A DEVIL IN DISGUISE: HOW PAYCHECK PROTECTION LEGISLATION VIOLATES THE FIRST AMENDMENT

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I. INTRODUCTION

Since the 1994 Republican congressional sweep, national paycheck protection legislation has enjoyed continued attention.[1] Its

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[1] *See* H.R. 2434, 106th Cong. (1999); H.R. 1625, 105th Cong. (1997); H.R. 3580, 104th Cong. (1996). During the 2000 presidential campaign, President George W. Bush supported paycheck protection legislation. *See* BUSH-CHENEY 2000, CAMPAIGN FINANCE REFORM, *available at* http://www.georgewbush.com/issues/campaignfin.html (last visited Oct. 25, 2000). Outlining his principles for campaign finance reform, President Bush also signaled his continued support for paycheck protection in a letter to Senate Minority Leader Trent Lott. *See* Letter from President George W. Bush, President of the United States, to U.S. Sen. Trent Lott, U.S. Senate Minority Leader (Mar. 15, 2001), *available at*

purpose is to give union members, employed under union security agreements, the right to deny their unions the ability to use their individual union dues to finance political and/or social causes that the union may support. Proponents often cite Thomas Jefferson's line, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[2] Paycheck protection supporters also believe unions should be more open and democratic,[3] and argue that unions should not be allowed to contribute money to causes that are not supported by each individual member.[4]

Paycheck protection opponents view the legislation as a partisan assault on the Democratic Party and the union movement.[5] They maintain that similar legislation should apply to other politically active organizations, such as corporations, advocacy groups, and non-profit entities.[6] They dismiss the assumption that union members object to the way that their dues are spent,[7] and stress that safeguards are already in place to protect any member who disagrees with certain union expenditures.[8]

Although a great deal of distrust toward paycheck protection is found in the political arena, very little exists within the First Amendment context. At first glance, this legislation appears to be an illusively attractive way of expanding free speech values, while also curbing the behavior that Jefferson describes as being "sinful and tyrannical."[9] Surprisingly, however, the most recent paycheck protection bill[10] has implicated key First Amendment issues that affect

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http://www.whitehouse.gov/news/releases/2001/03/20010315-7.html (last visited Feb. 21, 2002).

[2] THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, at xvii (Merrill D. Peterson & Robert C. Vaughan, eds., 1988).

[3] *See* Eric Heubeck, *Paycheck Protection – A Primer*, Jan. 1999, *available at* http://www.capitalresearch.org/LaborWatch/lw-0199.html.

[4] *Id.*

[5] *See* PUBLIC CITIZEN, 'PAYCHECK PROTECTION' OR 'WORKER GAG RULE?,' *available at* http://www.citizen.org/congress/reform/paycheck.htm (last visited Feb. 15, 2001).

[6] *See id. See also* Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177 (2001).

[7] *Supra* note 5.

[8] *See id.*

[9] *See supra* note 2.

[10] *See* H.R. 2434, *supra* note 1. Because the 106th U.S. House of Representatives did not pass this bill, and currently no such proposal has been introduced during the 108th Congress, this article merely utilizes this bill as a model of the form that future federal

both unions and union members who operate under certain union security arrangements.

This article attempts to highlight the concerns presented by this bill—which potentially implicate the First Amendment's right of expressive association and freedom from compelled speech. Parts I and II will provide a backdrop to paycheck protection by describing key labor law statutes, outlining recent legislation, and illustrating how the courts have handled labor law in the First Amendment context. Part III will describe the proper standard of review courts should utilize when analyzing paycheck protection. Part IV will examine paycheck protection under a union's First Amendment right to expressive association. Lastly, Part V will study paycheck protection against a union member's First Amendment protection against compelled speech.

II. Labor Law & Paycheck Protection Legislation

Two federal statutes authorize union security agreements and the U.S. Supreme Court identically interprets the language of both.[11] Under the National Labor Relations Act ("NLRA"),[12] a union that obtains majority support of a group of workers becomes their exclusive bargaining representative.[13] The 1947 Taft-Hartley NLRA amendments[14] provide for union security contracts[15] and the Railway Labor Act ("RLA")[16] also authorizes unions to engage in union security agreements.[17]

Union security agreements involve either union-shop or agency-shop arrangements.[18] Under a union-shop agreement, an employee must

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paycheck protection legislation will likely take. Due to the Republican Party's current control of the White House, U.S. House, and U.S. Senate, the possibility that paycheck protection will re-surface is increasingly likely.

[11] *See* Communications Workers of Am. v. Beck, 487 U.S. 735, 745 (1988).

[12] 29 U.S.C. § 159-60 (1994).

[13] *See id.* at § 159(a). The elected union must also provide "fair representation" to non-union members. *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

[14] *See* 29 U.S.C. §§ 158(a)(3), 8(b)(2) (1998).

[15] *Id.*

[16] 45 U.S.C. §§ 151-152 (1994).

[17] *See id.*

[18] Congressional consent to union security agreements involved the elimination of "free riders." *See* Michael C. Kochkodin, Note, *Activism and the Law: The Intersection of the Labor and Civil Rights Movement*, 2 U. PA. J. LAB. & EMP. L. 807, 809 (2000). Free riders "are workers who derive the benefits of union membership, but do not pay for them." *See* Oil Workers v. Mobil Oil Corp., 426 U.S. 407, 416 (1976).

become a member of the union and pay uniformly required union member dues.[19] Under an agency-shop agreement, workers are not required to join the union or pay dues; however, unions can charge non-members certain fees for acting as their collective bargaining representative.[20]

A key debate involves the issue of whether unions should be able to use worker funds, paid under a union security contract, for non-collective bargaining purposes.[21] The "opt-in" philosophy assumes that workers do not want their dues applied to non-collective bargaining activities.[22] Unions oppose this notion because member apathy would likely limit union contributions toward political campaigns.[23] Alternatively, the "opt-out" viewpoint presupposes that workers consent to unions using their dues and fees for non-collective bargaining activities.[24] Because most workers are less likely to proactively oppose dues allocated for non-collective bargaining purposes, the "opt-out" strategy helps support union financial activity within the political arena.[25]

Recent congressional legislation highlighted the "opt-in/opt-out" controversy. The Worker Paycheck Fairness Act of 1999[26] supports the "opt-in" philosophy[27] and required unions, under union security arrangements, to receive voluntary written approval from each worker

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[19] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 219, n.10 (1977). *See also* National Labor Relations Bd. v. General Motors Corp., 373 U.S. 734, 742 (1963).

[20] *See* Chicago Teachers Union v. Hudson, 475 U.S. 292, 303, n.10 (1986). This paper only refers to the agency-shop context when discussing First Amendment rights under union security arrangements.

[21] Non-collective bargaining purposes often include political and other expenditures. *See* Eric J. Felsberg, *Creating a Beck Statute: Recent Congressional Attempts and A Proposal for the Future*, 15 HOFSTRA LAB. & EMP. L.J. 247 (1997).

[22] Kochkodin, Note, *supra* note 18, at 809-10. Professor Harry G. Hutchinson refers to this principle as the "Postmodern/Public Choice" view. *See* Harry. G. Hutchinson, *Reclaiming the Labor Movement Through Union Dues?*, 33 U. MICH. L. REV. 447 (2000). *See also* EUGENE VOLOKH, FIRST AMENDMENT: LAW, CASES, PROBLEMS, & POLICY ARGUMENTS, 454, 487 (2001).

[23] Kochkodin, Note, *supra* note 18, at 809-10.

[24] *Id.*

[25] *Id.*

[26] *See* H.R. 2434, *supra* note 1.

[27] The bill's text argues that "[i]t is a fundamental tenet of this Nation that all men and women have a right to make individual and informed choices about the political, social, and charitable causes they support, and the law should protect that right to the greatest extent possible." *Id.* at § 2.

before engaging in certain union activities.[28] The text states that any union "accepting payment of dues or fees from an employee . . . must secure from each employee prior, voluntary, written authorization for any portion of such dues or fees which will be used for activities not necessary to performing the duties of the exclusive representative of the employees . . ."[29] The bill compels unions to furnish notice to workers regarding the authorization requirement.[30] Pursuant to regulations delineated by the Secretary of Labor,[31] the legislation also requires unions to report all expenses so that workers could determine which expenses are necessary in dealing with employers on labor-management issues.[32]

III. Relevant Labor Case Law

In *Railway Employers' Department v. Hanson*,[33] the Court dealt with a non-union worker's claim that a union security agreement violated Nebraska's "right to work" law.[34] While the Nebraska Supreme Court stated that the union security agreement violated the worker's First Amendment right to freedom of association,[35] the United States Supreme Court maintained that the RLA constituted sufficient state action.[36] However, the Court largely ignored the First Amendment concern of unions using non-member funds to financially support political and social activities.[37] The eight-justice majority argued that the RLA's union security provision only required workers to pay fees and dues.[38] Absent evidence illustrating union-imposed ideological conformity,[39] any First Amendment infringement was justified to stabilize labor-management relations.[40]

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28 *See id.* at § 4(a)(1).
29 *Id.*
30 *See id.* at § 5.
31 *See* H.R. 2434, *supra* note 1 at § 8.
32 *See id.* at § 6(a).
33 351 U.S. 225 (1956).
34 *Id.* at 228.
35 *Id.* at 230.
36 *Id.* at 232.
37 *Id.* at 238.
38 *See* Ry. Employers' Dept. v. Hanson, 351 U.S. 225, 238 (1956).
39 *Id.*
40 *Id.* at 233-34.

In *International Ass'n of Machinists v. Street*,[41] the Court examined whether employees are compelled, under union security agreements, to support union expenditures for political causes.[42] Despite the fact that the RLA's union security provision sought to eliminate free riders in the context of union collective bargaining activity, the Court maintained that workers were allowed to withhold individual financial support for specific political causes that they personally opposed.[43] The unanimous majority suggested that imposing an injunction on all political expenditures would violate the union's First Amendment freedom of political expression.[44] Instead, the Court supported an "opt-out" philosophy.[45] The majority stated that objecting employees could be reimbursed or courts could impose an injunction on union political expenditures in proportion to the individual's specific objection and the union's total budget.[46]

Abood v. Detroit Board of Education[47] involved a First Amendment freedom of association challenge to union security agreements for government employees.[48] The Court recognized that union security contracts impact First Amendment rights,[49] but referred to *Hanson* and *Street* and held that governmental interests in protecting a union's collective bargaining activities justified the infringement.[50] The Court also acknowledged the existence of state action.[51] However, the majority disagreed that union security agreements are invalid simply

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[41] 367 U.S. 740 (1961). In Ry. Clerks v. Allen, 373 U.S. 113 (1963), the Court stated that dissenting workers could object to all union political spending. *Id.* at 118. Unions, not workers, carried the burden of calculating the reimbursement. *Id.* at 122.

[42] *Street*, 367 U.S. at 744-45.

[43] *Id.* at 764-69. In the context of attorneys and state bar associations, the Court upheld this principle in Keller v. State Bar, 496 U.S. 1 (1990). Similar to dissenting workers being forced to support only collective bargaining expenditures, attorneys are not required to finance objectionable political and ideological causes with mandatory dues. *Id.* at 13-14. However, for university students, the Court affirmed mandatory student fees if the university administered them in a viewpoint-neutral manner. *See* Board of Regents of the Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000).

[44] *See Street*, 367 U.S. at 773.

[45] "[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Id.* at 774.

[46] *Id.* at 775.

[47] 431 U.S. 209 (1977).

[48] *Id.* at 213, 223-24.

[49] *Id.* at 222.

[50] *Id.* at 222-23, 225.

[51] *Id.* at 226. "The differences between public and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232.

because union collective bargaining for public sector employees might be inherently political and refused to grant public employees tighter First Amendment protection.[52]

Although the Court upheld these agreements, the majority stated that the government did not have a legitimate interest in requiring workers to support non-collective bargaining activities.[53] The majority maintained that dissenting employees could now refuse to subsidize all union non-collective bargaining expenditures.[54] "To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure."[55]

In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, and Express and Station Employees*,[56] the Court nullified a union rebate program for dissenting workers.[57] The rebate program collected worker representation fees, used them for both collective and non-collective bargaining activities, and later proportionally refunded monies to dissenting employees.[58] Instead of directly addressing First Amendment concerns,[59] the Court focused on how the rebate program violated the RLA's union security provisions.[60]

The *Ellis* Court also proffered a test by which workers could challenge union expenditures. To charge workers, union expenditures must be "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[61] Under the test, unions could not charge dissenting workers for union organizing

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52 Abood v. Detroit Bd. of Ed., 431 U.S. 209, 227-29 (1977).

53 *Id.* at 234-37.

54 *Id.* at 241.

55 *Id.*

56 466 U.S. 435 (1986).

57 *Id.* at 443.

58 *Id.* at 440-41.

59 *Id.*

60 *Id.* at 445-48. In Chicago Teacher's Union v. Hudson, 475 U.S. 292 (1986), non-union members challenged union procedure for calculating which dues could be used for collective bargaining. *Id.* First Amendment concerns required the process to be narrowly tailored to minimize infringement. *Id.* at 303. The Court instructed unions to provide reasons for dues, allow workers a reasonable opportunity to object before an impartial decision-maker, and create an account for disputed fees under review. *Id.* at 305.

61 *Ellis*, 466 U.S. at 448.

activities geared toward another employer's workers, some forms of union litigation, and union reporting on political outreach.[62]

In *Beck v. Communications Workers of America*,[63] the Court dealt with the NLRA, union expenditures, and dissenting private sector non-union members.[64] Reconciling the two federal statutes, the majority applied its RLA union security analysis to the NLRA.[65] Thus, the Court held that the NLRA prohibits all private sector unions from forcing dissenting non-union members to "support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment."[66] Although the *Beck* Court largely avoided First Amendment issues, the decision rested on the notion that compelling dissenting workers to support all union activity violates their freedom of association.[67]

In *Lehnert v. Ferris Faculty Association*[68] the Court dealt with a Michigan law allowing unions to charge dissenting employees for union lobbying activity.[69] The *Lehnert* Court developed a three-part test for union activities that dissenting employees must financially support. First, chargeable union activities must be germane to collective bargaining activities, Second, the chargeable activity must be justified by government interests in labor stability and eliminating free riders.[70] Third, charging for the activity cannot increase the First Amendment burdens already endured under a union security arrangement.[71] Only four justices supported the test's application, and the Court maintained that union lobbying was neither germane to collective bargaining,[72] nor in furtherance of labor stability.[73] The Court further acknowledged that compelling employees to support union lobbying or political activities,

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62 *Id.* at 450-53.

63 487 U.S. 735 (1988).

64 *Id.* at 739.

65 *Id.* at 746, 752-53.

66 *Id.* at 745.

67 *See* Heidi Marie Werntz, *Waiver of Beck Rights and Resignation Rights: Infusing the Union-Member Relationship with Individualized Commitment*, 43 CATH. U.L. REV. 159, 199-200 (1993) (citing Jennifer Freisen, *The Costs of Free Speech – Restrictions on the Use of Union Dues to Fund New Organizing*, 15 HASTINGS CONST. L.Q. 603, 608 (1988)).

68 500 U.S. 507 (1991).

69 *Id.* at 513.

70 *Id.* at 519.

71 *Id.*

72 *Id.* at 520 (plurality).

73 Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521 (1991) (plurality).

outside contract ratification or implementation, too greatly infringed upon their First Amendment rights.[74]

The question of whether employees, paying for only collective bargaining activities, enjoy a First Amendment right to remain union members was answered in *Kidwell v. Transportation Communications International Union.*[75] The Fourth Circuit Court of Appeals stated that, under the U.S. Supreme Court's RLA jurisprudence, unions are not constitutionally required to include employees who refuse to support non-collective bargaining activities.[76] The court noted a union's First Amendment right to freedom of association,[77] and offered two alternatives. The first alternative allowed employees to pay dues, become members, and vote on internal union structure, agreement ratification, and non-collective bargaining expenditures.[78] Alternatively, workers could avoid union membership, pay collective bargaining fees, and vote on whether the union should be the collective bargaining representative.[79]

IV. Standard Of Review

The Court's First Amendment jurisprudence in the area of union security agreements is not only vague, but has also dealt solely with issues brought by dissenting employees.[80] When analyzing an objecting worker's First Amendment rights, the Court has largely refused to create a standard of review, but rather has given deference to the RLA and NLRA legislative intent.[81] However, unions and individual union

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[74] *Id.* at 522 (plurality).

[75] 946 F.2d 283 (4th Cir. 1991).

[76] *See id.* at 297. Because the *Beck* Court announced that the RLA and NLRA's union security agreement provisions are statutory equivalents, the Court would likely reach the same conclusion under an NRLA challenge. *See* Kochkodin, Note, *supra* note 18, at 821.

[77] *See* Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283, 301-02 (4th Cir. 1991).

[78] *Id.* at 297.

[79] *Id.*

[80] *See* Ry. Employers' Dept. v. Hanson, 351 U.S. 225, 238 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Ry. Clerks v. Allen, 373 U.S. 113 (1963); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Ellis v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, and Express and Station Employees, 466 U.S. 435, 448 (1986); Communications Workers of Am. v. Beck, 487 U.S. 735 (1988); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).

[81] *See* Aaron Greg, Note, *The Constitutionality of Requiring Annual Renewal of Union Fee Objections in an Agency Shop,* 78 TEX. L. REV. 1159, 1172-74 (2000); Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector*

members also deserve First Amendment protection under union security arrangements. Accordingly, the Court should adopt a consistent review procedure regarding paycheck protection.

Under recent paycheck protection legislation,[82] the government requires unions to obtain written authorization from every union member who works under a union-security agreement, before it can make any non-collective bargaining expenditure.[83] The government creates a civil cause of action for violations,[84] dictates the authorization procedure,[85] and requires unions to file expense reports with the government.[86]

Due to the existence of state action above and beyond the RLA and NRLA, [87] paycheck protection creates key First Amendment concerns between a union's freedom of association and an individual union member's compelled speech. For most First Amendment freedom of association and compelled speech cases, the Court requires the government to satisfy strict scrutiny.[88] To pass strict scrutiny, a statute must serve a compelling state interest and be narrowly tailored to achieve the compelling state interest.[89]

Under current law, unions have a right to use union member dues for non-collective bargaining purposes.[90] Unions employ a set of democratic procedures that allow union members to vote on which non-collective bargaining causes the union will support.[91] Mandating a union member's prior written authorization for every non-collective

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Cases, 41 HASTINGS L.J. 1, (1989). *See also Abood*, 431 U.S. at 260, n.14 (Powell, J., concurring) (arguing that when examining a dissenting employee's First Amendment concerns, the Court avoids strict scrutiny analysis and offers no explicit standard of review. Instead the Court favors the government's concern with labor tranquility).

[82] *See* H.R. 2434, *supra* note 1.

[83] *Id.* at § 4(a)(1).

[84] *Id.* § 4(a)(c).

[85] *Id.* at § 8.

[86] *Id.* at § 6(c).

[87] For the First Amendment to apply, the government must impose a speech restriction. In *Hanson*, the Court maintained that merely working under a federally sanctioned union security agreement triggered the First Amendment. *Hanson*, 351 U.S. at 232.

[88] *See* VOLOKH, *supra* note 22, at 454, 487.

[89] *See Hanson*, 351 U.S. at 235.

[90] *See* Labor and Management Reporting and Disclosure Act of 1959 (codified at 29 U.S.C. § 401-503 (1994)). *See also* Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283, 297 (4th Cir. 1991).

[91] *See id.*

bargaining expenditure[92] could intrusively burden a union's internal governance and force unions to disclose its members' political and non-political views to the government and others. This could deprive unions of their expressive function, and strict scrutiny analysis should apply.

Conversely, all union members should also maintain basic First Amendment protections against compelled speech.[93] Under paycheck protection, members are required to speak on non-collective bargaining expenditures to both the government and the union.[94] Forcing workers to approve or disapprove of certain union expenditures could violate freedom of conscience and compel content-based speech; it may also unconstitutionally impair silence and label a worker's speech. Consequently, strict scrutiny analysis should govern the compelled speech aspect of paycheck protection as well.

V. Unions, Expressive Association & Strict Scrutiny

For strict scrutiny to apply, paycheck protection legislation must burden a union's expressive association.[95] Under a number of cases, the U.S. Supreme Court has dealt with the issue of forced alteration of an organization's expressive function.[96] Yet, the Court has also maintained that expressive association is not absolute. Rather, a compelling governmental interest, which does not suppress ideas and is achieved through the least restrictive means, can supersede First Amendment protection.[97]

To qualify for First Amendment protection, "a group must engage in some form of expression, whether it be public or private."[98] First Amendment protection is not solely reserved for advocacy groups,[99] and

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[92] *See* H.R. 2434, *supra* note 1 at § 6(c), § 8.

[93] *See* McIntyre v. Ohio Election Comm'n, 514 U.S. 334 (1995); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988); Pacific Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[94] *See* H.R. 2434, *supra* note 1 at § 4(a)(1), § 6.

[95] For purposes of this article, freedom of expressive association will solely focus on unions.

[96] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995); New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[97] *See Roberts*, 468 U.S. at 623.

[98] *Dale*, 530 U.S. at 648.

[99] *Id.*

unions that engage in a number of expressive functions will also fall within its sweep.[100] For example, unions lobby for legislation, support political and social causes, assist political candidates, and encourage union organization for other employers' employees.[101] Given that many unions engage in expressive conduct outside the collective bargaining arena,[102] the Court should determine whether paycheck protection legislation unduly impairs those unions' ability to engage in non-collective expressive conduct.

A. Internal Structure

In *Roberts v. United States Jaycees*,[103] the Court maintained that altering a group's internal affairs and organization may unconstitutionally infringe upon a group's freedom of expressive association.[104] While First Amendment expressive association rights are not absolute,[105] the state must demonstrate a compelling interest before it can enact constitutional paycheck protection legislation.

The bill crafted by the 106th Congress was designed to ensure that all workers possess sufficient information about their rights to withhold or contribute support for every non-collective bargaining expenditure.[106] As union membership has declined in recent years,[107] union revenues have substantially increased.[108] Furthermore, because some have

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[100] *See* Raymond Holger & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Peace Act and Its Implications for Public Policy*, 70 U. COL. L. REV. 871, 914 (1999) (citing JOHN DELANEY & SUSAN SCHWOCHAU, EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS, 265 (Bruce Kaufman & Morris Kleiner, eds., 1993)).

[101] *See* Communications Workers of Am. v. Beck, 487 U.S. 735, 745 (1988). *See also* Rep. Joe Knollenberg, *The Changing of the Guard: Republicans Take On Labor and the Use of Mandatory Dues or Fees for Political Causes*, 35 HARV. J. ON LEGIS. 347 (1998) (describing non-collective bargaining union activity).

[102] "A union appears to be an archetype of an expressive association." Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283, 301 (4th Cir. 1991).

[103] 468 U.S. 609 (1984).

[104] *See Roberts*, 468 U.S. at 623 (citing Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975)).

[105] *See id.*

[106] *See* H.R. 2434, *supra* note 1 at § 3.

[107] *See* Knollenberg, *supra* note 101, at 357 (citing Gail McCallion, *Union Membership Statistics*, CONG. RESEARCH SERVICE, 97-701E, July 10, 1997, at 2) (describing that from 1945-1996, union membership has declined from over 35% to just under 15%).

[108] *See id.* (citing KENNETH WEINSTEIN & THOMAS WIELGUS, HOW UNIONS DENY WORKERS' RIGHTS, at 4-5 (The Heritage Foundation Backgrounder No. 1087, 1996)). (Worker dues and fees annually range from $700-$2000, while non-collective bargaining

assessed union member political affiliation at 30% Republican and 10% Independent,[109] predominate union support for Democratic Party causes and candidates may not accurately reflect the conscience of union members.[110] Consistent with the "opt-in" philosophy,[111] the government may have a compelling interest in ensuring that non-collective bargaining expenditures echo the actual beliefs of union members.[112]

In *Cousins v. Wigoda*[113] and *Democratic Party of United States v. Wisconsin*,[114] the Court maintained that the state lacked a compelling interest in regulating how political parties select delegates to nominate presidential candidates.[115] The same principle should apply to unions for paycheck protection. Although the state may have a compelling interest in ensuring that actual union members have an opportunity to reject support for non-collective bargaining expenditures, it does not justify additional government interference with internal union procedure.

Similar to the emphasis on suffrage in *Wigoda* and *Democratic Party*,[116] all workers employed under union security agreements vote on whether a union represents their collective bargaining interests. Although union security arrangements mandate paying certain union fees,[117] all workers enjoy the right to financially support only activities sanctioned under *Lehnert's* three-part test.[118] Only those workers that voluntarily join as full union members can vote on union leadership and how the union engages in non-collective bargaining activity.[119] Just as the state did not have a compelling interest in dictating a political

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union expenditures now annually vary from $200-$1000 per worker).

[109] *See id.* at 360 (citing 104 CONG. REC. H1749 (daily ed. 1998) (statement of Rep. Randy Cunningham)).

[110] *See id.* (illustrating nearly universal union support for Democratic Party causes and candidates during the 1996 election).

[111] *See* Kochkodin, Note, *supra* note 18, at 809-10.

[112] *But see* Hartley, *supra* note 81, at n.12 (arguing that union independence from state regulation ensures full union democracy, avoids government regulation of wages, empowers individuals to unionize against powerful social and economic institutions, and reinforces accepted principles surrounding the majoritarian common good).

[113] Cousins v. Wigoda, 419 U.S. 477 (1975).

[114] Democratic Party of United States v. Wisconsin, 450 U.S. 107 (1981).

[115] *Wigoda*, 419 U.S. at 490-91; *Democratic Party*, 450 U.S. at 125-26.

[116] *Wigoda* 419 U.S. at 489; *Democratic Party*, 450 U.S. at 125.

[117] *See* 29 U.S.C. §§ 159-60 (1994); 45 U.S.C. § 151, 152 (1994).

[118] *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991).

[119] *See* 29 U.S.C. §§ 401-503; Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283 (4th Cir. 1991).

party's internal affairs under *Wigoda* and *Democratic Party*,[120] paycheck protection's mandate that unions receive every union member's prior written authorization for every non-collective bargaining expenditure[121] excessively alters a union's internal structure. The requirement overlooks democratic union procedure and does not serve a compelling state interest worthy of burdening a union's First Amendment right to expressive association.

Paycheck protection legislation not only lacks a compelling state interest that can justify infringing on unions' First Amendment right to expressive association, it is also not the least restrictive means by which any alleged compelling state interest could be served. The Court in *Street* acknowledged that all workers already enjoy the right to oppose non-collective bargaining expenditures.[122] Unions also currently employ democratic procedures by which union members can voice their dissent.[123] Forcing unions to obtain a union member's authorization for every non-collective bargaining expenditure would merely create "free rider situation[s] by permitting union members to avoid paying a fair share of political activity expenses incurred by an organization which they had voluntarily joined."[124] Under paycheck protection, a union member could refuse to support the union's non-collective bargaining activities and still enjoy the benefits they ultimately provide.[125] Far from narrowly tailored, paycheck protection does nothing more than recreate the various free-rider concerns the Court has actively worked to resolve.

B. Ultimate Disclosure of Dissent and Assent

Requiring unions to receive every member's written authorization before any non-collective bargaining expenditure can be made would

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120 *See Wigoda*, 419 U.S. at 490-91; *Democratic Party*, 450 U.S. at 125-26.

121 *See* H.R. 2434, *supra* note 1 at § 4(a)(1).

122 *Street*, 367 U.S. at 764-69.

123 *See* 29 U.S.C. § 401-503; *Kidwell*, 946 F.2d at 297.

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

125 This very issue prompted the Court's decisions regarding union-security agreements and dissenting employees and eventually created the right to only object to non-collective bargaining expenditures. *See* Ry. Employers' Dept. v. Hanson, 351 U.S. 225, 238 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Ry. Clerks v. Allen, 373 U.S. 113 (1963); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Ellis v. Bhd. of Ry., Airline and Steamship Clerks, Freight Handlers, and Express and Station Employees, 466 U.S. 435, 448 (1986); Communications Workers of Am. v. Beck, 487 U.S. 735 (1988); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).

suppress their right to expressive association. Because paycheck protection requires that unions disclose the results[126] and authorizes a civil cause of action for violations,[127] in an effort to avoid litigation threats under campaign finance law,[128] unions will likely be forced to release results in its detailed contribution and expense reports.[129] Moreover, the bill does not expressly prohibit the government, workers, or other groups from reviewing the authorization results.[130]

In *Buckley v. Valeo*,[131] the Court upheld the disclosure of political contributions and expenditures regardless of First Amendment expressive association infringement.[132] The *Buckley* Court maintained that disclosure requirements passed strict scrutiny because the requirements satisfied a compelling government interest.[133] The Court stated that disclosure provided evaluative information to the voting public, deterred corruption, and facilitated data collection in order to uncover violations.[134]

Through paycheck protection's authorization requirement and disclosure implications,[135] the state could have a compelling interest in eliminating union political corruption and providing information to union members. A poll conducted in 1996 revealed that over 84% of all union members supported increased union disclosure regarding its political expenditures.[136] In addition, congressional hearings have

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126 "In every case . . . where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation." Schneider v. New Jersey, 308 U.S. 147, 151 (1939).

127 See H.R. 2434, *supra* note 1 at § 4(c).

128 *See* Federal Election Campaign Act Amendments of 1974 (codified as amended at 2 U.S.C. § 431-441 (1994)) (The Act requires disclosure of contributions and expenditures for political candidates, political action committees, and political parties). The U.S. Supreme Court upheld these disclosure requirements in *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). After years of work by U.S. Senators Russell Feingold (WI) and John McCain (AZ), on Mar. 27, 2002 President George W. Bush signed the "Bipartisan Campaign Reform Act of 2002," which strengthens disclosure requirements and prohibits unions from making "soft-money" contributions to political parties for federal election purposes. The law takes effect Nov. 6, 2002. *See generally* H.R. 2356, 107th Cong. (2002).

129 *See* H.R. 2434, *supra* note 1 at § 6.

130 *See generally* H.R. 2434, *supra* note 1.

131 424 U.S. 1 (1976).

132 *Id.* at 64-68.

133 *Id.* at 66.

134 *Id.* at 66-68.

135 *See* H.R. 2434, *supra* note 1 at § 4(a)(1).

136 *See* Knollenberg, *supra* note 101, at 368 (citing Memorandum from Frank Lutz, The Luntz Research Companies, *To Americans for a Balanced Budget Amendment*, at 5 (Apr.

yielded information that some union members endure threats, intimidation, and coercion when deciding whether to withhold support for their union's non-collective bargaining expenditures.[137]

Regardless, despite the fact that some states may possess a compelling interest regarding union political activity, the bill requires a union member's written authorization for nearly all non-collective bargaining expenditures.[138] The union mandate refers to written authorization for "political, social, and charitable causes."[139] In a number of cases unrelated to political activity, the Court has upheld an organization's First Amendment expressive association rights over compelled membership catalogue and disclosure.[140]

In *Gibson*, the Court prohibited the government from forcing the NAACP to disclose and catalogue its membership regarding alleged communist infiltration.[141] The Court explained that while the state possessed a compelling government interest in uncovering communist influence in communist organizations,[142] the same interest did not apply to all organizations.[143] In its holding, the majority stated that expressive association rights triumphed ". . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial."[144]

The same analogy should be kept in mind when analyzing whether requiring unions to obtain, and ultimately disclose, every member's written authorization for all non-collective bargaining expenditures violates the First Amendment. Under *Buckley*,[145] the state may have a

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29, 1996)).

[137] *Id.* at 365 (citing *Worker Paycheck Fairness Act: Hearings on H.R. 1625 Before the House Comm. On Educ. and the Workforce*, 105th Cong. (1997) (statement of Charles Barth)).

[138] *See* H.R. 2434, *supra* note 1 at § 3.

[139] *Id.*

[140] *See* Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[141] *Gibson*, 372 U.S. at 558.

[142] *See* Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

[143] *Gibson*, 372 U.S. at 549.

[144] *Id.* at 556-57.

[145] *See* Buckley v. Valeo, 424 U.S. 1, 66-68 (1976).

compelling interest in limiting union political corruption by requiring prior written authorization and disclosure. However, the *Gibson* Court stated that although the government may have a compelling interest that requires membership disclosure from some groups,[146] the state did not hold the same interest in forcing disclosure for all organizations.[147] Similarly, with paycheck protection, the government may possess a restricted compelling state interest regarding authorization and disclosure for union political expenditures. However, the legislation lacks a sufficient compelling interest regarding authorization and disclosure for all non-collective bargaining expenditures. Like *Gibson*, state action under paycheck protection fails strict scrutiny and violates a union's First Amendment right to expressive association.

Even if courts find, using *Buckley*,[148] that paycheck protection serves a compelling state interest in targeting political union speech, the legislation is over-inclusive. To meet strict scrutiny's narrow tailoring requirement, a law cannot restrict a significant amount of speech that fails to implicate the compelling government interest.[149] Courts tend to review over-inclusiveness in terms of whether it is possible to immediately determine if the restriction excessively burdens speech unrelated to the compelling interest. If this analysis proves inconclusive, and it is possible that the restrictions could serve the interest, the law is not over-inclusive.[150]

It is not impossible to conclude that paycheck protection legislation significantly burdens speech unrelated to a compelling state interest in regulating union political speech. Under current campaign finance law, unions are required to report and disclose various contributions and expenses.[151] Therefore, the government already knows which union speech is political and which is not. However, paycheck protection does not solely target a union's political speech; it

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[146] *See* Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

[147] *Gibson*, 372 U.S. at 549.

[148] *Buckley*, 424 U.S. at 66-68.

[149] *See* VOLOKH, *supra* note 22, at 238.

[150] *Id.* However, in Schneider v. New Jersey, 308 U.S. 147, 162-63 (1939) the Court struck down a law as over-inclusive because it was impossible to determine if a ban on all leaf-letting actually served a compelling state interest in maintaining clean streets. The Court maintained that there was no way to tell which leaflets would be littered and which ones would not.

[151] *Buckley*, 424 U.S. at 12-59.

refers to all non-collective bargaining expenditures.[152] If operating under the guise of eliminating union political corruption, paycheck protection's restriction regarding all non-collective bargaining expenditures is over-inclusive and violates a union's First Amendment rights.

VI. Union Members, Compelled Speech & Strict Scrutiny

While it may be important to examine a union's First Amendment expressive association rights, paycheck protection litigation could also impair the rights of individual union members.[153] When the government compels an individual's content-based speech, courts apply strict scrutiny.[154] Under paycheck protection, the government requires union members to authorize all union non-collective bargaining expenditures.[155] In the process, union members could be forced either to affirm or deny support for every political, social, or charitable cause the union proposes. Union members may also be compelled to speak regarding how the union conducts its internal affairs. Consequently, courts should determine whether paycheck protection compels union members to engage in content-based speech.

A. Individual Freedom of Conscience

Under strict scrutiny, the state must have a compelling interest in forcing union members to authorize their union's non-collective bargaining expenditures. The legislation might induce union members to focus more attention on the candidates that unions want to support, cast informed votes on election day, and improve overall voter turnout.[156] With paycheck protection, the state could also maintain a compelling interest in facilitating a union member's individual freedom. Financially supporting causes is often considered an endorsement and the current system, which does not allow union members to affirm or deny every non-collective bargaining expenditure, could violate an

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[152] *See* H.R. 2434, *supra* note 1 at § 3.

[153] "The collective voice of the association is, to be sure, not the same as the speech of the individual." Victor Brundy, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL OF RTS. J. 1, at 11 (1995).

[154] *See* VOLOKH, *supra* note 22, at 454.

[155] *See* H.R. 2434, *supra* note 1 at § 4(a)(1).

[156] *See* Weiler, *supra* note 6, at 180.

individual's First Amendment right to free speech.[157] As the U.S. Supreme Court stated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[158] "a speaker has the autonomy to choose the content of his own message."[159]

While union members deserve to control their individual messages, they enjoy that right in the democratic context of voluntary union membership.[160] Full union members can decide how to vote on union leadership and which non-collective bargaining expenditures to support.[161] A more appropriate First Amendment concern involves how paycheck protection compels union members to speak. In a number of cases, the Court has argued against a compelling interest in forcing content-based speech.[162]

In *Riley v. National Federation of the Blind*,[163] the Court struck down a state statute that limited the fees that fundraisers could charge charities, required fundraisers to disclose prior collections to potential donors, and forced them to obtain a license.[164] The Court rejected the state's compelling interest in safeguarding charities against unfair contractual engagements.[165] The *Riley* majority maintained that "[t]he First Amendment mandates that we [the Court] presume that speakers, not the government, know best both what they want to say and how to say it."[166]

Under the First Amendment's restriction against content-based compelled speech, the state should not be able to regulate union members for their own benefit. Union members can reject supporting their union's non-collective bargaining expenditures and still retain core

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157 *See* Monte Arthur Mills, Note, *The Student, the First Amendment, and the Mandatory Fee*, 85 IOWA L. REV. 387, 393 (1999).

158 515 U.S. 557 (1995).

159 *Id.* at 573.

160 *See* 29 U.S.C. §§ 401-503 (1994). *See also* Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283 (4th Cir. 1991).

161 *See id.*

162 *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988); Pacific Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

163 487 U.S. 781 (1988).

164 *Id.*

165 *Id.* at 790.

166 *Id.* at 790-91.

collective bargaining benefits.[167] Union members may also exercise the right to vote regarding a variety of internal union matters.[168] Just as the state lacked a compelling interest in mandating how fundraisers conduct their business in *Riley*,[169] paycheck protection legislation lacks a compelling interest in dictating how union members deal with their union. "[G]overnment, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."[170]

The same principle was echoed in *Wooley v. Maynard*.[171] The *Wooley* Court struck down a New Hampshire law that forbid its drivers from tampering with a universal logo on state license plates.[172] The Court found that the state license plate logo possessed an ideological message.[173] Yet, the majority maintained that requiring the logo did not serve a compelling state interest in fostering history, individualism, or state pride.[174]

By demanding permission, paycheck protection forces union members to transmit an ideological message about particular causes and how unions should conduct internal affairs.[175] Under *Wooley*, the state did not have a compelling interest in forcing drivers to convey an ideological viewpoint,[176] and the same principle should apply under paycheck protection.[177] The bill forces union members to authorize

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[167] *See* Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283 (4th Cir. 1991).

[168] *See* 29 U.S.C. §§ 401-503 (1994).

[169] *Riley*, 487 U.S. at 790-91.

[170] *Id.* at 791.

[171] 430 U.S. 705 (1977).

[172] *Id.* at 707.

[173] *Id.* at 715.

[174] *Id.* at 717.

[175] Victor Brundy stated,

> "[Because] the target of governmental compulsion is the individual's pocket rather than his or her voice does not make persuasive the analogy to taxation in assessing the propriety of the coercion on the individual contributor, or in disconnecting the coercion from the claim of violation of the claimants speech protection."

Brundy, *supra* note 153, at 16.

[176] *Id.*

[177] Even more persuasive, states demand that drivers place a license plate on their cars. Still, the *Wooley* Court still struck down the government's logo tampering law within the context of requiring license plates. Under union security agreements, all workers can

every non-collective bargaining expenditure.[178] In doing so, union members would explicitly transmit critical ideological messages about particular causes when they are forced to affirm or refuse financial support. Similarly, every time the government forced a union member to authorize an expenditure under paycheck protection, union members would be expressing an ideological message because they would be rejecting the manner by which unions currently engage in non-collective bargaining activity. Just as forcing drivers to display a license plate that transmitted an ideological message unduly burdened free speech under *Wooley*,[179] requiring union members to authorize certain union expenditures would demand ideological expression that the First Amendment should not tolerate.[180]

Even if courts could find a compelling state interest in forcing union members to authorize all non-collective bargaining expenditures, paycheck protection is not the least restrictive means. If the compelling interest involves allowing union members to make better informed choices regarding union political and social activity, the state could require unions to provide members with detailed information illustrating a cause's advantages and disadvantages.[181] Should the compelling state interest pertain to increasing voting participation within the union, the government could require unions to post information regarding a union member's right to vote on their union's internal affairs.[182]

In essence, the government could achieve its compelling interests without requiring authorization. Mandated authorization compels union members to engage in content-based speech. Moreover, requiring union members' consent for non-collective bargaining expenditures is

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voluntarily decide to become full and active union members and pay full dues, or forfeit membership and only pay for core collective bargaining expenditures. *See* Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283 (4th Cir. 1991). Because workers, unlike drivers, are not forced by the government to engage in certain behavior, the *Wooley* compelled content-based speech analogy should pertain to paycheck protection with even greater force.

[178] *See* H.R. 2434, *supra* note 1 at § 4(a)(1).

[179] *See* Wooley v. Maynard, 430 U.S. 705, 715-717 (1977).

[180] "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

[181] However, the Court struck down a similar "equal time" procedure for newspapers in Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[182] *See* 29 U.S.C. §§ 401-503 (1994).

not the least restrictive means. Under strict scrutiny's second prong, paycheck protection still violates the First Amendment.

B. *Right to Silence*

A First Amendment right to speech also implies the right to remain silent and anonymous.[183] Under strict scrutiny, the state must show a compelling state interest in forcing union members to relinquish these First Amendment rights. Union members could be paying excessive dues for declining services.[184] Union support for non-collective bargaining causes may not accurately reflect the membership it professes to represent.[185]

In *West Virginia State Board of Education v. Barnette*,[186] the Court dealt with the First Amendment right to remain silent. The eight-justice majority dealt with a state law demanding a compulsory flag salute in the public schools.[187] Conditioning access to public education on forcing students to salute the flag, the state asserted an interest in fostering nationalism and discipline.[188] However, the Court countered that silence did not endanger the state's interest and stated that saluting the flag unconstitutionally coerced belief and attitude.[189] Urging a right to silence, Justice Jackson argued that "[t]o believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[190]

In *Barnette*, the government did not have a valid interest in fostering discipline and unity through a compulsory flag salute.[191] Similarly, paycheck protection does not possess a compelling interest in fostering similar values within unions. Although paycheck protection

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183 *See* Brundy, *supra* note 153, at 11 (referring to the right to remain silent and anonymous as "negative speech rights").

184 *See* Knollenberg, *supra* note 101, at 357 (citing Gail McCallion, *Union Membership Statistics*, CONG. RESEARCH SERVICE, 97-701E, July 10, 1997; KENNETH WEINSTEIN & THOMAS WIELGUS, HOW UNIONS DENY WORKERS' RIGHTS, at 4-5).

185 *See generally id. See also* Kochkodin, Note, *supra* note 18, at 809-10.

186 319 U.S. 624 (1943).

187 *Id.* at 625.

188 *Id.* at 631-33. (The *Barnette* Court maintained that the interests that could overcome a free speech burden exist when "expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.").

189 *Id.* at 633.

190 *Id.* at 641.

191 *Id.* at 631.

does not involve a compulsory affirmation of nationalism, it forces union members to speak on other ideological causes.[192] Under *Barnette*, the Court maintained that the government cannot, under threat of punishment, compel citizens to display their thoughts and beliefs.[193] Likewise, the government should not be able to force union members to authorize non-collective bargaining expenditures. Currently, union members have a right to voluntarily vote on ideological union expenditures, without fear of punishment.[194] They can also abstain from voting and still remain a union member.

To compel union members to vote and express a belief regarding all union expenditures threatens their full union membership.[195] The threat of punishment was a decisive factor in the *Barnette* Court's First Amendment compelled speech ruling.[196] This principle[197] should apply in the present matter as it was applied in *Kidwell*, because the bill unduly compromises a union member's right to silence, and violates the First Amendment.

C. *Right to Anonymity*

The Court dealt with the right to anonymity in *McIntyre v. Ohio Election Commission*.[198] The issue in *McIntyre* involved an Ohio statute that required all campaign literature to list the name and address of the persons distributing the information.[199] The Court considered the leafletting "political" and applied strict scrutiny.[200] The state asserted a compelling interesting in providing information to voters and preventing fraud.[201] However, the Court disagreed that requiring speakers to relinquish anonymity satisfied strict scrutiny.[202] The

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192 H.R. 2434, *supra* note 1 at § 4(a)(1).

193 *See* Barnette, 319 U.S. at 633.

194 *See* 29 U.S.C. §§ 401-503 (1994).

195 *See* Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283, 297 (4th Cir. 1991). (maintaining that union members who financially object to a union's non-collective bargaining expenditures cannot retain full membership).

196 *See Barnette*, 319 U.S. at 633-34.

197 "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* at 638.

198 514 U.S. 334 (1995).

199 *Id.* at 345.

200 *Id.* at 347.

201 *Id.* at 348, 349-52.

202 *Id.* at 354.

majority maintained that Ohio's voter information interest was insufficient and stated that eliminating anonymity did little to enhance the public's understanding of the speaker's message.[203] Further, the Court noted that the compelling interest in limiting fraud was not narrowly tailored because Ohio already enforced laws punishing fraud.[204]

The threat to a union member's anonymity is no less under paycheck protection. The state could assert a compelling state interest in forcing union members to more accurately convey their beliefs about certain union expenditures. The government may also want to ensure that non-collective bargaining expenditures correctly reflect the will of union membership. However, under *McIntyre*, a union member's right to anonymity should prevail.

When union members currently vote on their union's non-collective bargaining expenditures, their speech is political because it conveys an ideological message. Yet, internal union voting is voluntary and anonymous to the government and voting public. Under paycheck protection, there is no such guarantee.[205] Forcing union members to authorize certain expenditures would not allow the government to better understand the message that union members convey. To the contrary, paycheck protection forces union members to vote and abandon their anonymity. This ultimately impairs dissemination because a union member's beliefs would be involuntarily expressed. In *McIntyre*, the state did not have a compelling interest in eliminating anonymity to better understand a speaker's message.[206] Likewise, the state should not possess a similar interest under paycheck protection.

As in *McIntyre*, paycheck protection is not narrowly tailored to justify forcing union members to relinquish anonymity. The state may hold a compelling interest in ensuring that non-collective bargaining expenditures indicate a correct level of union member support. However, current law already ensures that union members can vote and persuade others regarding union leadership and non-collective bargaining expenditures.[207] If union members disagree with the union's

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[203] McIntyre v. Ohio Election Comm'n, 514 U.S. 334, 348 (1995). ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.").

[204] *Id.* at 352-53, 357.

[205] *See generally* H.R. 2434, *supra* note 1.

[206] *See McIntyre*, 514 U.S. at 348.

[207] *See* 29 U.S.C. §§ 401-503 (1994).

non-collective bargaining expenditures, they are not required to pay for them.[208] Just as Ohio already enforced laws that targeted the state's asserted compelling interest in *McIntyre*,[209] the government currently enforces laws that adequately cover union members. Because union members can vote on non-collective bargaining expenditures, paycheck protection is not narrowly tailored to relinquish a member's right to anonymity. Accordingly, the bill fails to survive strict scrutiny or the First Amendment.

VII. Conclusion

Although union-security agreements implicate an individual worker's First Amendment rights, the Court has repeatedly upheld a compelling state interest in maintaining labor-tranquility.[210] Mindful of First Amendment rights, the government has created flexibility. Workers are only required to support certain union expenditures[211] and union members can vote on how their union spends their dues.[212]

Yet, some feel that government needs to be more understanding about workers' First Amendment rights and have urged Congress to pass paycheck protection legislation.[213] Unfortunately, paycheck protection does not live up to the free speech values it attempts to vilify.

Paycheck protection infringes upon the First Amendment rights of unions and union members. It threatens a union's right to expressive association because the bill alters internal organization and governance. The legislation's authorization requirement also mandates disclosure of union membership and ideological belief, which poses additional danger to a union's freedom of expressive association.

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[208] If union members decide to withdraw support for the membership's majority decisions regarding non-collective bargaining expenditures, they only have to pay for collective bargaining expenditures. However, as a consequence, they will lose full union membership. *See* Kidwell v. Transportation Communications Intl. Union, 946 F.2d 283, 297 (4th Cir. 1991).

[209] *See McIntyre*, 514 U.S. at 352-53, 357.

[210] *See* Ry. Employers' Dept. v. Hanson, 351 U.S. 225, 238 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Ry. Clerks v. Allen, 373 U.S. 113 (1963); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Ellis v. Bhd. of Ry., Airline and Steamship Clerks, Freight Handlers, and Express and Station Employees, 466 U.S. 435, 448 (1986); Communications Workers of Am. v. Beck, 487 U.S. 735 (1988); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).

[211] *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991).

[212] *See* 29 U.S.C. §§ 401-503 (1994).

[213] *See generally* Knollenberg, *supra* note 101.

Furthermore, the bill compromises a union member's free speech rights by forcing union members to vote and convey a message on the validity of any issue the union might support. Requiring authorization, the bill also forces union members to repeatedly express disagreement with voluntary voting on matters of internal union procedure. In the process, paycheck protection violates a union member's freedom of conscience and right to silence and anonymity.

Union corruption is not an issue to be quickly overlooked. It is real, negatively affects far too many union members, and should be eradicated. However, before Congress drafts its next union reform bill, it needs to be far more mindful of the First Amendment. Paycheck protection, in its current form, runs right over it.