opposition came from, among others, suffragists and women's rights advocates.[229] Should a postmodern feminist union member who opposes current proposed protective labor legislation because of its adverse economic and sociological effects on those of her own gender be obligated to pay dues in support of this goal merely because the union leadership promotes such laws? Unless the union recognizes and defers to her goals and identity, and acts in *her* interest, she cannot plausibly be seen as noncore free rider. On the contrary, she is a forced rider since her interests and the interests of those for whom she is concerned are subordinated to the "greater good."

In all these instances, overprovision of the collective good as well as forced riding is possible. The beneficiaries of marijuana decriminalization or import restraints include individuals who are not members and do not pay dues to fund these objectives. Accordingly, resources are transferred from dissenters to union leaders and their objectives, which they use to benefit individuals and groups who fail to bear the full cost of attaining these goals.

It is possible that even the majority fails to share the noncore goals of the union leadership and yet finds the cost of removing an

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226. For a discussion of the regressive effects of import restraints on the distribution of income, and their negative effects generally, see Hutchison, *Distributional Consequences*, *supra*, note 216, at 1785–91.

227. *See* Pamela J. Nickless & James D. Whitney, *Protective Labor Legislation and Women's Employment*, *in* INTRODUCING RACE AND GENDER INTO ECONOMICS 31, 31 (Robin L. Bartlett ed., 1997).

228. *Id.* at 32.

229. *See id.* at 31.

offensive leader greater than the disutility of forced riding. This is especially true where union corruption[230] abounds and union democracy flounders.[231] Thus the leadership may remain entrenched and union democracy may remain a faint hope, despite the refusal of the leadership to share the public/collective goals of the majority.[232] This illustration demonstrates the plausibility of Dennis Mueller's claim that: "Where the benefits from collective action are not the same across all group members, '*there is a systematic tendency for "exploitation" of the great by the small.*'"[233] In sum, while the "commonality of the goals of an interest group's members makes the achievement of these goals a public good for the group, and thus gives rise to the same incentives to free-ride as exist in all public good . . . situations,"[234] it is equally true that the lack of commonality of goals among an interest group's members produces the identical incentive on the part of the union leadership to free ride as well. Thus, the Taft-Hartley Act's circumscribed conception of the free rider and the Supreme Court's affirmation of that conception intensify the possibility that *union leaders and a minority of union members allied with them* free ride, while a *majority* of union members persist as forced riders. To the extent this is true, the assertion that all union goals necessitate fully allocated dues payment from all members is fundamentally flawed. This description also underscores the emerging impression that union members and workers as a whole refuse to accept the proposition that conventional unions are the best vehicles for fostering their interest.

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230. *See* Macey, *supra* note 70, at 386; *see also* Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 368 (noting that even staunch union supporters blanche over the autocracy, entrenchment, and corruption of some union leaders).

231. *See e.g.*, Macey, *supra* note 70, at 386; Schwab, *supra* note 230, at 367. *See generally* Hadley et al., *supra* note 197.

232. The calculus of removing entrenched union leadership will likely include the disutility of insults, physical threats to safety, and other forms of intimidation. *See* Knollenberg, *supra* note 54, at 364–65; *supra* notes 102, 108 and accompanying text.

233. MUELLER, *supra* note 1, at 309 (quoting MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 29 (1965)). If this argument is persuasive, the *real* free riders are simply union leaders.

234. *Id.* at 308; *see also* Petro, *supra* note 168, at 511–13 (arguing that union free riders are actually forced riders).

F. Deficiencies in the Supreme Court's and Congress's Free Rider Analysis

The Supreme Court's and Congress's free rider analysis is defective in several respects. First, it assumes, contrary to public choice theory and the postmodern project that all workers benefit *equally* from *core* collective bargaining activities.[235] This assumption appears to be grounded in the dominant, yet not fully proved, hypothesis that unions provide economic benefits to *all* members.[236] Second, it fails to take into account the possibility that non-objectors may free ride at the expense of both ideological and core dues objectors. In other words, those with a cooperation deficit subsidize those with a high cooperation surplus as the payoff to independent action by objectors exceeds the value of cooperation. Legally permissible compulsory dues payment suggests government endorsement of an involuntary union enforcement mechanism[237] that punishes non-free riders for assumed free-riding behavior.[238] Third, even though intimidating exit barriers exist,[239] and even though union corruption and autocracy persevere,[240] the Court fails to suggest a solution to the fact that at least some union members (those who do not formally object and resign from the union) lack a commonality of interest with other union members and union officials.

The aggregate consequence of each of these inadequacies is the suppression of the varied diversity of viewpoints that exist in a pluralistic society. Given the social and bureaucratic power harnessed

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235. Communications Workers of Am. v. Beck, 487 U.S. 735, 748–49 (1988) (accepting that in the absence of a compulsory contribution scheme, all workers could reap the benefits of unionization without in any way contributing financial support to the union).

236. *See supra* note 194 and accompanying text.

237. One reason why cooperation continues in spite of incentives to defect and free ride is that organizations create mechanisms to seek out and discipline or punish defectors. Such mechanisms can include criticism, ostracism, and perhaps intimidation. The objective of such enforcement is to increase the cooperation-defection differential—that is to increase the shared benefits of cooperation by increasing the cost of defection and accordingly reducing the attractiveness of independent action. *See* Posner, *supra* note 10, at 139–42.

238. In other words, those individuals and subgroups whose group cooperation surplus is negative because the benefits of independence exceed the benefits of cooperation may be required to pay some dues. While such enforcement methods may plausibly increase asserted group "solidarity," such unity cannot be seen as "real" cooperation. Enforcement mechanisms which can be seen as voluntary yet enforce group cooperation norms and reduce the benefits of independence are seen as essential in ensuring group solidarity. *See id.*

239. *See supra* notes 107–08 and accompanying text.

240. *See* Schwab, *supra* note 230, at 368.

to entrenched leadership within the union movement,[241] and in light of the lack of commonality of interest, the Supreme Court and Congress's free rider analysis inescapably reifies hierarchy and subordination.[242]

Although the Supreme Court and Congress assume that private sector labor unions organize to pursue one objective (the improved economic bargaining power of workers), once the large initial costs of organization have been overcome, unions have the power and tendency to engage in additional activities which *may* be of interest to their members and which *may* plausibly improve the position of workers or the welfare of society generally.[243] Assertedly, in "every case the driving force behind the formation of an interest group is the belief that its members have *common* interests and goals."[244] And yet, that assumption, as the hypothetical model and accompanying illustrations have demonstrated, is inconsistent with basic public choice and postmodern analysis.

CONCLUSION

Building on the twin presumptions of free riding and solidarity, union advocates and unions have increasingly sought a sweeping interpretation of the social and political meaning of union dues. These twin misconceptions have buttressed assertions that labor unions have not only the power and right to speak for all workers as part of a class-based war for social justice, but have also served as grounds for contending that unions and the labor movement have the right to demand that union dues be impressed into the service of nonmembers and hegemonic ideologies. While union members

241. *See* Hadley et al., *supra* note 197, at 417–21. Union leaders in bureaucratized unions are often able to retain office without being responsive to the members. *See id.* at 421. Additionally, unions can be conceived of as mini-legislatures analogous to American democracy in that they operate under some form of "pluralism," whereby the policies chosen are the outcome of negotiations and competition among numerous political groups. *See, e.g.*, MASHAW, *supra* note 180, at 15–16. This is a rather benign view. On the other hand, as one observer points out, employees who take on the union establishment find the process marked by numerous forms of intimidation. *See* Knollenberg, *supra* note 54, at 364. Such intimidation, in my view, is inconsistent with a benign view of union "democracy."

242. Simultaneously, Congress and the Court fail to accord meaningful emphasis to the values of human autonomy and human dignity and freedom. For some employees the only escape from the Court's incomplete conception of the free rider—and the forced riding it implies—requires more than resignation from the union; it obliges them to abort the employment relationship altogether.

243. *See* MUELLER, *supra* note 1, at 308–09.

244. *Id.* at 308. Even celebrated law and economics scholars seem to uncritically accept this assumption. *See* POSNER, *supra* note 222, at 354.

have opposed the use of such monies for political and ideological purposes, their opposition has been largely scorned by those who see unions and themselves as part of a movement against social exclusion. Paradoxically, those workers who find the preferred collective goals antithetical to their identity discover that they and *their* interests are often excluded and ignored. As public choice theory, and a limited investigation of union corruption[245] and union bureaucracy imply, it is possible that even the majority of labor union members will find the goals of the leadership unappealing.

Despite this possibility, union expenditures for political purposes per union member in the United States continue to rise,[246] thus raising the Orwellian possibility that all workers and leaders are equal but some are more equal than others.[247] Resolving that issue is beyond the scope of this Article. Declarations of cooperation among workers who supposedly share meaningful attributes often defy coherence. Accordingly, much work needs to be done to cultivate a defensible statutory and interpretative conception of union dues, free riding, and forced riding.

Meanwhile, proponents of the labor union movement's impulse to attain the "universal good," premised upon a conception of homogenized preferences, must justify their vision against Thomas Jefferson's contention that "to compel a man to furnish contribution of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[248] Given the diversity of identities that are obtainable in a pluralistic society, it may be the task of the postmodern project to reclaim that conviction.

245. *See* Schwab, *supra* note 230, at 368.

246. *See* Knollenberg, *supra* note 54, at 350.

247. *See* MUELLER, *supra* note 1, at 307–19.

248. Knollenberg, *supra* note 54, at 373 (citing THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, at xvii (Merrill D. Peterson & Robert C. Vaughan eds., 1988)).