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"Right to Work" Legislation: A Meaningless Choice that Constricts Union Operations

John Simeone

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I. Introduction

A current trend among the states is the adoption of "right to work" laws.[1] Today, twenty-eight states adopted right to work laws, with other states likely to follow suit.[2] These laws, although varying in minor aspects, all stipulate that the prospective employment of an individual cannot be conditioned on their approval of joining a union.[3] Right to Work laws further mandate that employers can no longer condition employment on the acceptance of union membership.[4]

Proponents of right to work laws find their statutory support in NLRA Sections 8(a)(3) and 14(b).[5] The foundation of right to work laws is found in Section 8(a)(3), which states that "it shall be an unfair labor practice for an employer… by discrimination in regard to hire… to encourage or discourage membership in any labor organization."[6] This statutory language echoes the purpose of right to work laws, which is to give prospective employees a choice regarding their union membership. Furthermore, the NLRA states in Section 14(b) that "nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment."[7] The statutory language is clear in conveying a choice regarding union membership to prospective laborers. States are adopting this principle through right to work laws, and the trend is gaining momentum.[8]

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[1] NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, www.nrtw.org/right-to-work-states/ (last visited Oct. 2, 2017).
[2] *Id.*
[3] Erin Shannon, *Right-to-Work: What it is and How it Works*, WASHINGTON POLICY CENTER (Oct. 21, 2014), https://www.washingtonpolicy.org/publications/detail/right-to-work-what-it-is-and-how-it-works.
[4] *Id.*
[5] *Sweeney v. Pence*, 767 F.3d 654, 659 (7th Cir. 2014).
[6] *Id.*
[7] *Id.*
[8] Shannon, *supra* note 3.

The problem that arises from the implementation of "right to work" laws is that it puts unions in a financial bind. This financial bind stems from when a union chooses to utilize their exclusive representation option.[9] When a union acts as the exclusive bargaining representation, they must represent all workers in a labor force.[10] Unions will negotiate contracts for dues paying members, and unaffiliated employees when acting as the exclusive negotiator.[11] Yet, unions only receive compensation from the dues paying members, and the unaffiliated employees enjoy the benefit of the negotiations while not paying for the union's services.[12] In effect, the unaffiliated employees enjoy a "free rider" experience.[13]

Currently, the courts are diverging on whether this free rider experience amounts to an unconstitutional taking under the Fifth Amendment's Taking Clause.[14] One view, supported by the 7th Circuit, holds that unions are compensated through their exclusive bargaining power.[15] The opposition, which originates from Judge Wood's dissent in *Sweeney*, argues that non-members must pay for union services.[16] Judge Wood asserts that if non-members are not required to pay for these services, then a free-rider system will persist.[17] Such a free rider system is a Takings Clause issue, because unions will not receive just compensation for their expensive services.[18] This view is receiving growing support from various trial courts in the country.[19]

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[9] Mark D. Meredith, *From Dancing Halls to Hiring Halls: Actor's Equity and the Closed Shop* Dilemma, 96 Colum. L. Rev. 178, 190 (1996).
[10] Meredith, *supra* note 10.
[11] Meredith, *supra* note 10.
[12] Shannon, *supra* note 3.
[13] *Sweeney*, 767 F.3d at 683 (Wood, Dissenting).
[14] *Sweeney*, 767 F.3d at 671; *Int'l Ass'n v. Wis.*, 2016 Wisc. Cir. LEXIS 1 (Wis. Cir. Ct. Apr. 8, 2016).
[15] *Sweeney*, 767 F.3d at 666.
[16] *Sweeney*, 767 F.3d at 683, 684 (Wood, Dissenting).
[17] *Id.*
[18] *Id.*
[19] *Int'l Ass'n*, 2016 Wisc. Cir. LEXIS 1.

This Note argues that the views expressed in Judge Wood's dissent and various state trial courts is correct, and that "right to work" laws constitute an unjust taking under the Fifth Amendment Taking Clause. This note will first delve into the statutory framework supporting "right to work" laws. Next, this note will layout the various duties that accompany a union's duty of exclusive representation, and its implications on public and private employees. After laying this foundation, this note will comment on the "right to work" laws interaction with the various employer-employee relationship constructions. Next, this note will explore the present opposing views in the circuits. while also examining the various property interests associated with the Taking Clause of the Fifth Amendment. Finally, this note will argue that unions have a valid interest in monetary compensation for their services. The right to work laws denial of union fees will promulgate a free rider system, and thus a Takings Clause violation.

II. Background

Traditionally, union security agreements took one of three forms.[20] These agreements are a closed shop, union shop, and an agency shop.[21] Essentially, these three structures detail various ways in which employment relates to union membership.[22] In a closed shop, an employer can only hire workers who "were members of the union representing the employer's employees."[23] If the prospective employee resists joining the relevant union, then they are prohibited from employment.[24] However, in a union shop agreement, non-union members may be hired, but continued employment is conditioned that all employees become union members within a

[20] Meredith, *supra* note 10, at 186.
[21] *Id.*
[22] Ariana Levinson, *Federal Preemption of Local Right-to-Work Laws*, 54 HARV. J. ON LEGIS, 457, 463 (2017).
[23] Meredith, *supra* note 10, at 186.
[24] *Id.*

specified time frame.[25] Lastly, agency shop agreements stipulate that non-union members may be hired, and are never required to join a union.[26] Instead, workers in an agency shop must pay their fair share of union fees that stem from collective bargaining costs.[27]

The United States shifted from these traditional union security agreements by banning both closed shop and union shop agreements.[28] First, the NLRA prohibited closed shop agreements, and limited the scope of union-shop agreements.[29] Eventually, the NLRA declared union shops illegal under Section 8(a)(3), because of concerns associated with employees paying full dues, which would be used to finance a union's political activities.[30] Thus, the only permissible union security agreement is the agency shop.[31]

Moreover, the NLRA was created as means to govern the collective bargaining process between unions and employers.[32] The federal government hoped to encourage collective bargaining, thereby aiding the free-flow of commerce.[33] The Taft-Hartley Amendments of 1947 strengthened NLRA Section 8(a) by prohibiting employers from influencing union membership.[34] Here, the Amendments are reinforcing an employee's rights under Section 7 of the NLRA to "self-organize or bargain collectively through representatives of their own choosing."[35]

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[25] *Id.*
[26] Andrew Buttaro, *Stalemate at the Supreme Court: Friedrichs v. California Teachers Association, Public Unions, and Free Speech*, 20 TEX. REV. LAW & POL. 341, 343 (2006).
[27] *Id.*
[28] Levinson, *supra* note 21, at 463; 29 U.S.C. §8(a)(3) (1947).
[29] *Communications Workers of Am. V Beck*, 487 U.S. 735, 772-774 (1988); 29 U.S.C. §8(a)(3) (1947).
[30] Levinson, *supra* note 21, at 463; 29 U.S.C. §8(a)(3) (1947).
[31] *Id.*
[32] Holly R. Winefsky, Julie A. Tenney, *Preserving the Garment Industry Proviso: Protecting Acceptable Working Conditions Within the Apparel and Accessories Industries*, 31 HOFSTRA L. REV. 587, 592 (2002); 29 U.S.C. §§ 151-169 (1935).
[33] Winefsky, *supra* note 28.
[34] 29 U.S.C. § 8(a)(3) (1947).
[35] 29 U.S.C. § 7 (1947).

Furthermore, strict union shop agreements are also prohibited due to the Supreme Court's decision in *General Motors*.[36] Union shop agreements that contained a thirty-day grace period still existed after the prohibition of closed shop agreements. But, in 1963, the Supreme Court in *General Motors* held that this thirty-day grace period was improper under the recent amendments to the NLRA.[37] Essentially, the Supreme Court held that even in a union-shop agreement, a worker cannot be fired solely on their non-membership status.[38] Thus, the Supreme Court limited the term "membership" in Section 8(a)(3) of the NLRA to its "financial core," which encompasses solely the obligation to pay dues and fees.[39]

In a later decision, the Supreme Court whittled down on this "financial core" interpretation of Section 8(a)(3) of the NLRA.[40] Seeking to shift away from the political influence of unions, the Supreme Court limited agency fees to costs associated solely with the unions representational and collective-bargaining activities. Here, the "financial core" interpretation of *General Motors* is now further limited to only include a unions costs associated with representational activities.[41]

The result of the *Beck* limitation is the existence of agency shop agreements in modern labor law. Agency shop agreements abide by the Supreme Court's limitations, and only warrant payment for a union's representational activities.[42] But, subsequent provisions of the NLRA provide alternate routes for state to limit the agency shop agreement permitted by Section 8(a)(3) of the NLRA.[43]

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[36] *NLRA v. General Motors Corp*., 373 U.S. 734 (1963).
[37] *Id.*
[38] *Id.*
[39] *Id.* at 742.
[40] *Beck*, 487 U.S. at 740.
[41] *Id.*
[42] Meredith, *supra* note 10.
[43] *Sweeney*, 767 F.3d at 659.

Section 14 of the NLRA allows states to limit union security agreements.[44] Specifically, the wording of Section 14(a) permits states to pass legislation regarding collective bargaining.[45] Section 14(a) states: "for the purpose of any law, either national or local."[46] This language is interpreted to mean that Congress expressly allows local ordinances to legislate collective bargaining.[47] Moreover, Section 14(b) of the NLRA protects states rights, and reads as following:

> "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."[48]

Courts interpret Section 14(b) of the NLRA as protecting a state's ability to enact legislation that forbids union-security agreements which are allowed under Section 8(a)(3) of the NLRA.[49] This interpretation of Section 14(b) gives states the choice to prohibit agency shop agreements.[50] Many states are choosing to utilize this power by enacting "right to work" laws.

Additionally, this "financial core" interpretation is driven by a First Amendment concern, which stems from forcing non-union public employees to financially contribute to unions.[51] Forcing public employees to join unions triggers a potential violation of the First Amendment rights of speech and association.[52] This potential violation resides in the unions position in collective bargaining activities, which can have drastic civic and political consequences.[53]

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[44] 29 U.S.C. §14 (1947).
[45] *Id.*
[46] 29 U.S.C. §14(a) (1947).
[47] Levinson, *supra* note 21 at 476.
[48] 29 U.S.C. §14(b) (1947).
[49] *Id.*
[50] *Id.*
[51] *Sweeney*, 767 F.3d at 669.
[52] *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012).
[53] *Id.*

Requiring an individual to financially support a union whose actions are politically adverse to their views impinges upon that person's First Amendment rights.[54]

After recognizing this First Amendment right, *Abood* held that these public employees are still required to pay fees associated with a union's representational costs.[55] The court held that service charges relating to collective bargaining, contract administration, and grievance adjustment are subject to an agency fee.[56] Thus, agency shop agreements remain permissible for public employees, so long as the fees are related to representational services.

Alternatively, the Supreme Court later limited *Abood*, and drew a distinction between public and private employees.[57] In *Harris*, the Supreme Court held that this First Amendment right does not apply to private employees.[58] Private employees do not possess the First Amendment rights that protect them from compulsory association and speech.[59] Thus, private employees are subject to union shop agreements, where they may have to financially contribute to union activities that extend beyond their representational function.[60]

Furthermore, the Supreme Court posits that a single representative prevents prospective confusion that would stem from the attempted enforcement of two or more agreements which stipulate conditions of employment.[61] A single bargaining unit allows an employer to bargain with one entity, which provides an easier path to reach an agreement.[62] This sentiment is further expressed in federal law.[63]

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[54] *Id.*
[55] *Abood v. Detroit Bd. Of Educ*., 431 US 209, 226 (1977).
[56] *Id.*
[57] *Harris v. Quinn*, 134 U.S. 2618, 2638 (2014).
[58] *Id.* at 2644.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 221.
[62] *Id.*
[63] 29 U.S.C.S. §159(a) (2017).

Federal law implies that unions are better served to represent labor related actions.[64] This implication stems from the laborers ability to vote unions as their exclusive representation.[65] This federal grant essentially functions as a monopoly for unions, where a union is the only entity that can collectively bargain for all employees in a workforce.[66] Involved in this federal grant is the union's obligation to satisfy the duty of fair representation.[67] The duty of fair representation forces unions to adequately serve the interests of all members in a workforce, regardless of their affiliation with a union.[68] In other words, the duty of fair representation requires the union to represent both paying members and nonmembers.[69]

Although a union is still able to conduct members-only representation, chances are that unions will be designated as the exclusive-representation for laborers.[70] In right to work states, non-union members will be grouped into this representation, and will not be forced to pay for union services.[71] This presents a potential free-rider problem, where potential employees are incentivized to not contribute to a union.[72] The duties of fair representation and federal duty of exclusive representation allows these non-members to reap the benefits regardless of their choice to pay into the union.[73]

Criticisms are emerging about this free-rider problem, specifically whether it triggers the Takings Clause.[74] In the 7th Circuit, Judge Wood's dissent in *Sweeney* argued that the union's

[64] 29 U.S.C.S. §159(a) (2017).
[65] *Id*.
[66] *Sweeney*, 767 F.3d at 666.
[67] *Id*. at 671 (Wood, dissenting).
[68] *Id.*; Abood, 431 US at 221.
[69] *Id.*
[70] 29 U.S.C.S. §159(a) (2017).
[71] *Sweeney*, 767 F.3d at 666.
[72] *Id* at 673.
[73] *Id.*
[74] *Sweeney*, 767 F.3d at 672 (Wood, dissenting).

uncompensated services amount to an unconstitutional taking under the Fifth Amendment's Takings Clause.[75] Judge Wood asserts that unions suffer an unjust taking of property when forced to provide free services to non-members.[76]

Judge Wood argues that the right to work laws exempt non-union employees from reimbursing unions for their services.[77] Here, Judge Wood references *Beck*, and claims that federal law entitles unions to fees stemming from their representational duties.[78] Judge Wood refutes the notion that paying representational services will cause nonmember to morph into members.[79] Rather, union membership should be distinguished by the payments of initiation fees and monthly dues.[80]

Moreover, Judge Wood argues that the majority creates a "free rider" problem by holding that the unions are justly compensated through their grant of exclusive representation.[81] This "free rider" problem incentivizes employees to decline union membership, because they can reap the benefits of union services upon the commencement of a collective action.[82] This "free-rider" implicates the Takings Clause, because right to work laws mandate unions to provide property to another private party.[83] Judge Wood asserts that the Takings Clause is violated from this forced transfer of property without compensation.[84]

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[75] *Id.*
[76] *Id* at 671 (Wood, dissenting).
[77] *Id* at 674.
[78] *Id* at 676.
[79] *Sweeney*, 767 F.3d at 678.
[80] *Id* at 674.
[81] *Id* at 670.
[82] *Sweeney*, 767 F.3d at 673 (Wood, dissenting).
[83] *Id.* at 674.
[84] *Id.*

In making the Takings Clause argument, Judge Wood references the different services unions provide.[85] These services include filing grievances, investigations, arbitrations, and other duties.[86] The costs of these services can easily be thousands of dollars.[87] These uncompensated services force Judge Wood to focus on the seizure of money as a protected property interest when forming her Takings Clause analysis.[88] *Phillips v. Washington Legal Foundation* and *Brown v. Legal Foundation of Washington* support Judge Wood's argument that money is a recognized property interest under the Takings Clause.[89]

In *Phillips*, the court states that the interest accrued by funds in a lawyer-managed trust (IOLTA) accounts is the private property of the client.[90] Furthermore, in *Brown* the court held that funds transferred from IOLTA accounts to a legal foundation qualifies as an action for a "public use" under the Takings Clause.[91] *Brown* stated that the Takings Clause was violated if the clients were entitled to compensation.[92] Compensation is measured by an individual's pecuniary loss, not the recipient's gain.[93] Additionally, the public use prong is satisfied if a compelling public interest is served.[94] In *Brown,* the petitioners suffered no net loss, and served the public interest by providing legal services to the needy.[95] Taken together, the Supreme Court viewed that money was used for a public use, and implicitly acknowledged that money us a

85 *Id* at 675.
86 *Sweeney,* 767 F.3d at 671.
87 *Id.*
88 *Id.*
89 *Phillips v. Washington Legal Foundation,* 524 U.S. 156 (1998); *Brown v. Legal Foundation of Washington,* 538 U.S. 216 (2003).
90 *Id.*
91 *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003).
92 *Id.* at 240.
93 *Id.*
94 *Id.* at 232.
95 *Id.* at 240.

protected property interest. Also, these holdings collectively imply that money may be a protected property interest if an individual suffers a net loss.[96]

Judge Wood's dissent builds off the above-mentioned case law, and states that Indiana is forcing unions to donate their expensive services to nonmembers.[97] In doing so, the dissent references *Beck*, which implied that nonmembers should pay for the benefits they receive from union representation.[98] Judge Wood interprets *Beck* to mean that non-members can be compelled to pay for union services that they consume.[99]

The popularity of Judge Wood's dissent is evidenced by various state trial courts choosing to implement her argument rather than the *Sweeney* majority. The 14th Circuit of Wisconsin is one of the few courts to have followed Judge Wood's reasoning in *Sweeney*.[100] Here, Wisconsin was dealing with a newly implemented right to work law.[101] This state trial court followed Judge Wood's reasoning to a tee, and even quotes from her dissent at length to arrive at their conclusion.[102] The 14th Circuit of Wisconsin accepted the union's claim that they have a legally protected property interest in services performed for both member and non-members.[103] This private property interest exists because unions must use funds from their treasury to promulgate these services.[104]

Furthermore, the 14th Circuit of Wisconsin holds that the taking of union's funds qualifies as a "public use" under the Takings Clause.[105] Wisconsin legislators explained the

[96] *Brown*, 538 U.S. at 240.
[97] *Sweeney*, 767 F.3d at 674 (Wood, dissenting).
[98] *Beck*, 487 U.S. at 735.
[99] *Sweeney*, 767 F.3d at 675 (Wood, dissenting).
[100] *Int'l Ass'n v. Wis.*, 2016 Wisc. Cir. LEXIS 1 (Wis. Cir. Ct. Apr. 8, 2016)
[101] *Id.* at 3.
[102] *Id.* at 14, 15.
[103] *Id.* at 10.
[104] *Id.*
[105] *Int'l Ass'n*, 2016 Cir. LEXIS at 13.

purpose behind their newly enacted law to "make the business climate in the State more favorable by eliminating the power of labor organizations."[106] This purpose applies to all right to work laws, because their focus is to weaken the power unions have over business and labor. Under Takings Clause scrutiny, any private property seized by the government for a public use must be met with just compensation.[107] Here, the 14th Circuit of Wisconsin echoes Judge Wood and holds that a public use exists, even though the property (services) is transferring from one private party to another.[108] The court states that there is no principle where private property may be seized from one individual, and given to another for their private use and enjoyment.[109]

The 14th Circuit of Wisconsin also accepts that a "free rider" problem exists and will persist if unions remain uncompensated for their services to nonmembers.[110] The 14th Circuit essentially adopts Judge Wood's argument verbatim.[111] Wisconsin's state trial court is the first to hold that a right to work law operates as an unconstitutional taking. Yet, preceding opinions have held that the proper set of facts could demonstrate how a union would suffer a deprivation of compensation for services provided.[112] In *Zoeller v. Sweeney*, 19 N.E.3d 749, 754 (Ind. 2014), Justice Rucker's concurring opinion intimated that it is possible for unions to succeed on an unjust taking claim.[113] Justice Rucker explained that mandating unions to bear the cost of representing all employees presented the foundation of a Takings Claim.[114]

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[106] *Id*.
[107] *Sweeney*, 767 F.3d at 674 (Wood, dissenting).
[108] *Int'l Ass'n v. Wis.*, 2016 Cir. LEXIS at 13.
[109] *Id*.
[110] *Id*. at 15.
[111] *Id*.
[112] *Zoeller v. Sweeney*, 19 N.E.3d 749, 754 (Ind. 2014).
[113] *Id*.
[114] *Id*.

The 14th Circuit of Wisconsin's holding was stayed at the court of appeals; yet, it still has the effect of validating the arguments posed by Judge Wood and Justice Rucker.[115] The validation of Judge Wood's argument is evidenced by the further acceptance of her reasoning in additional jurisdictions.[116] In *W.Va. AFL-CIO v. Tomblin*, the West Virginia State Trial Court sided with the unions, and awarded a preliminary injunction to block the states right to work law.[117] The majority referenced Judge Wood's "free-rider" argument, where allowing non-paying laborers to reap the benefits of union services presents an unconstitutional taking.[118] The court chose to recognize the serious constitutional harms to unions, and stated that these harms were serious enough to delay the implementation of West Virginia's right to work law.[119]

Although, Judge Wood's argument has been met with growing acceptance, the opposition dominates. The majority in *Sweeney* that the unions were compensated for their services to nonmembers.[120] Here, the union chose not to advance a Takings Clause argument.[121] Yet, the majority reasoned that even if the union chose to advance the Takings Clause argument, they would face the challenge of proving how repealing Indiana's right to work laws would provide an adequate remedy.[122] It is federal law that enforces the duty of fair representation, and Indiana's right to work laws only precludes unions from collecting fees in the performance of

[115] William Welkowitz, *Unions Using "Takings" Clause Arguments to Challenge Right-to-Work Laws*, LABOR AND EMPLOYMENT BLOG, BLOOMBERG BNA (Dec. 20, 2016), https://www.bna.com/unions-using-takings-b73014448852/.
[116] *W. Va. AFL-CIO v. Tomblin*, 2017 W.V. Cir. LEXIS 2 (2017).
[117] *Id.*
[118] *Id.* at 17.
[119] *Id.*
[120] *Sweeney*, 767 F.3d at 666.
[121] *Id.* at 664.
[122] *Id.* at 666.

that federal duty.[123] Thus, the court implied that the federal duty may need to reexamined, rather than repealing Indiana's right to work law.[124]

Moreover, the majority refuted the idea that unions have a protectable property interest in securing fees for services provided for non-members.[125] The majority concluded that a union is justly compensated through "federal law's grant to the union the right to exclusively bargain with an employer."[126] Here, the 7th Circuit states that a union's right as the exclusive negotiator is just compensation for their provision of services to non-members.

Additionally, the Northern District of Idaho sided with the majority in *Sweeney*, and rejected Judge Wood's reasoning that right to work laws operate as an unconstitutional taking at the union's expense.[127] The court focused on the duty of fair representation proscribed by federal law.[128] The duty of fair representation precluded the union's claim that they suffer an unjust taking of property.[129] The court held that the duty of fair representation only restricts the union from collecting fees that are meant to cover the expenses associated with the performance of their duty.[130] The court also states that unions are justly compensated by their right to bargain exclusively with the employer.[131]

The West Virginia Supreme Court also refutes the notion that unions suffer an unconstitutional taking of property by being prohibited from collecting fees from nonmembers.[132] In *Morrisey v. West Virginia*, the court held that without a collective bargaining

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[123] *Id.*
[124] *Id.*
[125] *Sweeney*, 767 F.3d at 666.
[126] *Id.*
[127] *Int'l Union of Operating Eng'rs Local 370 v. Wasden,* 217 F. Supp. 3d 1209, 1223 (D. Idaho, 2016).
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Morrisey v. West Virginia AFL-CIO*, 2017 WL 410375 (W. Va. 2017).

agreement, a union only has a "unilateral expectation of fees."[133] West Virginia defines a "property interest" as a right that must derive from either a private contract or a state law.[134] Furthermore, a protected property interest must be something more than a unilateral expectation.[135] Thus, without a collective bargaining agreement, unions only have a unilateral expectation of fees from nonmembers.[136] Lastly, the court asserts that no other appellate court has examined a Takings Clause challenge to a right to work law and accepted the union's argument.[137]

Various law review articles touch on periphery issues regarding this question. Michael Hostetler explains that a bare desire for compensation does not amount to a recognized property interest.[138] Yet, in a footnote, Hostetler states that the Supreme Court has not out rightly determined whether personal services constitute property under the Takings Clause.[139] Regardless, Hostetler looks to the interpretations of various lower courts, who hold that the "time, experience, and skill of a professional" amount to a protectable property interest.[140]

Also, Howard Master examines the issue of whether labor is protected under the Takings Clause of the Fifth Amendment.[141] Master argues that the labor expended by the wrongfully convicted should be judged under the Takings Clause.[142] Furthermore, Master asserts that the

[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Morrisey*, 2017 WL 410375.
[138] Michael J. Hostetler, *Intangible Property under the Federal Mail Fraud Statute and the Takings Clause: A Case Study*, 50 Duke L.J. 589 (2000).
[139] *Id.*
[140] *Id.*
[141] Howard S. Master, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. Ann. Surv. Am. L. 97 (2004).
[142] *Id.* at 123.

exclusion of labor from the Takings Clause's scrutiny is "manifestly reasonable."[143] He goes on to say that labor has long been regarded as a protected property right.[144]

It is a long-standing principle that one's labor constitutes a protected property interest, which deserves compensation.[145] Yet, in right to work states, a distinction is made about the collection of union fees for representing nonmembers. The 7th Circuit asserts that it's the union's federal duty of fair representation which precludes them from receiving compensation.[146] Courts have previously held that certain professions are not entitled to fees.[147] The court held in *United States v. Dillon* that pro bono attorney services were not recognized under the Takings Clause.[148] The court reasoned that attorney's fees are different from other professions, because attorney's have a "civic duty" to represent indigents.[149] Attorney's, unlike other professions, have an ancient tradition of representing the impoverished when performing services as officers of the court.[150] Thus, this civic duty rule operates as an exception to the general proposition that labor constitutes a protectable property interest.[151]

Hostetler examines the civic duty rule and expands its scope to include activities on one's property that depart from "existing rule or understandings."[152] A breach of one of these rules or understandings could be a usage of property that constitutes a nuisance, or where tradition states that the particular property use does not require compensation.[153] Hostetler then asserts that

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[143] *Id.*
[144] *Id.*
[145] *Id.*; Hostetler, *supra* note 74; DeLisio v. Alaska Super. Ct., 740 P.2d 437, 440 (Alaska 1987) (quoting Coffeyville Vitrified Brick & Tile Co. v. Perry, 76 P. 848, 850 (Kan. 1904))
[146] *Sweeney*, 767 F.3d at 666.
[147] *United States v. Dillon*, 346 F.2d 633, 638 (9th Cir. 1965).
[148] *Id.*
[149] *Id.*
[150] *Id.* at 635.
[151] *Id.*
[152] Hostetler, *supra* note 74 at 128.
[153] *Id.*

outside of civic duty implications, labor is a protected property interest where an individual is free to sell it for compensation.[154]The 7th Circuit, nor any Right to Work state has yet to justify their prohibition on unions receiving compensation through a civic duty analysis. Instead, these courts rely on the federal duties of fair representation and exclusive representation when mandating that unions must provide nonmembers free services.

III. Analysis

Judge Wood rightfully asserts that "right to work" laws violate the Takings Clause of the Fifth Amendment.[155] The heart of Judge Wood's argument is that unions should receive monetary compensation for their representational services. Agency shops embody this type of fee system, which are permissible under the NLRA.[156] Although agency shops are permissible, states have the option to prohibit such a system under Section 8(a)(3) and Section 14(b) of the NLRA.[157] States are increasingly utilizing this power by implementing "right to work" laws.[158]

Yet, Judge Wood's contention arrives out of an externality of the right to work laws. This externality arises out of unions being forced to provide their services for free when operating as an exclusive representative.[159] These representative services are expensive, easily costing thousands of dollars.[160] Forcing the unions to swallow these immense financial costs triggers Takings Clause scrutiny, because the Supreme Court recognizes money as a protectable property interest.[161]

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[154] *Id.* at 123.
[155] *Sweeney*, 767 F.3d at PN (Wood, dissenting).
[156] *Beck*, 487 U.S. at 740.
[157] *Sweeney*, 767 F.3d at 659.
[158] Shannon, *supra* note 3.
[159] *Sweeney*, 767 F.3d at 672.
[160] *Id.*
[161] *see e.g. Phillips*, 524 U.S. at 156; *see also Brown*, 538 U.S. at 235.

The IOLTA cases expressed in the *Sweeney* dissent provide strong support that money is a property interest under the Takings Clause.[162] The Supreme Court in *Phillips* states that interest income generated in a lawyer's IOLTA account is viewed as private property of a client, and thus protected by the Takings Clause.[163] The court refuted the government's argument that private property was not implicated.[164] Here, the court approached the property issue by searching for the creator of the value.[165] The Supreme Court concluded that the interest was created from the client's funds, rather than any government efforts.[166]

Unlike the IOLTA accounts, the unions funds at stake here do not face the question of value origin. Furthermore, *Phillips*' analysis assigned value to the funds, and would only deny Takings Clause protection if it was the government who created the value.[167] Here, the value of the union funds is generated from their valuable representational services. The application of *Phillips* analysis to right to work states makes clear that the monetary expenses incurred by unions qualify as a protected property interest.

Moreover, *Brown* builds off the value of interest generated by IOLTA accounts, and takes it a step further by examining the Takings Clause issue.[168] The Supreme Court held that transferring the monetary interest to a different owner is a *per se* taking, so long as it is for a legit public use.[169] The right to work laws operate as a forced transfer of union funds from the union to nonmembers. Here, the duty of exclusive representation forces unions to expend their own resources when representing nonmembers. The duty of exclusive representation operates as a

[162] *Sweeney*, 767 F.3d at 673 (Wood, dissenting).
[163] *Phillips*, 524 U.S. at 156.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Brown*, 538 U.S. at 235.
[169] *Id.* at 240.

forced transfer under *Brown*, because it forces the transfer of funds from one owner to another.[170] Furthermore, the duty of fair representation requires unions to give the same quality of services to nonmembers.[171] The result is that nonmembers are receiving the same expensive services enjoyed by paying members.[172] The original owner (unions) are forced to convert those funds into services, which are meant to benefit nonmembers. This practice operates as a transfer, and *Brown* articulated that a practice of this sort is subject to Takings Clause scrutiny,[173] which requires payment to satisfy just compensation.[174]

Brown also explains that compensation is measured by an owner's pecuniary loss, rather than the benefiting party's gain.[175] Unlike *Brown*, where there was no pecuniary loss to the clients, here, there is a clear harm to unions.[176] The mandated services to nonmembers can cost unions thousands of dollars.[177] This blatant pecuniary loss to unions deserves to be met with adequate compensation from nonmembers.

Both *Brown* and *Phillips* focus on the transfer of money as a private property interest, which is subject to Takings Clause scrutiny.[178] Here, the unions provision of services is subject to Taking Clause scrutiny, because it involves the seizure money from a private party (unions), and transfers it to another private party (non-members), for a legitimate public use.[179] The Supreme Court must step in, and classify the expenses associated with union services to nonmembers as an involuntary transfer of funds, thus subject to Takings Clause Scrutiny.

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[170] *Id.*
[171] *Sweeney*, 767 F.3d at 666.
[172] *Sweeney*, 767 F.3d at 671 (Wood, Dissenting).
[173] *Id* at 674.
[174] *Brown*, 538 U.S. at 240
[175] *Id.* at 219.
[176] *Id.*
[177] *Sweeney*, 767 F.3d at 671 (Wood, Dissenting).
[178] *Brown*, 538 U.S. at 235; *Phillips*, 524 U.S. at 156.
[179] *Brown*, 538 U.S. at 240.

Brown also measures a "public use" by determining if there is a compelling public interest involved.[180] Diverting the interest from the IOLTA funds to accounts used for providing legal services to the impoverished qualified as compelling public interest.[181] Here, there is no justifiable public interest in providing free services to employees who decide against union membership. There is no implication that nonmembers are suffer a financial disadvantage when compared to union members. Furthermore, the interest of having employees represented in one collective action would still be met if an agency fee is imposed on nonmembers.[182] An agency fee would only require a nonmember to pay a union when they reap the benefits of union services.[183] Thus, agency fees would still allow employees to retain their nonmember status.

Additionally, unions are not subject to special duties that may exist in other professions. In *Dillon*, the court held that attorney's fees were not subject to Takings Clause scrutiny because lawyers have a "civic duty" to represent indigents.[184] The "civic duty" of an attorney stems from the ancient and established tradition of the profession to represent those who are in need.[185]

Unlike *Dillon*, the unions effected by right to work laws have no civic duty to provide services to nonmembers. The only potential "civic duty" assigned to unions is attached to the federal mandates of fair and exclusive representation. Judge Wood explains that accompanied with the right of fair representation is the duty to "serve the interests of all members of the bargaining unit without hostility or discrimination, and to exercise its discretion with complete

[180] *Id.*
[181] *Id.* at 219.
[182] Shannon, *supra* note 3.
[183] *Id.*
[184] *Dillon*, 346 F.2d at 638.
[185] *Id.*

good faith and honesty."[186] This is the only "civic duty" proscribed to unions. There is no mandate that unions execute this duty free of charge.

Yet, unions are implicitly coerced to represent all employees in an organization when undertaking representational duties. Unions have the option at the beginning of an action to represent only dues paying employees.[187] This option fades away if the majority of laborers vote to have the union serve as their sole representative.[188] Such a majority vote implicates the duty of exclusive representation.[189] Thus, this federal mandate of exclusive representation essentially operates as a forced civic duty on unions to represent all employees in an entity.

Exclusive representation is a fundamental value in labor law, which can be viewed as a direct benefit to unions. Unions do not have to worry about competing with other representatives when operating as the exclusive negotiator.[190] Unions essentially have a monopoly on contract negotiation/collective bargaining when operating as the exclusive negotiator.[191] But, the benefit of exclusive representation comes into question when dealing with right to work laws. The advantage of exclusive representation backfires on unions, because they are forced to represent nonmembers without receiving payment.

The reasoning behind this federal mandate can be best attributed to the government's interest in convenience. Forcing the unions to represent all employees when the majority of workers deem it appropriate allows their collective voice to be met with one representative.[192] Removing competition between representatives from this dynamic increases the expedience of

[186] *Sweeney*, 767 F.3d at 671 (Wood, dissenting).
[187] Dennis O. Lynch, *Incomplete Exclusivity and Fair Representation: Ineveitable Tensions in Florida's Public Sector Labor* Law, 37 U. Miami L. Rev. 573, 592 (1983).
[188] *Id*.
[189] *Id*.
[190] Kovacs, *supra* note 120.
[191] *Id*.
[192] *Id*.

collective labor actions, while also allowing employees to retrieve equal treatment. Without exclusive representation, only members would be represented by unions, while nonmembers would have to enter the open market and find individual representation.[193] Such a practice would lead members and nonmembers being governed by different labor agreements. This result would cause harm in labor relations; thus, exclusive representation exists partly to curb such a harmful practice.

Additionally, the Supreme Court already held that employees who are nonmembers can be compelled to compensate unions for their services.[194] In *Beck* and *Abood*, the Supreme Court established a distinction between the services nonmembers should be responsible for, and fees in which they should retain an exemption.[195] In their analysis of NLRA §8(a)(3), *Beck* and *Abood* held that nonmembers should be responsible for fees that are related to collective bargaining.[196] This holding reconciles the competing interests between unions who desire compensation, and nonmembers who wish to separate themselves from the political affiliations of a union.[197] Unions would be compensated for costs associated with contract administration and collective bargaining, and would not receive compensation for unrelated activities.[198] A straightforward application of *Beck* and *Abood* resolves the Takings Clause issue associated with right to work laws. Yet, the majority in *Sweeney* tweaked their application of this Supreme Court precedent.[199]

The majority in *Sweeney* narrowly followed the Supreme Court, and construed the word "member" of NLRA §8(a)(3) and boiled the word down to "its financial core."[200] The majority

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[193] *Id*.
[194] *Sweeney*, 767 F.3d at 675 (Wood, dissenting).
[195] *Beck*, 487 U.S. at 759; *Abood*, 431 U.S. at 225.
[196] *Id*.
[197] *Knox*, 132 S. Ct. at 2289.
[198] *Sweeney*, 767 F.3d at 674 (Wood, dissenting).
[199] *Id*.
[200] *Beck*, 487 U.S. at 740.

construed the financial core language to only amount to representation fees.[201] After implementing NLRA §14(b)'s allowance of state laws that prohibit membership, the majority concluded that states can prohibit agreements that force employees to pay representation fees.[202] Judge Wood rejects this interpretation in her dissent, and argues that membership should be limited to the payment of initiation fees and monthly dues.[203] The dissent argues that nonmembers and members should be distinguished on these two payments.[204] Furthermore, the dissent argues that nonmembers should be forced to pay dues when reaping the benefits from collective bargaining and contract administration.[205]

In right to work states, a prospective employee's decision to join a union, along with their payment of an initiation fee and monthly dues, should qualify them as a union member. Their continued membership should be solely reliant on their continued payment of these dues. Thus, when interpreting NLRA §14(b), the term "members" should be defined by one's adherence to their dues payments. If one fails to meet their dues obligations, they will be classified as a nonmember. This nonmember status will then bring in the holding from *Beck*, which mandates that nonmembers pay representation fees associated with collective bargaining and contract administration.[206]

Maintaining a bright line distinction between a "member" and "nonmember" is key to providing a fair environment to both employees and unions. Judge Wood criticizes the *Sweeney* majority for blurring the line between these two statuses.[207] Her criticism is aimed at the

[201] *Sweeney*, 767 F.3d at 661
[202] *Id.*
[203] *Sweeney*, 767 F.3d at 674 (Wood, dissenting).
[204] *Id.*
[205] *Id.*
[206] *Beck*, 487 U.S. at 759.
[207] *Sweeney*, 767 F.3d at 677 (Wood, dissenting).

majority's criterion for when a nonmember transforms into a member.[208] The *Sweeney* majority essentially reclassifies a nonmember as a member if they are forced to pay any reimbursement for representation.[209] By broadly interpreting the word "member" in §14(b), the *Sweeney* majority expands the scope of right to work laws, and directly harms the unions. A more rigid approach in construing "member" in NLRA §14(b) would prevent the unions preemption from collecting representation related fees from nonmembers.

If the Supreme Court adopts such an interpretation, then unions could immediately collect representational fees. As previously explained, unions and employees do not share any special relationship that is rooted in history or tradition. Although unions are not needed to prevent sweat shops, their protective services are still needed to ensure that workers receive necessary benefits. Today, employers are trying to cut costs by reducing medical coverage and reducing jobs.[210] Unions are needed to collectively represent employees who are threatened by these corporate initiatives, and unions need funds to furnish their services.

Yet, most courts invalidate the unions claim to these fees. The Supreme Court in West Virginia recently held that unions only have a unilateral expectation of fees from nonmembers.[211] The court focuses on the claimed property interest of unions, and states that a protected property interest must originate from a contract or state law.[212] In *Morrisey*, the Supreme Court in West Virginia raised this "unilateral expectation of fees" argument to refute the unions claim that they suffered an unjust taking.[213] The *Morrisey* majority improperly focuses on the agreement between the unions and employees when rejecting the unions claim to fees. Instead, the court

[208] *Id.*
[209] *Id.*
[210] A Brief History of Unions, https://www.unionplus.org/page/brief-history-unions (last visited Nov. 5, 2017).
[211] *Morrisey*, 2017 WL 4103745 at 7.
[212] *Id.*
[213] *Id.*

should examine the unions merits in demanding fees, and the costly consequences of rejecting their claim.

In examining the unions merits to these fees, the court should circle back to the IOLTA trust fund cases.[214] The IOLTA trust fund cases implied that an uncompensated involuntary transfer of funds qualifies as an unjust taking. The more proper analysis is to focus exclusively on the union's losses when forced to represent nonmembers. Under this framework, *Morrisey's* expectation analysis is discarded, and the core issue of the union's monetary loss is highlighted. The union's forced services, which result in costly monetary loss, fit perfectly under the framework explained in *Brown*.[215] Thus, *Morrisey's* expectation analysis circumvents the *Brown* analysis which focuses on monetary loss. The Supreme Court would be wise to discard the expectation analysis employed by *Morrisey*, and utilize *Brown* to analyze the direct harm incurred by unions.

Furthermore, lower courts generally consider the time, experience, and skill of a professional to be a protected property interest.[216] The Supreme Court has yet to hold that personal services of a professional qualify as a protected property interest.[217] A clarification by the Supreme Court would be instrumental in determining whether a union's services to all employees is a property interest. If the Supreme Court holds that professional services are a valid property interest, the lone issue would be whether the duties of fair and exclusive representation preempt the unions from collecting fees. It is here where a straightforward application of *Beck's*

[214] *Dillon*, 346 F.2d at 638; Hostetler *supra*, note 78.
[215] *Brown*, 538 U.S. at 235.
[216] Hostetler, *supra* note 77; *Family Div. Trial Lawyers of Superior Court-D.C. Inc. v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir 1984).
[217] *Id.*

holding would fit, and proper construction of the word member in NLRA §14(b) would permit unions to collect fees.[218]

Additionally, the question persists of what is adequate compensation? The *Sweeney* majority argued that unions are justly compensated through their right to be the exclusive negotiator between employer and employee relations.[219] The majority reasoned that the duty of fair representation accompanies the duty of exclusive representation, and proscribes the unions conduct in acting as the sole negotiator.[220] As mentioned before, the duty of exclusive representation is a complex issue that conveys the extreme benefit of a monopoly to unions. However, the benefits associated with exclusive representation must be balanced against any burden the privilege causes the unions.

The *Sweeney* majority explicitly acknowledged a burden the combination of both exclusive representation and the duty of fair representation inflict harm upon unions. Judge Tinder explains that because federal law imposes a duty of fair representation, Indiana's right to work statute in question did not "take" property from the unions.[221] Rather, the duty of fair representation only precluded the union from receiving fees during their performance of the duty. Thus, Judge Tinder posits that the federal duty of fair representation is to blame, and not Indiana's right to work law.[222]

Judge Tinder may be correct in assigning the blame to the interaction between exclusive representation and fair representation as the culprits for the unions precarious situation.[223] But,

[218] *Beck*, 487 U.S. at 759.
[219] *Sweeney*,, 767 F.3d at 666.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*

Judge Tinder states that unions are properly compensated through their right to be the exclusive negotiator to avoid grappling with these federal mandates.[224] Here, the majority fails to uphold the unions protected property rights and promotes the "free-rider" system. Exclusive representation fails to serve as adequate compensation because unions are still left without any monetary compensation. Moreover, the *Sweeney* majority fails to address how the perceived compensation through exclusive representation offsets the unions monetary loss.[225] Permitting a system where unions spend thousands of dollars in representation is unjust. The presence of federal mandates takes the power to remedy the situation away from the state courts. Thus, the Supreme Court must remedy the confusion, and allow the unions to receive proper remedy.

Fortunately, state courts are trending in the direction that provides a recourse for unions. First, Judge Wood's dissent states that the *Sweeney* majority enforced an unconstitutional confiscation that is perpetuated by the American labor law system.[226] Here, Judge Wood describes how there are alternatives to the labor law system utilized by the United States, where individuals can form members-only unions to collectively bargain.[227] The duty of exclusive representation intercedes on the viability of a members-only system.[228] As explained before, Judge Wood focuses on the majority's construction of the word "member" in NLRA §14(b).[229] Yet, Judge Wood digresses and explains that if her critique is wrong, then a constitutional problem exists in labor law jurisprudence. Here, Judge Wood says that Congress always has the option to change the labor law, but that is unlikely to occur.[230]

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[224] *Sweeney*, 767 F.3d at 666.
[225] *Id.*
[226] *Sweeney*, 767 F.3d at 670 (Wood, Dissenting).
[227] *Id.*
[228] *Id.* at 671.
[229] *Id.* at 684.
[230] *Id.*

Although Judge Wood directly references Congress in her dissent, she implicitly calls upon the Supreme Court to clarify the definition of the word "member" in NLRA §14(b).[231] If the Supreme Court distinguished union members from nonmembers under §14(b) scrutiny, then the *Beck* analysis could be applied in a straightforward manner. Instead, the *Sweeney* majority's "financial core" analysis of the word "membership" persists, which prevents the *Beck* analysis from having an impact.[232]

Judge Wood's dissent is met with growing popularity, as a Wisconsin State court adopted her reasoning verbatim when addressing a local right to work statute.[233] The 14th Circuit of Wisconsin sought to tackle the free-rider issue.[234] The court adopted Judge Wood's critiques of the exclusive representation labor law system, and her rejection that unions are adequately compensated through exclusive representation.[235] Unfortunately, this Wisconsin holding is not controlling because it was stayed by the Wisconsin Court of Appeals.[236] At the time of this article, it is unclear whether this holding will be binding in the 14th Circuit of Wisconsin. Yet, Wisconsin's attempted incorporation of Judge Wood's dissent validates her viewpoint, and displays that other states seek to take a similar approach.

Additionally, this Takings Clause issue was recently highlighted in a West Virginia state court, which recognized the unions harm in receiving no reimbursement for their services.[237] The court explained that although the state has an interest in shielding workers from forced membership into unions, that interest does not outweigh the burden on a unions provision of free

[231] *Sweeney*, 767 F.3d at 684 (Wood, Dissenting).
[232] *Sweeney* 767 F.3d at 660.
[233] *Int'l Ass'n v. Wis.*, 2016 Wisc. Cir. LEXIS 1.
[234] *Id*.
[235] *Id*.
[236] Welkowitz *supra* note 61.
[237] *W. Va. AFL-CIO*, 2017 W.V. Cir. (2017)

services to nonmembers.[238] The growing popularity of Judge Wood's argument produces a tension among the courts in right to work states. Lower courts attempt to implement concepts from Judge Wood's dissent, but their efforts are stonewalled. This stonewalling is a result of the courts upholding the exclusive representation labor law system engrained in America. Judge Wood, along with a growing number of lower courts, recognize that unions have a legally protectable interest in their resources, and are entitled to compensation for their expensive services.

Supporters of Judge Wood and the various lower courts argue that the exclusive representation system must be abolished. Catherine Fisk, a professor at UC Irvine School of Law, and Benjamin Sachs, a law professor at Harvard, make the argument for an alternative labor system.[239] Here, the two professors echo the sentiments expressed by Judge Wood's dissent, and then explain how abandoning the exclusive representation system is an adequate solution.[240] Abandoning the system of exclusive representation would make it difficult for nonmembers because they may end up with different working conditions than union members.[241] Thus, the authors believe that such an extreme reform would entice nonmembers to pay unions for their services.[242]

Turning away from the exclusive representation system would force nonmembers into a bind, but it is an extreme solution that is unnecessary. Instead, redefining the term "member" under NLRA §14(b) provides a more feasible, and just as effective remedy to the free rider problem posed by right to work statutes. Providing a direct method for the *Beck* analysis to take

[238] *Id.*
[239] Benjamin Sachs, Catherine Fisk, Opinion, *Why Should Unions Negotiate for Workers who don't pay their Fair Share*, L.A. TIMES, July 9, 2014.
[240] *Id.*
[241] *Id.*
[242] *Id.*

control will form a clear system, where nonmembers will be on notice of situations where they are obligated to pay unions. Additionally, unions will know when they can expect to be compensated, and when they should only expect payment from nonmembers. To provide a clearer system, the Supreme Court must step in and recognize the unions services to nonmembers as a protected property interest.

IV. Conclusion

The majority in *Morrisey* stated that "no other appellate court in this country has examined a Takings challenge to a right to work law and accepted" it.[243] Whether right to work laws constitute a Takings Clause issue is a rapidly developing topic. At the time of this note, no circuit court has adopted the principles of Judge Wood's argument. Yet, it does appear that a conflict is imminent with a growing number of lower courts accepting the *Sweeney* dissent.

If faced with this issue, the Supreme Court must draw on the reasoning expressed in Judge Wood's dissent, and provide unions a method to recoup funds. First, the Supreme Court must affirmatively recognize money as a protectable property interest. The IOLTA cases imply the compulsory seizure of money falls within a Takings Clause analysis. The Supreme Court must validate this trend, and place money within the grasp of the Takings Clause.

Next, the Supreme Court should uphold the narrow "financial core" interpretation of the word "membership" in NLRA §14(b). The Supreme Court would dismiss any interpretation that the word "membership" should be construed per its "financial core." Instead, an interpretation that rests on whether an individual's pay dues or not is more adequate. After providing a narrow construction of "membership," the Supreme Court could then apply *Beck* and institute a rigid set of circumstances when nonmembers must pay fees. *Beck* holds that nonmembers are mandated to

[243] *Morrisey*, 2017 WL 410375 (W. Va. 2017).

pay union fees when reaping the benefits of collective bargaining or contract administration.[244] Thus, unions would be entitled to receive compensation when performing forced services proscribed under the federal duties of exclusive and fair representation.

The option of removing the duty of exclusive representation would remedy the issue, but it is an extreme solution. Instead, the Supreme Court is better served to construe the word "member" in NLRA §14(b) that permits the *Beck* analysis to take hold. Ruling in this manner will allow the principles expressed in Judge Wood's *Sweeney* dissent, the 14th Circuit of Wisconsin, and the West Virginia state court to become active law.

This free-rider experience enjoyed by non-members has been increasingly criticized by the courts. The central argument proposed by the unions is that duty to provide services without compensation constitutes an unjust taking under the Takings Clause of the Fifth Amendment.[245] Thus far, courts have held that a state's passage of right to work laws, which in turn prohibit unions from being compensated for representing non-union members, does not equate to a Takings Clause violation.[246] Yet, a state trial court in Wisconsin held in the exact opposite of the circuits. The Wisconsin state trial court ruled that the fees unions spend in representing non-members in right to work states warrants compensation.[247]

[244] *Beck*, 487 U.S. at 759.
[245] *Sweeney*, 767 F.3d at 664.
[246] *Id.*; *Int'l Union of Operating Eng'rs Local 370 v. Wasden,* 217 F. Supp. 3d 1209, 1233 (D. Idaho, 2016).
[247] *Int'l Ass'n v. Wis.*, 2016 Wisc. Cir. LEXIS 1 (Wis. Cir. Ct. Apr. 8, 2016).