

## REDEFINING ORGANIZED LABOR: HOW THE SUPREME COURT CIRCUMSCRIBED THE ROLE OF PRIVATE SECTOR UNIONS IN AMERICAN COMMUNITIES

Organized labor is in crisis. Despite recent polling showing higher levels of public support for unions than at any time since the 1960s,<sup>1</sup> the current presidential administration has launched an unprecedented attack on organized labor.<sup>2</sup> Commentators have characterized the current moment as rivaling only President Reagan’s assaults on labor in the 1980s.<sup>3</sup> Simultaneously, union endorsements, primarily for Democrats, have diminished influence on members’ votes.<sup>4</sup> And perhaps most existentially, the NLRB — the principal administrative agency that protects workers’ right to join unions — is engaged in a constitutional fight to survive in its current form.<sup>5</sup> Although these challenges are profound, they are not unforeseen. Union presence in recent years is a far cry from that of Big Labor in generations past.<sup>6</sup> Understanding this moment thus requires looking back to the height of labor’s influence in the mid-twentieth century.

At the apex of labor’s power, unions were seen by both members and outsiders as key institutional players in the American social contract, uninhibited by a need to stay strictly within the confines of the

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<sup>1</sup> Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [<https://perma.cc/X2QZ-EDDQ>].

<sup>2</sup> See Erik Loomis, Opinion, *Trump Is Wiping Out Unions. Why Are They So Quiet?*, N.Y. TIMES (Sep. 1, 2025), <https://www.nytimes.com/2025/09/01/opinion/trump-unions-labor.html> [<https://perma.cc/G3WU-LPT6>].

<sup>3</sup> See *Parallels to the 1980s for US Workers*, TIME: CHARTER (Mar. 16, 2025, at 06:30 ET), <https://time.com/charter/7268549/parallels-to-the-1980s-for-us-workers> [<https://perma.cc/L8B9-2WKA>]; Julie Su, *Union-Buster in Chief*, AM. PROSPECT (Aug. 15, 2025), <https://prospect.org/2025/08/15/2025-08-15-union-buster-in-chief-federal-employees> [<https://perma.cc/59YL-6MFL>].

<sup>4</sup> See Erik Gunn, *In Swing States that Once Went for Trump, Unions Organize to Prevent a Repeat*, NEB. EXAM’R (Sep. 25, 2024, at 15:00 ET), <https://nebraskaexaminer.com/2024/09/25/in-swing-states-that-once-went-for-trump-unions-organize-to-prevent-a-repeat> [<https://perma.cc/X8J5-794S>] (quoting Professor Paul Clark, an expert on labor relations from the Pennsylvania State University).

<sup>5</sup> See *Space Expl. Techs. Corp. v. NLRB*, 151 F.4th 761, 767 (5th Cir. 2025); Matt Bruenig, *The Fifth Circuit Ruled That the NLRB Is Unconstitutional*, JACOBIN (Aug. 21, 2025), <https://jacobin.com/2025/08/nlr-unconstitutional-spacex-fifth-circuit> [<https://perma.cc/82MN-9E73>].

<sup>6</sup> Cf. Frank Newport, David W. Moore & Lydia Saad, *Long-Term Gallup Poll Trends: A Portrait of American Public Opinion Through the Century*, GALLUP (Dec. 20, 1999), <https://news.gallup.com/poll/3400/longterm-gallup-poll-trends-portrait-american-public-opinion.aspx> [<https://perma.cc/47AG-YXK6>] (explaining that as union membership declined, fewer surveyed Americans viewed “Big Labor” as a threat relative to “Big Government” or “Big Business”); Laura Feiveson, *Labor Unions and the U.S. Economy*, U.S. Dep’t of Treasury (Aug. 28, 2023), <https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy> [<https://perma.cc/Z5JY-WRKV>] (noting that union membership peaked in 1950s at “one-third of the workforce,” yet hovers around ten percent in recent years).

employer-employee relationship.<sup>7</sup> Indeed, unions transcended the boundaries of the workplace, as well as those of labor and politics.<sup>8</sup> Union membership was not something that workers left at the mill, factory, or farm when their shift was over; rather, unions were “involv[ed] with recreational activities and social clubs, [had] ties to churches and religious groups, and provi[ded] . . . regular information about government rules and programs as well as nonprofit services” in their communities.<sup>9</sup>

The Supreme Court is cited as one of the culprits for the decline of labor’s power, along with phenomena such as globalization and reduced domestic manufacturing.<sup>10</sup> But much of what the Court has been recognized for has been its role in expanding employers’ rights during unionization efforts,<sup>11</sup> bargaining,<sup>12</sup> and strikes.<sup>13</sup> Existing scholarship on the Supreme Court cases discussed in this Note mainly focuses on the cases’ impact on unions’ ability to negotiate union security agreements — the clauses in collective bargaining agreements that require workers to either contribute to or join a union.<sup>14</sup> The role of the Court in defining the institutional character of unions has been less of a focus.

This Note seeks to connect the sociolegal dots by analyzing how Supreme Court jurisprudence has shaped the institutional role of private sector unions in American society.<sup>15</sup> It argues that through changing

<sup>7</sup> See LAINEY NEWMAN & THEDA SKOCPOL, *RUST BELT UNION BLUES* 49–51 (2023).

<sup>8</sup> See *id.* at 50 (describing how unions “were relevant to workers” in matters of local news, sports, and access to healthcare).

<sup>9</sup> *Id.* at 51.

<sup>10</sup> LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, *ECON. POL’Y INST., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS* 3, 26–27 (2020), <https://files.epi.org/pdf/215908.pdf> [<https://perma.cc/3XEA-WT3A>].

<sup>11</sup> See *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477–79 (1941) (allowing employers to express views on unionization efforts); *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 310 (1974) (holding that employers can refuse to recognize unions “with authorization cards purporting to represent a majority of . . . employees” if they do not follow the NLRB election process); *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 273–74 (1965) (holding that a business can shut down entirely rather than allow unionization).

<sup>12</sup> *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (allowing employers to temporarily shut down and lay off employees to increase bargaining leverage); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (holding that the NLRB could not require a company or union to accept specific terms of collective-bargaining agreements); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (allowing employers to renege on terms from collective bargaining agreements by filing a petition in bankruptcy).

<sup>13</sup> See, e.g., *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (allowing striker replacements).

<sup>14</sup> See, e.g., Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 57–58, 78 (1990); Brian J. Woldow, Note, *The NLRB’s (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 ADMIN. L. REV. 1075, 1075–77 (2000).

<sup>15</sup> The arguments in this Note are limited in scope to private sector unions, and references to union membership throughout the Note should be understood as such. Jurisprudence on membership in *public* sector unions has its own body of case law. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977), *overruled by Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018).

jurisprudence on union objectors' dues and the meaning of membership, the Court embraced and reinforced a circumscribed vision for the institutional breadth of unions.

This Note focuses on those private sector industries regulated by the National Labor Relations Act<sup>16</sup> (NLRA), which was passed in 1935<sup>17</sup> and amended by the Taft-Hartley Act of 1947.<sup>18</sup> At times, cases that fall under the Railway Labor Act<sup>19</sup> (RLA) are discussed as well.<sup>20</sup> Most of the case law discussed herein concerns statutory rights or duties, not constitutional rights, though the doctrine regarding dues payment does sometimes blur the line.<sup>21</sup> In Part I, the Note begins by discussing the Supreme Court's standard for objectors' dues in the 1960s, which gave deference and flexibility to unions as a result of an associational theory of organized labor. Part II discusses how the Supreme Court changed course in the 1980s, arguing that the Court internalized the arguments of opponents to organized labor who sought to pigeonhole unions as nothing more than collective bargaining units. Part III discusses the impact of changing dues jurisprudence on unions' internal operations, and Part IV argues that the Court's jurisprudence contributed to a sociological redefining of unions in American society.

## I. UNION MEMBERSHIP IN THE ASSOCIATIONAL ERA

### A. *Statutory and Social Backdrop*

In the mid-twentieth century, unions were treated as associational entities.<sup>22</sup> Concerns about forced union membership centered on how to balance the freedom to organize with a person's right *not* to

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<sup>16</sup> 29 U.S.C. §§ 151–169. The NLRB governs disputes between employers and unions that fall under the purview of the NLRA. *See id.* §§ 153, 160.

<sup>17</sup> National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

<sup>18</sup> Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187).

<sup>19</sup> 45 U.S.C. §§ 151–163, 181–188.

<sup>20</sup> Two distinct bodies of law, based on two federal statutes, govern private sector unions. Private sector unions in the railroad and airline industries are regulated by the RLA, passed in 1926 and amended in 1936. *Id.* §§ 151–152, 181; Railway Labor Act, ch. 347, 44 Stat. 577 (1926); Railway Labor Act, ch. 166, sec. 201, 49 Stat. 1189, 1189 (1936) (codified at 45 U.S.C. §§ 181–188). The National Mediation Board governs disputes between unions and employers that fall under the purview of the RLA. 45 U.S.C. §§ 154–155, 183. The NLRA governs most other private sector unions. *See* 29 U.S.C. § 151.

<sup>21</sup> *See, e.g.,* Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. 177, 187–88 (2016) (“While *Beck* did not directly address First Amendment concerns, presumably because the Court has never found that the NLRA’s regulations of private conduct involve state action, the case clearly incorporates the First Amendment concerns that animated *Street* and *Abood*.” (footnotes omitted)).

<sup>22</sup> Joseph E. Kallenbach, *The Taft-Hartley Act and Union Political Contributions and Expenditures*, 33 MINN. L. REV. 1, 20 (1948).

associate.<sup>23</sup> The Taft-Hartley amendments of 1947 accounted for the latter concern, adding language to the NLRA that prohibited the spending of union dues on political campaigns to protect members who “found themselves . . . involuntarily contributing through payment of dues and assessments to the promotion of political programs to which they were actually opposed.”<sup>24</sup>

That provision built on the existing protections for objectors in the NLRA, which affords workers the “right to refrain from” union activity.<sup>25</sup> Section 7 gives employees both “the right[s] to self-organization, to form, join, or assist labor organizations . . . and . . . the right to refrain from any or all of such activities.”<sup>26</sup> However, Section 8(a)(3) of the NLRA permits employers to enter into agreements with labor unions that “require as a condition of employment membership” in that union.<sup>27</sup> Such contractual provisions are known as union security agreements, which protect unions from free riders by excluding employees from a bargaining unit if, for example, they “[d]o not wish to pay union dues.”<sup>28</sup> Union security agreements create agency shops<sup>29</sup> and union shops,<sup>30</sup> but are only allowed in states without right-to-work laws or in industries regulated by the RLA.<sup>31</sup>

<sup>23</sup> See, e.g., Clyde W. Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States*, 112 U. PA. L. REV. 647, 647–48 (1964).

<sup>24</sup> See Kallenbach, *supra* note 22, at 1.

<sup>25</sup> Summers, *supra* note 23, at 666 (quoting Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, § 7, 61 Stat. 136, 140 (codified as amended 29 U.S.C. § 157)).

<sup>26</sup> 29 U.S.C. § 157 (emphasis added).

<sup>27</sup> See *id.* § 158(a)(3).

<sup>28</sup> See *Union Security Clause*, PRACTICAL LAW GLOSSARY, 5-508-5483, Westlaw (database updated 2025).

<sup>29</sup> In agency shops, workers do not have to become *members* of the union, but they must pay dues to the union. *Gen. Motors Corp. v. NLRB*, 303 F.2d 428, 430 (6th Cir. 1962) (defining an agency shop as one in which “an employee pay[s] charges in lieu of union membership as a condition of employment”).

<sup>30</sup> In union shops, all workers represented by the exclusive bargaining agent are required to become members of the union once they are hired. See *Union Shop*, PRACTICAL LAW GLOSSARY, 3-508-5479, Westlaw (database updated 2025). The difference between union shops and closed shops — which were outlawed by the Taft-Hartley Act — is that joining a union is not a prerequisite for obtaining employment in a union shop; one must simply join the union representing the workplace after accepting employment. *Contrast id.* (“Workplace where an employee, to retain his job, must join a union . . .” (emphasis added)), with *Closed Shop*, LEGAL INFO. INST. (2022), [https://www.law.cornell.edu/wex/closed\\_shop](https://www.law.cornell.edu/wex/closed_shop) [<https://perma.cc/5TD5-AAHR>] (“A closed shop . . . requires *current membership* in a specific union as a *condition of employment*.” (emphasis added)).

<sup>31</sup> See Andrew Baker & Travis West, “Right to Work” Laws and Impact on Unionization, BLOOMBERG L. (Sep. 2020), <https://www.bloomberglaw.com/external/document/X8JDHSoOooooo/labor-relations-professional-perspective-right-to-work-laws-and> [<https://perma.cc/FAX5-56W5>] (“So-called right to work laws allow workers in a unionized workplace to opt out of paying union dues . . .”). Right-to-work laws do not apply to industries covered by the RLA because the RLA preempts state laws governing the interpretation of collective bargaining agreements. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 262–63 (1994) (quoting *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324 (1972)); *Can I Be Required to Be a Union Member or Pay Dues to a Union? (Railway or Airline Employee)*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <https://www.nrtw.org/required-join-pay-railway> [<https://perma.cc/7WBL-MUAU>].

The associational framework of the mid-twentieth century was beneficial for unions. Employees who objected to some aspect of their union's use of dues (objectors) could disassociate — socially or psychologically — without being allowed to withhold financial contribution.<sup>32</sup> The framework also afforded unions flexibility in *how* they used members' dues. Unions, just like other private organizations that received no money from the federal government — such as fraternal groups or the American Legion<sup>33</sup> — were able to spend their money in a variety of ways. For instance, many unions had large brick-and-mortar union halls.<sup>34</sup> The United Steelworkers (USW) had over 228 union halls across North America around 1960.<sup>35</sup> Unions also spent money on regular newsletters to members and joint labor newspapers.<sup>36</sup> Recreationally, they sponsored member leagues for softball, bowling, and other sports,<sup>37</sup> as well as social and charitable events,<sup>38</sup> and children's activities — such as, in the case of one Aliquippa, Pennsylvania, USW local, a school's soap box derby.<sup>39</sup> Unions sent their members to conferences across the country<sup>40</sup> and paid for retirement parties for valued members.<sup>41</sup> Of course, they also spent money on organizing.<sup>42</sup> Diverse uses of membership dues were part and parcel of unions' role in American society<sup>43</sup>: Unions were “cornerstone institutions in the fabric of community relations.”<sup>44</sup>

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<sup>32</sup> Cf. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 735 (1963) (rejecting the argument that agency shop arrangements are “unfair labor practice[s]” under the NLRA).

<sup>33</sup> See, e.g., *Frequent Questions*, AM. LEGION, <https://mylegion.org/personifyebusiness/Give/Frequent-Questions> [<https://perma.cc/JK39-99ER>] (explaining that the American Legion does not receive government funding).

<sup>34</sup> NEWMAN & SKOCPOL, *supra* note 7, at 68; see also Stephen McFarland, “*The Union Hall Was the Center of the Worker's Life*”: *Spaces of Class Formation in the United Auto Workers, 1937–1970*, 55 J. HIST. GEOGRAPHY 17, 17–18 (2017).

<sup>35</sup> NEWMAN & SKOCPOL, *supra* note 7, at 68.

<sup>36</sup> *Id.* at 77.

<sup>37</sup> *Id.* at 59.

<sup>38</sup> See, e.g., *id.* at 46.

<sup>39</sup> *Id.* at 65–66.

<sup>40</sup> *Id.* at 57.

<sup>41</sup> See, e.g., *id.* at 24.

<sup>42</sup> See *id.* at 23.

<sup>43</sup> See *id.* at 73. For instance, a 1955 survey of USW members evidences widespread support amongst members for broad involvement of the union in various sectors of American society. See *id.* at 74. Three-fifths of respondents affirmed that the USW made them feel like “more important and useful citizen[s],” and more than eighty percent of respondents agreed that unions were “one of the most important forces insuring [sic] democracy” in the United States. *Id.* (quoting John W. McCollum & Hazel M. West, Report on Union Member Attitude Survey, USW and the Union Rsch. & Educ. Project of the Univ. of Chi. (1955) (on file with Pa. State Univ., John P. Hoerr papers, USWA - Union Member Attitude Survey, 1955, Box 9)).

<sup>44</sup> *Id.* at 50.

### B. NLRB v. General Motors: *Requiring Dues from Objectors*

In the 1960s, the Supreme Court approved a scheme that bolstered the associational view of unions in which objectors had to pay the same amount of dues as full members.<sup>45</sup> Objectors were required to be pecuniary members of the union, but they were not recognized *by the union* as full members.<sup>46</sup> Although these workers were protected by collective bargaining agreements, they were not eligible to receive some benefits of union membership.<sup>47</sup> In other words, such workers were union members under the law but not in the eyes of the union. In contrast, union members who paid union dues and participated in some capacity with the union were seen by *both* the law and the union as members.<sup>48</sup> The Court's decision illustrated deference to unions and reflected a period of American history in which the elite and public alike understood both the institutional breadth of unions and the importance of active participation in civic life.

The differences between pecuniary and full membership initially emerged in a 1961 case before the NLRB called *General Motors Corp.*<sup>49</sup> That case later reached the Supreme Court and produced the scheme discussed above. In the late 1950s, General Motors Corporation (GM) refused to bargain with the United Auto Workers (UAW) union — “the exclusive representative of GM employees” in the bargaining unit — because GM alleged that the UAW's agency-shop agreement was illegal under the NLRA in Indiana, a right-to-work state.<sup>50</sup> The NLRB initially sided with GM, finding the agency agreement illegal due to the right-to-work status of Indiana,<sup>51</sup> but reversed its decision a few months later.<sup>52</sup>

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<sup>45</sup> See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 735–36 (1963).

<sup>46</sup> For ease of reference, this Note generally refers to these sets of members as “pecuniary members,” who were seen as members in the eyes of the law but not the union, in contrast to “full members,” who were seen as members by both the law and the union. *Cf. id.* at 737 (describing the obligations of and benefits received by employees under an “agency shop” union model). This Note will also at times refer to pecuniary members as “objectors.”

<sup>47</sup> *Cf. id.* at 743 (“If an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, . . . the employee may not be discharged for nonmembership even though he is not a formal member.”).

<sup>48</sup> *Cf. Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 106 (1985) (observing that “[f]ull union membership was . . . compulsory in a closed shop” union, meaning that “to keep their jobs, employees were required to attend union meetings, support union leaders, and otherwise adhere to union rules”).

<sup>49</sup> *Gen. Motors Corp.*, 130 NLRB 481 (1961).

<sup>50</sup> *Id.* at 481; *id.* at 483, 485 (Leedom, Chairman, concurring).

<sup>51</sup> See *id.* at 482 (majority opinion); *id.* at 487 (Leedom, Chairman, concurring); *id.* at 498–99 (Jenkins, Member, concurring); *id.* at 499–500 (Kimball, Member, concurring).

<sup>52</sup> See *Gen. Motors Corp.*, 133 NLRB 451, 460 (1961). After the NLRB's initial decision, the NLRB granted the UAW's motions for reconsideration and vacated its previous decision. *Id.* at 452. That NLRB decision was set aside by the Sixth Circuit before finally reaching the Supreme Court. *Gen. Motors Corp. v. NLRB*, 303 F.2d 428, 430 (6th Cir. 1962), *rev'd*, 373 U.S. 734, 745 (1963).

The case, before both the NLRB and Supreme Court, was important not only because of what it said about union security agreements, but also because of what it said about the meaning of union membership. NLRB Member Joseph A. Jenkins included testimony from UAW then-Vice President Leonard Woodcock about the different statuses of pecuniary and full union members.<sup>53</sup> Despite having to pay equal dues as full members, pecuniary members were not “eligible to participate in union meetings,” vote on negotiated agreements, receive the union’s publications “as a matter of right,” or have guaranteed access to strike or educational benefits.<sup>54</sup> “[O]ur constitution isn’t written in terms of nonmembers,” Member Jenkins quoted Woodcock as saying.<sup>55</sup>

Member Jenkins, in the initial decision, relied on Supreme Court Justice Burton’s definition of “membership” to understand what differentiated pecuniary from full membership in the UAW.<sup>56</sup> “The essential element” of full membership was “the desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member.”<sup>57</sup> Simple payment of dues thus did not confer full membership because an individual still may not “desire . . . to belong to the organization,” and, likewise, the organization may not recognize him as a member.<sup>58</sup> Member Jenkins noted that this definition of membership avoided “tortur[ing] the clear and unambiguous words” of the NLRA and thus construed membership in a union “to mean ‘membership’ as that phrase is commonly construed and understood.”<sup>59</sup>

When *NLRB v. General Motors Corp.*<sup>60</sup> (*NLRB v. GM*) arrived at the Supreme Court, the pecuniary members argued in their briefing that agency-shop agreements should not be allowed at all under the NLRA.<sup>61</sup> The pecuniary members asserted that “the Union’s proposed agency shop agreement [was] in violation of the rights conferred by Section 7 [of the NLRA], there being no contention that contributing financial support to a labor organization is not ‘assisting’ such labor organization.”<sup>62</sup>

The pecuniary members actually concurred with Member Jenkins and the UAW’s definition of membership. “‘Membership’ is not an

<sup>53</sup> *Gen. Motors Corp.*, 130 NLRB at 489 (Jenkins, Member, concurring).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 498 n.27 (quoting *Jencks v. United States*, 353 U.S. 657, 679 (1957) (Burton, J., concurring in the result)). The *Jencks* case concerned membership in a communist organization. 353 U.S. at 658–59.

<sup>57</sup> *Gen. Motors Corp.*, 130 NLRB at 498 n.27 (Jenkins, Member, concurring) (quoting *Jencks*, 353 U.S. at 679 (Burton, J., concurring in the result)).

<sup>58</sup> *See id.* (quoting *Jencks*, 353 U.S. at 679 (Burton, J., concurring in the result)).

<sup>59</sup> *Id.*

<sup>60</sup> 373 U.S. 734 (1963).

<sup>61</sup> Brief for Raymond E. Lewis et al. as Amici Curiae at 1–2, 7–8, *Gen. Motors Corp.*, 373 U.S. 734 (No. 404).

<sup>62</sup> *Id.* at 8.

obscure [sic], technical word,” they wrote.<sup>63</sup> “It is not one with a special meaning in the labor-management field. There is no reason not to apply its common, every-day meaning.”<sup>64</sup> The pecuniary members thus seemed to agree with the UAW’s contention that full “membership” to an organization required more than financial contribution.<sup>65</sup> They argued that their NLRA right to refrain from assisting the union was infringed because they had to pay dues, but paying dues was insufficient to confer *full* membership,<sup>66</sup> as the payment of dues was not based on “an agreement requiring ‘membership’” under section 8(a)(3) of the NLRA.<sup>67</sup>

In a short opinion by Justice White, the Court determined that the union *could* legally require objectors to pay full union dues.<sup>68</sup> The Court reversed the Sixth Circuit’s determination that agency-shop arrangements were prohibited in Indiana, a right-to-work state.<sup>69</sup> The Court held that paying full dues — becoming a pecuniary member — would protect an employee from being fired, meaning the employee was a “member” in NLRA terms, even if not in the eyes of the union.<sup>70</sup> The Court rejected the pecuniary members’ contention that agency-shop clauses were prohibited by the NLRA, recognizing that while “[i]t is permissible to condition employment upon membership, . . . membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. ‘Membership’ as a condition of employment is whittled down to its financial core.”<sup>71</sup> A pecuniary member was an employee who “me[t] only the minimum financial burden, and refuse[d] to support or ‘join’ the union in any other affirmative way.”<sup>72</sup> In contrast, full members paid dues *and* supported the union in additional affirmative ways, which granted them further entitlements from the union.<sup>73</sup> The union could not penalize someone for failing to perform the obligations of full-fledged

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<sup>63</sup> *Id.* at 7.

<sup>64</sup> *Id.*

<sup>65</sup> See Motion for Leave to File a Brief as Amici Curiae and Brief for the American Federation of Labor and Congress of Industrial Organizations and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW as Amici Curiae at 21, 24–25, Retail Clerks Int’l Ass’n, Loc. 1625 v. Schermerhorn, 373 U.S. 746 (1963) (No. 368) and *Gen. Motors Corp.*, 373 U.S. 734 (No. 404).

<sup>66</sup> See Brief for Raymond E. Lewis et al. as Amici Curiae, *supra* note 61, at 7–8.

<sup>67</sup> See *id.* at 9.

<sup>68</sup> *Gen. Motors Corp.*, 373 U.S. at 734–35.

<sup>69</sup> *Id.* at 736, 738.

<sup>70</sup> *Id.* at 743.

<sup>71</sup> *Id.* at 742.

<sup>72</sup> *Id.* at 744.

<sup>73</sup> See *id.* at 737 (“Employees choosing not to join would make the required payments . . . but they would not be entitled to attend union meetings, vote upon ratification of agreements negotiated by the union, or have a voice in the internal affairs of the union.”).

membership, but it could obligate the employer to fire someone for failing to perform the obligations of pecuniary membership.<sup>74</sup>

The Court bolstered its holding from *NLRB v. GM in Retail Clerks International Association, Local 1625 v. Schermerhorn*,<sup>75</sup> which was decided the same day. The Court stated that it could not “take seriously petitioners’ unsupported suggestion . . . that the union spends all of its income on collective bargaining expenses.”<sup>76</sup> Quoting the NLRB’s brief, the Court recognized that unions spend money “to promote . . . [or] defeat legislation . . . , to publish newspapers and magazines, to promote free labor institutions in other nations, to finance low cost housing, to aid victims of natural disaster, to support charities, to finance litigation, to provide scholarships, and to do [other] things” in the interest of their members.<sup>77</sup>

By creating a two-tiered membership structure, *NLRB v. GM* protected unions’ ability to maintain their own internal definition of full membership. The Court did not, as amici pecuniary members advocated,<sup>78</sup> hold that membership for purposes of the NLRA and membership for the union’s internal purposes were coextensive.<sup>79</sup> Had the Court done so, *all* membership could have been watered down to its financial core.<sup>80</sup> By instead separating pecuniary and full membership, the Court allowed unions to maintain participatory requirements for internal membership and avoided subjecting the requirements of full membership to constitutional scrutiny.

The two-tiered system enabled unions to reflect the underlying assumptions about civic engagement of the time. In both labor unions and other types of civic associations in the early to mid-twentieth century, “the appeal of America’s most successful membership federations went far beyond individual economic calculation.”<sup>81</sup> From the early nineteenth century through the mid-twentieth century, civic associations had large, highly involved membership bases.<sup>82</sup> Members participated in regular meetings,<sup>83</sup> attended conferences,<sup>84</sup> voted and elected leadership,<sup>85</sup> and abided by the association’s constitution or

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<sup>74</sup> *Id.* at 742.

<sup>75</sup> 373 U.S. 746 (1963).

<sup>76</sup> *Id.* at 753 n.6.

<sup>77</sup> *Id.*

<sup>78</sup> See Brief for Raymond E. Lewis et al. as Amici Curiae, *supra* note 61, at 3.

<sup>79</sup> *Gen. Motors Corp.*, 373 U.S. at 744–45.

<sup>80</sup> See, e.g., Brief for the Respondents at 29, *Comm’n Workers of Am. v. Beck*, 487 U.S. 735 (1988) (No. 86-637).

<sup>81</sup> THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MANAGEMENT TO MEMBERSHIP IN AMERICAN CIVIC LIFE* 84 (2003); see Theda Skocpol, *Associations Without Members*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/2001/12/19/associations-without-members> [https://perma.cc/BGV5-RJVS].

<sup>82</sup> See, e.g., SKOCPOL, *supra* note 81, at 31–36; Skocpol, *supra* note 81.

<sup>83</sup> SKOCPOL, *supra* note 81, at 78–79.

<sup>84</sup> *Id.* at 86–87.

<sup>85</sup> *Id.* at 104.

guiding documents.<sup>86</sup> The Supreme Court's conclusion in *NLRB v. GM* about what constituted union "membership" thus reflected a time in which organizational membership was about engagement and participation, not just financial contribution.<sup>87</sup>

## II. DOCTRINAL CHANGE BASED ON ANTI-UNION ADVOCACY

The composition of American civic associations evolved in the late twentieth century. Although civic associations were still omnipresent, membership in such associations became more about monthly donations to advocacy groups and less about "sustain[ing] intimate solidarities and facilitat[ing] connections to wider worlds."<sup>88</sup> During this same era, Supreme Court jurisprudence on the meaning of membership to a labor union changed. In *Communications Workers of America v. Beck*,<sup>89</sup> the Court replaced the *NLRB v. GM* scheme with a decision prohibiting unions from using objectors' dues for purposes unrelated to collective bargaining.<sup>90</sup> The administrative burdens<sup>91</sup> and messaging regarding unions<sup>92</sup> that resulted from *Beck* played a significant role in redefining unions' role in the modern era.

Challenges to specific uses of union dues emerged after *NLRB v. GM*. In the 1980s, the debate over the use of objectors' dues evolved into being about unions' statutory obligations to objecting employees.<sup>93</sup> In the 1984 case *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,<sup>94</sup> the Supreme Court had to determine whether, under the RLA, unions could use objectors' funds for the union's quadrennial convention, nongrievance litigation, union publications, union social activities, employee death benefits, and organizing efforts at other workplaces.<sup>95</sup>

The Ninth Circuit held in favor of the union on all of the activities in question.<sup>96</sup> The appellate panel recognized that social, charitable, and community-related expenses were "important to the union's members because they [brought] about harmonious working relationships, promote[d] closer ties among employees, and create[d] a more pleasant environment for union meetings."<sup>97</sup>

<sup>86</sup> See *id.* at 99–102.

<sup>87</sup> See *id.* at 21.

<sup>88</sup> *Id.* at 97; Skocpol, *supra* note 81.

<sup>89</sup> 487 U.S. 735 (1988).

<sup>90</sup> *Id.* at 745.

<sup>91</sup> See *infra* Part III, pp. 1690–92.

<sup>92</sup> See *infra* Part IV, pp. 1692–96.

<sup>93</sup> See, e.g., *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 438–39 (1984); *Beck*, 487 U.S. at 743.

<sup>94</sup> 466 U.S. 435 (1984).

<sup>95</sup> See *id.* at 440–41.

<sup>96</sup> *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 685 F.2d 1065, 1074–75 (9th Cir. 1982).

<sup>97</sup> *Id.* at 1074 (describing the union social activities expenditures).

The Supreme Court affirmed in part and reversed in part.<sup>98</sup> It agreed with the Ninth Circuit that union social expenditures did not frustrate the congressional intent of the RLA.<sup>99</sup> The Court quoted the chairman of the subcommittee that considered amendments to the RLA as evidence that “Congress [did not seek to] define precisely what normal, minor union expenses could be charged to objectors; he did not want the bill to say that ‘the unions . . . must not have any of the . . . kinds of little dues that they take up for giving a party, or something of that nature.’”<sup>100</sup> Under the RLA, the *Ellis* Court determined that objecting workers’ dues could be used for social activities,<sup>101</sup> conventions,<sup>102</sup> and publications so long as the publications did not concern activities for which objectors’ fees could not be used.<sup>103</sup> Objecting workers’ dues could *not* be used for nongrievance litigation<sup>104</sup> or external organizing efforts.<sup>105</sup>

Four years later, the Supreme Court “embrace[d] a more restrictive formulation of the test” regarding the uses of objectors’ dues under the NLRA.<sup>106</sup> In 1974, Harry Beck took action against his union when his employer, AT&T, agreed to an agency-shop security agreement.<sup>107</sup> With the help of the National Right to Work Legal Defense Foundation (NRW LDF), Beck and nineteen other telephone workers in Maryland sued the Communications Workers of America (CWA), AT&T, and AFL-CIO.<sup>108</sup> The plaintiffs “claim[ed] that the union failed to represent their interests fairly . . . by . . . enforcing an agreement that allow[ed] the exaction of funds for purposes that [did] not serve their interests and in some cases [were] contrary to their personal beliefs.”<sup>109</sup>

In the Brief for the Respondents, the NRW LDF wrote that workers should be required “to pay no more than the *pro rata* share of the costs of performing [the union’s] statutory duties as exclusive representative.”<sup>110</sup> The Foundation argued that charging objectors for “institutional activities, *whether or not those activities constitute[d]*

<sup>98</sup> *Ellis*, 466 U.S. at 457.

<sup>99</sup> *See id.* at 450.

<sup>100</sup> *Id.* (quoting *To Amend the Railway Labor Act . . . Providing for Union Membership and Agreements for Deduction from Wages of Carrier Employees for Certain Purposes: Hearing on S.3295 Before the S. Subcomm. of the Comm. on Lab. & Pub. Welfare*, 81st Cong. 173 (1950) (statement of Sen. Elbert D. Thomas, Chairman, S. Comm. on Lab. & Pub. Welfare)).

<sup>101</sup> *Id.* at 449–50.

<sup>102</sup> *Id.* at 448–49.

<sup>103</sup> *See id.* at 450–51.

<sup>104</sup> *Id.* at 453.

<sup>105</sup> *Id.* at 451–53. The Court did not determine whether objectors’ dues could go to death benefits. *Id.* at 453–54.

<sup>106</sup> *Abrams v. Commc’ns Workers of Am.*, 59 F.3d 1373, 1379 (D.C. Cir. 1995).

<sup>107</sup> *See SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 238–39 (2014).

<sup>108</sup> *Id.* at 239.

<sup>109</sup> *Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 743 (1988).

<sup>110</sup> Brief for the Respondents, *supra* note 80, at 17.

performance of its statutory duties,” was a violation of the NLRA because activities unrelated to collective bargaining did not “constitute performance of [the union’s] statutory duties.”<sup>111</sup> The Foundation’s position on unions’ purpose constricted unions to that which was outlined in the NLRA. Instead of viewing unions as flexible associational entities, the Foundation argued that unions were created and confined by the NLRA, and that the extent of their purpose was thus what was reflected in its statutory provisions.<sup>112</sup>

The NRW LDF framed union “membership” in a subtly different way than the case law does. The Brief for the Respondents in *Beck* twice misquoted the Court’s decision in *NLRB v. GM* as having stated that union “[m]embership’ is whittled down to its financial core.”<sup>113</sup> In fact, the full statement from *NLRB v. GM* was that “[m]embership’ as a condition of employment is whittled down to its financial core.”<sup>114</sup> The difference is consequential. The *NLRB v. GM* Court had distinguished pecuniary membership — or membership “as a condition of employment” — from full membership, saying that “the union’s proposal . . . does not require actual membership but demands only initiation fees and monthly dues.”<sup>115</sup> By misconstruing “membership as a condition of employment” as full union membership, the Foundation equated union membership with financial contribution. On that playing field, objectors had just as much of a right to determine how their money was spent as did fully participatory members. This move helped set up the Court to determine that unions were required to respect and account for objectors’ preferences in how dues were spent.<sup>116</sup>

In prior cases, such as *NLRB v. GM*, litigants had invoked an associational theory of objecting to compulsory union membership.<sup>117</sup> That argument failed to rein in union power because workers could voluntarily disassociate while still paying full dues.<sup>118</sup> So, in *Beck*, amici supporting the objectors went one step further. They argued that the collection of equal dues from objectors “compell[ed] nonunion workers to subsidize union political causes.”<sup>119</sup> According to amici, anything other than expenses “germane to collective bargaining”<sup>120</sup> perpetuated “union political causes.”<sup>121</sup> In its representation of the *Beck* plaintiffs,

<sup>111</sup> See *id.* at 18.

<sup>112</sup> See *id.* at 17–22.

<sup>113</sup> *Id.* at 18–19 (quoting *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963)).

<sup>114</sup> *Gen. Motors Corp.*, 373 U.S. at 742 (emphasis added).

<sup>115</sup> *Id.* at 741 (emphasis added).

<sup>116</sup> See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 762–63 (1988) (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984)).

<sup>117</sup> See *Gen. Motors Corp.*, 373 U.S. at 737, 742.

<sup>118</sup> See *id.*

<sup>119</sup> See Brief of Amicus Curiae Landmark Legal Foundation in Support of Respondents at 11, *Beck*, 487 U.S. 735 (1988) (No. 86-637).

<sup>120</sup> *Id.* at 12 (quoting *Bhd. of Ry. & S. S. Clerks v. Allen*, 373 U.S. 113, 122 (1963)).

<sup>121</sup> See *id.* at 11–12.

the Foundation rested on *Ellis*, among other cases, to argue that objectors should not be expected to pay equal dues to full members.<sup>122</sup> The Foundation posited that objectors were required to pay two types of fees, the first of which was “the portion used to finance Section 9(a) [collective bargaining] activities” and the second of which was “the portion used to finance its other, *extra*-representational activities.”<sup>123</sup> In addition to shifting the meaning of full union membership, the *Beck* plaintiffs asserted a framework in which every non-collective bargaining activity funded by unions constituted something to which a worker could voice a statutory objection.<sup>124</sup>

The NRW LDF and the other organizations supporting Beck<sup>125</sup> did not represent the entirety of the conservative coalition. To the Reagan Administration’s ire, Solicitor General Charles Fried filed an amicus brief in support of the union.<sup>126</sup> Solicitor General Fried did not believe that the NLRA prohibited unions from using objectors’ dues “for both collective bargaining and non-collective bargaining purposes.”<sup>127</sup> The fracture over this issue in the Republican Party illustrates the discomfort some felt in burdening private organizations with “judicially implied dut[ies].”<sup>128</sup>

Ultimately, the Supreme Court concluded in *Beck* that the NLRA prohibited unions from using objectors’ dues for “activities unrelated to collective bargaining, contract administration, or grievance adjustment.”<sup>129</sup> The majority opinion was authored by Justice Brennan. His opinion garnered five votes, crossing ideological lines: liberal Justices Brennan, Marshall, and Stevens, centrist Justice White — who authored *NLRB v. GM* — and conservative Chief Justice Rehnquist.<sup>130</sup> The Court’s analysis in *Beck* addressed how much latitude the Taft-Hartley amendments to the NLRA gave unions on how to spend dues money.<sup>131</sup> The Court acknowledged that “Congress expressly considered proposals regulating union finances but ultimately placed only a few limitations on the collection and use of dues and fees, and otherwise left unions free

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<sup>122</sup> Brief for the Respondents, *supra* note 80, at 36 (quoting *Ellis*, 466 U.S. at 448); *see also, e.g., id.* at 34–35 (quoting, *inter alia*, *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225, 238 (1956); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221–22 (1977)).

<sup>123</sup> *Id.* at 38.

<sup>124</sup> *See id.* at 37–38.

<sup>125</sup> *See, e.g.,* Brief of Amicus Curiae Landmark Legal Foundation in Support of Respondents, *supra* note 119, at 1.

<sup>126</sup> *See* Brief for the United States as Amicus Curiae at 25–27, 29, *Comm’n Workers of Am. v. Beck*, 487 U.S. 735 (1988) (No. 86-637); LEE, *supra* note 107, at 252–54.

<sup>127</sup> LEE, *supra* note 107, at 252 (quoting Brief for the United States as Amicus Curiae, *supra* note 126, at 18).

<sup>128</sup> *But see Beck*, 487 U.S. at 743 (arguing that federal courts have jurisdiction over “the judicially implied duty of fair representation”).

<sup>129</sup> *Id.* at 738.

<sup>130</sup> *Id.*

<sup>131</sup> *See, e.g., id.* at 744–45 (quoting 29 U.S.C. § 158(a)(3)).

to arrange their financial affairs as they saw fit.”<sup>132</sup> But it concluded that “Congress understood [section] 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities.”<sup>133</sup>

To glean legislative intent on how restricted union spending should be, the Court looked to congressional testimony from 1947.<sup>134</sup> The Court claimed that the congressional intent behind Taft-Hartley was to eliminate the free-rider problem<sup>135</sup> while simultaneously “withholding from unions the power to cause the discharge of employees for any other reason.”<sup>136</sup> The Court stated that “[i]t simply does not follow from [the legislative record] that Congress left unions free to exact dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective-bargaining activities.”<sup>137</sup> This interpretation of the legislative history stands in contrast to the Court’s interpretation of the same legislative record in *NLRB v. GM*, where it found “nothing in the legislative history of the [Taft-Hartley] Act indicating that Congress intended . . . [section] 8(a)(3) to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security arrangements.”<sup>138</sup>

Indeed, the Court’s interpretation of the legislative history in *Beck* ignored that Congress was, at best, split at the time of Taft-Hartley’s passage as to how much latitude unions should have regarding use of member dues. Senator Robert Taft — nicknamed “Mr. Republican”<sup>139</sup> — fiercely objected to union shops overall.<sup>140</sup> If a worker objected, “[t]hen, there might be a threat of beating up his family or himself if he did not join and sign a card.”<sup>141</sup> But others, such as Senator Claude Pepper of Florida, believed unions should be able to do what they liked with dues money.<sup>142</sup> Senator Pepper endorsed the associational theory of labor unions, comparing a union’s financial business to that of other civic organizations<sup>143</sup>: “I aver that a labor union has as much right to fix its own dues as has the [fraternal] lodge to which I belong, or the church to which I belong. That is their business.”<sup>144</sup> Senator James Murray of Montana agreed and went so far as to compare the prospect of the

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<sup>132</sup> *Id.* at 757.

<sup>133</sup> *Id.* at 759.

<sup>134</sup> *See id.* at 747–54.

<sup>135</sup> *See id.* at 755 (quoting S. REP. NO. 80-105, at 7 (1947)).

<sup>136</sup> *Id.* at 756 (quoting *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 41 (1954)).

<sup>137</sup> *Id.* at 759.

<sup>138</sup> *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 741 (1963).

<sup>139</sup> *Robert A. Taft: A Featured Biography*, U.S. SENATE, [https://www.senate.gov/senators/FeaturedBios/Featured\\_Bio\\_Taft.htm](https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Taft.htm) [<https://perma.cc/3L2A-2T2H>].

<sup>140</sup> *See* 93 CONG. REC. 4435 (1947) (statement of Sen. Robert A. Taft).

<sup>141</sup> *Id.*

<sup>142</sup> *See id.* at 6514 (statement of Sen. Claude Pepper).

<sup>143</sup> *See id.*

<sup>144</sup> *Id.*

government's overinvolvement in unions' affairs to fascism: "Such governmental power to direct how, when, and for what, labor unions shall spend their funds is exactly what made the Nazi labor front a going organization," he stated.<sup>145</sup>

In his opinion concurring in part and dissenting in part from the *Beck* decision, Justice Blackmun expressed support for retaining the *NLRB v. GM* holding.<sup>146</sup> Justice Blackmun stated that he would have found that "Congress did not intend to prohibit union-security agreements that require the tender of full union dues and standard union initiation fees from nonmember employees, without regard to how the union expends the funds so collected."<sup>147</sup>

In the twenty-five years between *GM* in 1963 and *Beck* in 1988, private sector unions went from collecting full dues from objectors — and using such monies for almost any purpose — to collecting only a fraction of dues from objectors and being required to spend those dues only (or, in the case of unions regulated by the RLA, generally<sup>148</sup>) on collective bargaining purposes. Why did the Court accept such a contraction of deference to unions? One hypothesis is that the liberal Justices were mainly focused on avoiding the *Beck* plaintiffs' constitutional claims based on an expanded understanding of state action.<sup>149</sup> In addition to making statutory arguments, an organization that supported the *Beck* plaintiffs had argued that because the NLRA — a federal statute — authorized union-shop and agency-shop agreements, the state action doctrine was satisfied and unions were subject to the limits of the Constitution.<sup>150</sup> As such, it argued that spending dues on "activities other than collective bargaining" was the "[c]ompelled subsidization of a political ideology," which was "a clear violation of the First Amendment."<sup>151</sup> But the theory that the liberal Supreme Court Justices were mainly concerned with avoiding the constitutional question does not explain why the Justices accepted the NRW LDF's interpretation of unions' statutory duties to objectors.<sup>152</sup>

Most likely, the Court's conclusion in *Beck* simply reflected the era's changing winds regarding unions. By accepting the *Beck* plaintiffs' binary of — on the one hand — necessary costs associated with collective bargaining and — on the other hand — "extra" costs for other

<sup>145</sup> *Id.* at 6498 (statement of Sen. James Murray).

<sup>146</sup> See *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 766 (1988) (Blackmun, J., concurring in part and dissenting in part) (citing *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 736 (1963)).

<sup>147</sup> *Id.* at 780.

<sup>148</sup> See *supra* notes 101–105 and accompanying text.

<sup>149</sup> Cf. LEE, *supra* note 107, at 245 (discussing the "threat[]" that "broad theories of state action" would pose to the internal policies of workplaces in the realm of affirmative action programs).

<sup>150</sup> See Brief of Amicus Curiae Landmark Legal Foundation in Support of Respondents, *supra* note 119, at 8–10.

<sup>151</sup> *Id.* at 11–12.

<sup>152</sup> See Brief for the Respondents, *supra* note 80, at 17; *Beck*, 487 U.S. at 762–63 (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 448 (1984)).

activities, the Court suggested that all non-collective bargaining union activities were extraneous.<sup>153</sup> This construction of unions' purpose was a dramatic shift from the widely accepted role of unions in the mid-twentieth century. But it reflected the "fall from grace" that unions experienced in the late 1970s and 1980s.<sup>154</sup> Public approval of unions had been declining overall since the 1950s.<sup>155</sup> Attacks on unions ramped up,<sup>156</sup> and media coverage became disproportionately focused on strike activity.<sup>157</sup> Unions ceased to be seen as community-centered organizations and began to be seen as political apparatuses.<sup>158</sup> In accordance with such a framing, the Court accepted that unions could not require employees to contribute dues to the "political, ideological, economic, or social effects of [the union's] *extra*-statutory actions"<sup>159</sup> — even if those extrastatutory actions were funding the annual union picnic or holiday party.

### III. NEW ADMINISTRATIVE BURDENS ON UNIONS

Most immediately, *Beck* meant more red tape for unions. To enforce *Beck*, the NLRB and various courts of appeals held that unions were required to prophylactically inform workers of their right to refrain from paying full union dues.<sup>160</sup> One court of appeals also held that unions were required to hire independent auditors to review their allocations of chargeable and nonchargeable expenses to objectors.<sup>161</sup> Complying with mandates for segregating dues thus required significant administrative effort. One Fifth Circuit case explained the technicalities of the International Association of Machinists and Aerospace Workers' (IAM) procedures for separating objectors' dues from members' dues:

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<sup>153</sup> See *supra* notes 129–133, 137 and accompanying text.

<sup>154</sup> Bradley Nash, Jr., *Labor Law and the State: The Crises of Unions in the 1980s*, at 10 (Apr. 19, 2000) (Ph.D. dissertation, Virginia Polytechnic Institute & State University), <https://techworks.lib.vt.edu/items/220c99f6-ac4c-4c66-8652-263baa6e0762> [<https://perma.cc/BW5N-RLBQ>].

<sup>155</sup> See David Madland & Karla Walter, *Why Is the Public Suddenly Down on Unions?*, CTR. FOR AM. PROGRESS ACTION FUND (July 20, 2010), <https://www.americanprogressaction.org/article/why-is-the-public-suddenly-down-on-unions> [<https://perma.cc/VHS9-T3HE>].

<sup>156</sup> See Charles M. Rehmus, *Labor and Politics in the 1980s*, 473 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 41 (1984).

<sup>157</sup> See Diane E. Schmidt, *Public Opinion and Media Coverage of Labor Unions*, 14 J. LAB. RSCH. 151, 156 (1993).

<sup>158</sup> See NEWMAN & SKOCPOL, *supra* note 7, at 116, 121–23.

<sup>159</sup> Brief for the Respondents, *supra* note 80, at 39; see *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 738, 762–63 (1988).

<sup>160</sup> See, e.g., *Cal. Saw & Knife Works*, 320 NLRB 224, 233 (1995); *Prod. Workers Union of Chi. & Vicinity*, Loc. 707 v. NLRB, 161 F.3d 1047, 1055 (7th Cir. 1998); *Raymond Interior Sys., Inc. v. NLRB*, 812 F.3d 168, 177 (D.C. Cir. 2016) (quoting *Cal. Saw & Knife Works*, 320 NLRB at 233).

<sup>161</sup> See *Ferriso v. NLRB*, 125 F.3d 865, 866, 869 (D.C. Cir. 1997).

The IAM maintains a database to keep track of employees and designates them as “members,” “nonmember agency fee payors,” or “objecting nonmember agency fee payors.” An employee who objects is designated as an “objecting nonmember agency fee payor.” . . .

The purpose of the database is to allocate the union’s annual expenses as “chargeable” and “non-chargeable.” An objecting member is not required to fund the “non-chargeable” expenses because they are not related to the union’s representational services.<sup>162</sup>

Formulating such procedures was not simple, either. The associate general counsel of the IAM testified to Congress that, to design its *Beck* compliance approach, the IAM had to hire a law professor, who created “the legal bases of [the] program,” “record-keeping requirements,” and “calculation methodologies.”<sup>163</sup>

Union officials and others, including some Republicans, pushed back on these newfound administrative burdens. AFL-CIO Secretary-Treasurer Thomas Donahue criticized attempts by the George H.W. Bush Administration to create stricter guidance on *Beck*, saying that doing so was burdening unions “with an enormous amount of red tape and then mak[ing] union members pick up the tab.”<sup>164</sup> In July 1992, the AFL-CIO newspaper reported that a top Bush official stepped down due to his opposition to the Administration’s proposed *Beck* rules.<sup>165</sup> The article quoted Representative William D. Ford’s statement on the proposed rules: They were but “a poorly disguised attack on the American labor movement, designed to bury unions under mountains of recordkeeping and reporting requirements.”<sup>166</sup>

Recording expenditures as “chargeable” or “nonchargeable” was important, as improper categorization could be the basis for litigation. But in the early years of *Beck*, unions expressed confusion about which expenditures could acceptably be charged to objectors and which could not. The general counsel’s report at the 1990 Massachusetts AFL-CIO convention reflected this uncertainty: “The challenge for unions is twofold in the actual administration of agency fee. First, what specific activities are chargeable and nonchargeable? Second, what procedures must a union adopt to assure lawful collection of the fee?”<sup>167</sup>

<sup>162</sup> *Shea v. Int’l Ass’n of Machinists & Aerospace Workers*, 154 F.3d 508, 510–11 (5th Cir. 1998).

<sup>163</sup> *Beck Rights 2001: Are Workers Being Heard?: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & the Workforce*, 107th Cong. 26 (2001) [hereinafter *Beck Rights 2001*] (statement of Christopher T. Corson, Assoc. Gen. Couns., Int’l Ass’n of Machinists & Aerospace Workers), <https://www.congress.gov/107/chrg/CHRG-107hhrg77906/CHRG-107hhrg77906.pdf> [<https://perma.cc/9VVD-GJ67>].

<sup>164</sup> *AFL-CIO Damns Bush Scheme to Tie Up Unions in Red Tape*, AFL-CIO NEWS, June 22, 1992, at 2 (quoting Thomas R. Donahue, Sec’y-Treasurer, AFL-CIO).

<sup>165</sup> Rex Hardesty, *Labor Department Official, Bypassed on Beck Rules, Quits Post*, AFL-CIO NEWS, July 6, 1992, at 1, 8.

<sup>166</sup> *Id.* at 8 (quoting Rep. William D. Ford).

<sup>167</sup> *Report of the Office of the General Counsel, in MASS. AFL-CIO COUNCIL, REPORTS AND PROCEEDINGS, THIRTY-THIRD COPE & LEGISLATIVE CONFERENCE / CONVENTION 1, 3* (1990).

Other questions remained unanswered by *Beck*. One gray area concerned unions' use of objectors' monies for publications and newsletters. At a 1996 House Oversight Committee hearing, the Republican Chairman from California, Representative Bill Thomas, asked panelists about the line between political and nonpolitical union publications, asserting that he did not think there was "anything wrong with [unions that] want to communicate with their members to produce an in-house newspaper."<sup>168</sup> While the *Ellis* decision under the RLA had said that using objectors' dues for publications was permissible so long as the publication did not concern anything for which the union could not use the objectors' dues,<sup>169</sup> the *Beck* decision under the NLRA had not mentioned publications.<sup>170</sup> *Beck* and its progeny created just as many questions as they answered.

For organizations like the NRW LDF, *Beck's* byproduct of added administrative burdens — and confusion — was advantageous. Reed Larson, the President of the National Right to Work Committee, testified to Congress that, in 1996, many of the roughly 300 cases being handled by the Committee's sister organization, the NRW LDF, asserted *Beck* claims.<sup>171</sup> A few years later, Raymond J. LaJeunesse, Jr., the Vice President of the NRW LDF, recommended that workers seeking to assert their *Beck* rights should "su[e] their bargaining agent in federal court for breach of the duty of fair representation."<sup>172</sup> For unions, the threat of a *Beck* lawsuit from a discontented or suspicious objector was ever-present.<sup>173</sup>

#### IV. THE ROLE OF UNIONS IN AMERICAN SOCIETY, POST-BECK

Beyond administrative burdens and confusion, *Beck* sent a powerful message about unions' purpose. *Beck* and its progeny required — and still require — unions to tell all members that certain union activities are nonessential.<sup>174</sup> In practice, unions must inform employees that the "union[s] may not use their monies . . . for activities unrelated to collective bargaining, contract administration, or grievance adjustment" if the employees do not so desire.<sup>175</sup> Such statements instill in workers the belief that unions are only legally sanctioned to engage in three actions:

<sup>168</sup> *Influencing Elections: Political Activity of Labor Unions: Hearing Before the H. Comm. on H. Oversight*, 104th Cong. 47 (1996) [hereinafter *Influencing Elections*] (statement of Rep. William M. Thomas, Chairman, H. Comm. on H. Oversight).

<sup>169</sup> See *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 450–51, 451 n.11 (1984).

<sup>170</sup> See *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988) (lacking any mention of union publications).

<sup>171</sup> *Influencing Elections*, *supra* note 168, at 43 (statement of Reed Larson, President, Nat'l Right to Work Comm.).

<sup>172</sup> *Beck Rights 2001*, *supra* note 163, at 34 (statement of Raymond J. LaJeunesse, Jr., Vice President and Staff Att'y, NRW LDF).

<sup>173</sup> See, e.g., *id.*; *id.* at 18 (statement of Robert Penrod).

<sup>174</sup> See cases cited *supra* note 160 and accompanying text.

<sup>175</sup> See *Raymond Interior Sys., Inc. v. NLRB*, 812 F.3d 168, 177 (D.C. Cir. 2016).

collective bargaining, contract administration, and grievance adjustment. Beyond those three actions, all other activities of the union are nonessential and extraneous — and potentially wasteful. As one speaker at the 1992 Massachusetts AFL-CIO convention said, *Beck* required “any plant that has any kind of a federal contract” to “put [up] a big announcement . . . that any worker . . . has a right to demand [their] money back” for purportedly nonessential union activities.<sup>176</sup>

Both advocates and opponents of organized labor understood that unions derived much of their strength from activities unrelated to collective bargaining.<sup>177</sup> In 1990, Rex H. Reed, the Executive Vice President of the NRW LDF, wrote that “[t]he major labor unions of our country are engaged in a variety of political, ideological, social, charitable, and other programs that expend great blocks of officer and staff time.”<sup>178</sup> In fact, he said, “[c]ollective bargaining turned out to be a *minor* part of what the unions do.”<sup>179</sup> But a key ingredient for union success is collective buy-in,<sup>180</sup> and examples abound of loyal union members becoming initially involved via social activities or community engagement. A member of an International Brotherhood of Electrical Workers (IBEW) local in Frankfort, Indiana, commented of the 1975 union bowling tournament: “You’d be surprised what this means to our people. I’ve seen many members become involved in their union through its sports activities.”<sup>181</sup> Similarly, a USW officer explained in 2020 that community was the reason she became involved in her local union after initially being “tricked” into going to a union meeting by a friend.<sup>182</sup> “Once you’re in it and friends with people, it’s an addiction, you start volunteering . . . . From there, I got involved in the political aspect, going to Washington and lobbying.”<sup>183</sup>

Some objectors even expressed remorse or nostalgia at being excluded from the non-collective bargaining activities of unions. Craig Sickler, a former member of the IAM in Charlotte, North Carolina, explained in congressional testimony that “[a]s a result of [his] objection, [he] was thrown out of the union. This is the policy of the union. Regardless of your motivation[,] . . . [y]ou can’t vote on the expenditures of money for new union halls. You can’t attend social activities. You’re

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<sup>176</sup> PROCEEDINGS OF THE 35TH COPE-LEGISLATIVE CONFERENCE / CONVENTION OF THE MASSACHUSETTS / AFL-CIO 52 (1992) (speech of Evie Dubrow).

<sup>177</sup> See NEWMAN & SKOCPOL, *supra* note 7, at 57, 59.

<sup>178</sup> Rex H. Reed, *Revolution Ahead: Communications Workers v. Beck*, 13 HARV. J.L. & PUB. POL’Y 635, 640 (1990).

<sup>179</sup> *Id.* (emphasis added).

<sup>180</sup> See, e.g., Thomas Kochan & John S. Ahlquist, *What It Takes To Form a Union — And Where to Begin*, HARV. BUS. REV. (Oct. 7, 2024), <https://hbr.org/2024/10/what-it-takes-to-form-a-union-and-where-to-begin> [<https://perma.cc/HFY6-V7VZ>].

<sup>181</sup> NEWMAN & SKOCPOL, *supra* note 7, at 84 (quoting *District 20 Hosts 4th International Bowling Tournament*, STEEL LAB., July 1975, at 10).

<sup>182</sup> See *id.* at 83.

<sup>183</sup> *Id.* at 83–84.

thrown out. You're a non-member."<sup>184</sup> Even Harry Beck, the namesake of *Beck* rights, attested that he became involved in the union through its social activities: "[O]nce a month [the union] had a blast of a beer party with all you could drink — free. That's the way unionism was presented to me. . . . [T]he free beer party once a month really got my attention."<sup>185</sup> After *Beck*, the question became whether it was a legitimate purpose of the union to host events with the goal of fostering camaraderie, either within the membership ranks or with the wider community.

The two decades between 1980 and 2000 were marked by the steep and steady decline of union density in the U.S.<sup>186</sup> In that same period, local unions began to struggle internally with participation from members. Edwin D. Hill, former president of the IBEW, reflected that when he was young, "[u]nion meetings were a place one went for camaraderie," but by the time he retired in 2015, "remaining [unions] often turn out only a few members for meetings."<sup>187</sup> A former USW local union president from western Pennsylvania noted a similar trend, attesting that members would not attend union meetings, even when he brought dinner in, and suggested that this was in part because workers' friend groups were only — in his estimation — ten percent comprised of fellow union members.<sup>188</sup> "That matters, because a chance to socialize with friends beyond work was likely a major incentive for members to attend union meetings in labor's heyday."<sup>189</sup>

Initially, when attacks on unions ramped up in the early 1980s, union members and communities came together, energized by adversity.<sup>190</sup> But loss after loss wore people down.<sup>191</sup> The *Beck* decision overlapped with scores of factory shutdowns in the industrial Midwest,<sup>192</sup> where union density was highest.<sup>193</sup> Losses were not only felt when factories closed; they were also felt when the political winds changed, such as when President Reagan broke the Professional Air Traffic Controllers Organization strike in 1981.<sup>194</sup> For some workers, the threat of joblessness meant that "survival instincts came out"<sup>195</sup> and that the willingness

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<sup>184</sup> See *Beck Rights 2001*, *supra* note 163, at 22 (statement of Craig Sickler).

<sup>185</sup> *Id.* at 110 (written statement of Harry Beck).

<sup>186</sup> See PAUL D. ROMERO & JULIE M. WHITTAKER, CONG. RSCH. SERV., R47596, A BRIEF EXAMINATION OF UNION MEMBERSHIP DATA 4–5 fig. 2 (2023).

<sup>187</sup> *An Interview with President Emeritus Edwin D. Hill*, ELEC. WORKER, July 2015, at 3.

<sup>188</sup> NEWMAN & SKOCPOL, *supra* note 7, at 113–14.

<sup>189</sup> *Id.* at 114.

<sup>190</sup> *Id.* at 105.

<sup>191</sup> See *id.* at 106.

<sup>192</sup> See *id.* at 109–10.

<sup>193</sup> See Quoc Trung Bui, *50 Years of Shrinking Union Membership, In One Map*, NPR (Feb. 23, 2015, at 11:04 ET), <https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> [<https://perma.cc/YL3Z-3NDJ>].

<sup>194</sup> See NEWMAN & SKOCPOL, *supra* note 7, at 98–99.

<sup>195</sup> *Id.* at 118.

to put their union over self-interest dissipated.<sup>196</sup> *Beck* and its progeny aided that process by requiring unions to tell workers that only certain union actions were truly necessary.

The practical effect of *Beck* was that the differentiating factor between full union members and objectors, in the eyes of the union, became whether the worker paid full dues.<sup>197</sup> No longer did objectors and full members pay the same amount of dues, as was the case under *NLRB v. GM*.<sup>198</sup> Though subtle, this change implicitly sanctioned passive union membership, in which dues payment was seen as members' only responsibility. The transformation in dues jurisprudence from 1963 to the end of the twentieth century was likely due at least in part to the Court's internalization of anti-union advocates' legal reasoning, which sought to pigeonhole unions into nothing more than collective bargaining units.<sup>199</sup> *Beck* and its progeny contributed to the pigeonholing narrative by telling unions that their proper purpose was limited to collective bargaining and functionally requiring unions to inform their members of the same.

Changes in dues jurisprudence from the 1960s to the turn of the century directly mirrored the membership-to-management trend seen in other civic associations in the same period, in which grassroots membership federations became increasingly bureaucratized.<sup>200</sup> As of the late twentieth century, large-scale organizations had become "much less concerned with brotherhood, sisterhood, fellow citizenship, and community service than ever before in the nation's long civic history."<sup>201</sup> Although many Americans in recent decades have still remained members of civic organizations — such as, for instance, the Sierra Club — participation in those organizations often entails little more than sending monthly or yearly fees.<sup>202</sup> Similarly, for many union members in the post-*Beck* world, membership has come to be understood as consisting solely of yearly dues.<sup>203</sup> Passive union membership has, by all accounts, increased substantially; fewer people attend union meetings than in generations past, and local union leaders struggle to incentivize participation.<sup>204</sup> In the past several decades, workers have increasingly seen their unions as nothing more than collective bargaining units<sup>205</sup> — a direct reflection of the *Beck* holding.

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<sup>196</sup> *See id.*

<sup>197</sup> *See Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988).

<sup>198</sup> *See NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 737, 742 (1963).

<sup>199</sup> *See supra* notes 110–111 and accompanying text.

<sup>200</sup> *See SKOCPOL, DIMINISHED DEMOCRACY, supra* note 81, at 163.

<sup>201</sup> *Id.* at 158–61.

<sup>202</sup> *See id.* at 161–63.

<sup>203</sup> *Cf. NEWMAN & SKOCPOL, supra* note 7, at 200 (describing political messaging that portrays unions as unnecessary, reducing membership to an obligation to pay dues).

<sup>204</sup> *Id.* at 103–04, 114 (quoting *An Interview with President Emeritus Edwin D. Hill, supra* note 187).

<sup>205</sup> *See id.* at 106.

The vision of unionism of the mid-twentieth century — which took pride in maintaining union halls, sponsoring little leagues, and keeping the community up to date on union business and members' lives via regular newsletters<sup>206</sup> — simply does not map onto a legal paradigm in which unions' only legitimate purpose is collective bargaining. Unions thrived in the era in which they were viewed on par with other civic associations because, at the height of their power, they operated like other civic associations. Like the fraternal groups of yesteryear, unions were federated membership organizations with lodges (or halls), constitutions, conventions, and officers.<sup>207</sup> Of course, opponents of organized labor would be quick to point out that other civic organizations are voluntary associations, whereas labor unions are involuntary associations as a result of union-security agreements.<sup>208</sup> But the Supreme Court seemed to have solved for that problem in 1963: If workers were not happy with the union, they were free to socially disassociate.<sup>209</sup>

The current crisis of organized labor is an accumulation of decades of detrimental labor law.<sup>210</sup> Increasingly, scholars have been putting forth proposals to reinvent labor law from the ground up, such as by imposing sectoral rather than firm-by-firm bargaining.<sup>211</sup> Creating a more hospitable legal landscape for unions does not, at present, appear politically feasible.<sup>212</sup> But on that day when reform or reinvention does become possible, lessons from the era of Big Labor should inform legal change: Unions, at the height of their power, undergirded the fabric of communities and were core to members' personal identities.<sup>213</sup> The law did not require them to simply be collective bargaining units.

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<sup>206</sup> See *supra* notes 34–39 and accompanying text.

<sup>207</sup> See *supra* notes 82–86 and accompanying text.

<sup>208</sup> See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 736 (1963).

<sup>209</sup> See *id.* at 743–44.

<sup>210</sup> See Sharon Block & Benjamin Sachs, Opinion, *Unions Are as Popular as Ever. Our Labor Laws Haven't Caught Up Yet.*, MS NOW (Sep. 1, 2025, at 06:00 ET), <https://www.msnbc.com/opinion/msnbc-opinion/labor-day-unions-polls-law-trump-rcna228132> [<https://perma.cc/VC2W-VV3R>]; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

<sup>211</sup> See, e.g., Cynthia Estlund, *Part II: Why Sectoral Co-Regulation?*, ONLABOR (May 22, 2024), <https://onlabor.org/part-ii-why-sectoral-co-regulation> [<https://perma.cc/6X5H-XFPD>].

<sup>212</sup> See, e.g., Leonard Bierman, Rafael Gely & William B. Gould IV, *Achieving the Achievable: Realistic Labor Law Reform*, 88 MO. L. REV. 311, 346 (2023) (“It is difficult to envision a scenario in which the U.S. Congress will enact the type of labor law reform necessary[,] . . . [and] the Supreme Court, particularly with its current composition, is unlikely to uphold attempts by Congress to correct the situation.”).

<sup>213</sup> See NEWMAN & SKOCPOL, *supra* note 7, at 83.